

**ATTACHMENT A - CONTRACT**

Department of Information Technology (DoIT)

“Enterprise Budgeting System Replacement”

DOIT-FY-16-24

THIS CONTRACT (the “Contract”) is made this 7<sup>th</sup> day of September, 2016 by and between Performa Software USA, Inc. and, on behalf of the STATE OF MARYLAND (“State”), the MARYLAND Department of Information Technology (“DoIT”).

IN CONSIDERATION of the following, the parties agree as follows:

**1. Definitions**

In this Contract, the following words have the meanings indicated.

- 1.1. “COMAR” means the Code of Maryland Regulations.
- 1.2. “Contract” means this contract for Enterprise Budgeting System Replacement.
- 1.3. “Contract Manager” means the individual identified in Section 1.6 of the Request for Proposals (RFP), or a successor designated by the Department.
- 1.4. “Contractor” means Performa Software USA, Inc., whose principal business address is: 11951 Freedom Drive, Suite 1300 Reston, VA 20191
- 1.5. “Department” means the Department of Information Technology (DoIT).
- 1.6. “eMM” means eMaryland Marketplace.
- 1.7. “Financial Proposal” means the Contractor’s best and final financial proposal dated July 26, 2016.
- 1.8. “Minority Business Enterprise” (MBE) means an entity meeting the definition at COMAR 21.0 1.02.01B(54), which is certified by the Maryland Department of Transportation under COMAR 21.11.03.
- 1.9. “Procurement Officer” means the person identified in Section 1.5 of the RFP or a successor designated by the Department.
- 1.10. “Proposal” means, as appropriate, either or both an Offeror’s Technical or Financial Proposal.
- 1.11. “RFP” means the Request for Proposals for Enterprise Budgeting System Replacement, Solicitation # DoIT-FY-16-24 and any amendments thereto issued in writing by the State.
- 1.12. “Confidential Data” means any executive, pre-decisional, personally identifiable information (PII), protected health information (PHI) or other data as identified by the State’s Information Security policy.
- 1.13. “Software” means the object code version of computer program Deliverables created by Contractor for delivery to the State or programs licensed pursuant to this Contract. Software includes all prior, current, and future versions of the Software and all maintenance updates and error corrections for the duration of this contract. Software also includes any upgrades, updates, bug fixes or modified versions or backup copies of the Software licensed to the State by Contractor or an authorized distributor.
- 1.14. “Source Code” means executable instructions for Software in their high level, human readable form which are in turn interpreted, parsed and/or compiled to be executed as part of a

computing system.

- 1.15. "State" means the State of Maryland.
- 1.16. "System Source Materials" means those materials necessary to wholly reproduce and fully operate the EBS system ("System") in a manner equivalent to the original System including, but not limited to:
  - a) Source Code, including Source Code created by the Contractor or subcontractor(s) and Source Code that is leveraged or extended by the Contractor for use in the project.
  - b) All associated rules, reports, forms, templates, scripts, data dictionaries and database functionality.
  - c) All associated configuration file details needed to duplicate the run time environment as deployed in the original system.
  - d) All design details, flow charts, algorithms, processes, formulas, pseudo-code, procedures, instructions, help files, programmer's notes and other documentation required to operate the software for the State
  - e) A complete list of third party, open source, or commercial software components and detailed configuration notes for each component necessary to reproduce the system (e.g., operating system, relational database, and rules engine software).
  - f) All associated training materials for business users and technical staff
- 1.17. "Third-Party Software" means software and supporting documentation that:
  - a) Are owned by a third party, not by the State, the Contractor, or a subcontractor, and
  - b) Are included in, or necessary or helpful to the operation, maintenance, support or modification of the System, and
  - c) Were specifically identified and listed as Third Party Software in the Proposal.
- 1.18. "Technical Proposal" means the Contractor's best and final technical proposal dated July 26, 2016.
- 1.19. "Veteran-owned Small Business Enterprise" (VSBE) means a business that is verified by the Center for Veterans Enterprise of the United States Department of Veterans Affairs as a veteran-owned small business. See Code of Maryland Regulations (COMAR) 21.11.13.
- 1.20. Capitalized terms not defined herein shall be ascribed the meaning given to them in the RFP.

## **2. Scope of Contract**

- 2.1. The Contractor shall provide work products and services described in this Contract (the "Services") to select, implement and support a state-of-the-art commercially available software package(s) ("Solution") to support the creation, analysis and monitoring of operating budgets for all State agencies and the Department of Budget and Management ("DBM").
- 2.2. These work products and Services shall be provided in accordance with the terms and conditions of this Contract and the following Exhibits, which are attached and incorporated herein by reference. If there are any inconsistencies between this Contract and Exhibits A through D, the terms of this Contract shall control. If there is any conflict among the exhibits, the following order of precedence shall determine the prevailing provision.

Exhibit A – The RFP, including all amendments, addenda, and attachments

Exhibit B – The Contract Affidavit dated August 18<sup>th</sup>, 2016

Exhibit C – The Technical Proposal

## Exhibit D – The Financial Proposal

**3. Period of Performance**

- 3.1. The Contract shall start as of the date of full execution by the parties (“Effective Date”). From the Effective Date, the Contract shall continue for a period of three (3) years. In its sole discretion, the Department shall have the right to exercise an option to extend the Contract for two (2), two-year renewal periods.
- 3.2. The Contractor shall provide work products and services under this Contract as of the date provided in a written Notice to Proceed.
- 3.3. Audit, confidentiality, document retention, patents, copyrights & intellectual property (see §5), warranty, payment and indemnification obligations, and limitations of liability under this Contract, and any other obligations specifically identified, shall survive expiration or termination of the Contract.

**4. Consideration and Payment**

- 4.1. In consideration of the performance in accordance with the requirements of the Contract, the Department shall promptly process a proper invoice for payment in accordance with the terms of this Contract.
- 4.2. The total payment for products and services provided under a fixed price contract or the fixed price element of a combined fixed price – time and materials contract shall be the firm fixed price submitted by the Contractor in its Financial Proposal. For time and materials contracts, or contracts which include both fixed price and time and materials elements, total payments to the Contractor for the Contract may not exceed \$10,584,586.33 (the “NTE Amount”) which includes \$8,496,911.03 for the base years, \$1,026,862.78 for Option Period #1 and \$1,060,812.52 for Option Period #2.

The Contractor shall notify the Contract Manager, in writing, at least 60 days before time and material obligations are expected to reach the NTE Amount. The Contractor shall have no obligation to perform the time and materials requirements under this Contract after payments reach the NTE Amount. The cessation of the Contractor’s obligation to perform under this paragraph 4.2 is expressly conditioned on the following: that prior to the NTE Amount being reached, the Contractor shall: (i) give the notice required under this paragraph 4.2; (ii) promptly consult with the Department and cooperate in good faith with the Department to establish a plan of action to assure that every reasonable effort has been undertaken by the Contractor to complete critical work in progress prior to the date the NTE Amount will be reached; and (iii) secure databases, systems, platforms and/or applications on which the Contractor is working in an industry standard manner designed to prevent no damage or vulnerabilities to any of the same.

- 4.3. The Contractor shall submit invoices as required in the RFP. Invoices that contain both fixed price and time and material items must clearly identify the items to be either fixed price or time and material billing. Invoices for third-party Software support and maintenance will be paid on an annual basis. Each invoice must include the Contractor’s Federal Tax Identification Number: [REDACTED] [REDACTED] The Contractor’s eMM identification number is [REDACTED] Payments to the Contractor pursuant to this Contract shall be made no later than 30 days after the Department’s receipt of a proper invoice from the Contractor. Charges for late payment of invoices other than as prescribed by Title 15, Subtitle 1, of the State Finance and Procurement Article, Annotated Code of Maryland, as from time-to-time amended, are prohibited. Invoices shall be submitted to the

Contract Manager. The final payment under this Contract will not be made until after certification is received from the Comptroller of the State that all taxes have been paid.

