



**Texas.gov 3.0 Procurement**

**Texas.gov Payment Services**

## **Master Services Agreement**

**DIR Contract No. DIR-ESS-TGOV-PMNT-254**

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Between

**The State of Texas, acting by and through  
the Texas Department of Information Resources**

*and*

**Texas NICUSA, LLC**

March 14, 2018

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### Exhibit 1.0 Operating Model

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## MASTER SERVICES AGREEMENT

This Master Services Agreement (the "**MSA**" or "**Agreement**") is entered into as of the Effective Date by and between the State of Texas, acting by and through the Texas Department of Information Resources ("**DIR**"), with its principal place of business at 300 West 15<sup>th</sup> Street, Suite 1300, Austin, Texas 78701, and **Texas NICUSA, LLC** ("**Successful Respondent**"), with a principal place of business \_25501 W. Valley Parkway, Suite 300, Olathe, Kansas 66061.

WHEREAS, in accordance with the Laws of the State, DIR issued the "Request for Offers (RFO) for "Texas.gov Payment Services" on the Texas Comptroller of Public Accounts' "Electronic State Business Daily (ESBD)" Web site, agency requisition number DIR-TSO-TMP-254 (the "**RFO**");

WHEREAS, in response to the RFO, the Successful Respondent submitted Successful Respondent's Response, dated September 18, 2017, as amended and supplemented thereafter (the "**Response**");

WHEREAS, after evaluation of all Responses and a determination that the Successful Respondent should be invited to negotiations, DIR invited the Successful Respondent to engage and the Successful Respondent has engaged in extensive negotiations, discussions and due diligence that have culminated in the formation of the contractual relationship described in this Agreement; and

WHEREAS, DIR desires to procure from the Successful Respondent, and the Successful Respondent desires to provide to DIR and the DIR Customers on the terms and conditions specified in this Agreement, the Services described in this Agreement, on the terms and conditions specified herein.

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

### 1 INTRODUCTION

#### 1.1 Provision, Performance and Management by the Successful Respondent.

DIR desires certain services presently provided, performed and managed by or for DIR and the DIR Customers or otherwise required by the DIR Customers, including:

- (a) DIR in its capacity as a recipient of Services;
- (b) any State agency or institution of higher education as defined in Section 2054.003, Texas Government Code,
- (c) any local government or licensing entity as defined in Section 2054.251, Texas Government Code, and
- (d) any other Entity permitted under Law to purchase Services from or through DIR.

The Successful Respondent has carefully reviewed DIR's and the DIR Customers' requirements, has performed all due diligence it deems necessary, and desires to deploy, perform and manage such services for DIR and the DIR Customers.

#### 1.2 Successful Respondent's Experience and Qualifications.

Successful Respondent represents and warrants that it is an established provider of the Services (as defined in **Section 4.1** below) as awarded under this Agreement and has the skills, qualifications, expertise, financial resources and experience necessary to provide the Services (including the plans, reports, and other deliverables) described in this Agreement.

#### 1.3 Definitions.

Except as otherwise expressly provided in this Agreement, all capitalized terms used in this Agreement shall have the meanings ascribed to them in **Exhibit 1.1 Definitions**. Capitalized terms used in this Agreement but not defined in **Exhibit 1.1 Definitions** shall have the meanings ascribed to them in ITIL. Words having well-known technical or trade meanings, but not otherwise defined in **Exhibit 1.1**

**Definitions** or in ITIL, shall be accorded such meaning unless expressly defined otherwise herein. Terms or phrases that are not capitalized are to be given their usual meaning.

#### 1.4 Other Terms.

The terms defined in this Agreement include the plural as well as the singular and the derivatives of such terms. Unless otherwise expressly stated, the words "**herein**," "**hereof**," and "**hereunder**" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section, Subsection, Exhibit, Attachment, or other subdivision. Article, Section, Subsection, Exhibit and Attachment references refer to articles, sections and subsections of, and exhibits and attachments to, this Agreement. The words "**include**" and "**including**" shall not be construed as terms of limitation. Unless otherwise modified, the words "**day**," "**month**," and "**year**" mean, respectively, calendar day, calendar month and calendar year. As stated in **Section 21**, the word "**notice**" and "**notification**" and their derivatives means notice or notification in writing. References in this Agreement to any Law shall be to such Law in changed or amended form or to a newly adopted Law replacing a prior Law. All references to this Agreement shall include the Exhibits and Attachments to this Agreement unless otherwise provided. Other terms used in this Agreement are defined in the context in which they are used and have the meanings there indicated.

