

4. STANDARD TERMS

4.1 Duties of Contractor

Contractor must perform the services and provide the deliverables described in Section 2.10 – Services to be Provided (the “Agreement Activities”). An obligation to provide delivery of any commodity is considered a service and is an Agreement Activity.

Contractor must furnish all labor, equipment, materials, and supplies necessary for the performance of the Agreement Activities, and meet operational standards, unless otherwise specified in Section 2.10 – Services to be Provided.

Contractor must:

- a. Perform the Agreement Activities in a timely, professional, safe, and workmanlike manner consistent with standards in the trade, profession, or industry;
- b. Meet or exceed the performance and operational standards, and specifications of this Agreement;
- c. Provide all Agreement Activities in good quality, with no material defects;
- d. Not interfere with MDHHS’s operations;
- e. Obtain and maintain all necessary licenses, permits or other authorizations necessary for the performance of this Agreement;
- f. Cooperate with MDHHS, including MDHHS’s quality assurance personnel, and any third party to achieve the objectives of this Agreement;
- g. Return to MDHHS any State-furnished equipment or other resources in the same condition as when provided when no longer required for this Agreement;
- h. Not make any media releases without prior written authorization from MDHHS;
- i. Assign to MDHHS any claims resulting from state or federal antitrust violations to the extent that those violations concern materials or services supplied by third parties toward fulfillment of this Agreement;
- j. Comply with all State physical and IT security policies and standards which will be made available upon request; and
- k. Provide MDHHS priority in performance of this Agreement except as mandated by federal disaster response requirements.

Any breach under this provision is considered a material breach.

Contractor must also be clearly identifiable while on State property by wearing identification issued by the State, and clearly identify themselves whenever making contact with the State.

4.2 Notices

All notices and other communications required or permitted under this Agreement must be in writing and will be considered given and received: (a) when verified by written receipt if sent by courier; (b) when actually received if sent by mail without verification of receipt; or (c) when verified by automated receipt or electronic logs if sent by facsimile or email.

4.3 Reserved

4.4 Reserved

4.5 Performance Guarantee

Contractor must at all times have financial resources sufficient, in the opinion of MDHHS, to ensure performance of this Agreement and must provide proof upon request. MDHHS may require a performance bond if, in the opinion of MDHHS, it will ensure performance of this Agreement.

4.6 Insurance Requirements

Contractor must maintain the insurances identified below and is responsible for all deductibles. All required insurance must:

- a. Protect the State from claims that may arise out of, are alleged to arise out of, or result from Contractor's or a subcontractor's performance;
- b. Be primary and non-contributing to any comparable liability insurance (including self-insurance) carried by the State; and
- c. Be provided by a company with an A.M. Best rating of "A" or better and a financial size of VII or better.

Insurance Type	Additional Requirements
Commercial General Liability Insurance	
<p><u>Minimal Limits:</u> \$1,000,000 Each Occurrence Limit \$1,000,000 Personal & Advertising Injury Limit \$2,000,000 General Aggregate Limit \$2,000,000 Products/Completed Operations</p> <p><u>Deductible Maximum:</u> \$50,000 Each Occurrence</p>	Contractor must have their policy endorsed to add "the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents" as additional insureds using endorsement CG 20 10 11 85, or both CG 2010 07 04 and CG 2037 07 04.

	If the contractor will deal with children, schools, or the cognitively impaired, coverage must not have exclusions or limitations related to sexual abuse and molestation liability.
Umbrella or Excess Liability Insurance	
<u>Minimal Limits:</u> \$4,000,000 General Aggregate	Contractor must have their policy endorsed to add “the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents” as additional insureds.
Automobile Liability Insurance	
<u>Minimal Limits:</u> \$1,000,000 Per Occurrence	Contractor must have their policy: (1) endorsed to add “the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents” as additional insureds; and (2) include Hired and Non-Owned Automobile coverage.
Workers’ Compensation Insurance	
<u>Minimal Limits:</u> Coverage according to applicable laws governing work activities.	Waiver of subrogation, except where waiver is prohibited by law.
Employers Liability Insurance	
<u>Minimal Limits:</u> \$500,000 Each Accident \$500,000 Each Employee by Disease \$500,000 Aggregate Disease.	
Privacy and Security Liability (Cyber Liability) Liability Insurance	

<u>Minimal Limits:</u> \$1,000,000 Each Occurrence \$1,000,000 Annual Aggregate	Contractor must have their policy: (1) endorsed to add “the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees, and agents” as additional insureds; and (2) cover information security and privacy liability, privacy notification costs, regulatory defense and penalties, and website media content liability.
Professional Liability (Errors and Omissions) Insurance	
<u>Minimal Limits:</u> \$1,000,000 Each Occurrence \$1,000,000 Annual Aggregate <u>Deductible Maximum:</u> \$50,000 Per Loss	

If any of the required policies provide claims-made coverage, the Contractor must:

- a. Provide coverage with a retroactive date before the effective date of the Agreement or the beginning of Agreement Activities;
- b. Maintain coverage and provide evidence of coverage for at least three years after completion of the Agreement Activities; and
- c. If coverage is canceled or not renewed, and not replaced with another claims-made policy form with a retroactive date prior to the Agreement effective date, Contractor must purchase extended reporting coverage for a minimum of three years after completion of work.