- 4.4. In addition to any other available remedies, if, in good faith, the Procurement Officer disputes any invoiced amounts as a result of a failure by Contractor to perform in accordance with the requirements of this Contract, then Contractor will be notified by the State in writing on or prior to the payment due date for such disputed amounts, and be provided a time specified by the State to cure the breach. If the breach is not cured within the time specified within the notification, the Procurement Officer may withhold such disputed amounts pending resolution of such dispute.
- 4.5. Payment of an invoice by the Department is not evidence that services were rendered as required under this Contract.

## **5. Patents, Copyrights, Intellectual Property**

- 5.1. All copyrights, patents, trademarks, trade secrets, and any other intellectual property rights existing prior to the effective date of this agreement shall belong to the party that owned such rights immediately prior to the Effective Date ("Pre-Existing Intellectual Property"). "Contractor Materials" means all Pre-Existing Intellectual Property of Contractor and all other intellectual property acquired or developed by Contractor outside of this Contract, or created by Contractor or its subcontractors as a tool for use in connection with the Services hereunder and any modifications and derivatives thereof. If Pre-Existing Intellectual Property or Contractor Material includes any design, device, material, process, or other item, which is covered by a patent or copyright or which is proprietary to or a trade secret of another, the Contractor shall obtain the necessary permission or license to permit the State to use such item or items pursuant to its rights granted under the Contract
- 5.2. Except for (1) information created or otherwise owned by the Department or licensed by the Department from third-parties, including all information provided by the Department to Contractor, (2) Software and other deliverables created by Contractor or its subcontractor(s) specifically for the State under the Contract ("Deliverables"), which the State shall own upon full payment to Contractor under this Contract and subject to the terms and conditions herein, except for any Contractor Materials included herein, and (3) Contractor Materials for which the license rights are granted to the State as provided herein, all rights, title, and interest in the intellectual property embodied in the Solution, including the know-how and methods by which the Solution is provided and the processes that make up the Solution, will belong solely and exclusively to Contractor and its licensors, and the Department will have no rights in any of the above except as expressly granted in this Agreement. Any SaaS Software developed by Contractor during the performance of the Contract will belong solely and exclusively to Contractor and its licensors. For all Software provided by the Contractor under the Contract, Contractor hereby grants to the State nonexclusive, irrevocable, unlimited, perpetual, non-cancelable, and non-terminable rights to use and make copies of the Software and to modifications to the Software. For all Contractor Materials embedded in any Deliverables, subject to the terms and conditions herein, Contractor grants to the State the right to use such Contractor Materials in connection with its permitted use of such Deliverable. During the period between delivery of a Deliverable by Contractor and the date of payment therefor by the State in accordance with this Contract (including throughout the duration of any payment dispute discussions), subject to the terms and conditions contained herein, Contractor grants the State a royalty-free, non-exclusive, limited license to use such Deliverable and to use any Contractor Materials contained therein in accordance with this Contract. To the extent the State requests under Sections R20.6 or R20.7 that Contractor deliver and transfer title to the State for any items, including work in progress, the transfer of ownership shall be subject to the terms of this Section 5, including with respect to Contractor Materials included in any such items.

The State hereby grants to Contractor a non-exclusive, worldwide, royalty-free, perpetual, irrevocable license (with right to sublicense and the right of sublicensees to sublicense further) to use, make, execute, reproduce, sell, display, perform, distribute, modify or otherwise prepare derivative works based on any or all Deliverables and any or all such modifications or derivative works based on the Deliverables.

- 5.3. Subject to the terms of Section 6, Contractor shall defend, indemnify, and hold harmless the State, including, but not limited to, the Department and its agents, officers, and employees, from and against any and all claims, costs, losses, damages, liabilities, judgments and expenses (including without limitation reasonable attorneys' fees) arising out of or in connection with any third party claim that work products the contractor provides to the State and/or includes in order to implement and operate the System infringes, misappropriates or otherwise violates any third-party intellectual property rights enforceable in the United States. Contractor shall not enter into any settlement involving third party claims that contains any admission of or stipulation to any guilt, fault, liability or wrongdoing by the State or that involves the payment of any amounts by the State, without the State's prior written consent.
- 5.4 To the extent permitted by law, Contractor shall be entitled to control the defense or settlement of such claim provided that the State will, upon requesting indemnification hereunder: (a) provide reasonable cooperation to Contractor in connection with the defense or settlement of any such claim, at Contractor's expense; and (b) be entitled to participate in the defense of any such claim at its own expense. Any such settlement that contains any admission of or stipulation to any guilt, fault, liability or wrongdoing by the State or that involves the payment of any amounts by the State requires the State's written consent before approval.
- 5.5 Except if Contractor has pre-existing knowledge of such infringement, Contractor's obligations under this section will not apply to the extent any intellectual property infringes, misappropriates or otherwise violates any intellectual rights as a result of (i) modifications made by the State, in violation of the license granted to the State, pursuant to section 5.2 or which were not approved in writing by Contractor, (ii) the failure of the indemnified party to use any corrections or modifications made available by Contractor, (iii) the combination, operation or use of the Solution or Deliverable in connection with a third-party product, platform, network, data or service not provided by the Contractor; or (iv) Contractor's compliance with the written specifications or directions of the State such as incorporate third party Software or other materials which causes infringement; or (v) the State's failure to use any new or corrected versions of the Software or Documentation made available by Contractor.
- 5.6. Without limiting Contractor's obligations under Section 5.3, if all or any part of the Deliverable or Solution is held, or Contractor reasonably determines that it could be held, to infringe, misappropriate or otherwise violate any third party intellectual property right, Contractor (after consultation with the State and at no cost to the State): (a) shall procure for the State the right to continue using the Deliverable or Solution in accordance with its rights under this Contract; (b) replace the Deliverable or Solution with an item that does not infringe, misappropriate or otherwise violate any third party intellectual property rights and, complies with the item's specifications, and all rights of use and/or ownership set forth in this Contract; (c) modify the Deliverable or Solution so that it no longer infringes, misappropriates or otherwise violates any third party intellectual property right and complies with the Deliverable or Solution's specifications and all rights of use and/or ownership set forth in this Contract or (d) if Contractor cannot procure, replace or modify such Deliverable, request the State to cease the infringing use of the Deliverable and refund any pre-paid fees for the allegedly infringing services that have not been performed or provide a reasonable pro-rata refund for the allegedly infringing Deliverable or Solution.

- 5.7. Except for any Pre-Existing Intellectual Property and third-party intellectual property, and as specifically set forth above in Section 5.2(2), Contractor shall not acquire any right, title or interest (including any intellectual property rights subsisting therein) in or to any goods, software, technical information, specifications, drawings, records, documentation, data or any other materials (including any derivative works thereof) provided by the State to the Contractor. Notwithstanding anything to the contrary herein, the State may, in its sole and absolute discretion, grant the Contractor a license to such materials, subject to the terms of a separate writing executed by the Contractor and an authorized representative of the State. Notwithstanding the foregoing, the State agrees to secure all necessary rights, licenses and/or permissions to allow Contractor to access and use any goods, software, technical information, specifications, drawings, records, documentation, data or any other materials the State provides to the Contractor in Contractor's performance of the services or production of the deliverables.
- 5.8. Without limiting the generality of the foregoing, neither Contractor nor any of its subcontractors shall use any software or technology in a manner that will cause any patents, copyrights or other intellectual property which are owned or controlled by the State or any of its affiliates (or for which the State or any of its subcontractors has received license rights) to become subject to any encumbrance or terms and conditions of any third-party or open source license (including, without limitation, any open source license listed on <http://www.opensource.org/licenses/alphabetical>) (each an "Open Source License"). These restrictions, limitations, exclusions and conditions shall apply even if the State or any of its subcontractors becomes aware of or fails to act in a manner to address any violation or failure to comply therewith. No act by the State or any of its subcontractors that is undertaken under this Contract as to any software or technology shall be construed as intending to cause any patents, copyrights or other intellectual property that are owned or controlled by the State (or for which the State has received license rights) to become subject to any encumbrance or terms and conditions of any Open Source License.
- 5.9. The Contractor shall report to the Department, promptly and in written detail, each notice or claim of copyright infringement received by the Contractor with respect to all deliverables delivered under this Contract.
- 5.10. The Contractor shall not affix (or permit any third party to affix), without the Department's consent, any restrictive markings upon any deliverables that are owned by the State, and if such markings are affixed, the Department shall have the right at any time to modify, remove, obliterate, or ignore such warnings.