#### 1.5 Compliance with Procurement Laws.

This Agreement is the result of compliance with applicable procurement laws of the State. DIR issued a solicitation on the Texas Comptroller of Public Accounts' Electronic State Business Daily, Request for Offer (RFO) DIR-TSO-TMP-254, on July 19, 2017, for the Texas.gov Payment Services. The Successful Respondent responded and DIR after evaluation and a determination that Successful Respondent should be invited into negotiations, DIR and Successful Respondent have engaged in extensive negotiations, discussions and due diligence that have culminated in the formation of the contractual relationship described in this Agreement. Upon execution of all agreements arising from the RFO, a notice of award for RFO DIR-TSO-TMP-254 shall be posted by DIR on the ESBID.

#### 1.6 Legal Authority

DIR is authorized to enter into this Agreement under Chapter 2054, specifically including Subchapters F, I and K, Texas Government Code. Successful Respondent is authorized to enter into this Agreement pursuant to the authorization of its governing board or controlling owner or officer.

## 2 CONTRACT DOCUMENTS

This Agreement includes each of the Exhibits, Attachments, and other documents attached to this Agreement which are hereby incorporated into and deemed part of this Agreement, and unless otherwise expressly stated all references to this Agreement shall include the Exhibits, Attachments and other documents attached to this Agreement. A listing of Exhibits and certain of the Attachments is included in the table of contents. Unless otherwise expressly stated, references to specific Exhibits and Attachments include all numbered subsidiary Exhibits and Attachments (e.g., references to **Exhibit 3.0** include not only **Exhibit 3.0**, but also all sub-exhibits in that series (i.e., 3.1, 3.2, etc.).

In the event of a conflict between or among the various documents comprising the Agreement, the following order of precedence will control:

1. Article 1 through Article 21 of this Agreement;
2. **Exhibits 1.0 (Operating Model), 2.0 (Service Model), 3.0 (Performance Model), and 4.0 (Business Model)**;
3. Request for Offer # DIR-TSO-TMP-254 and any Revisions of Addenda thereto;
4. The documents submitted by Successful Respondent to DIR (the "Proposal Documents"):
  - i) TechnicalSolution\_PMT Negotiation\_NIC\_final (File Date: February 28, 2018)

- ii) Other\_Solution\_Components\_PMT Negotiations\_NIC\_final (File Date: February 28, 2018)
- iii) NIC\_DIR\_RFRO\_Transition\_Plan\_final (File Date: February 28, 2018)
- iv) NIC\_DIR\_RFRO\_Transition\_Project\_Plan\_final (File Date: February 28, 2018)

### 3 TERM

#### 3.1 Initial Term.

The initial term of this Agreement shall commence as of 12:00:00 a.m., Central Time on the Effective Date and continue until 11:59:59 p.m., Central Time, on August 31, 2022, unless this Agreement is terminated earlier as provided herein, in which case the initial term of this Agreement shall end at 11:59:59 p.m., Central Time, on the effective date of such termination (the "**Initial Term**").

#### 3.2 Extension.

By giving notice to the Successful Respondent no less than ninety (90) days prior to the expiration date of the Initial Term or the then-current Renewal Term, DIR shall have the right to extend the Term for four (4) extension periods (each, a "**Renewal Term**") of up to one (1) year each (the exact period of which shall be specified in DIR's notice of extension) on the terms and conditions of this Agreement that are then in effect. No Termination Charge shall be applicable to any termination on or after the end of the Initial Term.

### 4 SERVICES

#### 4.1 Overview.

- (a) **Services.** Commencing on the Commencement Date, the Successful Respondent shall provide the Texas.gov Payment Services to DIR, and, upon DIR's request, to DIR Customers, Constituents, and Authorized Users. The Texas.gov Payment Services shall consist of provision of on-line payment processing services and support of the Texas.gov 3.0 program through any or all of the following, as they may evolve during the Term or be supplemented, enhanced, modified or replaced, in each case in accordance with and within the scope of this Agreement:
  - (i) The services, functions and responsibilities described in this Agreement and its Exhibits and Attachments and the following:
    - (1) The Texas.gov Payment Services, as further described in **Exhibit 2.0** Series and **Exhibit 3.3 Critical Deliverables**;
    - (2) the services, functions and responsibilities described in **Exhibit 1.0 (Operating Model)**, **Exhibit 2.0 (Service Model)**; **Exhibit 3.0 (Performance Model)**, and **Exhibit 4.0 (Business Model)**;
    - (3) any New Services, upon DIR's authorization of such New Services in accordance with the terms of this Agreement; and
    - (4) Termination Assistance Services, as further described in **Exhibit 2.2 Termination Assistance Services**.