Contractor must:

- a. Provide insurance certificates to the Contract Administrator, containing the agreement or purchase order number, at Agreement formation and within 20 calendar days of the expiration date of the applicable policies;
- b. Require that subcontractors maintain the required insurances contained in this Section;
- c. Notify the Contract Administrator within five business days if any insurance is cancelled; and
- d. Waive all rights against the State for damages covered by insurance. Failure to maintain the required insurance does not limit this waiver.

Contractors who are self-insured must provide the following:

- a. Proof of self-insurance from the Michigan Department of Insurance and Financial Services for auto liability.
- b. Proof of self-insurance from the Michigan Department of Licensing and Regulatory Affairs for worker's compensation and employer's liability.
- c. A copy of their most recent, independently audited financial statements.

This Section is not intended to and is not to be construed in any manner as waiving, restricting or limiting the liability of either party for any obligations under this Agreement (including any provisions hereof requiring Contractor to indemnify, defend and hold harmless the State).

4.7 Reserved

4.8 Extended Purchasing Program

Upon written agreement between MDHHS and the Contractor, this Agreement may be extended to: (a) MiDEAL members, (b) other states (including governmental subdivisions and authorized entities), or (c) State of Michigan employees. MiDEAL members include local units of government, school districts, universities, community colleges, and nonprofit hospitals. A current list of MiDEAL members is available at www.michigan.gov/mideal.

If extended, Contractor must supply all Agreement Activities at the established Agreement prices and terms, and MDHHS reserves the right to impose an administrative fee and negotiate additional discounts based on any increased volume generated by such extensions.

Contractor must submit invoices to, and receive payment from, extended purchasing program members on a direct and individual basis.

4.9 Independent Contractor

Contractor is an independent contractor and assumes all rights, obligations and liabilities set forth in this Agreement. Contractor, its employees, and agents will not be considered employees of MDHHS. No partnership or joint venture relationship is created by virtue of this Agreement. Contractor, and not MDHHS, is responsible for the payment of wages, benefits and taxes of Contractor's employees and any subcontractors. Prior performance does not modify Contractor's status as an independent contractor.

4.10 Subcontracting

Contractor may not delegate any of its obligations under this Agreement without the prior written approval of MDHHS. Contractor must notify MDHHS

at least 90 calendar days before the proposed delegation, and provide MDHHS any information it requests to determine whether the delegation is in its best interest. If approved, Contractor must:

- a. Be the sole point of contact regarding all contractual matters, including payment and charges for all Agreement Activities;
- b. Make all payments to the subcontractor; and
- c. Incorporate the terms and conditions contained in this Agreement in any subcontract with a subcontractor.

Contractor remains responsible for the completion of the Agreement Activities, compliance with the terms of this Agreement, and the acts and omissions of the subcontractor. MDHHS, in its sole discretion, may require the replacement of any subcontractor.

4.11 Staffing

MDHHS's Contract Administrator may require Contractor to remove or reassign personnel by providing a notice to Contractor.

4.12 Reserved

4.13 Assignment

Contractor may not assign this Agreement to any other party without the prior approval of MDHHS. Upon notice to Contractor, MDHHS, in its sole discretion, may assign in whole or in part, its rights or responsibilities under this Agreement to any other party. If MDHHS determines that a novation of this Agreement to a third party is necessary, Contractor will agree to the novation and provide all necessary documentation and signatures.

4.14 Change of Control

Contractor will notify, at least 90 calendar days before the effective date, MDHHS of a change in Contractor's organizational structure or ownership. For purposes of this Agreement, a change in control means any of the following:

- a. A sale of more than 50% of Contractor's stock;
- b. A sale of substantially all of Contractor's assets;
- c. A change in a majority of Contractor's board members;
- d. Consummation of a merger or consolidation of Contractor with any other entity;
- e. A change in ownership through a transaction or series of transactions; or
- f. The board (or the stockholders) approves a plan of complete liquidation.

A change of control does not include any consolidation or merger effected exclusively to change the domicile of Contractor, or any transaction or series of transactions principally for bona fide equity financing purposes.

In the event of a change of control, Contractor must require the successor to assume this Agreement and all of its obligations under this Agreement.

4.15 Reserved

4.16 Acceptance

Agreement Activities are subject to inspection and testing by MDHHS within 30 calendar days of MDHHS's receipt of them ("State Review Period"), unless otherwise provided in Section 2.10 – Services to be Provided. If the Agreement Activities are not fully accepted by MDHHS, MDHHS will notify Contractor by the end of the State Review Period that either: (a) the Agreement Activities are accepted, but noted deficiencies must be corrected; or (b) the Agreement Activities are rejected. If MDHHS finds material deficiencies, it may: (i) reject the Agreement Activities without performing any further inspections; (ii) demand performance at no additional cost; or (iii) terminate this Agreement in accordance with Section 4.23, Termination for Cause.