## **6. Indemnification**

- 6.1. Contractor shall indemnify, defend, and hold the State, its directors, officers, employees and agents harmless from liability, including all related defense costs and expenses (including reasonable attorneys' fees and costs of investigation, litigation, settlement, judgments, interest and penalties), attributable to claims of third parties for (a) tangible property damage, bodily injury and death, to the extent caused by or contributed to by the Contractor, and (b) third party claims for fraud, gross negligence or willful misconduct of Contractor, including all related defense costs and expenses (including reasonable attorneys' fees and costs of investigation, litigation, settlement, judgments, interest and penalties) finally awarded, to the extent arising from or relating to the performance of the Contractor or its subcontractors under this Contract.
- 6.2. The State has no obligation to provide legal counsel or defense to the Contractor or its subcontractors in the event that a suit, claim or action of any character is brought by any person not party to this Contract against the Contractor or its subcontractors as a result of or relating to the Contractor's obligations under this Contract.

- 6.3. The State has no indemnity obligation for the payment of any judgments or the settlement of any claims against the Contractor or its subcontractors as a result of or relating to the Contractor's obligations under this Contract.
- 6.4. The Contractor shall immediately notify the Procurement Officer of any claim or suit made or filed against the Contractor or its subcontractors regarding any matter resulting from or relating to the Contractor's obligations under the Contract, to the extent permitted by applicable law and confidentiality obligations, and will cooperate, assist, and consult with the State in the State's defense or investigation of any claim, suit, or action made or filed by a third party against the State as a result of or relating to the Contractor's performance under this Contract.
- 6.5. Section 6 shall survive expiration of this Contract.

## **7. Limitations of Liability**

- 7.1. In no event shall Contractor, its subsidiaries or subcontractors, or their respective personnel be liable to the State for any consequential, special, indirect, incidental, punitive, or exemplary loss, relating to this Contract or the Services, except to the extent resulting from the recklessness, bad faith or intentional misconduct of Contractor or its subcontractors.
- 7.2. Contractor shall be liable for any direct loss or damage to the State occasioned by the acts or omissions of Contractor, its subcontractors, agents or employees, including but not limited to personal injury; physical loss; or violations of the Patents, Copyrights, Intellectual Property sections of this Contract, as follows:
7. 2.1. For infringement of patents, trademarks, trade secrets and copyrights as provided in Section 5 ("Patents, Copyrights, Intellectual Property") of this Contract;
7. 2.2. Without limitation for damages for bodily injury (including death) and damage to real property and tangible personal property to the extent directly and proximately caused by the Contractor while engaged in performing the Services;; and
7. 2.3. For all other claims, damages, loss, costs, expenses, suits or actions in any way related to this Contract where liability is not otherwise set forth as being "without limitation," and regardless of the basis on which the claim is made, Contractor's liability shall not exceed one time the total obligated value of the Contract. For clarity, the obligated value is the Contract price of the three (3) year base period plus any two (2)-year renewal option at such time as the renewal option is exercised in writing by the State. Contractor's indemnification obligations for third-party claims arising under Section 6 ("Indemnification") of this Contract are included in this limitation of liability only if the State is immune from liability. Contractor's indemnification liability for third-party claims arising under Section 6 of this Contract shall be unlimited if the State is not immune from liability for claims arising under Section 6.
7. 2.4. In no event shall the existence of a subcontract operate to release or reduce the liability of Contractor hereunder. For purposes of this Contract, Contractor agrees that it is responsible for performance of the services and compliance with the relevant obligations hereunder by its Subcontractors.

## **8. Prompt Pay Requirements**

- 8.1. If the Contractor withholds payment of an undisputed amount to its subcontractor, the State, at its option and in its sole discretion, may take one or more of the following actions:

- (a) Not process further payments to the Contractor until payment to the subcontractor is verified;
  - (b) Suspend all or some of the Contract work without affecting the completion date(s) for the Contract work;
  - (c) Pay or cause payment of the undisputed amount to the subcontractor from monies otherwise due or that may become due to the Contractor;
  - (d) Place a payment for an undisputed amount in an interest-bearing escrow account; or
  - (e) Default Contractor for failing to perform in accordance with the requirement to promptly pay sub-contractors.
  - (f) Take other or further actions as appropriate to resolve the withheld payment.
- 8.2. An “undisputed amount” means an amount owed by the Contractor to a subcontractor for which there is no good faith dispute. Such “undisputed amounts” include (a) retainage which had been withheld and is, by the terms of the agreement between the Contractor and subcontractor, due to be distributed to the subcontractor and (b) an amount withheld because of issues arising out of an agreement or occurrence unrelated to the agreement under which the amount is withheld.
- 8.3. An act, failure to act, or decision of a Procurement Officer or a representative of the Department concerning a withheld payment between the Contractor and subcontractor under this Contract, may not:
- (a) Affect the rights of the contracting parties under any other provision of law;
  - (b) Be used as evidence on the merits of a dispute between the Department and the Contractor in any other proceeding; or
  - (c) Result in liability against or prejudice the rights of the Department.
- 8.4 The remedies enumerated above are in addition to those provided under COMAR 21.11.03.13 with respect to subcontractors that have contracted pursuant to the Minority Business Enterprise program.

## 9. Risk of Loss; Transfer of Title

Risk of loss for conforming materials specified as deliverables to the State hereunder shall remain with the Contractor until the deliverables are received and accepted by the State. Title of all such deliverables passes to the State upon acceptance by the State as set forth in Section 5.

## 10. Confidentiality

Subject to the Maryland Public Information Act and any other applicable laws, all confidential or proprietary information and documentation relating to either party (including without limitation, any information or data stored within the Contractor’s computer systems and Cloud Infrastructure, if applicable) shall be held in confidence by the other party, using a reasonable degree of care. Each party shall, however, be permitted to disclose relevant confidential information to its officers, agents and employees to the extent that such disclosure is necessary for the performance of their duties under this Contract, provided the data may be collected, used, disclosed, stored and disseminated only as provided by and consistent with the law. The provisions of this section shall not apply to information that (a) is lawfully in the public domain; (b) has been independently developed by the other party without violation of this Contract; (c) was already rightfully in the possession of such party; (d) was supplied to such party by a third party lawfully in possession thereof and legally permitted to further disclose the information; or (e) which such party is required to disclose by law.

## 11. Exclusive Use and Ownership

Except as may otherwise be set forth in this Contract, Contractor shall not use, sell, sub-lease, assign, give, or otherwise transfer to any third party any other information or material provided to Contractor by the Department or developed by Contractor relating to the Contract as a Deliverable to which ownership is granted to the Department under Section 5 above, except that Contractor may provide said information to any of its officers, employees and subcontractors who Contractor requires to have said information for fulfillment of Contractor's obligations hereunder. Each officer, employee and/or subcontractor to whom any of the Department's confidential information is to be disclosed shall be advised by Contractor of and bound by confidentiality and intellectual property terms substantially equivalent to those of this Contract.