#### 4.2 Transition Services.

- (a) **Transition.** The Successful Respondent shall perform the Transition Services, including provision of the deliverables described in the Transition Plan. Unless otherwise agreed, DIR shall not incur any charges, fees, or expenses payable to Successful Respondent or any third party engaged by the Successful Respondent in connection with the Transition Services, other than those charges, fees and expenses specified in **Exhibit 4.0 Business Model**.
- (b) **Transition Plan.** The preliminary Transition Plan is incorporated by reference to the Successful Respondent's preliminary Response. The Successful Respondent shall complete, and submit to DIR for review, a final Transition Plan on or before the date set forth in **Exhibit 3.3 Critical Deliverables**. DIR



will review the submitted Transition Plan according to the procedures and criteria set forth in **Exhibit 2.1.2 Statement of Work** and **Exhibit 3.3 Critical Deliverables**. If a Transition Plan submitted by the Successful Respondent is not acceptable to DIR, Successful Respondent shall address and resolve any questions or concerns DIR may have and promptly incorporate any modifications, additions, or deletions requested by DIR. The Successful Respondent shall revise and resubmit the Transition Plan until Accepted by DIR. Upon DIR's Acceptance, the Transition Plan shall automatically be incorporated into this Agreement by reference and shall supersede and replace all prior Transition Plans.

- (c) **Performance.** The Successful Respondent shall perform the Transition Services in accordance with the timetable set forth in the Transition Plan. Successful Respondent shall assist DIR in connection with DIR's and the DIR Customers' evaluation or testing of the deliverables set forth in the Transition Plan. Except as otherwise expressly stipulated in the Transition Plan (which will appropriately acknowledge that some element of disruption may be inevitable as in any such transition, but shall in all events be minimized), Successful Respondent shall perform the Transition Services in a manner that shall not (i) disrupt or have an unnecessary adverse impact on the activities or operations of DIR or the DIR Customers, (ii) degrade the Services then being received by DIR or the DIR Customers or (iii) disrupt or interfere with the ability of DIR or the DIR Customers to obtain the full benefit of the Services. Without limiting its obligations or responsibilities, prior to undertaking any transition activity, Successful Respondent shall discuss with DIR and the relevant DIR Customers all known DIR and DIR Customer-specific material risks and shall not proceed with such activity until DIR is reasonably satisfied with the plans with regard to such risks (provided that, neither Successful Respondent's disclosure of any such risks to DIR, nor DIR's acquiescence in Successful Respondent's plans, shall operate or be construed as limiting Successful Respondent's responsibility under this Agreement). Successful Respondent will, at DIR's request, participate in transition meetings with Service Component Providers (SCPs).
- (d) **Notification of Problems.** Successful Respondent shall provide to DIR written notice of any acts or omissions (whether by DIR, a DIR Customer, a Service Component Provider, DIR Contractor, Successful Respondent or any third party), any failure to perform any of each such party's obligations under the Agreement and any other events that may affect Successful Respondent's performance of the Transition Services. Successful Respondent shall provide such written notice within thirty (30) days after Successful Respondent first knew or should have known of such acts, omissions, or failures or other events. Such written notice shall describe in reasonable detail such acts, omissions, failures or other events and the manner in which the foregoing may affect Successful Respondent's performance.
- (e) **Remedies for Transition Failures.** In the event that Successful Respondent fails to identify and resolve any problems that may impede or delay the timely completion of each task in the Transition Plan, without prejudice to DIR's other rights and remedies under the Agreement or at law or equity, (i) Successful Respondent will provide, at its sole cost and expense, all such additional resources as are necessary to identify and resolve any problems that may impede or delay the timely completion of each task in the Transition Plan, and (ii) DIR may equitably reduce the Charges set forth in **Exhibit 4.0 Business Model** in an amount reasonably estimated by DIR to account for the Services that DIR and/or the DIR Customers are not receiving or did not receive. Successful Respondent represents and warrants to DIR that, as of the Commencement Date, it is ready to commence performing the Services in accordance with the terms of this Agreement, including with respect to pricing, applicable Service Levels and other performance obligations. In the event that such representation and warranty is not true and correct, Successful Respondent will reimburse DIR for any costs or expenses incurred by DIR as a result of the failure of such representation and warranty to be true and correct. In the event that Successful Respondent is required to perform any Transition activities following the Effective Date, Successful Respondent will complete such activities at its own cost and expense and in such a manner so as to not materially disrupt or cause any material adverse impact on DIR's operations or activities.

