

PROPOSED SERVICES CONTRACT

This Agreement for professional services and other deliverables (this "Agreement"), made and effective as of [specify date] ("Effective Date"), by and between the State of Iowa, acting by and through the Iowa Department of Public Health [the "Department"] and [name of Contractor], a corporation organized under the laws of _____ (the "Contractor"). The parties agree as follows:

SECTION 1. PURPOSE AND TERM

1.1 Purpose. The parties have entered into this Agreement for the purpose of retaining Contractor to provide professional services and other deliverables in connection with the WIC Electronic Benefits Transfer Services (eWIC) for the Department and the State of Iowa (the "State"), as more fully described in this Agreement, including RFP # _____ and the Statement(s) of Work.

1.2 Term. The initial term of this Agreement is from [_____], through [_____], unless terminated earlier in accordance with the terms of this Agreement.

SECTION 2. DEFINITIONS

In addition to any other terms that may be defined elsewhere in this Agreement, the following terms shall have the following meanings:

"Acceptance" means that the Department has determined that one or more Deliverables satisfy the Department's Acceptance Tests. Final Acceptance means that the Department has determined that all Deliverables to be provided under a Statement of Work satisfy the Department's Acceptance Tests. Non-acceptance means that the Department has determined that one or more Deliverables have not satisfied the Department's Acceptance Tests.

"Acceptance Criteria" means the Specifications, goals, performance measures, testing results and/or other criteria designated by the Department and against which the Deliverables may be evaluated for purposes of Acceptance or Non-acceptance thereof.

"Acceptance Tests" or "Acceptance Testing" mean the tests, reviews and other activities that are performed by or on behalf of Department to determine whether the Deliverables meet the Acceptance Criteria or otherwise satisfy the Department, as determined by the Department in its sole discretion. Acceptance Testing may include testing of individual or multiple units, modules or components, system or integration testing, user-acceptance testing, load/stress testing, system security testing, network testing, recovery/backup testing, data transfer, migration and conversion testing, and Documentation review.

"Authorized Contractors" means independent Contractors, consultants or other Third Parties who are retained or hired by the State, the Department or any other Governmental Entity of the State to use, maintain, support, modify, or enhance the System or to otherwise assist Department with its use of the System for other purposes.

"Confidential Information" means, subject to any applicable State and federal laws and regulations, including but not limited to Iowa Code Chapter 22, any confidential or proprietary information or trade secrets disclosed by either party (a "disclosing party") to the other party (a "receiving party") that, at the time of disclosure, is designated as confidential (or like designation), is disclosed in circumstances of confidence, or would be understood by the parties, exercising reasonable business judgment, to be confidential. Confidential Information does not include any information that: (i) was rightfully in the possession of the receiving party from a source other than the disclosing party prior to the time of disclosure of the information by the disclosing party to the receiving party; (ii) was known to the receiving

party prior to the disclosure of the information by the disclosing party; (iii) was disclosed to the receiving party without restriction by an independent third party having a legal right to disclose the information; (iv) is in the public domain or shall have become publicly available other than as a result of disclosure by the receiving party in violation of this Agreement or in breach of any other agreement with the disclosing party; (v) is independently developed by the receiving party without any reliance on Confidential Information disclosed by the disclosing party; (vi) is disclosed or is required or authorized to be disclosed pursuant to law, rule, regulation, subpoena, summons, or the order of a court, lawful custodian, governmental Department or regulatory authority, or by applicable regulatory or professional standards; or (vii) is disclosed by the receiving party with the written consent of the disclosing party.

“Deficiency” means a defect, flaw, failure, omission, interruption of service, or other problem of any nature whatsoever with respect to a Deliverable, including, without limitation, any failure of a Deliverable to conform to or meet an applicable Specification. Deficiency also includes the lack of something essential or necessary for completeness or proper functioning of a Deliverable.

“Deliverables” mean the System, Software, Source Code, Documentation, hardware, goods, services, work, work product, items, materials and property to be created, developed, produced, delivered, performed or provided by or on behalf of, or made available through, Contractor (or any agent, Contractor or subcontractor of Contractor) in connection with this Agreement, and all related legal rights to own or use the same. Except as otherwise provided in this Agreement, Deliverables shall include any and all: inventions, ideas, concepts, discoveries, methodologies, processes, applications, programs, software, source code, object code, and any other code, language or programming in any stage of development, improvements, modifications, enhancements, upgrades, releases, works-in-progress, techniques, know-how, designs, creative works and original works of authorship, work product, derivative works, Specifications, data, databases, compositions of matter, drawings, notes, plans, papers, graphics, copy, artwork, images, templates, forms, reports, studies, screen designs, utilities, routines, tests, devices, materials, documents, information, content, and all other tangible and intangible works, materials and property of any kind and nature that are related to the Deliverables or created, developed, produced, delivered, or provided by or on behalf of, or made available through, Contractor (or any agent, Contractor, subcontractor, subsidiary or affiliate of Contractor) in connection with this Agreement.

“Department” means the entity identified that is issuing the Contract and any other Department or Agency that purchases from the Contract.

“Documentation” means any and all technical information, commentary, explanations, design documents, system architecture documents, database layouts, code, test materials, training materials, guides, manuals, worksheets, notes, work papers, and all other information, documentation and materials related to or used in conjunction with the Deliverables, in any medium, including hard copy, electronic, digital, and magnetically or optically encoded media.

“Enhancements” shall mean any and all updates, upgrades, patches, additions, modifications or other enhancements made by Contractor with respect to the Software, any new releases of Software, and all changes to the Documentation and Source Code made by Contractor as a result of such Enhancements.

“Governmental Entity” shall mean any Governmental Entity, as defined in Iowa Code Section 8A.101, or any successor provision to that section. The term Governmental Entity shall also include agencies, independent agencies, the Judicial Branch, courts, boards, authorities, institutions, establishments, divisions, bureaus, commissions, committees, councils, examining boards, public utilities, offices of elective constitutional or statutory officers, and other units, branches, or entities of government.

“Project” means the project to develop and implement all services and Deliverables to be performed and provided by Contractor as described in a Statement of Work.

“Project Completion Date” means the date by which Contractor must complete all work and provide all Deliverables pursuant to any Statement of Work. For purposes of this Agreement, the Project Completion Date will be specified in a Statement of Work.

“Project Plan” means the Project Plan attached hereto as Schedule B, as modified from time to time upon written agreement of the parties. The Project Plan is incorporated into this Agreement by this reference as if fully set forth in this Agreement.

“Software” means all software, programs, applications and components which comprise the System including all Third Party Software and any other software, programs, applications and components listed in any and all Statements of Work, in all forms, including Source Code and object code, all related Documentation and Enhancements, and all copies of the foregoing.

“Source Code” means the human-readable source code, source program, scripts and/or programming language, including HTML, XML, XHTML, Visual Basic, and JAVA, for or related to any program, application or software (including the Software). Source Code includes all source code listings, instructions (including compile instructions), programmer’s notes, commentary and all related technical information and Documentation, including all such information and Documentation that is necessary or useful for purposes of maintaining, repairing or making modifications or enhancements to any source code, program, application or software (including the Software).

“Specifications” mean all specifications, requirements, technical standards, performance standards, representations and other criteria related to the Deliverables stated or expressed in this Agreement, the Documentation, the RFP (as defined below), and the Proposal (as defined below). Specifications shall include the Acceptance Criteria and any specifications, standards or criteria stated or set forth in any applicable state, federal, foreign and local laws, rules and regulations. Specifications shall include, without limitation, the existing and planned data model for the System, including all data elements, logical relationships and an entity relationship diagram, the functional requirements specifications and a functional design for the System, including descriptions of each System function and a functional hierarchy diagram, a definition of the existing and planned System modules, including a diagram showing the system design, interface design document including descriptions of all internal and external interfaces, final specifications of the System architecture, including hardware, software and operating system for all system components and interfaces, the detailed System security plan, detailed business and technical requirements, detailed system planning & design, functional hierarchy diagram, entity relationship diagram, data conversion and migration protocols, Software and hardware configuration plan. The Specifications are incorporated into this Agreement by reference as if fully set forth in this Agreement.

“Statement of Work” means the initial statement of work set forth in Schedule A to this Agreement, and any additional statement of work that may be executed by the parties, and any amendments thereto. Each Statement of Work will describe the Deliverables and services to be provided by Contractor and the fixed, not-to-exceed compensation and final delivery dates associated therewith. In addition each Statement of Work will include, without limitation, a description of the Contractor personnel or teams that will complete the work, including each Contractor’s personnel’s roles and responsibilities; a resource allocation plan; a detailed work breakdown structure; a communication plan; a configuration management plan; a risk management plan; and detailed business and technical requirements. Each Statement of Work is incorporated into this Agreement by this reference as if fully set forth in this Agreement.

“System” means [insert name of System or a description] as more fully described in the Agreement (including the Statement(s) of Work, RFP, and Proposal) and all component parts and Deliverables which comprise the System.

“Third Party” means a person or entity (including, but not limited to any form of business organization, such as a corporation, partnership, limited liability corporation, association, etc.) that is not a party to this Agreement.

“Third Party Software” means software, firmware and other programs licensed or acquired from Third Parties. Third Party Software shall be considered Software under this Agreement.

SECTION 3. DOCUMENTS INCORPORATED

3.1 Incorporation. The Department's Request for Proposal No. _____ for the Colorado and Iowa WIC Electronic Benefits Transfer (EBT) Services ("RFP") and Contractor's proposal dated _____, in response to the RFP ("Proposal"), together with any clarifications, attachments, appendices, or amendments to the RFP and Proposal are incorporated into this Agreement by this reference as if fully set forth in this Agreement; provided, however, that none of Contractor's proposed exceptions or modifications to the sample contracts attached to the RFP shall be incorporated into this Agreement unless expressly set forth herein.

3.2 Contractual Obligations. The terms and conditions of the RFP and of the Proposal are made contractual obligations of Contractor, except that any proposed revisions or modifications made by Contractor to the sample contracts attached to the RFP shall not be deemed to limit, modify or otherwise affect any of the contractual obligations of Contractor or the Department hereunder, unless expressly stated herein.

3.3 Preference. In the case of any inconsistency or conflict between the specific provisions of this document, the RFP or the Proposal, any inconsistency or conflict shall be resolved as follows: first, by giving preference to the specific provisions of this document and any schedules, exhibits or other attachments; second, by giving preference to the specific provisions of the RFP and any amendments; third, by giving preference to the specific provisions of the Best and Final Offer; and fourth by giving preference to the specific provisions of the Proposal.

3.4 No Inconsistency. The references to the parties' obligations, which are contained in this document, are intended to change, modify, supplement or clarify the obligations as stated in the RFP and the Proposal. The failure of the parties to make reference to the terms of the RFP or Proposal in this document shall not be construed as creating a conflict and will not relieve Contractor of the contractual obligations imposed by the terms of the RFP and the Proposal. Terms offered in the Proposal, which exceed the requirements of the RFP, shall not be construed as creating an inconsistency or conflict with the RFP or this document. Notwithstanding anything herein to the contrary, the Department shall have only those obligations that are expressly stated in this document, and the Proposal does not create any express or implied obligations of the Department.

SECTION 4. SCOPE OF WORK

4.1 Statement(s) of Work. Contractor shall provide the Department with the Deliverables in accordance with the Statement(s) of Work and all other terms and conditions of this Agreement.

4.2 Amendments to Statement(s) of Work. The parties agree that each Statement of Work may be amended, modified, or replaced at any time during the term of this Agreement upon the mutual written consent of the parties.

4.3 Delivery. Contractor shall deliver to the Department all Deliverables as set forth in a Statement of Work. Contractor acknowledges and agrees that it shall deliver and provide to the Department all Source Code and Documentation related to any Software or other Deliverables that are created, developed, produced, delivered, performed or provided by or on behalf of, or made available through, Contractor under each Statement of Work, unless otherwise agreed to in writing by the Department. Contractor shall provide all such Deliverables in both hard copy and electronic format (acceptable to the Department) and as otherwise required and noted herein or in the applicable Statement of Work.