Within 10 business days from the date of Contractor's receipt of notification of acceptance with deficiencies or rejection of any Agreement Activities, Contractor must cure, at no additional cost, the deficiency and deliver unequivocally acceptable Agreement Activities to MDHHS. If acceptance with deficiencies or rejection of the Agreement Activities impacts the content or delivery of other non-completed Agreement Activities, the parties' respective Program Managers must determine an agreed to number of days for re-submission that minimizes the overall impact to this Agreement. However, nothing herein affects, alters, or relieves Contractor of its obligations to correct deficiencies in accordance with the time response standards set forth in this Agreement.

If Contractor is unable or refuses to correct the deficiency within the time response standards set forth in this Agreement, MDHHS may cancel the order in whole or in part. MDHHS, or a third party identified by MDHHS, may perform the Agreement Activities and recover the difference between the cost to cure and the Agreement price plus an additional 10% administrative fee.

4.17 Reserved

4.18 Reserved

4.19 Reserved

4.20 Terms of Payment

Invoices must conform to the requirements communicated from time-to-time by MDHHS. All undisputed amounts are payable within 45 days of MDHHS's receipt. Contractor may only charge for Agreement Activities performed as specified in Section 2.10 – Services to be Provided. Invoices must include an itemized statement of all charges. MDHHS is exempt from State sales tax for direct purchases and may be exempt from federal excise tax, if Services purchased under this Agreement are for MDHHS's exclusive use. Notwithstanding the foregoing, all prices are inclusive of taxes, and Contractor is responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state, or local governmental entity on any amounts payable by MDHHS under this Agreement.

MDHHS has the right to withhold payment of any disputed amounts until the parties agree as to the validity of the disputed amount. MDHHS will notify Contractor of any dispute within a reasonable time. Payment by MDHHS will not constitute a waiver of any rights as to Contractor's continuing obligations, including claims for deficiencies or substandard Agreement Activities. Contractor's acceptance of final payment by MDHHS constitutes a waiver of all claims by Contractor against MDHHS for payment under this Agreement, other than those claims previously filed in writing on a timely basis and still disputed.

MDHHS will only disburse payments under this Agreement through Electronic Funds Transfer (EFT). Contractor must register with the State at <http://www.michigan.gov/cpexpress> to receive electronic fund transfer payments. If Contractor does not register, MDHHS is not liable for failure to provide payment.

Without prejudice to any other right or remedy it may have, MDHHS reserves the right to set off at any time any amount then due and owing to it by Contractor against any amount payable by MDHHS to Contractor under this Agreement.

4.21 Reserved

4.22 Stop Work Order

MDHHS may suspend any or all activities under this Agreement at any time. MDHHS will provide Contractor a written stop work order detailing the suspension. Contractor must comply with the stop work order upon receipt. Within 90 calendar days, or any longer period agreed to by Contractor, MDHHS will either: (a) issue a notice authorizing Contractor to resume work, or (b) terminate this Agreement or purchase order. MDHHS will not pay for

Agreement Activities, Contractor's lost profits, or any additional compensation during a stop work period.

4.23 Termination for Cause

MDHHS may terminate this Agreement for cause, in whole or in part, if Contractor, as determined by MDHHS:

- a. Endangers the value, integrity, or security of any location, data, or personnel;
- b. Becomes insolvent, petitions for bankruptcy court proceedings, or has an involuntary bankruptcy proceeding filed against it by any creditor;
- c. Engages in any conduct that may expose MDHHS to liability;
- d. Breaches any of its material duties or obligations; or
- e. Fails to cure a breach within the time stated in a notice of breach.

Any reference to specific breaches being material breaches within this Agreement will not be construed to mean that other breaches are not material.

If MDHHS terminates this Agreement under this Section, MDHHS will issue a termination notice specifying whether Contractor must: (a) cease performance immediately, or (b) continue to perform for a specified period. If it is later determined that Contractor was not in breach of this Agreement, the termination will be deemed to have been a Termination for Convenience, effective as of the same date, and the rights and obligations of the parties will be limited to those provided in Section 4.24, Termination for Convenience.

MDHHS will only pay for amounts due to Contractor for Agreement Activities accepted by MDHHS on or before the date of termination, subject to MDHHS's right to set off any amounts owed by the Contractor for MDHHS's reasonable costs in terminating this Agreement. The Contractor must pay all reasonable costs incurred by MDHHS in terminating this Agreement for cause, including administrative costs, attorneys' fees, court costs, transition costs, and any costs MDHHS incurs to procure the Agreement Activities from other sources.

4.24 Termination for Convenience

MDHHS may immediately terminate this Agreement in whole or in part without penalty and for any reason, including but not limited to, appropriation or budget shortfalls. The termination notice will specify whether Contractor must: (a) cease performance of the Agreement Activities immediately, or (b) continue to perform the Agreement Activities in accordance with Section 4.25, Transition Responsibilities. If MDHHS terminates this Agreement for convenience, MDHHS will pay all reasonable costs, as determined by MDHHS, for MDHHS approved Transition Responsibilities.