#### **4.3 Termination Assistance Services.**

- (a) **General.** Upon DIR's request, Successful Respondent shall provide Termination Assistance Services directly to DIR, any DIR Customer, any successors or assignees of such Entities and any of their designee(s).
  - (i) **Period of Provision.** Successful Respondent shall provide Termination Assistance Services commencing on the date a determination is made by DIR that there shall be an Assistance

Event, which date may be up to eighteen (18) months prior to effective date of such Assistance Event or on such earlier date as DIR may request, and continuing for up to three (3) months after the effective date of such Assistance Event, as designated by DIR, subject to such further extensions as permitted in **Section 4.3(a)(iii)**.

- (ii) **Notice of an Assistance Event.** DIR will provide Successful Respondent with written notice of an Assistance Event. Such notice will include a description of the Services that are to be terminated or discontinued, the affected DIR Customers, and the anticipated effective date of the Assistance Event. DIR may modify or update any of the information provided in the initial notice of an Assistance Event from time to time by a supplemental notice from DIR to Successful Respondent.
  - (iii) **Extension of Services.** DIR may elect to end the period for performance of Termination Assistance Services (in whole or in part), in its sole discretion, and restart the period for performance of Termination Assistance Services provided that the total of all such delays shall not result in Termination Assistance Services being performed for no more than a total of twenty-four (24) months without Successful Respondent's consent.
  - (iv) **Firm Commitment.** Successful Respondent shall provide Termination Assistance Services regardless of the reason for the Assistance Event (including a termination for cause by Successful Respondent).
  - (v) **Performance.** Successful Respondent shall provide all Termination Assistance Services subject to and in accordance with the terms and conditions of this Agreement. Successful Respondent shall perform Termination Assistance Services with at least the same degree of accuracy, quality, completeness, timeliness, responsiveness and resource efficiency as it is or was required to provide the same or similar Services in accordance with this Agreement. The quality and level of performance of Termination Assistance Services provided by Successful Respondent shall continue to meet or exceed the Service Levels and shall not be degraded or deficient in any respect. Service Level Credits shall be assessed for any failure to meet Service Levels during any period in which Termination Assistance Services are provided. If any period for performing any Termination Assistance Services extends beyond the expiration or the effective date of any termination of this Agreement, the provisions of this Agreement shall remain in full effect for the duration of such period.
- (b) **Scope.** As part of the Termination Assistance Services, Successful Respondent shall timely transfer the control and responsibility for Services previously performed by or for Successful Respondent to DIR, the DIR Customers and/or their designee(s), and upon DIR request, shall execute any documents reasonably necessary to effect such transfers. Successful Respondent shall also provide any and all information and assistance requested by DIR required for: (i) the Systems and processes associated with the Services to operate and be maintained and enhanced efficiently; (ii) the Services to continue without interruption or adverse effect; and (iii) the orderly transfer of the Services (or replacement or supplemental services) to DIR, the DIR Customers and/or their designee(s).
- (c) **General Support.**
- a. Prior to the Termination Assistance event, Successful Respondent shall (i) assist DIR, the DIR Customers and/or their designee(s) in developing a written plan for the migration of the Services to DIR, the DIR Customers and/or their designee(s), which plan shall include (as requested by DIR) capacity planning, process planning, facilities planning, human resources planning, technology planning, telecommunications planning and other planning necessary to effect the transition, (ii) perform programming and consulting services as requested to assist solely in implementing the transition plan, (iii) train personnel designated by DIR, the DIR Customers and/or their designee(s) in the use of any processes or associated Equipment, Materials, Systems or tools used in connection with the provision of the Services as needed for such personnel to assume responsibility for performance of the Services, (iv) provide a catalog of all processes, Materials, DIR Data, Equipment, Third Party Contracts and tools used to provide the Services, (v) provide machine readable and printed listings and associated documentation for source code for Software owned by DIR or any DIR Customer and source code to which DIR and/or the DIR