4.4 Performance Standards. The parties agree that the performance standards and related payment, monitoring and review provisions set forth in Schedule C are incorporated herein by this reference as if fully set forth in this Agreement.

4.5 Department Not Required to Accept or Install Enhancements. Contractor shall not condition any of the Department's rights or Contractor's obligations under this Agreement, or any other contract related to the System or the Software, on the Department accepting or installing any Enhancements or additional functionality provided by Contractor.

4.6 Hardware. Contractor shall recommend to the Department all Third Party hardware necessary or desirable to be acquired to complete work and provide the Deliverables under a Statement of Work. At the Department's sole discretion, the Department will procure such Third Party hardware directly or require Contractor to procure or make available the Third Party hardware for the Department upon such terms and conditions as are acceptable to the Department. Contractor represents and warrants with respect to all Third Party hardware procured or made available by or through the Contractor that, upon delivery to the Department: such hardware will be new and unused; title to the hardware will be free and clear of all liens, security interests, charges and encumbrances or other restrictions; the Department's use and possession of the hardware will not be interrupted or otherwise disturbed by any person or entity asserting a claim under or through Contractor; and the hardware will be free of any rightful claim of any Third Person or entity based on patent or copyright infringement, trade secret misappropriation, unfair trade practice, or otherwise.

4.7 Third Party Software. Contractor shall recommend to the Department all Third Party Software necessary or desirable to be acquired to complete work and provide all Deliverables under a Statement of Work. At the Department's sole discretion, the Department will license such Third Party Software directly or require Contractor to license or sublicense the Third Party Software to or on behalf of the Department at the Department's expense. In the latter case, Contractor shall ensure that all Third Party Software or other materials provided pursuant to this Agreement shall be licensed to the Department pursuant to a license agreement, the terms and conditions of which must be acceptable to the Department.

4.8 Manufacturers' Warranties. Contractor shall take all action necessary to ensure that the State and the Department shall be entitled to receive and enjoy all warranties, indemnities and other benefits associated with Third Party Software and Third Party hardware. At the Department's request, Contractor shall assign to the State and the Department all of the licensor's and manufacturer's warranties and indemnities pertaining to Third Party Software and Third Party hardware under any license or other

agreement between Contractor and any Third Parties relating to any Third Party Software and Third Party hardware.

SECTION 5. COMPENSATION AND ADDITIONAL RIGHTS AND REMEDIES

5.1 Compensation. In consideration of Contractor providing the Department with the Deliverables in accordance with the terms and conditions of this Agreement, Contractor shall be entitled to receive the fees or other compensation associated with such Deliverables as specified in a Statement of Work, subject to all terms and conditions of this Agreement, including, without limitation Section 5.2 (Invoices) and Section 5.3 (Retention). The Department shall not be obligated to pay any other compensation, fees, expenses, costs, charges or other amounts to Contractor in connection with this Agreement or any Statement of Work. All fees and compensation payable hereunder to Contractor are fixed, not-to-exceed amounts, and Contractor shall not be compensated on a time and materials basis. [It is expressly understood and agreed that in no event will the total fees or compensation to be paid under the initial Statement of Work exceed the sum of \$_____]. Contractor is not entitled to payment for any Deliverable provided under this Agreement or any Statement of Work if the Department reasonably determines that such Deliverable has not been satisfactorily or completely delivered or performed, or that such Deliverable fails to meet or conform to any applicable Specifications or that there is a material Deficiency with respect to such Deliverable. In no event shall the Department be obligated to pay Contractor any fees, costs, compensation or other amounts in excess of the amount specified in a Statement of Work for any one or more Deliverables, unless the Department otherwise agrees to pay such fees, costs, compensation other amounts pursuant to a written Change Order or an amendment to this Agreement executed by the Department. No payment, including final payment, shall be construed as acceptance of any Deliverables with Deficiencies or incomplete work, and Contractor shall remain responsible for full performance in strict compliance with the terms and conditions of this Agreement. Contractor's acceptance of the last payment from the Department shall operate as a release of any and all claims related to this Agreement that Contractor may have or be capable of asserting against the Department or the State. No advance payments shall be made for any Deliverables provided by Contractor pursuant to this Agreement.

5.2 Invoices. Upon receipt of written notice of Acceptance from the Department with respect to one or more Deliverables, Contractor shall submit an invoice to the Department requesting payment of the fees or other compensation specified in the Statement of Work associated with such Deliverable(s), less the Retained Amount(s) to be withheld in accordance with Section 5.3. All invoices submitted by Contractor shall comply with all applicable rules concerning payment of such fees, charges or other claims and shall contain appropriate documentation as necessary to support the fees or charges included on the invoice and all information reasonably requested by the Department. The Department shall pay all approved invoices in arrears and in conformance with Iowa Code section 8A.514 and 11 Iowa Admin. Code 41.1(2). The Department may pay in less than sixty (60) days, as provided in Iowa Code section 8A.514. However, an election to pay in less than sixty (60) days shall not act as an implied waiver of Iowa Code section 8A.514. Notwithstanding anything herein to the contrary, the Department shall have the right to dispute any invoice submitted for payment and withhold payment of any disputed amount if the Department believes the invoice is inaccurate or incorrect in any way.

5.3 Retention. To secure Contractor's performance under this Agreement, the Department shall retain 15% of the fees or other compensation associated with each Deliverable and payable hereunder (the "Retained Amounts"). The Retained Amounts for Deliverables provided under any Statement of Work shall be payable upon the Department's delivery of written notice of Final Acceptance of such Deliverables to Contractor, subject to the terms and conditions hereof.

5.4 Erroneous Payments and Credits. Contractor shall promptly pay or refund to the Department the full amount of any overpayment or erroneous payment within ten (10) business days after either discovery by the Contractor or notification by the Department of the overpayment or erroneous payment. In the event Contractor fails to timely pay or refund any amounts due the Department under this Section 5.4, the Department will charge interest of one percent (1%) per month compounded on the outstanding balance after the date payment or refund is due, or the maximum amount allowed by law, whichever is greater.

The Department may, in its sole discretion, elect to have Contractor apply any amounts due to the Department under this Section 5.4 against any amounts payable by the Department under this Agreement.

5.5 Reimbursable Expenses. There shall be no reimbursable expenses associated with this Agreement separate from the compensation referred to in this section. Contractor shall be solely responsible for all costs, charges and expenses it incurs in connection with its performance under this Agreement, including, but not limited to, travel, mileage, meals, lodging, equipment, supplies, personnel, salaries, benefits, insurance, training, conferences, telephone, utilities, start-up costs, and all other costs and expenses of Contractor.

5.6 Set-off Against Sums Owed by Contractor. In the event that Contractor owes the Department or the State any sum under the terms of this Agreement, any other agreement, pursuant to a judgment, or pursuant to any law, the Department may set off such sum against any sum invoiced to the Department by Contractor in the Department's sole discretion unless otherwise required by law. Any amounts due to the Department as damages may be deducted by the Department from any money or sum payable by the Department to Contractor pursuant to this Agreement or any other agreement between Contractor and the Department.

5.7 Withholding Payments. In addition to pursuing any other remedy provided herein or by law, the Department may withhold compensation or payments to Contractor, in whole or in part, without penalty or legal liability to the Department or work stoppage by Contractor, in the event the Department determines that: (i) Contractor has failed to perform any of its duties or obligations as set forth in this Agreement; or (ii) any Deliverable has failed to meet or conform to any applicable Specifications or contains or is experiencing a Deficiency. No interest shall accrue or be paid to Contractor on any compensation or other amounts withheld or retained by the Department under this Agreement.

Deficiency Period	Description	Hold-back Remedy
First month	The first month in which a deficiency is not corrected within the timeframe specified in the corrective action plan.	Twenty-five percent (25%) of the total payment owed to the Contractor
Second consecutive month	The second consecutive month in which a deficiency is not corrected within the timeframe specified in the corrective action plan.	Fifty percent (50%) of the total payment owed to the Contractor
Third and additional consecutive months	The third and additional consecutive month(s) in which a deficiency is not corrected within the timeframe specified in the corrective action plan.	One hundred percent (100%) of the total payment owed the Contractor

5.7.1 Financial Remedies for Implementation Delays. Contractor shall meet agreed upon due dates for Implementation Milestones; start date of User Acceptance Testing (UAT), start date of Pilot Test, start date of the Statewide Rollout, completion data of the Statewide Rollout, and Contract Transition. The Department shall impose a remedy of \$1,000 dollars per day for each day of delay beyond the date specified in the approved Project Schedule for delays due to Contractor or Subcontractor errors, omissions, or inability to meet contracted readiness or implementation activities.

5.7.2 Financial Remedies for Non-Compliance. Any delay or failure by the Contractor in the timely execution of its obligations in accordance with dates in a Department approved Work Plan and/or in

accordance with the specified performance standards will interfere with the proper and timely implementation of the EBT system and services. The Department may incur costs to maintain the functions that would have otherwise been performed by the Contractor or its subcontractors. The following sections describe the liquidated damages the Department may impose at its option as a result of delay or failure of the Contractor or its subcontractors to perform its obligations.

For the amount of any such damages, the Department shall have the right to reduce the amount of payment to the Contractor for monthly payments and/or require direct payment from the Contractor to the Department.

5.7.2.1 Maximum Liquidated Damages. The maximum total liquidated damages assessable in one calendar month shall be no more than \$75,000;

5.7.2.2 Payments. Amounts imposed by the Department as liquidated damages shall be deducted by the Department from any money payable to the Contractor, or the Department may bill the Contractor as a separate item. The Contractor shall immediately make full payment on such bills. The Department shall make its claims against the Contractor for liquidated damages in a reasonable time after discovery of an instance of non-conformance with performance standards;

5.7.2.3 Reductions in Payments. Should Contractor non-conformance of performance result in Department expenses or liquidated damages, the Department shall be entitled to offset those expenses from the amount due the Contractor.

5.7.2.4 Procurement of Cure Services. If, in the reasonable judgment of the Department, a default by the Contractor is not so substantial as to require termination, reasonable efforts to induce the Contractor to cure the default are unavailing and the default is capable of being cured by the Department or by another resource without unduly interfering with continued performance by the Contractor, the Department may provide or procure the services reasonably necessary to cure the default, other than with respect to the EBT host processor, in which event the Contractor shall reimburse the Department for the actual cost of the services. This remedy is not available for curing any defaults with respect to the EBT host processor or access to the software used on the EBT host processor

5.7.3 Liquidated Damages. The following represent circumstances under which liquidated damages may be imposed on the Contractor by the Department;

5.7.3.1 Contractor EBT Processor System Component Downtime. In any week(s) where the Contractor's unscheduled downtime of the Host central computer; Host FTP servers, WIC MIS to EBT Host interfaces, Vendor to EBT Host interfaces, EBT Host SQL database, EBT Host WEB Service user portal, EBT Host WEB Service user portal exceeds 30 minutes, the liquidated damages shall be as follows:

31-60	minutes	\$1,000 each minute over 30 minutes
61-90	minutes	\$2,000 each minute over 60 minutes
91-120	minutes	\$2,500 each minute over 90 minutes
121+	minutes	\$3,000 each minute over 120 minutes

5.7.3.2 Benefit Availability. Liquidated damages for the following failures shall be \$500 per hour or portion of an hour up to \$2,500 per incident, with a maximum of \$10,000 per month for each failure to; begin file processing within one hour of receipt, confirm receipt of a valid file within one hour of successfully processing the file, request a replacement file if unable to process a file and confirm receipt of subsequent transmissions within 30 minutes until successful transmission has been completed, provide benefits to households according to the benefit availability schedule specified by the Department, for each failure to process transmissions as specified in the performance standards, for each failure to post benefits within 30 minutes of receipt of a valid transmission;

5.7.3.3 Inaccurate Transactions. Contractor failure to limit inaccurate transactions to no more than two inaccurate transactions per 50,000 transactions, measured and reported on a rolling 30 day basis, the Department may withhold payments to the Contractor according to the in Section 5.7;

5.7.3.4 Failure to Meet Transaction Response Time. In the second consecutive month and in successive consecutive months following a failure to meet the system processing speed standards for EBT transactions as specified in the MIS-EBT Universal Interface and the Operating Rules for WIC EBT, the Department may withhold payments according to the schedule in Section 5.7. Payments may be withheld until the Department is reasonably assured by the Contractor that the system will meet the system response time Performance Standards. Upon such assurance, the Department shall promptly pay to the Contractor all outstanding payment amounts being withheld under this Section, according to the contract payment terms;

In any month in which the Contractor's EBT host processor fails to process and respond to transactions as specified in the MIS-EBT Universal Interface and the Operating Rules for WIC EBT, measured on a monthly basis, the Department may impose liquidated damages equal to five percent (5%) of the total invoice amount for that month's transaction processing. The maximum liquidated damages assessable in a one month period for failure to meet the EBT host transaction processing speed requirements will be \$25,000;

5.7.3.5 Overpayment of Benefits. The Contractor shall be responsible for any overpayment for benefits due to an inaccurate transaction within the Contractor's control, to include all incurred costs resulting from the overpayment. Contractor may not seek to recover such costs from WIC vendors. The Contractor shall be responsible for actual damages, if any, suffered by the Department resulting from the overpayment, including all expenses incurred that would not have been incurred but for the Contractor's overpayment for benefits.