## **12. Source Code Escrow**

- 12.1. The State will be named as a beneficiary under an escrow agreement ("Escrow Agreement") that shall be entered into between the Contractor and an escrow agent ("Escrow Agent") within 15 days of the date hereof pursuant to which Contractor shall deliver a Source Code Escrow Package to Escrow Agent. The Contractor shall promptly provide a copy of the fully-executed Escrow Agreement to the State. The term "Source Code Escrow Package" means: a) a complete copy in machine-readable form of the source code and executable code of the Software licensed to the State under the Contract; b) a complete copy of any existing design documentation and user documentation; c) complete instructions for compiling and linking every part of the source code into executable code for purposes of enabling verification of the completeness of the source code as provided below; and d) any other materials that constitute System Source Materials or System Documentation as defined in the RFP. The Escrow Agreement shall govern the maintenance and release of the Source Code Escrow Package, and Contractor agrees to update, enhance, or otherwise modify such Source Code Escrow Package promptly upon each implementation of a new version of any component thereof. Contractor shall pay all fees and expenses charged by Escrow Agent, including, but not limited to, fees and expenses related to the State being a named beneficiary under the Escrow Agreement. The State shall treat the Source Code Escrow Package as Contractor's confidential information. Under all circumstances, the Source Code Escrow Package shall remain the property of Contractor. The State shall only use the Source Code Escrow Package as contemplated in the Contract (including, but not limited to confidentiality provisions and usage restrictions). The Escrow Agent shall maintain the Source Code Escrow Package in a repository located in the United States.
- 12.2. In the event that the Escrow Agent either ceases providing escrow services to Contractor or Contractor determines in its reasonable business judgment that the Escrow Agent is no longer providing acceptable escrow services, Contractor shall replace the Escrow Agent with another escrow agent, using an agreement which provides the State with rights no less advantageous than those in the Escrow Agreement. In such case, the new Escrow Agent shall be substituted in all ways for the incumbent Escrow Agent with respect to Section 12.1 above and all references herein to Escrow Agent shall be deemed to include such substitute Escrow Agent. The Escrow Agreement shall provide for 30-day advance notification to the State in the event that the Escrow Agreement is modified, terminated, or expires.
- 12.3. Contractor shall inform the State of the availability of an escrow for any third party Software solutions it provides to the State.
- 12.4. In addition to the rights and obligations contained in the Escrow Agreement referenced in Section 12.1, the State shall have the Software Escrow Package released by the Escrow Agent to the State's possession immediately upon any voluntary or involuntary filing of bankruptcy or any other insolvency proceeding, including but not limited to a general assignment for the benefit of including but not limited to a general assignment for the benefit of creditors, the appointment of a receiver for business or assets; the appointment of a receiver for business or assets; Contractor's

dissolution or liquidation, voluntary or otherwise; the State has compelling reasons to believe that such events will cause Contractor to fail to meet its obligations in the foreseeable future; or Contractor's discontinuance of support or failure to support in accordance with this Contract any Software system or if the Contractor is otherwise unable or unwilling to provide the Source Code Escrow Package. This condition will also be considered met if after repeated e-mail and phone requests by the State for service, the State makes a request for service in writing to the Contractor's last known address served by certified signed receipt required mail delivery by U.S. Post Office or by a nationally recognized (in the United States) overnight carrier, and the Contractor remains unresponsive, meaning that the Contractor is unable to acknowledge message receipt, unwilling or otherwise unable to satisfy the request for a period longer than 15 days from attempt to deliver the written request.

- 12.5. As an alternative to section 12.1-12.4 above, the Contractor may provide the source code to the State as part of a project deliverable, database backup, or software licenses agreement, provided that this source code is kept current and operational.

### **13. Notification of Legal Requests**

The Contractor shall contact the State upon receipt of any electronic discovery, litigation holds, discovery searches and expert testimonies related to the State's data under this Contract, or which in any way might reasonably require access to the data of the State, unless prohibited by law from providing such notice. The Contractor shall not respond to subpoenas, service of process and other legal requests related to the State without first notifying the State, unless prohibited by law from providing such notice.

### **14. Termination and Suspension of Service**

- 14.1. In the event of a termination of the Contract, the Contractor shall implement an orderly return of all State data, as set forth in Section 14.2.
- 14.2. Upon termination or the end of the base period and option periods if any, of this Contract, the Contractor must provide transition assistance requested by the State to facilitate the orderly transfer of services to the State or a follow-on contractor for the State as follows: (a) return to the State all State data in either the form it was provided to the State or a mutually agreed format; (b) provide the schema necessary for reading of such returned data; (c) preserve, maintain, and protect all State data for a period of up to ninety (90) days after the termination or expiration date, so that the State can ensure that all returned data is readable; (d) not delete State data until the earlier of ninety (90) days or the date the State directs such deletion; (e) after the retention period, the Contractor shall securely dispose of all State data in all of its forms, such as disk, CD/DVD, backup tape and paper; State data shall be permanently deleted and shall not be recoverable, according to NIST-approved methods; and certificates of destruction shall be provided to the State; and (f) prepare an accurate accounting from which the State and Contractor may reconcile all outstanding accounts. The final monthly invoice for the services provided hereunder shall include all charges for the ninety-day data retention period.
- 14.3. The Contractor shall, unless legally prohibited from doing so, securely dispose of all State data in its systems or otherwise in its possession or under its control, in all of its forms, such as disk, CD/DVD, backup tape and paper, when requested by the State. Data shall be permanently deleted and shall not be recoverable, according to NIST-approved methods. Certificates of destruction shall be provided to the State.
- 14.4. During any period of service suspension pursuant to R22.5, the Contractor shall not take any action to intentionally erase any State data.
- 14.5. The State shall be entitled to any post-termination assistance generally made available with

respect to the services.

**15. Data Center Audit**

A SOC 2 Audit applies to this Contract.

**16. Change Control and Advance Notice**

Unless otherwise specified in the Service Level Agreement, the Contractor shall give seven (7) days advance notice to the State of any upgrades (e.g., major upgrades, minor upgrades, system changes) that may impact service availability and performance.

**17. Redundancy, Data Backup and Disaster Recovery**

Unless specified otherwise in the RFP, the Contractor must maintain or cause to be maintained disaster avoidance procedures designed to safeguard (a) State data and other confidential information, (b) Contractor's processing capability and (c) the availability of hosted services, in (a), (b) and (c) throughout the base period, and any option periods and at all times in connection with its required performance of those services. Any force majeure provisions of this Contract do not limit the Contractor's obligations under this "Redundancy, Data Backup and Disaster Recovery" Contract provision.

**18. Effect of Contractor Bankruptcy**

All rights and licenses granted by the Contractor under this Contract are and shall be deemed to be rights and licenses to "intellectual property," and the subject matter of this Contract, including services, is and shall be deemed to be "embodiments of intellectual property" for purposes of and as such terms are used and interpreted under § 365(n) of the United States Bankruptcy Code ("Code") (11 U.S.C. § 365(n) (2010)). The State has the right to exercise all rights and elections under the Code and all other applicable bankruptcy, insolvency and similar laws with respect to this Contract (including all executory statement of works). Without limiting the generality of the foregoing, if the Contractor or its estate becomes subject to any bankruptcy or similar proceeding: (a) subject to the State's rights of election, all rights and licenses granted to the State under this Contract shall continue subject to the respective terms and conditions of this Contract; and (b) the State shall be entitled to a complete duplicate of (or complete access to, as appropriate) all such intellectual property and embodiments of intellectual property, and the same, if not already in the State's possession, shall be promptly delivered to the State, unless the Contractor elects to and does in fact continue to perform all of its obligations under this Contract.

**19. Parent Company Guarantee (If Applicable)**

[Corporate name of Parent Company] hereby guarantees absolutely the full, prompt and complete performance by "[Contractor]" of all the terms, conditions and obligations contained in this Contract, as it may be amended from time to time, including any and all exhibits that are now or may become incorporated hereunto, and other obligations of every nature and kind that now or may in the future arise out of or in connection with this Contract, including any and all financial commitments, obligations and liabilities. "[Corporate name of Parent Company]" may not transfer this absolute guaranty to any other person or entity without the prior express written approval of the State, which approval the State may grant, withhold, or qualify in its sole and absolute discretion. "[Corporate name of Parent Company]" further agrees that if the State brings any claim, action, suit or proceeding against "[Contractor]", "[Corporate name of Parent Company]" may be named as a party, in its capacity as Absolute Guarantor.

**R20. General Terms and Conditions**

**R20.1. Pre-Existing Regulations**

In accordance with the provisions of Section 11-206 of the State Finance and Procurement Article, Annotated Code of Maryland, the regulations set forth in Title 21 of the Code of Maryland Regulations (COMAR 21) in effect on the date of execution of this Contract are applicable to this Contract.