The Contractor may terminate this Agreement upon 30 days written notice to MDHHS at any time prior to the completion of the Agreement period.

4.25 Transition Responsibilities

Upon termination or expiration of this Agreement for any reason, Contractor must, for a period of time specified by MDHHS (not to exceed 90 calendar days), provide all reasonable transition assistance requested by MDHHS, to allow for the expired or terminated portion of the Agreement Activities to continue without interruption or adverse effect, and to facilitate the orderly transfer of such Agreement Activities to MDHHS or its designees. Such transition assistance may include, but is not limited to:

- a. Continuing to perform the Agreement Activities at the established Agreement rates;
- b. Taking all reasonable and necessary measures to transition performance of the work, including all applicable Agreement Activities, training, equipment, software, leases, reports and other documentation, to MDHHS or MDHHS's designee;
- c. Taking all necessary and appropriate steps, or such other action as MDHHS may direct, to preserve, maintain, protect, or return to MDHHS all materials, data, property, and confidential information provided directly or indirectly to Contractor by any entity, agent, vendor, or employee of MDHHS;
- d. Transferring title in and delivering to MDHHS, at MDHHS's discretion, all completed or partially completed deliverables prepared under this Agreement as of the Agreement termination date; and
- e. Preparing an accurate accounting from which MDHHS and Contractor may reconcile all outstanding accounts (collectively, "Transition Responsibilities").

This Agreement will automatically be extended through the end of the transition period.

4.26 General Indemnification

Contractor must defend, indemnify and hold the State, its departments, divisions, agencies, offices, commissions, officers, and employees harmless, without limitation, from and against any and all actions, claims, losses, liabilities, damages, costs, attorney fees, and expenses (including those required to establish the right to indemnification), arising out of or relating to:

- a. Any breach by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable) of any of the promises, agreements, representations, warranties, or insurance requirements contained in this Agreement;

- b. Any infringement, misappropriation, or other violation of any intellectual property right or other right of any third party;
- c. Any bodily injury, death, or damage to real or tangible personal property occurring wholly or in part due to action or inaction by Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable); and
- d. Any acts or omissions of Contractor (or any of Contractor's employees, agents, subcontractors, or by anyone else for whose acts any of them may be liable).

MDHHS will notify Contractor in writing if indemnification is sought; however, failure to do so will not relieve Contractor, except to the extent that Contractor is materially prejudiced. Contractor must, to the satisfaction of MDHHS, demonstrate its financial ability to carry out these obligations.

MDHHS is entitled to: (i) regular updates on proceeding status; (ii) participate in the defense of the proceeding; (iii) employ its own counsel; and to (iv) retain control of the defense if MDHHS deems necessary. Contractor will not, without MDHHS's written consent (not to be unreasonably withheld), settle, compromise, or consent to the entry of any judgment in or otherwise seek to terminate any claim, action, or proceeding. To the extent that any State employee, official, or law may be involved or challenged, MDHHS may, at its own expense, control the defense of that portion of the claim.

Any litigation activity on behalf of the State, or any of its subdivisions under this Section, must be coordinated with the Department of Attorney General. An attorney designated to represent MDHHS may not do so until approved by the Michigan Attorney General and appointed as a Special Assistant Attorney General.

4.27 Infringement Remedies

If, in either party's opinion, any piece of equipment, software, commodity, or service supplied by Contractor or its subcontractors, or its operation, use or reproduction, is likely to become the subject of a copyright, patent, trademark, or trade secret infringement claim, Contractor must, at its expense:

- a. Procure for MDHHS the right to continue using the equipment, software, commodity, or service, or if this option is not reasonably available to Contractor,
- b. Replace or modify the same so that it becomes non-infringing; or
- c. Accept its return by MDHHS with appropriate credits to MDHHS against Contractor's charges and reimburse MDHHS for any losses or costs incurred as a consequence of MDHHS ceasing its use and returning it.

4.28 Limitation of Liability

MDHHS is not liable for consequential, incidental, indirect, or special damages, regardless of the nature of the action.

4.29 Disclosure of Litigation, or Other Proceeding

Contractor must notify MDHHS within 14 calendar days of receiving notice of any litigation, investigation, arbitration, or other proceeding (collectively, "Proceeding") involving Contractor, a subcontractor, or an officer or director of Contractor or subcontractor, that arises during the term of this Agreement, including:

- a. A criminal Proceeding;
- b. A parole or probation Proceeding;
- c. A Proceeding under the Sarbanes-Oxley Act;
- d. A civil Proceeding involving:
 - 1) A claim that might reasonably be expected to adversely affect Contractor's viability or financial stability; or
 - 2) A governmental or public entity's claim or written allegation of fraud; or
- e. A Proceeding involving any license that Contractor is required to possess in order to perform under this Agreement.