5.7.3.6 Customer Service Performance Standards. During any consecutive two-month period in which 85% of all participant, WIC vendor and State calls to the EBT Contractor's toll free call center are not answered within four rings and a live customer service representative (CSR) does not respond to 100% of all calls within two minutes of a call being put on hold, the Contractor shall submit a corrective action plan. The corrective action plan shall be submitted to the Department within 15 days following the end of the second month. The Contractor shall achieve full compliance with this Performance Standard within 15 days of the submission of the corrective action plan. If the Contractor does not meet this Performance Standard within 15 days of submission of the plan, the Department may hold back 25% of total payments owed to the Contractor by the Department. Payments may be held back until the Department is reasonably assured that the Contractor shall comply with this Performance Standard. Upon such assurance, the Department shall promptly pay to the Contractor all outstanding payment amounts being withheld under this Section.

5.8 Correction/Cure. The Department may request a corrective action plan and will set a due date for submission of the plan. If the Contractor does not comply by submitting a corrective action plan by the

due date, and the Department has not granted an extension, the program may withhold payment according to the hold-back schedule under section 5.7. If the Department determines that the deficiency has not been corrected according to the agreed upon corrective action plan; the Department may withhold payment with respect to any Deliverable or cure any Contractor default under this Agreement without prejudice to any other remedy it may have if Contractor fails to correct such Deficiencies as required in this Agreement or if Contractor otherwise defaults or fails to perform any provision of the Agreement within the time period specified in a notice of default from the Department. The Department may provide or procure the services reasonably necessary to correct any Deficiencies or cure any Contractor default, in which event Contractor shall reimburse the Department for the actual costs incurred by the Department for such services (or for the reasonable value of the time expended by any Department or State employees who provide such services). In addition, Contractor shall cooperate with the Department or any Third Parties retained by the Department who assist in curing such default, including by allowing access to any pertinent materials or work product of Contractor.

5.9 Error Correction. With respect to each notice from the Department to Contractor during the term of this Agreement that notifies Contractor that any Deliverable delivered by Contractor (and previously accepted by the Department) contains or experiences a Deficiency, Contractor shall, at no cost to the Department, promptly (i) correct the Deficiency and repair the affected Deliverable, and (ii) provide the Department with all necessary materials with respect to such repaired or corrected Deliverable, including without limitation the provision of new Source Code, master program disks or other media acceptable to the Department and-related Documentation.

5.10 Monitoring and Review. The Department shall monitor and review Contractor's performance under this Agreement to ensure compliance with this Agreement. Such review and monitoring shall include the Department's assessment of invoices and reports furnished by Contractor pursuant to this Agreement. Performance deficiencies as set forth in Schedule C shall trigger the invocation of withholding of payments or other remedies specified within this Agreement.

SECTION 6. ACCEPTANCE TESTS, PROJECT MANAGEMENT, KEY PERSONNEL AND LIQUIDATED DAMAGES

6.1. Contractor shall commence and complete all work and provide all Deliverables in accordance with the deadlines, timelines, terms, conditions, Specifications and other requirements specified in this Agreement, including those which may be specified in a Statement of Work and the Project Plan. Contractor shall deliver, install and complete all services and provide all Deliverables with respect to a Statement of Work no later than the Project Completion Date.

6.2 All Deliverables shall be subject to the Department's Acceptance Testing and Acceptance, unless otherwise specified in a Statement of Work. Upon completion of all work to be performed by Contractor with respect to any Deliverable, Contractor shall deliver a written notice to the Department certifying that the Deliverable meets and conforms to applicable Specifications; provided, however, that Contractor shall pretest the Deliverable to determine that it meets and operates in accordance with applicable Specifications prior to delivering such notice to the Department. At the Department's request, Contractor shall assist the Department in performing Acceptance Tests at no additional cost to the Department. Within a reasonable period of time after the Department has completed its Acceptance Testing, the Department shall provide Contractor with written notice of Acceptance or Non-acceptance with respect to each Deliverable that was evaluated during such Acceptance Testing. If the Department determines that a Deliverable satisfies its Acceptance Tests, the Department shall provide Contractor with notice of Acceptance with respect to such Deliverable. If the Department determines that a Deliverable fails to satisfy its Acceptance Tests, the Department shall provide Contractor with notice of Non-acceptance with respect to such Deliverable. In the event the Department provides notice of Non-acceptance to Contractor with respect to any Deliverable, Contractor shall correct and repair such Deliverable and submit it to the Department within ten (10) days of Contractor's receipt of notice of Non-acceptance so that the Department may re-conduct its Acceptance Tests with respect to such Deliverable. In the event the

Department determines, after re-conducting its Acceptance Tests with respect to any Deliverable that Contractor has attempted to correct or repair pursuant to this Section 6.2, that such Deliverable fails to satisfy its Acceptance Tests, then the Department shall have the continuing right, at its sole option, to: (i) require Contractor to correct and repair such Deliverable within such period of time as the Department may specify in a written notice to Contractor; (ii) refuse to accept such Deliverable without penalty or legal liability and without any obligation to pay any fees or other amounts associated with such Deliverable (or receive a refund of any fees or amounts already paid with respect to such Deliverable); (iii) accept such Deliverable on the condition that any fees or other amounts payable with respect thereto shall be reduced or discounted to reflect, to the Department's satisfaction, the Deficiencies present therein and any reduced value or functionality of such Deliverable or the costs likely to be incurred by the Department to correct such Deficiencies; or (iv) terminate this Agreement and/or seek any and all available remedies, including damages. Notwithstanding the provisions of Section 10 of this Agreement, the Department may terminate this Agreement pursuant to this Section 6.2 without providing Contractor with any notice or opportunity to cure provided for in Section 10. The Department's right to exercise the foregoing rights and remedies, including termination of this Agreement, shall remain in effect until Acceptance Tests are successfully completed to the Department's satisfaction and the Department has provided Contractor with written notice of Final Acceptance. If the Department determines that all Deliverables satisfy its Acceptance Tests, the Department shall provide Contractor with notice of Final Acceptance with respect to such Deliverables. Contractor's receipt of any notice of Acceptance, including Final Acceptance, with respect to any Deliverable(s) shall not be construed as a waiver of any of the Department's rights to enforce the terms of this Agreement or require performance in the event Contractor breaches this Agreement or any Deficiency is later discovered with respect to such Deliverable(s). In addition, Contractor's receipt of any notice of Acceptance with respect to any Deliverable(s) shall not be construed as a waiver by the Agencies of its right to refuse to provide notice of Final Acceptance.

6.3 Project Management and Reporting.

6.3.1 Contractor or Project Manager. Contractor shall provide a dedicated Project Manager for the implementation. Contractor's Project Manager will be subject to the Department's approval. The Contractor's Project Manager's duties shall commence no later than 15 days after the effective date of execution of this Agreement and will continue through the Department's written acceptance of the successful statewide implementation of the Contractor's EBT system. During the design, development and implementation phases it is preferred that the Contractor's Project Manager be located in-state. Contractor shall provide a dedicated Project Manager for the entire length of the operations phase of this Agreement. During the operations phase, the Contractor's Project Manager must maintain regular contact through required status reports and requested calls with the Department's WIC EBT Manager and designated staff members. The continuation of the Contractor's Implementation Project Manager as its Operations Project Manager is subject to Department approval. During the contract, the Department may request the replacement of the Contractor's Project Manager for any legitimate performance reason and the replacement will be subject to Department approval. Staff replacement occurring at the Department's request shall be performed within 30 calendar days of receipt of the request.

Contractor represents that its Project Manager will be fully qualified to perform the tasks required of that position under this Agreement. Contractor's Project Manager shall be able to make binding decisions pursuant to this Agreement on behalf of and for Contractor. Any written commitment by Contractor's Project Manager and persons designated by her/him in writing for this purpose, within the scope of this Agreement, shall be binding upon Contractor. Contractor's Project Manager shall exercise her or his best efforts while performing under this Agreement. Contractor's Project Manager shall be at the Department's site as needed during the course of work under this Agreement and will be available either in person, by telephone or E-mail to respond promptly (in no event more than 2 hours after receipt of a request or inquiry from the Department) during the business day to inquiries from the Department;

6.3.2 Review Meetings. Commencing with performance of this Agreement, Contractor's Project Manager and other key Contractor staff shall meet weekly with the Department's Project Manager and representatives, unless otherwise mutually agreed, to discuss progress made by the Contractor in the performance of this Agreement. Each review meeting shall be hosted and facilitated by the Contractor either in person or via conference call. The call will consist of updates on project activities, review of the project work plan and status of project schedule, review of issues and risks, and planning for upcoming activities. Contractor's Project Manager shall provide an agenda for the meeting no later than two (2) business days prior to the meeting or call. The Contractor will provide meeting notes for each meeting or call no later than close of business the next business day following the call;

6.3.3 Reports. Contractor shall develop and submit a template for a status report to be provided for review at the project initiation meeting. The content of the status report will include activities completed within the reporting period, upcoming activities for the next reporting period, identification of critical action items (including person assigned), issues, risks or roadblocks, status of clinic enablement, status of WIC vendor enablement and certification, the status of project deliverables, and an updated Project Schedule. The Project Schedule is expected to be the primary focus of project management and communication and shall be updated regularly during each reporting period. The status report shall be submitted to the State WIC Program at least two (2) business days prior to the scheduled recurring status call. The status reports shall provide a description of all project activities within the reporting period, including but not limited to tasks accomplished, deliverables submitted, project schedule, progress on any applicable enhancement or change requests, outstanding tasks/deliverables, outstanding problems, issues, or changes, and next steps;

6.3.4 Problem Reporting Omissions. The Department's receipt of a report that identifies any problems shall not relieve Contractor of any obligation under this Agreement or waive any other remedy under this Agreement or at law or equity that the Department may have. The Department's

failure to identify the extent of a problem or Deficiency, or the extent of damages incurred as a result of a problem or Deficiency, shall not act as a waiver of performance under this Agreement;

6.3.5 Change Order Procedure. The Department may at any time request a modification to the scope of a Statement of Work using a change order. The following procedures for a change order shall be followed:

6.3.5.1 Written Request. The Department shall specify in writing the desired modifications to the Statement of Work with the same degree of specificity as in the original Statement of Work. Changes requested by the Department to the system/program baseline and conforming changes shall be initiated using an agreed upon change order process;