#### **R20.2. Maryland Law Prevails**

This Contract shall be construed, interpreted, and enforced according to the laws of the State of Maryland. The Maryland Uniform Computer Information Transactions Act (Commercial Law Article, Title 22 of the Annotated Code of Maryland) does not apply to this Contract, the Software, or any Software license acquired hereunder.

#### **R20.3. Multi-year Contracts contingent upon Appropriations**

If the General Assembly fails to appropriate funds or if funds are not otherwise made available for continued performance for any fiscal period of this Contract succeeding the first fiscal period, this Contract shall be canceled automatically as of the beginning of the fiscal year for which funds were not appropriated or otherwise made available; provided, however, that this will not affect either the State's rights or the Contractor's rights under any termination clause in this Contract. The effect of termination of the Contract hereunder will be to discharge both the Contractor and the State of Maryland from future performance of the Contract, but not from their rights and obligations existing at the time of termination. The Contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the Contract. The State shall notify the Contractor as soon as it has knowledge that funds may not be available for the continuation of this Contract for each succeeding fiscal period beyond the first.

#### **R20.4. Cost and Price Certification**

R20.4.1. The Contractor, by submitting cost or price information certifies that, to the best of its knowledge, the information submitted is accurate, complete, and current as of a mutually determined specified date prior to the conclusion of any price discussions or negotiations for:

- (1) A negotiated contract, if the total contract price is expected to exceed \$100,000, or a smaller amount set by the Procurement Officer; or
- (2) A change order or contract modification, expected to exceed \$100,000, or a smaller amount set by the Procurement Officer.

R20.4.2. The price under this Contract and any change order or modification hereunder, including profit or fee, shall be adjusted to exclude any significant price increases occurring because the Contractor furnished cost or price information which, as of the date agreed upon between the parties, was inaccurate, incomplete, or not current.

#### **R20.5. Contract Modifications**

The Procurement Officer may, at any time, by written order, make changes in the work within the general scope of the Contract. No other order, statement or conduct of the Procurement Officer or any other person shall be treated as a change or entitle the Contractor to an equitable adjustment under this section. Except as otherwise provided in this Contract, if any change under this section causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work, an equitable adjustment in the Contract price and/or schedule shall be made and the Contract modified in writing accordingly. Pursuant to COMAR 21.10.04, the Contractor must assert in writing its right to an adjustment under this section and shall include a written statement setting forth the nature

and cost of such claim. No claim by the Contractor shall be allowed if asserted after final payment under this Contract. Failure to agree to an adjustment under this section shall be a dispute under Section 20.8, Disputes. Nothing in this section shall excuse the Contractor from proceeding with the Contract as changed.

#### **R20.6. Termination for Default**

(1) The State may, subject to the provisions of paragraph (3) of this Section R20.6 by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances: (a) If the Contractor fails to perform within the time specified herein or any extension thereof; or (b) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the procurement officer may authorize in writing) after receipt of notice from the procurement officer specifying such failure.

(2) In the event the State terminates this contract in whole or in part as provided in paragraph (1) of this clause, the State may procure substitute performance upon terms and in whatever manner the procurement officer may deem appropriate, and the Contractor shall be liable to the State for any excess costs for substitute performance; provided, that the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(3) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the State in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform shall be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if the default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform unless substitute performance for the subcontractor was obtainable from another source in sufficient time to permit the Contractor to meet the performance schedule.

(4) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the State, be the same as if the notice of termination had been issued pursuant to such clause. If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, and if this contract does not contain a clause providing for termination for convenience of the State, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(5) If this contract is terminated as provided in paragraph (1) of this clause, the State, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the State, in the manner, at the times, and to the extent, if any, directed by the

procurement officer, (a) the fabricated or unfabricated parts, work in progress, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (b) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the State; and the Contractor shall, upon direction of the procurement officer, protect and preserve property in the possession of the Contractor in which the State has an interest. Payment for completed supplies delivered to and accepted by the State shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the State and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and procurement officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." The State may withhold from amounts otherwise due the Contractor hereunder such sum as the procurement officer determines to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders.

(6) The rights and remedies of the State provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(7) As used in paragraph (3) of this clause, the terms, "subcontractor" and "subcontractors" mean subcontractor(s) at any tier."

#### **R20.7. Termination for Convenience**

The performance of work under this Contract may be terminated by the State in accordance with this clause in whole, or from time to time in part, whenever the State shall determine that such termination is in the best interest of the State. The State will pay all reasonable costs associated with this Contract that the Contractor has incurred up to the date of termination, and all reasonable costs associated with termination of the Contract. However, the Contractor shall not be reimbursed for any anticipatory profits that have not been earned up to the date of termination. Termination hereunder, including the determination of the rights and obligations of the parties, shall be governed by the provisions of COMAR 21.07.01.12 (A)(2).

#### **R20.8. Disputes**

This Contract shall be subject to the provisions of Title 15, Subtitle 2, of the State Finance and Procurement Article of the Annotated Code of Maryland, as from time to time amended, and COMAR 21.10 (Administrative and Civil Remedies). Pending resolution of a claim, the Contractor shall proceed diligently with the performance of the Contract in accordance with the Procurement Officer's decision. Unless a lesser period is provided by applicable statute, regulation, or the Contract, the Contractor must file a written notice of claim with the Procurement Officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier. Contemporaneously with or within 30 days of the filing of a notice of claim, but no later than the date of final payment under the Contract, the Contractor must submit to the Procurement Officer its written claim containing the information specified in COMAR 21.10.04.02.

#### **R20.9. Living Wage**

If a Contractor subject to the Living Wage law fails to submit all records required under COMAR 21.11.10.05 to the Commissioner of Labor and Industry at the Department of Labor, Licensing and Regulation, the Department may withhold payment of any invoice or retainage. The Department may require certification from the Commissioner on a quarterly

basis that such records were properly submitted.

**R20.10. Non-Hiring of Employees**

No official or employee of the State of Maryland, as defined under General Provisions Article, §5-101, Annotated Code of Maryland, whose duties as such official or employee include matters relating to or affecting the subject matter of this Contract, shall during the pendency and term of this Contract and while serving as an official or employee of the State become or be an employee of the Contractor or any entity that is a subcontractor on this Contract.

**R20.11. Nondiscrimination in Employment**

The Contractor agrees: (a) not to discriminate in any manner against an employee or applicant for employment because of race, color, religion, creed, age, sex, marital status, national origin, sexual orientation, sexual identity, ancestry, or disability of a qualified person with a disability, or any otherwise unlawful use of characteristics; (b) to include a provision similar to that contained in subsection (a), above, in any underlying subcontract except a subcontract for standard commercial supplies or raw materials; and (c) to post and to cause subcontractors to post in conspicuous places available to employees and applicants for employment, notices setting forth the substance of this clause.

**R20.12. Commercial Non-Discrimination**

R20.12.1. As a condition of entering into this Contract, Contractor represents and warrants that it will comply with the State's Commercial Nondiscrimination Policy, as described under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland. As part of such compliance, Contractor may not discriminate on the basis of race, color, religion, ancestry, national origin, sex, age, marital status, sexual orientation, sexual identity, disability, or other unlawful forms of discrimination in the solicitation, selection, hiring, or commercial treatment of subcontractors, vendors, suppliers, or commercial customers, nor shall Contractor retaliate against any person for reporting instances of such discrimination. Contractor shall provide equal opportunity for subcontractors, vendors, and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that this clause does not prohibit or limit lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the marketplace. Contractor understands that a material violation of this clause shall be considered a material breach of this Agreement and may result in termination of this Contract, disqualification of Contractor from participating in State contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party.

R20.12.2. As a condition of entering into this Contract, upon the request of the Commission on Civil Rights, and only after the filing of a complaint against Contractor under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland, as amended from time to time, Contractor agrees to provide within 60 days after the request a complete list of the names of all subcontractors, vendors, and suppliers that Contractor has used in the past four (4) years on any of its contracts that were undertaken within the State of Maryland, including the total dollar amount paid by Contractor on each subcontract or supply contract. Contractor further agrees to cooperate in any investigation conducted by the State pursuant to the State's Commercial Nondiscrimination Policy as set forth under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland, and to provide any

documents relevant to any investigation that are requested by the State. Contractor understands that violation of this clause is a material breach of this Contract and may result in Contract termination, disqualification by the State from participating in State contracts, and other sanctions.