4.30 Reserved

4.31 State Data

- a. Ownership. MDHHS's data ("**State Data**," which will be treated by Contractor as Confidential Information) includes:
 - 1) MDHHS's data collected, used, processed, stored, or generated as the result of the Agreement Activities;
 - 2) Personally identifiable information ("PII") collected, used, processed, stored, or generated as the result of the Agreement Activities, including, without limitation, any information that identifies an individual, such as an individual's social security number or other government-issued identification number, date of birth, address, telephone number, biometric data, mother's maiden name, email address, credit card information, or an individual's name in combination with any other of the elements here listed; and,
 - 3) Personal health information ("PHI") collected, used, processed, stored, or generated as the result of the Agreement Activities, which is defined under the Health Insurance Portability and Accountability Act (HIPAA) and its related rules and regulations. State Data is and will remain the sole and exclusive property of MDHHS and all right, title, and interest in the same is reserved by MDHHS.

This Section survives the termination of this Agreement.

b. Contractor Use of State Data. Contractor is provided a limited license to State Data for the sole and exclusive purpose of providing the Agreement Activities, including a license to collect, process, store, generate, and display State Data only to the extent necessary in the provision of the Agreement Activities. Contractor must:

- 1) Keep and maintain State Data in strict confidence, using such degree of care as is appropriate and consistent with its obligations as further described in this Agreement and applicable law to avoid unauthorized access, use, disclosure, or loss;
- 2) Use and disclose State Data solely and exclusively for the purpose of providing the Agreement Activities, such use and disclosure being in accordance with this Agreement, any applicable Statement of Work, and applicable law; and
- 3) Not use, sell, rent, transfer, distribute, or otherwise disclose or make available State Data for Contractor's own purposes or for the benefit of anyone other than MDHHS without MDHHS's prior written consent.

This Section survives the termination of this Agreement.

c. Extraction of State Data. Contractor must, within five business days of MDHHS's request, provide MDHHS, without charge and without any conditions or contingencies whatsoever (including but not limited to the payment of any fees due to Contractor), an extract of the State Data in the format specified by MDHHS.

d. Backup and Recovery of State Data. Unless otherwise specified in Section 2.5 – Services to be Delivered, Contractor is responsible for maintaining a backup of State Data and for an orderly and timely recovery of such data. Unless otherwise described in Section 2.10 – Services to be Provided, Contractor must maintain a contemporaneous backup of State Data that can be recovered within two hours at any point in time.

e. Loss of Data. In the event of any act, error or omission, negligence, misconduct, or breach that compromises or is suspected to compromise the security, confidentiality, or integrity of State Data or the physical, technical, administrative, or organizational safeguards put in place by Contractor that relate to the protection of the security, confidentiality, or integrity of State Data, Contractor must, as applicable:

- 1) Notify MDHHS as soon as practicable but no later than 24 hours of becoming aware of such occurrence;
- 2) Cooperate with MDHHS in investigating the occurrence, including making available all relevant records, logs, files, data reporting, and other materials required to comply with applicable law or as otherwise required by MDHHS;

- 3) In the case of PII or PHI, at MDHHS's sole election, (i) notify the affected individuals who comprise the PII or PHI as soon as practicable but no later than is required to comply with applicable law, or, in the absence of any legally required notification period, within five calendar days of the occurrence; or (ii) reimburse MDHHS for any costs in notifying the affected individuals;
- 4) In the case of PII, provide third-party credit and identity monitoring services to each of the affected individuals who comprise the PII for the period required to comply with applicable law, or, in the absence of any legally required monitoring services, for no less than 24 months following the date of notification to such individuals;
- 5) Perform or take any other actions required to comply with applicable law as a result of the occurrence;
- 6) Without limiting Contractor's obligations of indemnification as further described in this Agreement, indemnify, defend, and hold harmless MDHHS for any and all claims, including reasonable attorneys' fees, costs, and expenses incidental thereto, which may be suffered by, accrued against, charged to, or recoverable from MDHHS in connection with the occurrence;
- 7) Be responsible for recreating lost State Data in the manner and on the schedule set by MDHHS without charge to MDHHS; and,
- 8) Provide to MDHHS a detailed plan within 10 calendar days of the occurrence describing the measures Contractor will undertake to prevent a future occurrence.

Notification to affected individuals, as described above, must comply with applicable law, be written in plain language, and contain, at a minimum: name and contact information of Contractor's representative; a description of the nature of the loss; a list of the types of data involved; the known or approximate date of the loss; how such loss may affect the affected individual; what steps Contractor has taken to protect the affected individual; what steps the affected individual can take to protect himself or herself; contact information for major credit card reporting agencies; and, information regarding the credit and identity monitoring services to be provided by Contractor.

This Section survives the termination of this Agreement.

4.32 Non-Disclosure of Confidential Information

The parties acknowledge that each party may be exposed to or acquire communication or data of the other party that is confidential, privileged communication not intended to be disclosed to third parties. The provisions of this Section survive the termination of this Agreement.

a. Meaning of Confidential Information. For the purposes of this Agreement, the term “**Confidential Information**” means all information and documentation of a party that:

- 1) Has been marked “confidential” or with words of similar meaning, at the time of disclosure by such party;
- 2) If disclosed orally or not marked “confidential” or with words of similar meaning, was subsequently summarized in writing by the disclosing party and marked “confidential” or with words of similar meaning; and,
- 3) Should reasonably be recognized as confidential information of the disclosing party.