6.3.5.2 Contractor's Response. Contractor shall submit to the Department any proposed modifications to the Project Plan and a firm cost proposal, if applicable, start date, completion dates, and written plan specifying the progress of each phase identified: Design, Development, Testing, and Implementation for the requested change order within five ten (510) business days of receiving the Department's change order request. Contractor agrees that there shall be no additional cost or Contractor compensation for or with respect to any change order requests for modifications, Deliverables, modules or functionality that are envisioned in, conceptually similar in nature to, or consistent with, the RFP or the Proposal. Cost proposals shall be estimated utilizing the hourly rates agreed upon in the Schedule C. The hourly rates shall be fully-loaded rates, including over-head costs. Modifications to the Statement of Work that incorporate additional detail with respect to any Deliverable will not have the effect of increasing the not-to-exceed cost of that Deliverable, unless Contractor can show by clear and convincing evidence to the Department that the process of gathering detailed requirements for the Project revealed information previously unknown to the Contractor, that such new information will cause the estimated time, and therefore cost, necessary to complete a particular Deliverable to increase, and that the incorporation of that information alone into the Project requirements is the sole cause of the additional time and cost;

6.3.5.3 Effect of Change Order. Both parties must sign and date the change order to authorize the change in Deliverables described therein and incorporate the changes into the Statement of Work and this Agreement. The Department shall designate Change Orders as low, medium or high priority. Contractor shall begin work on low priority changes within 180 calendar days of authorization by both parties. Contractor shall begin work on medium priority changes within 60 calendar days of authorization by both parties. Contractor shall begin work on high priority changes within 30 calendar days of authorization by both parties. No services shall be performed pursuant to the change order and no payment shall be made on account of the change order until the change order is fully executed by both parties. Upon such execution, a change order shall alter only that portion of a Statement of Work to which it expressly relates and shall not otherwise affect the terms and conditions of this Agreement.

6.4 Key Personnel. The Department considers [specify the names and or titles of specific personnel of Contractor and Contractor's subcontractors] Retail Enablement Manager, Technical System Lead, and System Test Manager ("Key Personnel") to be essential to a successful project. Contractor acknowledges that a significant reason the Department has entered into this Agreement is because of the special qualifications of such Key Personnel. Contractor shall not remove, reassign, transfer, or replace any of the individual(s) identified in this section except in the event of death, illness, retirement, disability, or termination from employment, conditions permitting absence from employment under the Family and Medical Leave Act of 1993, or in the event of the Department's written consent. In the event Contractor requests the Department to consent to a removal, reassignment, transfer or other replacement of any Key Personnel, the Department may review the qualifications of the proposed substitute personnel before providing its written consent or rejecting such replacement. Any such replacement shall have substantially equivalent or better ability, experience and qualifications than the Key Personnel being replaced. Contractor shall not charge the Department, and the Department shall not pay for any proposed replacement personnel while such replacement becomes acclimated to the Project, and acquires the

necessary skills and project knowledge to proceed with the work under this Agreement. In no event shall this time period exceed twenty (20) business days. Any replacement personnel approved by the Department shall thereafter be deemed Key Personnel for purposes of this Agreement. If at any time during the term of this Agreement, the Department becomes dissatisfied with the performance of any individual who is part of Contractor's personnel, the Department shall notify Contractor of the reasons for such dissatisfaction and may request replacement of such individual. Contractor will promptly investigate such request and the reasons for such dissatisfaction and report back to the Department on the corrective action Contractor believes is appropriate to address the Department's concerns and dissatisfaction. If the parties determine that such individual needs to be replaced, the replacement shall be effected promptly with a substitute individual having equal or greater ability, experience and qualifications than the departing individual.

Contractor acknowledges and agrees that any breach by Contractor of this Section 6.4 will delay and disrupt the Project and the Department's operations and will result in significant loss, expense and damages to the Department and the State. Furthermore, Contractor acknowledges and agrees that it may be extremely impractical and difficult to determine actual damages that the Department or the State may sustain as a result thereof. Accordingly, Contractor agrees to pay as liquidated damages [\$1,000 a day] for each and every day or portion thereof that Contractor removes, reassigns or substitutes a person identified in Section 6.4 in violation of that section.

The assessment of liquidated damages shall not constitute a waiver or release of any other remedy the Department may have for Contractor's breach of this Agreement, including the Department's right to terminate this Agreement. The assessment of liquidated damages shall be in addition to and not in lieu of such other remedies as may be available to the Department. It is expressly agreed that the waiver of any liquidated damages due the Department shall constitute a waiver only as to such liquidated damages and not a waiver of any future liquidated damages. Any failure by the Department to demand liquidated damages within any period of time shall not constitute a waiver of such claim by the Department.

Amounts due the Department as liquidated damages may be deducted by the Department from any fees or other compensation payable to Contractor under this Agreement, or the Department may bill Contractor for such amounts or otherwise request in writing Contractor's payment of liquidated damages assessed by the Department. Contractor shall promptly pay the Department any assessed liquidated damages, but in no event later than fifteen (15) days after the date of the Department's assessment or other written request for liquidated damages. At the Department's option, the Department may obtain payment of assessed liquidated damages through one (1) or more claims upon any performance bond furnished by Contractor.

6.5 Security Regulation; Cooperation. Contractor and Contractor's personnel shall comply with the Department's and the State's security regulations including any procedure which the Department's personnel, Contractors and consultants are normally asked to follow. Contractor agrees to cooperate fully and to provide any assistance necessary to the Department in the investigation of any security breaches that may involve Contractor or Contractor's personnel.

SECTION 7. OWNERSHIP AND INTELLECTUAL PROPERTY

7.1 Ownership of Contractor-Owned Deliverables. Except as specifically granted or otherwise provided in this Agreement, Contractor shall own all Deliverables that were independently and exclusively developed by Contractor prior to the Effective Date of this Agreement ("Contractor-Owned Deliverables").

7.2 License to Contractor-Owned Deliverables. Subject to the terms and conditions of this Agreement and any license agreement(s) applicable to Contractor-Owned Deliverables, Contractor hereby grants to the Department and the State a nonexclusive, irrevocable, perpetual, fully paid up, royalty-free, worldwide right and license to use, reproduce, modify, distribute copies of, perform, display, and prepare derivative works based upon, the Contractor-Owned Deliverables, and to authorize others to do the same on the State's and the Department's behalf. The foregoing grant shall be in addition to (and

shall not be construed to limit) any rights, licenses and privileges as may be granted in any license agreement(s) applicable to Contractor-Owned Deliverables. Contractor agrees that neither Contractor nor any agent, affiliate or subcontractor of Contractor shall charge the Department or the State any royalty, license fee, or similar charge for any Contractor-Owned Deliverable that was created or developed under a separate agreement using funds provided by the U.S. Federal Government whether through a cooperative agreement or otherwise.

7.3 Ownership and Assignment of Other Deliverables. The State will own all Deliverables (excluding Contractor-Owned Deliverables) and Contractor hereby irrevocably assigns, transfers and conveys to the Department and the State all right, title and interest in and to such Deliverables, and all intellectual property rights and proprietary rights arising out of, embodied in, or related to such Deliverables, including copyrights, patents, trademarks, trade secrets, trade dress, mask work, utility design, derivative works, and all other rights and interests therein or related thereto ("State-Owned Deliverables"). Contractor represents and warrants that the State and the Department shall acquire good and clear title to all State-Owned Deliverables, free from any claims, liens, security interests, encumbrances, intellectual property rights, proprietary rights, or other rights or interests of Contractor or of any Third Party, including any employee, agent, Contractors, subcontractor, subsidiary or affiliate of Contractor. The Contractor (and Contractor's employees, agents, Contractors, subcontractors, subsidiaries and affiliates) shall not retain any property interests or other rights in and to the State-Owned Deliverables and shall not use any State-Owned Deliverables, in whole or in part, for any purpose, without the prior written consent of the Department and the payment of such royalties or other compensation as the Department deems appropriate. Immediately upon the request of the Department, Contractor will deliver to the Department or destroy, or both, at the Department's option, all copies of any State-Owned Deliverables in the possession of Contractor.

7.4 Waiver. To the extent any of Contractor's rights in any State-Owned Deliverables are not subject to assignment or transfer hereunder, including any moral rights and any rights of attribution and of integrity, Contractor hereby irrevocably and unconditionally waives all such rights and enforcement thereof and agrees not to challenge the State's and the Department's rights in and to the State-Owned Deliverables.

7.5 Acknowledgement. Contractor acknowledges and agrees that the State and the Department, as owners and assignees of the State-Owned Deliverables, shall have all rights incident to complete ownership, and may, without limitation: (i) obtain, secure, file and apply for any legal protection necessary to secure or protect any rights in and to the State-Owned Deliverables, including the prosecution and issuance of letters patent, copyright registrations, and other analogous protection, and any extensions or renewals with respect thereto; (ii) adapt, change, modify, edit or use the State-Owned Deliverables as the Department or the State sees fit, including in combination with the works of others, prepare derivative works based on the State-Owned Deliverables, and publish, display, perform and distribute throughout the world any State-Owned Deliverable(s) in any medium, whether now known or later devised, including, without limitation, any digital or optical medium; and (iii) make, use, sell, license, sublicense, lease, or distribute the State-Owned Deliverables (and any intellectual property rights therein or related thereto) without payment of additional compensation to Contractor or any Third Party.

7.6 Further Assurances. At the Department's request, Contractor will (both during and after the termination or expiration of this Agreement) execute and deliver such instruments, provide all facts known to it, and take such other action as may be requested by the Department to: (i) establish, perfect or protect the State's and the Department's rights in and to the State-Owned Deliverables and to carry out the assignments, transfers and conveyances set forth in Section 7.3, and (ii) obtain and secure copyright registration or such other registrations or intellectual property protections as may be desirable or appropriate to the subject matter, and any extensions or renewals thereof. In the event the Department is unable, after reasonable effort, to secure Contractor's signature on any letters patent, copyright, or other analogous protection relating to the State-Owned Deliverables, for any reason whatsoever, Contractor hereby irrevocably designates and appoints the Department, and its duly authorized officers, employees and agents, as Contractor's agent and attorney-in-fact, to act for and in its behalf to execute and file any

such application or applications and to do all other lawfully permitted acts to further the prosecution and issuance of letters patent, copyright registrations, and other analogous protection, including extensions and renewals thereon, with the same legal force and effect as if executed by Contractor.

7.7 Third Party Intellectual Property. In the event that a Deliverable is intellectual property owned by a Third Party "Third Party Intellectual Property"), Contractor shall secure on behalf of and in the name of the State and the Department, an irrevocable, nonexclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the Third Party Intellectual Property, and to authorize others to do the same on the Department's and the State's behalf. In the event that a Deliverable created by Contractor under this Agreement is a derivative work based upon Third Party Intellectual Property, or is a compilation that includes Third Party Intellectual Property, Contractor shall secure on behalf of and in the name of the State and the Department an irrevocable, nonexclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the pre-existing elements of such Third Party Intellectual Property, and to authorize others to do the same on the State's and the Department's behalf.

7.8 Rights of the Federal Government. If all or a portion of the funding used to pay for the Deliverables is being provided through a grant from the Federal Government, Contractor acknowledges and agrees that pursuant to applicable federal laws, regulations, circulars and bulletins, the awarding Department of the Federal Government reserves and will receive certain rights including, without limitation a royalty-free, non-exclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes, the Deliverables [developed] under this Agreement and the copyright in and to such Deliverables.