### **R20.13. Subcontracting and Assignment**

R20.13.1 The Contractor may not subcontract any portion of the work products or services provided under this Contract without obtaining the prior written approval of the Procurement Officer, nor may the Contractor assign this Contract or any of its rights or obligations hereunder, without the prior written approval of the State, each at the State's sole and absolute discretion. Any such subcontract or assignment shall include the terms of this Contract and any other terms and conditions that the State deems necessary to protect its interests. The State shall not be responsible for the fulfillment of the Contractor's obligations to any subcontractors.

R20.13.2. Subcontractor Disclosure  
The Contractor shall identify all of its strategic business partners related to work products or services provided under this Contract, including but not limited to all subcontractors or other entities or individuals who may be a party to a joint venture or similar agreement with the Contractor, and who shall be involved in any application development and/or operations.

### **R20.14. Minority Business Enterprise Participation**

R20.14.1. Establishment of Goal and Subgoals.

An overall MBE subcontractor participation goal and subgoals have been established for this procurement as described in section 1.33 of the RFP.

R20.14.2. Liquidated Damages for MBE program

R20.14.2.1. This Contract requires the Contractor to make good faith efforts to comply with the MBE Program and Contract provisions. The State and the Contractor acknowledge and agree that the State will incur damages, including but not limited to loss of goodwill, detrimental impact on economic development, and diversion of internal staff resources, if the Contractor does not make good faith efforts to comply with the requirements of the MBE Program and MBE Contract provisions. The parties further acknowledge and agree that the damages the State might reasonably be anticipated to accrue as a result of such lack of compliance are difficult to ascertain with precision.

R20.14.2.2. Therefore, upon a determination by the State that the Contractor failed to make good faith efforts to comply with one or more of the specified MBE Program requirements or Contract provisions, the Contractor agrees to pay liquidated damages to the State at the rates set forth below. The Contractor expressly agrees that the State may withhold payment on any invoices as a set-off against liquidated damages owed. The Contractor further agrees that for each specified violation, the agreed upon liquidated damages are reasonably proximate to the loss the State is anticipated to incur as a result of such violation.

- i. Failure to submit each monthly payment report in full compliance with COMAR 21.11.03.13B (3): \$100.00 per day until the monthly report is submitted as required.
- ii. Failure to include in its agreements with MBE subcontractors a provision

requiring submission of payment reports in full compliance with COMAR 21.11.03.13B (4): \$807.71 per MBE subcontractor.

- iii. Failure to comply with COMAR 21.11.03.12 in terminating, canceling, or changing the scope of work/value of a contract with an MBE subcontractor and/or amendment of the MBE participation schedule: the difference between the dollar value of the MBE participation commitment on the MBE participation schedule for that specific MBE firm and the dollar value of the work performed by that MBE firm for the contract.
- iv. Failure to meet the Contractor's total MBE participation goal and sub goal commitments: the difference between the dollar value of the total MBE participation commitment on the MBE participation schedule and the MBE participation actually achieved.
- v. Failure to promptly pay all undisputed amounts to an MBE subcontractor in full compliance with the prompt payment provisions of this Contract: \$100.00 per day until the undisputed amount due to the MBE subcontractor is paid.

Notwithstanding the use of liquidated damages, the State reserves the right to terminate the Contract and exercise all other rights and remedies provided in the Contract or by law.

#### R20.14.3. MBE Prompt Pay Requirements

R20.14.3.1. To ensure compliance with certified MBE subcontract participation goals, the Department may, consistent with COMAR 21.11.03.13, take the following measures:

- A) Verify that the certified MBEs listed in the MBE participation schedule actually are performing work and receiving compensation as set forth in the MBE participation schedule. This verification may include, as appropriate:
  - (1) Inspecting any relevant records of the Contractor;
  - (2) Inspecting the jobsite; and
  - (3) Interviewing subcontractors and workers.
  - (4) Verification shall include a review of:
    - (a) The Contractor's monthly report listing unpaid invoices over 30 days old from certified MBE subcontractors and the reason for nonpayment; and
    - (b) The monthly report of each certified MBE subcontractor, which lists payments received from the Contractor in the preceding 30 days and invoices for which the subcontractor has not been paid.
- B) If the Department determines that the Contractor is not in compliance with certified MBE participation goals, then the Department will notify the Contractor in writing of its findings, and

will require the Contractor to take appropriate corrective action. Corrective action may include, but is not limited to, requiring the Contractor to compensate the MBE for work performed as set forth in the MBE participation schedule.

C) If the Department determines that the Contractor is in material noncompliance with MBE Contract provisions and refuses or fails to take the corrective action that the Department requires, then the Department may:

- (1) Terminate the Contract;
- (2) Refer the matter to the Office of the Attorney General for appropriate action; or
- (3) Initiate any other specific remedy identified by this Contract.

R20.14.3.2. Upon completion of the contract, but before final payment or release of retainage or both, the Contractor shall submit a final report, in affidavit form under the penalty of perjury, of all payments made to, or withheld from MBE subcontractors.

#### **R20.15. Insurance Requirements**

The Contractor shall maintain workers' compensation coverage, property and casualty insurance, cyber liability insurance, and any other insurance as required in the RFP. The minimum limits of such policies must meet any minimum requirements established by law and the limits of insurance required by the RFP, and shall cover losses resulting from or arising out of Contractor action or inaction in the performance of services under the Contract by the Contractor, its agents, servants, employees or subcontractors. Effective no later than the date of execution of the Contract, and continuing for the duration of the Contract term, and any applicable renewal and transition periods, the Contractor shall maintain such insurance coverage and shall report such insurance annually or upon Contract renewal, whichever is earlier, to the Procurement Officer. Certificates of insurance evidencing this coverage shall be provided within five (5) days of notice of recommended award. All insurance policies shall be issued by a company properly authorized to do business in the State of Maryland.

#### **R20.16. Veteran Owned Small Business Enterprise Participation**

An overall VSBE subcontractor participation goal has been established for this procurement as described in section 1.41 of the RFP.

#### **R20.17. Security Requirements and Incident Response**

R20.17.1. The Contractor agrees to abide by all applicable federal, State and local laws concerning information security and comply with current State and Department of Information Technology information security policy, currently found at <http://doit.maryland.gov/Publications/DoITSecurityPolicy.pdf>, in each case in performing the services. Contractor shall limit access to and possession of Confidential Data to only employees whose responsibilities reasonably require such access or possession and shall train such employees on the Confidentiality obligations set forth herein. Changes to such policies will be addressed through the project's written change request process.

- R20.17.2. The Contractor agrees to notify the Department in accordance with Section R20.17.3 when any Contractor system that may access, process, or store State's Confidential Data or State systems is subject to an unintended access or attack. Unintended access or attack means a compromise by a computer malware, malicious search engine, credential compromise or unauthorized access by an individual or automated program due to a failure to secure Contractor's system in accordance with the terms of this Contract or adhere to security procedures required by this Contract.
- R20.17.3. The Contractor further agrees to notify the Department within twenty-four (24) hours of the discovery of the unintended access or attack by providing notice via written or electronic correspondence to the Contract Manager, Department chief information officer and Department chief information security officer.
- R20.17.4. The Contractor agrees to notify the Department within two (2) hours if there is a threat to Contractor's product as it pertains to the use, disclosure, and security of the State data.
- R20.17.5. If an unauthorized use or disclosure of any Confidential Data occurs, the Contractor must provide written notice to the Department within one (1) business day after Contractor's discovery of such use or disclosure and thereafter all information the State (or Department) requests concerning such unauthorized use or disclosure.
- R20.17.6. The Contractor, within one day of discovery, shall report to the Department any improper or non-authorized use or disclosure of Confidential Data. Contractor's report shall identify:
- (a) the nature of the unauthorized use or disclosure;
  - (b) the Confidential Data used or disclosed,
  - (c) who made the unauthorized use or received the unauthorized disclosure;
  - (d) what the Contractor has done or shall do to mitigate any deleterious effect of the unauthorized use or disclosure; and
  - (e) what corrective action the Contractor has taken or shall take to prevent future similar unauthorized use or disclosure.
  - (f) The Contractor shall provide such other information, including a written report, as reasonably requested by the State.
- R20.17.7. The Contractor shall protect Confidential Data according to a written security policy no less rigorous than that of the State, and shall supply a copy of such policy to the State for validation. The Contractor agrees to comply with all applicable laws that require the notification of individuals in the event of unauthorized release of Confidential Data or other event requiring notification. In the event of a breach of any of the Contractor's security obligations or other event requiring notification under applicable law, the Contractor agrees to assume responsibility for informing all such individuals in accordance with applicable law and to indemnify, hold harmless and defend the State (or Department) and its officials and employees from and against any claims, damages, or other harm related to such security obligation breach or other event requiring the notification.
- R20.17.8. The Contractor shall disclose all of its non-proprietary security processes and technical limitations to the State.
- R20.17.9. This Section shall survive expiration or termination of this Contract.