The term “Confidential Information” does not include any information or documentation that was:

- 1) Subject to disclosure under the Michigan Freedom of Information Act (FOIA);
- 2) Already in the possession of the receiving party without an obligation of confidentiality;
- 3) Developed independently by the receiving party, as demonstrated by the receiving party, without violating the disclosing party’s proprietary rights;
- 4) Obtained from a source other than the disclosing party without an obligation of confidentiality; or,
- 5) Publicly available when received, or thereafter became publicly available (other than through any unauthorized disclosure by, through, or on behalf of, the receiving party).

For purposes of this Agreement, in all cases and for all matters, State Data is deemed to be Confidential Information.

b. Obligation of Confidentiality. The parties agree to hold all Confidential Information in strict confidence and not to copy, reproduce, sell, transfer, or otherwise dispose of, give or disclose such Confidential Information to third parties other than employees, agents, or subcontractors of a party who have a need to know in connection with this Agreement or to use such Confidential Information for any purposes whatsoever other than the performance of this Agreement. The parties agree to advise and require their respective employees, agents, and subcontractors of their obligations to keep all Confidential Information confidential. Disclosure to a subcontractor is permissible where:

- 1) Use of a subcontractor is authorized under this Agreement;
- 2) The disclosure is necessary or otherwise naturally occurs in connection with work that is within the subcontractor's responsibilities; and
- 3) Contractor obligates the subcontractor in a written contract to maintain MDHHS's Confidential Information in confidence.

At MDHHS's request, any employee of Contractor or any subcontractor may be required to execute a separate agreement to be bound by the provisions of this Section.

- c. Cooperation to Prevent Disclosure of Confidential Information. Each party must use its best efforts to assist the other party in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the foregoing, each party must advise the other party immediately in the event either party learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Agreement and each party will cooperate with the other party in seeking injunctive or other equitable relief against any such person.
- d. Remedies for Breach of Obligation of Confidentiality. Each party acknowledges that breach of its obligation of confidentiality may give rise to irreparable injury to the other party, which damage may be inadequately compensable in the form of monetary damages. Accordingly, a party may seek and obtain injunctive relief against the breach or threatened breach of the foregoing undertakings, in addition to any other legal remedies which may be available, to include, in the case of MDHHS, at the sole election of MDHHS, the immediate termination, without liability to MDHHS, of this Agreement or any Statement of Work corresponding to the breach or threatened breach.
- e. Surrender of Confidential Information upon Termination. Upon termination of this Agreement or a Statement of Work, in whole or in part, each party must, within five calendar days from the date of termination, return to the other party any and all Confidential Information received from the other party, or created or received by a party on behalf of the other party, which are in such party's possession, custody, or control; provided, however, that Contractor must return State Data to MDHHS following the timeframe and procedure described further in this Agreement. Should Contractor or MDHHS determine that the return of any Confidential Information is not feasible, such party must destroy the Confidential Information and must certify the same in writing within five calendar days from the date of termination to the other party. However, MDHHS's legal ability to destroy Contractor data may be restricted by its retention and disposal schedule, in which case Contractor's Confidential Information will be destroyed after the retention period expires.

4.33 Data Privacy and Information Security

- a. Undertaking by Contractor. Without limiting Contractor's obligation of confidentiality as further described, Contractor is responsible for establishing and maintaining a data privacy and information security

program, including physical, technical, administrative, and organizational safeguards, that is designed to:

- 1) Ensure the security and confidentiality of the State Data;
 - 2) Protect against any anticipated threats or hazards to the security or integrity of the State Data;
 - 3) Protect against unauthorized disclosure, access to, or use of the State Data;
 - 4) Ensure the proper disposal of State Data; and
 - 5) Ensure that all employees, agents, and subcontractors of Contractor, if any, comply with all of the foregoing. In no case will the safeguards of Contractor's data privacy and information security program be less stringent than the safeguards used by MDHHS, and Contractor must at all times comply with all applicable State IT policies and standards, which are available to Contractor upon request.
- b. Audit by Contractor. No less than annually, Contractor must conduct a comprehensive independent third-party audit of its data privacy and information security program and provide such audit findings to MDHHS.
- c. Right of Audit by the State. Without limiting any other audit rights of MDHHS, MDHHS has the right to review Contractor's data privacy and information security program prior to the commencement of Agreement Activities and from time to time during the term of this Agreement. During the providing of the Agreement Activities, on an ongoing basis from time to time and without notice, MDHHS, at its own expense, is entitled to perform, or to have performed, an on-site audit of Contractor's data privacy and information security program. In lieu of an on-site audit, upon request by MDHHS, Contractor agrees to complete, within 45 calendar days of receipt, an audit questionnaire provided by MDHHS regarding Contractor's data privacy and information security program.
- d. Audit Findings. Contractor must implement any required safeguards as identified by MDHHS or by any audit of Contractor's data privacy and information security program.
- e. State's Right to Termination for Deficiencies. MDHHS reserves the right, at its sole election, to immediately terminate this Agreement or a Statement of Work without limitation and without liability if MDHHS determines that Contractor fails or has failed to meet its obligations under this Section.