SECTION 8. REPRESENTATIONS, WARRANTIES AND COVENANTS

8.1 Contractor represents and warrants that the Deliverables (in whole and in part) shall: (i) be free from material Deficiencies; and (ii) meet, conform to and operate in accordance with all Specifications and in accordance with this Agreement for one year following the date on which the Department provides Contractor with written notice of Final Acceptance (the "Warranty Period"). During the Warranty Period, Contractor shall, at its expense, repair, correct or replace any Deliverable that contains or experiences material Deficiencies or fails to meet, conform to or operate in accordance with Specifications within ten (10) days of receiving notice of such Deficiencies or failures from the Department. In the event Contractor is unable to repair, correct or replace such Deliverable to the Department's satisfaction, Contractor shall refund the fees or other amounts paid for the Deliverables and for any services related thereto. The foregoing shall not constitute an exclusive remedy under this Agreement, and the Department shall be entitled to pursue any other available contractual, legal or equitable remedies. Contractor shall be available at all reasonable times to assist the Department with questions, problems and concerns about the Deliverables, to inform the Department promptly of any known Deficiencies in any Deliverables, repair and correct any Deliverables not performing in accordance with the warranties contained in this Agreement, notwithstanding that such Deliverable may have been accepted by the Department, and provide the Department with all necessary materials with respect to such repaired or corrected Deliverable.

8.2 Contractor represents and warrants that it is fully aware of the Department's business requirements and intended purposes and uses for the Deliverables as set forth herein and in the RFP, and the Deliverables shall satisfy such requirements in all material respects and are fit for such intended purposes and uses.

8.3 Contractor represents and warrants that: (i) all Deliverables, excluding Third-Party Software, shall be wholly original with and prepared solely by Contractor; (ii) it owns, possesses, holds, and has received or secured all rights, permits, permissions, licenses and authority necessary to provide the services and Deliverables to the Department hereunder and to assign, grant and convey the rights, benefits, licenses and other rights assigned, granted or conveyed to the Department hereunder without violating any rights of any Third Party; (iii) Contractor has not previously and will not grant any rights in any Deliverables to any Third Party that are inconsistent with the rights granted to the Department herein; and (iv) the

Department shall peacefully and quietly have, hold, possess, use and enjoy the Deliverables without suit, disruption or interruption.

8.4 Contractor represents and warrants that: (i) the Deliverables (and all intellectual property rights therein and related thereto); and (ii) the Department's use of, and exercise of any rights with respect to, the Deliverables (and all intellectual property rights therein and related thereto), do not and will not, under any circumstances, misappropriate a trade secret or infringe upon or violate any copyright, patent, trademark, trade dress or other intellectual property right, proprietary right or personal right of any Third Party. Contractor further represents and warrants there is no pending or threatened claim, litigation or action that is based on a claim of infringement or violation of an intellectual property right, proprietary right or personal right or misappropriation of a trade secret related to the Deliverables. Contractor shall inform the Department in writing immediately upon becoming aware of any actual, potential or threatened claim of or cause of action for infringement or violation of an intellectual property right, proprietary right, or personal right or misappropriation of a trade secret. If such a claim or cause of action arises or is likely to arise, then Contractor shall, at the Department's request and at the Contractor's sole expense: (i) procure for the Department the right or license to continue to use the Deliverable at issue; (ii) replace such Deliverable with a functionally equivalent or superior Deliverable free of any such infringement, violation or misappropriation; (iii) modify or replace the affected portion of the Deliverable with a functionally equivalent or superior Deliverable free of any such infringement, violation or misappropriation; or (iv) accept the return of the Deliverable at issue and refund to the Department all fees, charges and any other amounts paid by the Department under this Agreement or any related agreement with respect to such Deliverable. In addition, Contractor agrees to indemnify, defend, protect and hold harmless the Department and the State and their officers, directors, employees, officials and agents as provided in the Indemnification section of this Agreement, including for any breach of the representations and warranties made by Contractor in this Section 8.4. The foregoing remedies shall be in addition to and not exclusive of other remedies available to the Department and shall survive termination of this Agreement.

8.5 All warranties made by Contractor in this Agreement, whether or not this Agreement specifically denominates Contractor's promise as a warranty or whether the warranty is created only by Contractor's affirmation or promise, or is created by a description of the materials and services to be provided, or by provision of samples to the Department, shall not be construed as limiting or negating any warranty provided by law, including without limitation, warranties which arise through course of dealing or usage of trade. The warranties expressed in this Agreement are intended to modify the warranties implied by law only to the extent that they expand the warranties applicable to the goods and services provided by the Contractor.

8.6 Contractor represents, warrants and covenants that all services to be performed under this Agreement shall be performed in a professional, competent, diligent and workmanlike manner by knowledgeable, trained and qualified personnel, all in accordance with the terms and Specifications of this Agreement and the standards of performance considered generally acceptable in the industry for similar tasks and projects. In the absence of a Specification for the performance of any portion of this Agreement, the parties agree that the applicable specification shall be the generally accepted industry standard. So long as the Department notifies Contractor of any services performed in violation of this standard, Contractor shall re-perform the services at no cost to the Department, such that the services are rendered in the above-specified manner, or if the Contractor is unable to perform the services as warranted, Contractor shall reimburse the Department any fees or compensation paid to Contractor for the unsatisfactory services.

8.7 Contractor represents, warrants and covenants that it has complied with, and shall comply with, all applicable federal, state, foreign and local laws, rules, regulations, codes, and ordinances in connection with its performance under this Agreement.

8.8 Contractor represents, warrants and covenants that it has no interest and shall not acquire any direct or indirect interest that would conflict in any manner or degree with the performance of its obligations under this Agreement.

8.9 Contractor represents and warrants that the Deliverables will comply with any applicable federal, state foreign and local laws, rules, regulations, codes, and ordinances in effect during the term of this Agreement, including applicable provisions of Section 508 of the Rehabilitation Act of 1973, as amended, and all standards and requirements established by the Architectural and Transportation Barriers Access Board and the Iowa Department of Administrative Services, Information Technology Enterprise.

8.10 Contractor covenants that it will comply with and adhere to all Department and State information technology standards, including, without limitation, all technical and security standards, procedures and protocols, and that Contractor will take all precautions necessary to prevent unauthorized access to the Department's and the State's systems, networks, computers, property, records, data, and information.

8.11 Contractor is not in arrears with respect to the payment of any monies due and owing the State or any Department, Department or other Governmental Entity thereof, including but not limited to the payment of taxes and employee benefits, and it will not become so during the Term of this Agreement, or any extensions thereof.

8.12 Contractor represents, warrants and covenants that for the duration of the Agreement and the Warranty Period, all Documentation will accurately reflect the operation of any Deliverable(s) to which the Documentation pertains and will enable the Department to use and maintain such Deliverable(s) for their intended purposes.

8.13 Contractor's warranties provided in this Section 8 are in addition to and not in lieu of any other warranties provided in this Agreement. All warranties provided for in this Agreement shall be cumulative, shall be deemed consistent and not in conflict, are intended to be given full force and effect and to be interpreted expansively to give the broadest warranty protection to the Department.

SECTION 9. INDEMNIFICATION

9.1 Contractor and its successors and permitted assigns shall indemnify and hold harmless the Department, the State and their employees, officers, board members, agents, representatives, and officials ("Indemnitees") from and against any and all claims, actions, suits, liabilities, damages, losses, settlements, demands, deficiencies, judgments, costs and expenses (including, without limitation, the reasonable value of time of the Attorney General's Office and the costs, expenses and attorney fees of other counsel retained by any Indemnitee) directly or indirectly related to, resulting from, or arising out of this Agreement, including but not limited to any claims related to, resulting from, or arising out of:

9.1.1 Any violation or breach of any term or condition of this Agreement by or on behalf of Contractor, including, the furnishing or making by Contractor of any statement, representation, warranty or certification in connection with this Agreement, the RFP or the Proposal that is false, deceptive, or misleading; or

9.1.2 Any negligent act or omissions, intentional or willful misconduct, or unlawful acts of Contractor, its officers, employees, agents, board members, subsidiaries, affiliates, Contractors or subcontractors; or

9.1.3 Contractor's performance or attempted performance of this Agreement; or

9.1.4 Failure by Contractor or its employees, agents, officers, directors, subsidiaries, affiliates, Contractors or subcontractors to comply with any applicable local, state, and federal laws, rules, ordinances and regulations; or

9.1.5 Any failure by Contractor or its employees, agents, officers, directors, Contractors or subcontractors to make all reports, payments and withholdings required by Federal and state law with respect to Social Security, worker's compensation, employee income and other taxes, fees or costs required by the Contractor to conduct business in the State; or

9.1.6 Any claim of misappropriation of a trade secret or infringement or violation of any intellectual property rights, proprietary rights or personal rights of any Third Party, including any claim that any Deliverable or any use thereof (or the exercise of any rights with respect thereto) infringes, violates or misappropriates any patent, copyright, trade secret, trademark, trade dress, mask work, utility design, or other proprietary right of any Third Party.

9.2 Contractor's obligations under this Section 9 are not limited to third-party claims, but shall also apply to any claims that either party may assert against the other.

9.3 Contractor shall be liable for any personal injury or damage to property caused by the fault or negligence of Contractor, its officers, directors, employees, agents and approved Contractor or subcontractors.

9.4 Contractor's duties as set forth in this Section 9 shall survive the termination of this Agreement and shall apply to all acts or omissions taken or made in connection with the performance of this Agreement regardless of the date any potential claim is made or discovered by the Department or any other Indemnitee.

SECTION 10. DEFAULT AND TERMINATION

10.1 Termination for Cause by the Department. The Department may terminate this Agreement upon written notice for the breach by Contractor of any material term, condition or provision of this Agreement, if such breach is not cured within the time period specified in the Department's notice of breach or any subsequent notice or correspondence delivered by the Department to Contractor, provided that cure is feasible. Any time allowed for cure of a default shall not eliminate or reduce any liability Contractor may have for liquidated damages. In addition, the Department may terminate this Agreement effective immediately without penalty or legal liability and without advance notice or opportunity to cure for any of the following reasons:

10.1.1 Contractor furnished any statement, representation, warranty or certification in connection with this Agreement, the RFP or the Proposal that is false, deceptive, or materially incorrect or incomplete;

10.1.2 Contractor or any of Contractor's officers, directors, employees, agents, subsidiaries, affiliates, Contractors or subcontractors has committed or engaged in fraud, misappropriation, embezzlement, malfeasance, misfeasance, or bad faith;

10.1.3 Dissolution of Contractor or any parent or affiliate of Contractor owning a controlling interest in Contractor;

10.1.4 Contractor terminates or suspends its business;

10.1.5 Contractor's authorization to engage in business either in Iowa or where organized is suspended, terminated, revoked or forfeited;

10.1.6 Contractor has failed to comply with any applicable international, federal, state, or local laws, rules, ordinances, regulations or orders when performing within the scope of this Agreement;

10.1.7 The Department determines or believes the Contractor has engaged in conduct that has or may expose the Department or the State to material liability;

10.1.8 Contractor infringes or allegedly infringes or violates any patent, trademark, copyright, trade dress or any other intellectual property right or proprietary right, or Contractor misappropriates or allegedly misappropriates a trade secret; or

10.1.9 Any of the following has been engaged in by or occurred with respect to Contractor or any corporation, shareholder or entity having or owning a controlling interest in Contractor:

10.1.9.1 Commencing or permitting a filing against it which isn't discharged within ninety (90) days, of a case or other proceeding seeking liquidation, reorganization, or other relief with respect to itself or its debts under any bankruptcy, insolvency, or other similar law now or hereafter in effect; or filing an answer admitting the material allegations of a petition filed against it in any involuntary case or other proceeding commenced against it seeking liquidation, reorganization, or other relief under any bankruptcy, insolvency, or other similar law now or hereafter in effect with respect to it or its debts; or consenting to any such relief or to the appointment of or taking possession by any such official in any voluntary case or other proceeding commenced against it seeking liquidation, reorganization, or other relief under any bankruptcy, insolvency, or other similar law now or hereafter in effect with respect to it or its debts;

10.1.9.2 Seeking or suffering the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets;

10.1.9.3 Making an assignment for the benefit of creditors;

10.1.9.4 Failing, being unable, or admitting in writing the inability generally to pay its debts or obligations as they become due or failing to maintain a positive net worth and such additional capital and liquidity as is reasonably adequate or necessary in connection with Contractor's performance of its obligations under this Agreement; or

10.1.9.5 Taking any action to authorize any of the foregoing.

The Department's right to terminate this Agreement shall be in addition to and not exclusive of other remedies available to the Department, and the Department shall be entitled to exercise any other rights and pursue any remedies, in law, at equity, or otherwise.