**R20.18. Security Incident or Data Breach Notification**

The Contractor shall inform the State of any security incident or data breach.

- R20.18.1. Incident Response: The Contractor may need to communicate with outside parties regarding a security incident, which may include contacting law enforcement, fielding media inquiries and seeking external expertise as mutually agreed upon, defined by law or contained in the Contract. Discussing security incidents with the State should be handled on an urgent as-needed basis, as part of Contractor communication and mitigation processes as mutually agreed upon, defined by law or contained in the Contract.
- R20.18.2. Security Incident Reporting Requirements: The Contractor shall report a security incident to the appropriate State-identified contact immediately.
- R20.18.3. Breach Reporting Requirements: If the Contractor has actual knowledge of a confirmed data breach that affects the security of any State content that is subject to applicable data breach notification law, the Contractor shall (1) promptly notify the appropriate State-identified contact within 24 hours or sooner, unless shorter time is required by applicable law, and (2) take commercially reasonable measures to address the data breach in a timely manner.

**R20.19 Data Breach Responsibilities**

This section only applies when a data breach occurs with respect to Confidential Data within the possession or control of the Contractor.

- R20.19.1. The Contractor, unless stipulated otherwise, shall immediately notify the appropriate State-identified contact by telephone in accordance with the agreed upon security plan or security procedures if it reasonably believes there has been a security incident.
- R20.19.2. The Contractor, unless stipulated otherwise, shall promptly notify the appropriate State-identified contact within 24 hours or sooner by telephone, unless shorter time is required by applicable law, if it confirms that there is, or reasonably believes that there has been, a data breach. The Contractor shall (1) cooperate with the State to investigate and resolve the data breach, (2) promptly implement necessary remedial measures, if necessary, and (3) document responsive actions taken related to the data breach, including any post-incident review of events and actions taken to make changes in business practices in providing the services, if necessary.
- R20.19.3. Unless otherwise stipulated, if a data breach is a direct result of the Contractor's breach of its Contract obligation to encrypt Confidential Data or otherwise prevent its release, the Contractor shall bear the costs associated with (1) the investigation and resolution of the data breach; (2) notifications to individuals, regulators or others required by State law; (3) a credit monitoring service required by State or federal law; (4) a website or a toll-free number and call center for affected individuals required by State law; and (5) complete all corrective actions as reasonably determined by Contractor based on root cause; all [(1) through (5)] subject to this Contract's limitation of liability.

**R21 Data Protection****R21.1 Data Ownership**

The State will own all right, title and interest in its data that is related to the services provided by this

contract. The Contractor and/or Subcontractor(s) shall not access public jurisdiction user accounts or public jurisdiction data, except (1) in the course of data center operations, (2) in response to service or technical issues, (3) as required by the express terms of this Contract, including as necessary to perform the services hereunder or (4) at the State's written request.

### **R21.2 Loss of Data**

In the event of loss of any State data or records where such loss is due to the intentional act, omission, or negligence of the Contractor or any of its subcontractors or agents, the Contractor shall be responsible for restoring such lost data in accordance with the Recovery Point Objective (RPO) set forth in the Service Level Agreement. The Contractor shall ensure that all data is backed up and is recoverable by the Contractor. In accordance with prevailing federal or state law or regulations, the Contractor shall report the loss of non-public data as directed in Section 20.17.

Protection of data and personal privacy (as further described and defined in section 20.17) shall be an integral part of the business activities of the Contractor to ensure there is no inappropriate or unauthorized use of State information at any time. To this end, the Contractor shall safeguard the confidentiality, integrity and availability of State information and comply with the following conditions:

- R21.2.1 The Contractor shall implement and maintain appropriate administrative, technical and organizational security measures to safeguard against unauthorized access, disclosure or theft of Confidential Data and non-public data. Such security measures shall be in accordance with recognized industry practice and not less stringent than the measures the Contractor applies to its own Confidential Data and non-public data of similar kind.
- R21.2.2 All data collected or created in the performance of this contract shall become and remain property of the State.
- R21.2.3 All Confidential Data shall be encrypted at rest and in transit with controlled access, including back-ups. Unless otherwise stipulated, the Contractor is responsible for the encryption of the Confidential Data.
- R21.2.4 Unless otherwise stipulated, the Contractor shall encrypt all non-public data at rest and in transit. The State shall identify data it deems as non-public data to the Contractor. The level of protection and encryption for all non-public data shall be identified and made a part of this Contract.
- R21.2.5 At no time shall any data or processes – that either belong to or are intended for the use of the State or its officers, agents or employees – be copied, disclosed or retained by the Contractor or any party related to the Contractor for subsequent use in any transaction that does not include the State.
- R21.2.6 The Contractor shall not use any information collected in connection with the service issued under this Contract for any purpose other than fulfilling the service.

## **R22 Other Mandatory Items**

### **R22.1 Data Location**

The Contractor shall provide its services to the State and its end users solely from data centers in the United States ("U.S."). Storage of State data at rest shall be located solely in data centers in the U.S. The Contractor shall not allow its personnel or contractors to store State data on portable devices, including personal computers, except for devices that are used and kept only at its U.S. data centers. The Contractor shall permit its personnel and contractors to access State data remotely only as

required to provide technical support. If requested by the State, the Contractor shall provide technical user support on a 24/7 basis.

### **R22.2 Import and Export of Data**

The State shall have the ability to import or export data in piecemeal or in entirety at its discretion without interference from the Contractor. This includes the ability for the State to import or export data to/from third parties.

### **R22.3 Encryption of Data at Rest**

The Contractor shall ensure hard drive encryption consistent with validated cryptography standards as referenced in FIPS 140-2, Security Requirements for Cryptographic Modules for all Confidential Data, unless the State approves the storage of Confidential Data on a Contractor portable device in order to accomplish Contract work. A minimum of AES-256 or better is acceptable to the State.

### **R22.4 Compliance with federal Health Insurance Portability and Accountability Act (HIPAA) and State Confidentiality Law**

HIPAA clauses do not apply to this Contract.

### **R22.5. Suspension of Work**

The Procurement Officer unilaterally may order the Contractor in writing to suspend, delay, or interrupt all or any part of its performance for such period of time as the Procurement Officer may determine to be appropriate for the convenience of the State. Notwithstanding anything to the contrary elsewhere in this Contract or the RFP, (i) Contractor shall not be obligated to retain any personnel on this engagement during the suspension period, and (ii) upon recommencement of the services following any such suspension, Contractor may use personnel other than those performing the services immediately prior to the start of the suspension period. In the event of such a written order, the Procurement Officer may grant Contractor's request for a no cost extension of the Implementation Date.

### **R22.6. Nonvisual Accessibility Warranty**

R22.6.1. The Contractor warrants that the information technology Software to be provided under the Contract.

- (a) provides equivalent access for effective use by both visual and non-visual means;
- (b) will present information, including prompts used for interactive communications, in formats intended for both visual and non-visual use;
- (c) if intended for use in a network, can be integrated into networks for obtaining, retrieving, and disseminating information used by individuals who are not blind or visually impaired; and
- (d) is available, whenever possible, without modification for compatibility with Software and hardware for non-visual access.