4.34 Reserved

4.35 Reserved

4.36 Records Maintenance, Inspection, Examination, and Audit

MDHHS or its designee may audit Contractor to verify compliance with this Agreement. Contractor must retain, and provide to MDHHS or its designee and the auditor general upon request, all financial and accounting records related to this Agreement through the term of this Agreement and for four years after the latter of termination, expiration, or final payment under this Agreement or any extension (“**Audit Period**”). If an audit, litigation, or other action involving the records is initiated before the end of the Audit Period, Contractor must retain the records until all issues are resolved.

Within 10 calendar days of providing notice, MDHHS and its authorized representatives or designees have the right to enter and inspect Contractor's premises or any other places where Agreement Activities are being performed, and examine, copy, and audit all records related to this Agreement. Contractor must cooperate and provide reasonable assistance. If any financial errors are revealed, the amount in error must be reflected as a credit or debit on subsequent invoices until the amount is paid or refunded. Any remaining balance at the end of this Agreement must be paid or refunded within 45 calendar days.

This Section applies to Contractor, any parent, affiliate, or subsidiary organization of Contractor, and any subcontractor that performs Agreement Activities in connection with this Agreement.

4.37 Warranties and Representations

Contractor represents and warrants:

- a. Contractor is the owner or licensee of any Agreement Activities that it licenses, sells, or develops and Contractor has the rights necessary to convey title, ownership rights, or licensed use;
- b. All Agreement Activities are delivered free from any security interest, lien, or encumbrance and will continue in that respect;
- c. The Agreement Activities will not infringe the patent, trademark, copyright, trade secret, or other proprietary rights of any third party;
- d. Contractor must assign or otherwise transfer to MDHHS or its designee any manufacturer's warranty for the Agreement Activities;
- e. The Agreement Activities are merchantable and fit for the specific purposes identified in this Agreement;
- f. The Agreement signatory has the authority to enter into this Agreement;
- g. All information furnished by Contractor in connection with this Agreement fairly and accurately represents Contractor's business, properties, finances, and operations as of the dates covered by the information, and Contractor will inform MDHHS of any material adverse changes; and
- h. All information furnished and representations made in connection with the award of this Agreement is true, accurate, and complete, and contains no

false statements or omits any fact that would make the information misleading.

A breach of this Section is considered a material breach of this Agreement, which entitles MDHHS to terminate this Agreement under Section 4.23, Termination for Cause.

4.38 Conflicts and Ethics

Contractor will uphold high ethical standards and is prohibited from:

- a. Holding or acquiring an interest that would conflict with this Agreement;
- b. Doing anything that creates an appearance of impropriety with respect to the award or performance of this Agreement;
- c. Attempting to influence or appearing to influence any State employee by the direct or indirect offer of anything of value; or
- d. Paying or agreeing to pay any person, other than employees and consultants working for Contractor, any consideration contingent upon the award of this Agreement.

Contractor must immediately notify MDHHS of any violation or potential violation of these standards. This Section applies to Contractor, any parent, affiliate, or subsidiary organization of Contractor, and any subcontractor that performs Agreement Activities in connection with this Agreement.

4.39 Compliance with Laws

Contractor must comply with all federal, state and local laws, rules and regulations.

4.40 Reserved

4.41 Reserved

4.42 Nondiscrimination

Under the Elliott-Larsen Civil Rights Act, 1976 PA 453, MCL 37.2101, et seq., and the Persons with Disabilities Civil Rights Act, 1976 PA 220, MCL 37.1101, et seq., Contractor and its subcontractors agree not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment, or a matter directly or indirectly related to employment, because of race, color, religion, national origin, age, sex, height, weight, marital status, or mental or physical disability. Breach of this covenant is a material breach of this Agreement.

4.43 Unfair Labor Practice

Under MCL 423.324, MDHHS may void any Agreement with a Contractor or subcontractor who appears on the Unfair Labor Practice register compiled under MCL 423.322.

4.44 Governing Law

This Agreement is governed, construed, and enforced in accordance with Michigan law, excluding choice-of-law principles, and all claims relating to or arising out of this Agreement are governed by Michigan law, excluding choice-of-law principles. Any dispute arising from this Agreement must be resolved in Michigan Court of Claims. Contractor consents to venue in Ingham County, and waives any objections, such as lack of personal jurisdiction or forum non conveniens. Contractor must appoint agents in Michigan to receive service of process.

4.45 Non-Exclusivity

Nothing contained in this Agreement is intended nor will be construed as creating any requirements contract with Contractor. This Agreement does not restrict the State or its agencies from acquiring similar, equal, or like Agreement Activities from other sources.

4.46 Force Majeure

Neither party will be in breach of this Agreement because of any failure arising from any disaster or acts of god that are beyond their control and without their fault or negligence. Each party will use commercially reasonable efforts to resume performance. Contractor will not be relieved of a breach or delay caused by its subcontractors. If immediate performance is necessary to ensure public health and safety, MDHHS may immediately contract with a third party.