10.2 Termination for Convenience. Following thirty (30) days written notice, the Department may terminate this Agreement in whole or in part for convenience without the payment of any penalty or incurring any further obligation or liability to Contractor. Termination for convenience can be for any reason or no reason at all.

10.3 Termination Due to Lack of Funds or Change in Law. Notwithstanding anything in this Agreement to the contrary, and subject to the limitations set forth below, the Department shall have the right to terminate this Agreement without penalty or legal liability and without any advance notice as a result of any of the following:

10.3.1 The legislature or governor fail in the sole opinion of the Department to appropriate funds sufficient to allow the Department to either meet its obligations under this Agreement or to operate as required and to fulfill its obligations under this Agreement; or

10.3.2 If funds are de-appropriated, reduced, not allocated, or receipt of funds is delayed, or if any funds or revenues needed by the Department to make any payment hereunder are insufficient or unavailable for any other reason as determined by the Department in its sole discretion; or

10.3.3 If the Department's authorization to conduct its business or engage in activities or operations related to the subject matter of this Agreement is withdrawn or materially altered or modified; or

10.3.4 If the Department's duties, programs or responsibilities are modified or materially altered; or

10.3.5 If there is a decision of any court, administrative law judge or an arbitration panel or any law, rule, regulation or order is enacted, promulgated or issued that materially or adversely affects the Department's ability to fulfill any of its obligations under this Agreement or the operation of the [System].

The Department shall provide Contractor with written notice of termination pursuant to this section.

10.4 Limitation of the State's Payment Obligations. In the event of termination of this Agreement for any reason by either party (except for termination by the Department pursuant to Section 10.1), the Department shall pay only those amounts, if any, due and owing to Contractor for Deliverables for which Acceptance has been provided by the Department up to and including the date of termination of this Agreement and for which the Department is obligated to pay pursuant to this Agreement; provided however, that in the event the Department terminates this Agreement pursuant to Section 10.3, the Department's obligation to pay Contractor such amounts and other compensation shall be limited by, and subject to, legally available funds. Payment will be made only upon submission of invoices and proper proof of Contractor's claim. Notwithstanding the foregoing, this Section 10.4 in no way limits the rights or remedies available to the Department and shall not be construed to require the Department to pay any compensation or other amounts hereunder in the event of Contractor's breach of this Agreement or any amounts withheld by the Department in accordance with the terms of this Agreement. The Department shall not be liable, under any circumstances, for any of the following:

10.4.1 The payment of unemployment compensation to Contractor's employees;

10.4.2 The payment of workers' compensation claims, which occur during the Agreement or extend beyond the date on which the Agreement terminates;

10.4.3 Any costs incurred by Contractor in its performance of the Agreement, including, but not limited to, startup costs, overhead or other costs associated with the performance of the Agreement;

10.4.4 Any damages or other amounts, including amounts associated with the loss of prospective profits, anticipated sales, goodwill, or for expenditures, investments or commitments made in connection with this Agreement;

10.4.5 Any taxes Contractor may owe in connection with the performance of this Agreement, including, but not limited to, sales taxes, excise taxes, use taxes, income taxes or property taxes.

10.5 Contractor's Termination Duties. Upon receipt of notice of termination and upon request of the Department, Contractor shall:

10.5.1 Cease work under this Agreement and take all necessary or appropriate steps to limit disbursements and minimize costs, and furnish a report within thirty (30) days of the date of notice of termination, describing the status of all work performed under the Agreement and such other matters as the Department may require;

10.5.2 Immediately cease using and return to the Department any property (including, without limitation, Department Property) or materials, whether tangible or intangible, provided by the Department to Contractor;

10.5.3 Cooperate in good faith with the Department and its employees, agents and independent Contractors during any transition period specified by the Department in connection with the transition of work, services and Deliverables to be provided by any replacement service provider;

10.5.4 Immediately return to the Department any payments made by the Department for services or Deliverables that were not rendered or provided by Contractor;

10.5.5 Immediately deliver to the Department any and all Deliverables (including State-Owned Deliverables, Source Code, object code, Software, and Documentation) for which the Department has made payment (in whole or in part) that is in the possession of under the control of the Contractor or its agents or subcontractors in whatever stage of development and form of recordation such property is expressed or embodied as that time.

10.6 Termination for Cause by Contractor. Contractor may only terminate this Agreement upon written notice of the breach by the Department of any material term, condition or provision of this Agreement, if such breach is not cured within sixty (60) days of the Department's receipt of Contractor's written notice of breach.

10.7 Contract Closeout. Contractor shall work with the Department and any other organization designated by the Department to facilitate an orderly transition of services at the end of the contract term. Contractor shall work in a professional manner with the Department's next contractor to execute a smooth and timely transition at the end of the contract term. The Department reserves the right to serve as a mediator between the Contractor and the new contractor, subcontractors, and WIC vendors. Contractor shall allow for fallback to its system in the case of database conversion failure, shall transfer WIC EBT data, and complete any additional closeout activities as agreed to by both parties.

SECTION 11. INSURANCE

11.1 Insurance Policies. Contractor shall, at its sole expense, maintain in full force and effect, with insurance companies admitted to do business in the State of Iowa and acceptable to the Department, insurance covering its work of the type and in amounts required by this Agreement. Contractor's insurance shall, among other things, insure against any loss or damage resulting from or related to Contractor's performance of this Agreement regardless of the date the claim is filed or expiration of the policy. All insurance policies required by this Agreement shall: (i) be subject to the approval of the Department; (ii) remain in full force and effect for the entire term of this Agreement; and (iii) not be canceled, reduced or changed without the Department's prior written consent. The State of Iowa and the Department shall be named as additional insureds on all such policies, and all such policies shall include the following endorsement: "It is hereby agreed and understood that the State of Iowa and the Department are named as additional insured, and that the coverage afforded to the State of Iowa and the Department under this policy shall be primary insurance. If the State of Iowa or the Department have the insurance which is applicable to a loss, such other insurance shall be on an excess, secondary or contingent basis. The amount of the insurer's liability under this policy shall not be reduced by the existence of such other insurance." Notwithstanding the foregoing, the requirement that the State of Iowa and the Department be named as additional insureds on all policies of insurance shall not apply to Contractor's Workers Compensation Insurance.

Unless otherwise requested by the Department, Contractor shall cause to be issued insurance policies with the coverages set forth below:

Type of Insurance	LIMIT	AMOUNT
General Liability (including contractual liability) written on an occurrence basis	General Aggregate	\$2 million
	Products –	
	Comp/Op Aggregate	\$2 million
	Personal injury	\$1 million
Excess Liability, umbrella form	Each Occurrence	\$1 million
	Each Occurrence	\$5 million

	Aggregate	\$5 million
Errors and Omissions Insurance	Each Occurrence	\$2 million
Automobile Liability	As Required by Iowa law	
Property Damage	Each Occurrence	\$2 million
	Aggregate	\$2 million
Workers Compensation and Employer Liability	As Required by Iowa law	

11.2 Claims Provision. All insurance policies required by this Agreement, with the exception of the policy for Errors and Omissions Insurance, must provide coverage on an “occurrence basis” for all claims arising from activities occurring during the term of the policy regardless of the date the claim is filed or expiration of the policy. The policy for Errors and Omissions Insurance will provide coverage on a “claims made” basis, provided however, that such policy includes Extended Reporting Period or Tail Coverage acceptable to the Department.

11.3 Certificates of Coverage. At the time of execution of this Agreement, Contractor shall deliver to the Department certificates of insurance certifying the types and the amounts of coverage, certifying that said insurance is in force before the Contractor starts work, certifying that said insurance applies to, among other things, the work, activities, products and liability of the Contractor related to this Agreement, certifying that the State of Iowa and the Department are named as additional insureds on the policies of insurance by endorsement as required herein, and certifying that no cancellation or modification of the insurance will be made without at least thirty (30) days prior written notice to the Department. All certificates of insurance shall be subject to approval by the Department. The Contractor shall simultaneously with the delivery of the certificates deliver to the Department one duplicate original of each insurance policy.

Contractor shall maintain all insurance policies required by this Contract in full force and effect during the entire term of this Contract and any extensions or renewals thereof, and shall not permit such policies to be canceled or amended except with the advance written approval of the Department. The Contractor shall submit certificates of the insurance, which indicate coverage and notice provisions as required by this Contract, to the Department upon execution of this Contract. The certificates shall be subject to approval by the Department. The insurer shall state in the certificate that no cancellation of the insurance will be made without at least thirty (30) days’ prior written notice to the Department. Approval of the insurance certificates by the Department shall not relieve the Contractor of any obligation under this Contract

11.4 Liability of Contractor. Acceptance of the insurance certificates by the Department shall not act to relieve Contractor of any obligation under this Agreement. It shall be the responsibility of Contractor to keep the respective insurance policies and coverages current and in force during the life of this Agreement. Contractor shall be responsible for all premiums, deductibles and for any inadequacy, absence or limitation of coverage, and the Contractor shall have no claim or other recourse against the State or the Department for any costs or loss attributable to any of the foregoing, all of which shall be borne solely by the Contractor. Notwithstanding any other provision of this Agreement, Contractor shall be fully responsible and liable for meeting and fulfilling all of its obligations under Section 11 of this Agreement.

11.5 Waiver of Subrogation Rights. Contractor shall obtain a waiver of any subrogation rights that any of its insurance carriers, with the exception of the insurance carrier for the policy for the Errors and Omissions Insurance, might have against the Department or the State. The waiver of subrogation rights shall be indicated on the certificates of insurance coverage supplied to the Department for all policies except for the policy for the Errors and Omissions Insurance.

11.6 Filing of Claims. In the event either the Department or the State suffers a loss and is unable to file a claim under any policy of insurance required under this Agreement, the Contractor shall, at the Department’s request, immediately file a proper claim under such policy. Contractor will provide the Department with proof of filing of any such claim and keep the Department fully informed about the status

of the claim. In addition, Contractor agrees to use its best efforts to pursue any such claim, to provide information and documentation requested by any insurer providing insurance required hereunder and to cooperate with the Department and the State. Contractor shall pay to the Department and the State any insurance proceeds or payments in receives in connection with any such claim immediately upon Contractor's receipt of such proceeds or payments.

11.7 Proceeds. In the event the Department or the State suffers a loss that may be covered under any of the insurance policies required under this Section 11, neither the Contractor nor any subsidiary or affiliate thereof shall have any right to receive or recover any payments or proceeds that may be made or payable under such policies until the Department and/or the State have fully recovered any losses, damages or expenses sustained or incurred by it (subject to applicable policy limits), and Contractor hereby assigns to the Department and the State all of its rights in and to any and all payments and proceeds that may be made or payable under each policy of insurance required under this Agreement.

SECTION 12. CONTRACT ADMINISTRATION

12.1 Independent Contractor. Contractor is an independent Contractor performing services for the Department. Contractor shall not hold itself out as an employee or agent of the Department. The Department shall not provide Contractor with office space, support staff, equipment or tools, or supervision beyond the terms of this Agreement. Neither Contractor nor any of its staff are eligible for any State employee benefits, including, but not limited to, retirement benefits, insurance coverage or the like. Contractor and its staff shall not be considered employees of the Department or the State for any purpose, including for federal or State tax purposes. The Department shall not withhold taxes on behalf of Contractor. Contractor shall be responsible for payment of all taxes in connection with any income earned from performing this Agreement.