R22.6.2. The Contractor further warrants that the cost, if any, of modifying the information technology Software for compatibility with software and hardware used for non-visual access does not increase the cost of the information technology by more than five percent. For purposes of this Contract, the phrase "equivalent access" means the ability to receive, use and manipulate information and operate controls necessary to access and use information technology by non-visual means. Examples of equivalent access include keyboard controls used for input and synthesized speech, Braille, or

other audible or tactile means used for output.

#### **R22.7. Compliance with Laws/Arrearages**

The Contractor hereby represents and warrants that:

- R22.7.1 It is qualified to do business in the State of Maryland and that it will take such action as, from time to time hereafter, may be necessary to remain so qualified;
- R22.7.2. It is not in arrears with respect to the payment of any monies due and owing the State of Maryland, or any department or unit thereof, including but not limited to the payment of taxes and employee benefits, and that it shall not become so in arrears during the term of this Contract;
- R22.7.3. It shall comply with all federal, State and local laws, regulations, and ordinances applicable to its activities and obligations under this Contract; and,
- R22.7.4. It shall obtain, at its expense, all licenses, permits, insurance, and governmental approvals, if any, necessary to the performance of its obligations under this Contract.

#### **R22.8 Contingent Fee Prohibition**

The Contractor warrants that it has not employed or retained any person, partnership, corporation, or other entity, other than a bona fide employee or bona fide agent working for the Contractor, to solicit or secure this Contract, and that it has not paid or agreed to pay any person, partnership, corporation or other entity, other than a bona fide employee or bona fide agent, any fee or other consideration contingent on the making of this Contract.

#### **R22.9. Delays and Extensions of Time**

The Contractor agrees to perform this Contract continuously and diligently. No charges or claims for damages shall be made by the Contractor for any delays or hindrances from any cause whatsoever during the progress of any portion of the work specified in this Contract. Time extensions will be granted only for excusable delays that arise from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to acts of God, acts of the public enemy, acts of the State in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the State, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of either the Contractor or the subcontractors or suppliers.

#### **R22.10. Financial Disclosure**

The Contractor shall comply with the provisions of §13-221 of the State Finance and Procurement Article of the Annotated Code of Maryland, which requires that every business that enters into contracts, leases, or other agreements with the State of Maryland or its agencies during a calendar year under which the business is to receive in the aggregate \$100,000 or more, shall, within 30 days of the time when the aggregate value of these contracts, leases or other agreements reaches \$100,000, file with the Secretary of State of Maryland certain specified information to include disclosure of beneficial ownership of the business.

#### **R22.11 Political Contribution Disclosure**

The Contractor shall comply with Md. Code Ann., Election Law Article, Title 14, which requires that every person that enters into a contract for a procurement with the State, a county, or a municipal corporation, or other political subdivision of the State, during a

calendar year in which the person receives a contract with a governmental entity in the amount of \$200,000 or more, shall file with the State Board of Elections statements disclosing: (a) any contributions made during the reporting period to a candidate for elective office in any primary or general election; and (b) the name of each candidate to whom one or more contributions in a cumulative amount of \$500 or more were made during the reporting period. The statement shall be filed with the State Board of Elections: (a) before execution of a contract by the State, a county, a municipal corporation, or other political subdivision of the State, and shall cover the 24 months prior to when a contract was awarded; and (b) if the contribution is made after the execution of a contract, then twice a year, throughout the contract term, on: (i) February 5, to cover the six (6) month period ending January 31; and (ii) August 5, to cover the six (6) month period ending July 31. Additional information is available on the State Board of Elections website:

[http://www.elections.state.md.us/campaign\\_finance/index.html](http://www.elections.state.md.us/campaign_finance/index.html).

#### **R22.12 Retention of Records**

R22.12.1. The Contractor and Subcontractors shall retain and maintain all records and documents in any way relating to this Contract for three (3) years after final payment by the State under this Contract, or any applicable statute of limitations, prevailing federal or State law or regulation, or condition of award, whichever is longer, and shall make them available for inspection and audit by authorized representatives of the State, including the Procurement Officer or the Procurement Officer's designee, at all reasonable times. The Contractor shall, upon request by the Department, make available such records as needed by the State, including, but not limited to itemized billing documentation containing the dates, hours spent and work performed by the Contractor and its subcontractors under the Contract. The Contractor agrees to cooperate fully in any audit conducted by or on behalf of the State, including, by way of example only, making records and employees available as, where, and to the extent requested by the State and by assisting the auditors in reconciling any audit variances. Contractor shall not be compensated for providing any such cooperation and assistance. All records related in any way to the Contract are to be retained for the entire time provided under this section.

R22.12.2. This provision shall survive expiration of this Contract.

#### **R23. Right to Audit**

R23.1 The State reserves the right, at its sole discretion and at any time, to perform an audit of the Contractor's and/or Subcontractors' performance under this Contract. In this agreement, an audit is defined as a planned and documented independent activity performed by qualified personnel, including but not limited to State and federal auditors, to determine by investigation, examination, or evaluation of objective evidence from data, statements, records, operations and performance practices (financial or otherwise) the Contractor's compliance with the Contract, including but not limited to the adequacy and compliance with established procedures and internal controls over the services being performed for the State.

R23.2 Upon three (3) business days' notice, Contractor and/or Subcontractors shall provide the State reasonable access during normal business hours to their records to verify conformance to the terms of this Contract. The State shall be permitted to conduct these audits with any or all of its own internal resources or by securing the services of a third party accounting/audit firm, solely at the State's election. The State shall have the right to copy, at its own expense, any record related to the services performed

pursuant to this Contract.

R23.3 Contractor and/or Subcontractors shall cooperate with the State or the designated auditor and shall provide the necessary assistance for the State or the designated auditor to conduct the audit.

R23.4 The right to audit shall include subcontractors in which goods or services are subcontracted by Contractor and/or Subcontractors and that provide essential support to the services provided to the State under this Contract. Contractor and/or Subcontractors shall ensure the State has the right to audit with any lower tier subcontractor.

**24. Administrative Information**

**24.1. Procurement Officer and Contract Manager**

The day-to-day work to be accomplished under this Contract shall be performed under the direction of the Contract Manager and, as appropriate, the Procurement Officer. All matters relating to the interpretation of this Contract shall be referred to the Procurement Officer for determination.

**24.2. Notices**

All notices hereunder shall be in writing and either delivered personally or sent by certified or registered mail, postage prepaid as follows:

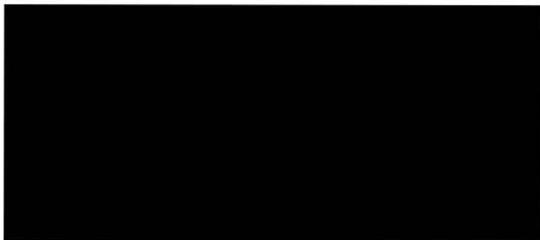
If to the State:

Derek Rost  
45 Calvert Street  
Annapolis, MD 21401  
Phone Number: (410) 260-7396  
E-Mail: Derek.Rost@Maryland.Gov

With a copy to:

Dale Eutsler  
Department of Information Technology (DoIT)  
100 Community Place  
Crownsville, MD 21032  
Phone Number: (410) 697-9669  
E-Mail: Dale.Eutsler@Maryland.Gov

If to the Contractor:



IN WITNESS THEREOF, the parties have executed this Contract as of the date hereinabove set forth.

CONTRACTOR

[Redacted Contractor Name]

By:

[Redacted Signature]

STATE OF MARYLAND

Department of Information Technology (DoIT)

[Redacted Signature]

By:

[Redacted Signature]

Or designee:

\_\_\_\_\_

9/7/16

Date

Approved for form and legal sufficiency this 23<sup>rd</sup> day of August, 2016.

[Redacted Signature]

Assistant Attorney General

APPROVED BY BPW:

9/7/2016

(Date)

7-IT

(BPW Item #)