4.47 Dispute Resolution

The parties will endeavor to resolve any Agreement dispute in accordance with this provision. The parties must submit the dispute to a senior executive if unable to resolve the dispute within 15 business days. The parties will continue performing while a dispute is being resolved, unless the dispute precludes performance. A dispute involving payment does not preclude performance.

Litigation to resolve the dispute will not be instituted until after the dispute has been elevated to the parties' senior executive and either concludes that resolution is unlikely, or fails to respond within 15 business days. The parties are not prohibited from instituting formal proceedings: (a) to avoid the

expiration of statute of limitations period; (b) to preserve a superior position with respect to creditors; or (c) where a party makes a determination that a temporary restraining order or other injunctive relief is the only adequate remedy. This Section does not limit MDHHS's right to terminate this Agreement.

4.48 Media Releases

News releases (including promotional literature and commercial advertisements) pertaining to the Agreement or project to which it relates must not be made without prior written MDHHS approval, and then only in accordance with the explicit written instructions of MDHHS.

4.49 Website Incorporation

MDHHS is not bound by any content on Contractor's website unless expressly incorporated directly into this Agreement.

4.50 Entire Agreement

This Agreement is the entire agreement of the parties related to the Agreement Activities. This Agreement supersedes and replaces all previous understandings and agreements between the parties for the Agreement Activities.

4.51 Severability

If any part of this Agreement is held invalid or unenforceable, by any court of competent jurisdiction, that part will be deemed deleted from this Agreement and the severed part will be replaced by agreed upon language that achieves the same or similar objectives. The remaining Agreement will continue in full force and effect.

4.52 Waiver

Failure to enforce any provision of this Agreement will not constitute a waiver.

4.53 Survival

The provisions of this Agreement that impose continuing obligations, including warranties and representations, termination, transition, insurance coverage, indemnification, and confidentiality, will survive the expiration or termination of this Agreement.

4.54 Agreement Modification

This Agreement may not be amended except by signed agreement between the parties. Notwithstanding the foregoing, no subsequent Statement of Work or amendment executed after the effective date will be construed to amend this Agreement unless it specifically states its intent to do so and cites the section or sections amended.

The Contractor shall, upon request of MDHHS and receipt of a proposed amendment, amend this Agreement, if and when required in the opinion of MDHHS, due to the revision of federal or state laws or regulations.

4.55 Options to Renew

At the discretion of MDHHS, this Agreement may be renewed in writing by an amendment not less than 30 days before its expiration. This Agreement may be renewed for up to two additional one-year periods.

4.56 Certification Regarding Debarment, Suspension, and Other Responsibility Matters

Assurance is hereby given to MDHHS that the Contractor will comply with Federal Regulation, 2 CFR part 180 and certifies to the best of its knowledge and belief that it, its employees and its subcontractors:

- a. Are not presently debarred, suspended, proposed for debarment, declared ineligible, sentenced to a denial of federal benefits by a state or federal court, or voluntarily excluded from covered transactions by any federal or state department or agency;
- b. Have not within a three-year period preceding this Agreement been convicted of or had civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
- c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state, or local) with commission of any of the offenses enumerated in section 2, and;
- d. Have not within a three-year period preceding this Agreement had one or more public transactions (federal, state or local) terminated for cause or default.

Where the parties are unable to certify to any of the statements in this certification, the Contractor shall attach an explanation to this Agreement.

The Contractor certifies to the best of its knowledge that within the past three years, the Contractor has not;

- a. Failed to substantially perform a state contract, agreement, or subcontract according to its terms, conditions, and specifications within specified time limits.
- b. Refused to provide information or documents required by a contract or agreement including, but not limited to information or documents necessary for monitoring contract performance.
- c. Failed to respond to requests for information regarding contract or agreement compliance, or accumulated repeated substantiated complaints regarding performance of a contract or agreement.
- d. Failed to perform a state contract, agreement, or subcontract in a manner consistent with any applicable state or federal law, rule, regulation, order, or decree.

The Contractor shall include Section 4.56 (Certification Regarding Debarment, Suspension, and Other Responsibility Matters) language as written above in all subcontracts with other parties.

The Contractor shall require each primary subcontractor, whose subcontract will exceed \$25,000, to disclose to the Contractor, in writing, whether at the time of the award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, or proposed for debarment by the state of Michigan. The Contractor shall then inform MDHHS of the subcontractor's status and reasons for the Contractor's decision to use such subcontractor, if the Contractor so decides.

If it is determined that the Contractor knowingly rendered an erroneous certification under this provision, in addition to the other remedies available to the state, MDHHS may immediately terminate this Agreement.

If the state finds that grounds to debar exist, it shall send notice to the Contractor of proposed debarment indicating the grounds for proposed debarment and the procedures for requesting a hearing. If the Contractor does not respond with a written request for a hearing within 20 calendar days, the state shall issue the decision to debar without a hearing. The debarment period may be of any length up to eight years. After the debarment period expires, the Contractor may reapply for inclusion on bidder lists through the regular application process by authority of Executive Order 2003-1.