12.2 Compliance with the Law and Regulations and Federal Assurances.

12.2.1 Contractor and its employees, agents, officers, directors, approved Contractors and subcontractors shall comply with all applicable federal, state, international, and local laws, rules, ordinances, codes, regulations and orders when performing within the scope of this Agreement, including without limitation, all laws applicable to the prevention of discrimination in employment, the administrative rules of the Iowa Department of Management and the Iowa Civil Rights Commission which pertain to equal employment opportunity and affirmative action, laws relating to prevailing wages, occupational safety and health standards, prevention of discrimination in employment, payment of taxes, gift laws, lobbying laws, and laws relating to the use of targeted small businesses as subcontractors or suppliers. Contractor shall comply with any applicable reporting and compliance standards of the Iowa Department of Management regarding equal employment. Contractor may be required to submit its affirmative action plan to the Iowa Department of Management to comply with the requirements of 541 Iowa Admin. Code Chapter 4. Contractor shall make the provisions of this section a part of its contracts with any subcontractors providing goods or services related to Contractor's performance of this Agreement;

12.2.2 In accordance with this assurance, Contractor understands that it must comply with federal Executive Order 11246, the Copeland "Anti-Kickback Act" (18 USC 874), Section 306 of the federal Clean Air Act, Section 508 of the federal Clean Water Act, and that it has certified that neither it nor its principals are debarred or suspended from federal financial assistance programs and activities and to complete and return in pursuit of such certification any appropriate form required by the Department (see Federal Executive Order 12549 and 7 CFR Part 3017);

12.2.3 Contractor shall give notice to any labor union with which it has a bargaining or other agreement of its commitment under this section of the Agreement. Contractor shall make the provisions of this section a part of its contracts with any subcontractors providing goods or services related to the fulfillment or performance of this Agreement;

12.2.4 The Department may consider the failure of Contractor to comply with any law or regulation as a material breach of this Agreement.

12.3 Confidentiality. Contractor and its employees, agents, approved Contractors and subcontractors may have access to Confidential Information, data, software, hardware, programs or other information or property possessed, owned or maintained by the Department or the State ("Department Property") to the extent necessary to carry out its responsibilities under the Agreement. Such Department Property shall at all times remain the property of the Department and/or the State. Contractor shall preserve the confidentiality of Department Property disclosed or furnished by the Department to Contractor and shall maintain procedures for safeguarding such property. Contractor will designate one individual who shall remain the responsible authority in charge of all Department Property collected, used, or disseminated by Contractor in connection with the performance of this Agreement. Contractor shall accept responsibility for providing adequate supervision and training to its agents, employees and any approved Contractors and subcontractors to ensure compliance with the terms of this Agreement. Contractor and its employees, agents, and any approved Contractors or subcontractors may be required by the Department to execute confidentiality or non-disclosure agreements to obtain access to certain Department Property. Contractor and its employees, agents, approved Contractors and subcontractors shall not disclose, publish, reproduce, disseminate or otherwise use any Department Property received, collected, maintained, or used in the course of performance of the Agreement except as permitted by the Department to enable Contractor to perform its obligations under this Agreement and except as required by applicable laws, rules or regulations, either during the term of this Agreement or thereafter. Contractor agrees to return any and all Department Property received, collected, accessed, maintained, created, or used in the course of the performance of the Agreement in whatever form it is maintained promptly at the request of the Department. In the event that Contractor receives a request for access to any Department Property, Contractor shall immediately communicate such request to the Department for consideration and handling.

Contractor shall indemnify the Department, the State and all other Indemnitees in the manner provided for indemnification elsewhere in this Agreement for a violation of this section. In the event of a breach of this section, the Department may terminate this Agreement immediately without notice of default and opportunity to cure. Contractor acknowledges that the disclosure of any Confidential Information of the Department or the State will immediately give rise to continuing irreparable injury to the Department and others that is inadequately compensable in damages at law. Accordingly, and without prejudice to any other remedy available to the Department, the Department will be entitled to injunctive relief. Contractor's obligations under this section shall survive expiration or termination of this Agreement.

12.4 Amendments. This Agreement may be amended in writing from time to time by mutual consent of the parties. Both parties must execute all amendments to this Agreement.

12.5 Third Party Rights. No person other than the parties hereto, their respective successors and permitted assigns, the State and Governmental Entities may rely on or derive any rights pursuant to or under this Agreement. This Agreement is intended to benefit only the Department, the State, Governmental Entities and the Contractor.

12.6 Choice of Law and Forum.

12.6.1 This Agreement shall be governed in all respects by, and construed in accordance with, the laws of the state of Iowa, without giving effect to the choice of law principles thereof;

12.6.2 Any and all litigation or actions commenced in connection with this Agreement, including after expiration or termination of this Agreement, shall be brought in Des Moines, Iowa, in Polk County District Court for the State of Iowa, if jurisdiction is proper. However, if jurisdiction is not proper in the Iowa District Court for Polk County, but is proper only in a United States District Court, the matter shall be commenced in the United States District Court for the Southern District of Iowa, Central Division. Contractor irrevocably: (i) consents and agrees that any legal or equitable action or proceeding arising under, in connection with or arising out of this Agreement shall be brought and

maintained exclusively in the aforesaid courts; (ii) submits to and accepts, with respect to any such action or proceeding, for it and in respect of its properties and assets regardless of the physical or legal situs thereof, generally and unconditionally, the jurisdiction of the aforesaid courts; and (iii) waives any objection to such jurisdiction based on forum non conveniens or otherwise;

12.6.3 This provision shall not be construed as waiving any immunity to suit or liability, in state or federal court, which may be available to the Department or the State, including sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise;

12.6.4 Contractor irrevocably consents to service of process by certified or registered mail addressed to the Contractor's designated agent. The Contractor appoints [] as its agent to receive service of process. If for any reason the Contractor's agent for service is unable to act as such or the address of the agent changes, Contractor shall immediately appoint a new agent and provide the Department with written notice of the change in agent or address. Any change in the appointment of the agent or address will be effective only upon actual receipt by the Department. Nothing in this provision will alter the right of the Department to serve process in any other manner permitted by law;

12.6.5 This Section 12.6 shall survive termination of this Agreement.

12.7 Assignment and Delegation. This Agreement may not be assigned, transferred or conveyed in whole or in part without the prior written consent of the other party, except that the Department may assign, transfer, or convey this Agreement, in whole or in part, to any State Department, Governmental Entity or unit of State government that succeeds the Department's duties hereunder or otherwise assumes responsibility for functions or duties currently assumed by the Department to which the Deliverables relate. For purposes of construing this clause, a transfer of a controlling interest in Contractor, a merger, sale or consolidation of Contractor, or a sale of substantially all of Contractor's assets shall be considered an assignment. Contractor agrees that it shall provide the Department with the earliest possible advance notice of any proposed sale or transfer or any controlling interest in or substantial assets of Contractor and of any proposed merger, sale or consolidation of Contractor. Contractor agrees that it shall not use this Agreement, or any portion thereof, for collateral or to otherwise secure any financial obligation of Contractor or any affiliate thereof without the prior written consent of the Department.

12.8 Use of Subcontractors/Third Parties. None of the services to be provided by Contractor pursuant to this Agreement shall be subcontracted or delegated to any Third Party without the prior written consent of the Department. The Department's consent shall not be deemed in any way to provide for the incurrence of any additional obligation of the Department, whether financial or otherwise. Any subcontract to which the Department has consented shall be in writing and shall in no way alter the terms and conditions of this Agreement. All subcontracts shall be subject to the terms and conditions of this Agreement and to any conditions of approval that the Department may deem necessary. Contractor is solely liable for any and all payments that may be due to a subcontractor pursuant to any subcontract. Contractor shall indemnify and hold harmless the Department and the State from and against any and all claims, demands, liabilities, suits, actions, damages, losses, costs and expenses of every kind and nature whatsoever arising as a result of Contractor's breach of any subcontract into which it enters, including Contractor's failure to pay any and all amounts due to any subcontractor. In addition, the Department is not responsible for any failure of any subcontractor to pay any amounts that may be due to Contractor, and Contractor may not refuse to perform its obligations under this Agreement for any such failure. If Contractor fails, neglects or refuses to pay promptly, as due, any claim for labor or services furnished to Contractor or any subcontractor by any person in connection with the Deliverables provided under this Agreement, the Department may pay such claim and charge the amount of the payment against funds due or to become due Contractor under this Agreement. The payment of a claim in the manner authorized in this paragraph shall not relieve Contractor or its surety from any obligation with respect to any unpaid claims. All subcontracts shall contain provisions which allow the Department to access the subcontractor's books, documents, and records and for inspections of work, as required of Contractor

herein. No subcontract or delegation of work shall relieve or discharge Contractor from any obligation, provision, or liability under this Agreement. Contractor shall remain responsible for such performance and shall be fully responsible and liable for all acts or omissions of any such Contractor or subcontractor. Any action of a subcontractor, which, if done by Contractor, would constitute a breach of this Agreement, shall be deemed a breach by Contractor and have the same legal effect.

12.9 Integration. This Agreement represents the entire Agreement between the parties concerning the subject matter hereof, and neither party is relying on any representation that may have been made which is not included in this Agreement. The Department shall not be bound by any “shrink-wrap” agreement, “click-wrap” agreement, or “sneakwrap” agreement (or any other similar agreement) that may accompany or relate to a Deliverable. Contractor acknowledges that it has thoroughly read this Agreement and all related schedules, exhibits, and other documents and has had the opportunity to receive competent advice and counsel necessary for it to form a complete understanding of all rights and obligations herein and to accept same freely and without coercion of any kind. Accordingly, this Agreement shall not be construed or interpreted against the Department on the basis of draftsmanship or preparation thereof.

12.10 Obligation Beyond Agreement Term. This Agreement shall remain in full force and effect to the end of the specified term or until terminated or canceled pursuant to this Agreement. Contractor’s obligations under this Agreement which by their nature would continue beyond the termination of this Agreement, including, by way of illustration and not by limitation, those obligations set forth in Sections 4, 5, 7, 8, 9, 10.4 - 10.6, 11, 12.2, 12.3, 12.6, 12.8, 12.10 - 12.16, 12.18, 12.19, 12.24, 12.25, 12.28, 12.30, 12.32, 12.33, and 12.37 – 12.39 shall survive termination of this Agreement and/or termination of Support.

12.11 Supersedes Former Agreements. This Agreement supersedes all prior Agreements between the Department and Contractor for the goods, services and other Deliverables provided in connection with this Agreement.

12.12 Waiver. Except as specifically provided for in a waiver signed by duly authorized representatives of the Department and Contractor, failure by either party at any time to require performance by the other party or to claim a breach of any provision of this Agreement shall not be construed as affecting any subsequent breach or the right to require performance with respect thereto or to claim a breach with respect thereto. No term or condition of this Agreement shall be held to be waived, modified, or deleted except by an instrument, in writing, signed by the parties hereto.

12.13 Notices.

12.13.1 Notices. Notices under this Agreement shall be in writing and delivered to the representative of the party to receive notice (identified below) at the address of the party to receive notice as it appears below or as otherwise provided for by proper notice hereunder. The effective date for any notice under this Agreement shall be the date of delivery of such notice (not the date of mailing) which may be effected by certified U.S. Mail return receipt requested with postage prepaid thereon or by recognized overnight delivery service, such as Federal Express or UPS:

If to the Department:

If to Contractor:

12.13.2 Any notice or communication sent by certified U.S. Mail under this Agreement shall be deemed given upon receipt as evidenced by the U.S. Postal Service return receipt card, or if sent by overnight delivery service, upon receipt as evidenced by the signature attained by the carrier;

12.13.3 From time to time, the parties may change the name and address of a party designated to receive notice. Such change of the designated person shall be in writing to the other party and as provided herein.

12.14 Cumulative Rights. The various rights, powers, options, elections and remedies of the Department and the State provided in this Agreement shall be construed as cumulative and no one of them is exclusive of the others or exclusive of any rights, remedies or priorities allowed the Department and the State by law, and shall in no way affect or impair the right of the Department or the State to pursue any other contractual, equitable or legal remedy to which the Department and the State may be entitled. The election by the Department or the State of any one or more remedies shall not constitute a waiver of the right to pursue other available remedies.

12.15 Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of this Agreement.

12.16 Time is of the Essence. Time is of the essence with respect to Contractor's performance of its obligations under this Agreement. Contractor shall ensure that all personnel and any other subcontractors of Contractor providing services to the Department are responsive to the Department's requirements and requests in all respects.

12.17 Authorization. Contractor represents and warrants that it has the right, power and authority to enter into and perform its obligations under this Agreement and that it has taken all requisite action (corporate, statutory, or otherwise) to approve execution, delivery and performance of this Agreement, and this Agreement constitutes a legal, valid and binding obligation of Contractor, enforceable in accordance with its terms.

12.18 Successors in Interest. All the terms, provisions, and conditions of the Agreement shall be binding upon and inure to the benefit of the parties' hereto and their respective successors, assigns, and legal representatives.

12.19 Records Retention and Access. Contractor shall maintain books, documents and records that sufficiently and properly document Contractor's performance under this Agreement, including records that document all fees and other amounts charged during the term of this Agreement, for a period of at least five (5) years following the later of the date of final payment, termination or expiration of this Agreement, or the completion of any required audit. Contractor shall permit the Auditor of the State of Iowa or any authorized representative of the State, and where federal funds are involved, the Comptroller General of the United States or any other authorized representative of the United States government, at no charge, to access and examine, audit, excerpt and transcribe any pertinent books, documents, electronic or optically stored and created records or other records of Contractor relating directly or indirectly to Contractor's performance under this Agreement. Contractor shall not impose a charge or seek payment for any fee, charge, or expense associated with any audit or examination of such books, documents and records. Contractor shall require its subcontractors to agree to the same provisions of this section.

12.20 Headings or Captions and Terms. The section headings or captions are for identification purposes only and do not limit or construe the contents of the sections. Unless the context of this Agreement otherwise clearly requires, references to the plural include the singular, references to the singular include the plural, and the word "or" has the inclusive meaning represented by the phrase "and/or." The words "include" and "including" shall be deemed to be followed by the phrase "without limitation." The words "thereof," "herein," "hereunder," and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement.

12.21 Multiple Counterparts. This Agreement may be executed in several counterparts, all of which when taken together shall constitute one contract binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.

12.22 Not a Joint Venture. Nothing in this Agreement shall be construed as creating or constituting the relationship of the partnership, joint venture (or other association of any kind or agent/principal relationship) between the parties hereto. No party, unless otherwise specifically provided for herein, has

the authority to enter into any agreement or create an obligation or liability on behalf of, in the name of, or binding upon, another party to this Agreement.

12.23 Additional Provisions. The parties agree that if an Addendum, Rider, Schedule, Appendix or Exhibit is attached hereto by the parties, and referred to herein, then the same shall be deemed incorporated herein by reference.

12.24 Further Assurances and Corrective Instruments. The parties agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for carrying out the expressed intention of this Agreement.

12.25 Obligations of Joint Entities. If Contractor is a joint entity, consisting of more than one individual, partnership, corporation or other business organization, all such entities shall be jointly and severally liable for carrying out the activities and obligations of this agreement, and for any default of such activities and obligations.

12.26 Delays or Impossibility of Performance. Neither party shall be in default under this Agreement if performance is prevented, delayed or made impossible to the extent that such prevention, delay, or impossibility is caused by a "force majeure." The term "force majeure" as used in this Agreement includes an event that no human foresight could anticipate or which if anticipated, is incapable of being avoided. Circumstances must be abnormal and unforeseeable, so that the consequences could not have been avoided through the exercise of all due care, such as acts of God, war, civil disturbance and other similar catastrophic events or causes. The delay or impossibility of performance must be beyond the control and without the fault or negligence of the parties. "Force majeure" does not include: financial difficulties of the Contractor or any parent, subsidiary, affiliated or associated company of Contractor or any subcontractor used by Contractor; claims or court orders that restrict Contractor's ability to deliver the Deliverables contemplated by this Agreement; strikes; labor unrest; or supply chain disruptions. If delay results from a subcontractor's or supplier's conduct, negligence or failure to perform, the Contractor shall not be excused from compliance with the terms and obligations of the Contractor unless the subcontractor or supplier is prevented from timely performance by a "force majeure" as defined in this Agreement. If a "force majeure" delays or prevents the Contractor's performance, the Contractor shall immediately use its best efforts to directly provide alternate, and to the extent possible, comparable performance. Comparability of performance and the possibility of comparable performance shall be determined solely by the Department. The party seeking to exercise this provision and not perform or delay performance pursuant to a "force majeure" shall immediately notify the other party of the occurrence and reason for the delay. The parties shall make every effort to minimize the time of nonperformance and the scope of work not being performed due to the unforeseen events. Dates by which the Contractor's performance obligations are scheduled to be met will be extended only for a period of time equal to the time lost due to any delay so caused.

12.27 Material Breaches. The references in this Agreement to specific material breaches of this Agreement shall not be construed as implying that other breaches of this Agreement are not material.

12.28 Right of Inspection. Contractor shall allow the Department, or anyone designated by the Department, to inspect its facilities and books and records at all reasonable times in order to monitor and evaluate performance of this Agreement.

12.29 Taxes. Contractor shall be responsible for paying any taxes incurred by Contractor in the performance of this Agreement. The Department and the State are exempt from the payment of State sales and other taxes.

12.30 Title to Property. Title to all property (including Department Property) furnished by the Department and/or the State to Contractor to facilitate the performance of this Agreement shall remain the sole property of the Department and/or the State. All such property shall only be used by Contractor for

purposes of fulfilling its obligations under this Agreement and shall be returned to the Department upon the earliest of completion, termination, or cancellation of this Agreement or at the Department's request. Contractor acknowledges that it shall acquire no interest or rights in and to such property. Except as expressly provided in this Agreement, Contractor shall not disclose or use such property for any purpose, including pledging or encumbering it, selling or using it for monetary gain, using it to compile mailing lists, solicit business or pursue other business activities, or otherwise. Title to all property purchased by Contractor, for which Contractor has been reimbursed or paid by the Department under this Agreement, shall pass to and vest in the Department and/or State, except as otherwise provided in this Agreement.

12.31 Exclusivity. This Agreement is not exclusive. During the term of this Agreement, the Department may obtain similar services from other service providers.

12.32 Award of Related Agreements. The Department may undertake or award supplemental or successor agreements for work related to this Agreement. Contractor shall cooperate fully with other Contractors, consultants and other persons who may be engaged by the Department or the State in connection with this Agreement. Contractor will ensure that any of its Contractors or subcontractors that have been approved by the Department will abide by this provision.

12.33 Sovereign Immunity. The Department and the State do not waive sovereign immunity by entering into this Agreement and specifically retain and reserve the defense of sovereign immunity and all defenses available to them under State and federal laws, rules and regulations for any claim arising out of or related to this Agreement.

12.34 Disclaimer. All information contained in the RFP and any appendices or attachments thereto reflect the information available to the Department at the time the above-cited documents were prepared. The Department does not warrant the accuracy of any such information and shall not be liable for any errors or omissions, or the results of errors or omissions, which may be discovered, at any time, to exist in those documents.

12.35 Procurement by other Governmental Entities. Contractor acknowledges and agrees that other State agencies, courts, boards, commissions, establishments, units and other Governmental Entities may procure services and Deliverables from Contractor under this Agreement.

12.36 Assignment of Third Party Warranties. Contractor hereby assigns and shall assign to the Department any and all existing and future warranties, indemnities and other benefits obtained or available from the licensor of any Third Party software or the manufacturer of any equipment or replacement parts provided or otherwise furnished in connection with this Agreement.

12.37 Attorney's Fees and Expenses. In the event Contractor defaults in any obligations under this Agreement, Contractor shall pay to the Department all costs and expenses (including, without limitation, the reasonable value of time of the Attorney General's Office and the costs, expenses and attorney fees of other counsel retained by or on behalf of the Department) incurred by the Department in enforcing this Agreement or any of its rights and remedies with respect thereto.

12.38 Contract Compliance Audit. Contractor agrees that the Department or a representative of its selection may conduct a complete contract compliance audit at least once annually during the term of this Agreement and after termination or expiration of this Agreement to determine whether or not the Contractor is complying with the terms of this Agreement, criteria established for access to Department Property, State and federal laws regarding Confidential Information, and any other applicable laws and regulations. Contractor shall promptly comply with and correct any deficiencies noted in the audit report as audit exceptions and will promptly implement any recommendations reasonably requested by the Department or its representatives. Contractor shall not impose any charge or fee in connection with any contract compliance audit.

12.39 Care of Property. Contractor shall be responsible for the proper custody and care of any property, data, databases, software, interfaces, hardware, telecommunications lines and equipment, intellectual property and Department Property furnished by the Department for Contractor's use in connection with the performance of the Agreement. Contractor shall exercise its best efforts to prevent damage to all such property and shall, at the Department request, restore damaged property to the extent possible to its condition prior to the damage at the sole expense of Contractor. Such restoration shall be complete when judged satisfactory by the Department. In addition, at the Department's request, Contractor will reimburse the Department for any loss or damage to such property caused by Contractor, or any agent, Contractor or subcontractor employed or utilized by Contractor. Contractor shall not take any action that would impair the value of, or goodwill associated with, the name, property and intellectual property rights of the Department and the State. Contractor shall obtain the prior advance written approval from the Department prior to Contractor's use (in advertising, publicity, public contract bidding, or otherwise) of the name, marks or intellectual property rights of the Department or the State.

12.40 Notification of Events. Contractor shall notify the Department in writing if any of the following has been engaged in by or occurred with respect to Contractor or any corporation, shareholder or entity having or owning a controlling interest in Contractor:

12.40.1 Contractor files or permits the filing against it of a case or other proceeding seeking liquidation, reorganization, or other relief with respect to itself or its debts under any bankruptcy, insolvency, or other similar law now or hereafter in effect; or filing an answer admitting the material allegations of a petition filed against it in any involuntary case or other proceeding commenced against it seeking liquidation, reorganization, or other relief under any bankruptcy, insolvency, or other similar law now or hereafter in effect with respect to it or its debts; or consenting to any such relief or to the appointment of or taking possession by any such official in any voluntary case or other proceeding commenced against it seeking liquidation, reorganization or other relief under any bankruptcy, insolvency, or other similar law now or hereafter in effect with respect to it or its debts; or

12.40.2 Seeking or suffering the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; or

12.40.3 Making an assignment for the benefit of creditors; or

12.40.4 Failing, being unable, or admitting in writing the inability generally to pay its debts or obligations as they become due or failing to maintain a positive net worth and such additional capital and liquidity as is reasonably adequate or necessary in connection with Contractor's performance of its obligations under this Agreement; or

12.40.5 An order is entered approving an involuntary petition to reorganize the business of Contractor for all or part of its property; or

12.40.6 If a writ or warrant of attachment, execution, distraint, levy, possession or any similar process that may materially affect the operation of Contractor is issued by any court or administrative Department against all or any material portion of Contractor's property; or

12.40.7 Taking any action to authorize any of the foregoing.

IN WITNESS WHEREOF, in consideration of the mutual covenants set forth above and for other good and valuable consideration, the receipt, adequacy and legal sufficiency of which are hereby acknowledged, the parties have entered into the above Agreement and have caused their duly authorized representatives to execute this Agreement.

**State of Iowa, acting by and through
the Iowa Department of Public Health**

Name of Contractor

By: _____

Name:

Title:

Date: _____

By: _____

Date: _____

Proposed Service Contract