Customers are entitled under this Agreement and assist in its re-configuration, (vi) provide technical documentation for Software used by Successful Respondent to provide the Services as needed for continuing performance of the Services, (vii) analyze and report on the space required for the DIR Data and the Software needed to provide the Services, (viii) assist in the execution of data migration and testing process until the successful completion of the transition to DIR, the DIR Customers and/or their designee(s), (ix) create and provide copies of the DIR Data in the format and on the media reasonably requested by DIR, the DIR Customers and/or their designee(s), (x) provide a complete and up-to-date, electronic copy of the Service Management Manual (SMM) in the format and on the media reasonably requested by DIR, the DIR Customers and/or their designee(s) and (xi) provide other technical and process assistance, documentation and information as requested by DIR, the DIR Customers and/or their designee(s).

- b. After the Assistance Event and during the Termination Assistance Period, Successful Respondent shall answer any questions that may arise concerning the Services previously performed by the Successful Respondent. DIR may request Successful Respondent to provide certain discontinued Services after the Assistance Event; however, such Termination Assistance Services may include a charge as described in **Section 4.3(l)**.
- (d) **Certain Materials.** Successful Respondent shall provide source code and artifacts (e.g., documentation, use cases, test scripts, design models, activity diagrams and systems configuration) which Successful Respondent has in its possession, or Successful Respondent Agents have in their possession, for (i) any modification or enhancement made hereunder by Successful Respondent to DIR Software, (ii) any Software developed pursuant to this Agreement which DIR owns or with respect to which DIR is otherwise entitled to source code and (iii) as otherwise provided in an applicable Statement of Work; provided that Successful Respondent shall provide such source code and artifacts (A) upon any request from DIR during the Term and any Termination Assistance Period, (B) upon termination or expiration of this Agreement or the applicable Statement of Work and (C) upon the End Date.
- (e) **Right to Acquire.** DIR, the DIR Customers and/or their designee(s) shall have the right (but not the obligation) to purchase any or all Third-Party Software as a Service (SaaS) type systems and on premise software licenses that are owned by Successful Respondent and implicated by the relevant Assistance Event.
- (f) **Personnel**
  - (i) **List of Successful Respondent Personnel.** Successful Respondent shall promptly provide to DIR a list, organized by location, of the Successful Respondent Personnel assigned to the performance of the Services that are implicated by each Assistance Event. Such list shall, subject to applicable Privacy Laws, specify each such Successful Respondent Personnel's name, job title, fully loaded rate, leave status, years of service and job responsibilities. DIR agrees not to disseminate the personally identifiable information contained in such list without Successful Respondent's consent. Successful Respondent shall not terminate, reassign or otherwise remove from the performance of the Services any such dedicated Successful Respondent Personnel until after the end of the applicable Termination Assistance Services period.
  - (ii) **Right to Hire.** DIR, the DIR Customers and/or their designee(s) shall be permitted, (subject **to the last sentence of this Section 4.3(f)(ii) and Section 4.3(f)(iii)** below), to meet with, solicit and hire, effective after the later of (A) the date of DIR's notice of an Assistance Event and (B) the completion of the Termination Assistance Services requiring such Successful Respondent Personnel, any Successful Respondent Personnel substantially dedicated to the performance of the Services during the twelve (12) month period prior to the date of DIR's notice of an Assistance Event who are implicated by that Assistance Event. Successful Respondent hereby waives its rights, if any, under contracts with such Successful Respondent Personnel restricting the ability of such Successful Respondent Personnel to be recruited or hired by DIR, the DIR Customers and/or their designee(s) (including waiving any right to restrict such personnel via non-compete agreements or other contractual means). Successful Respondent shall provide DIR, the DIR Customers and/or their designee(s) with reasonable assistance in their efforts to meet with, solicit and hire such Successful Respondent Personnel, and shall give DIR, the DIR Customers and/or their designee(s) reasonable access to such Successful Respondent Personnel

for interviews, evaluations and recruitment. DIR shall endeavor, and shall cause the DIR Customers and their designee(s) to endeavor, to conduct the above-described activities in a manner that is not unnecessarily disruptive of Successful Respondent's performance of its obligations under this Agreement. Notwithstanding the foregoing, DIR or DIR Customer's designees shall have the rights set forth in this **Section 4.3(f)(ii)** only upon DIR's notice of a complete termination or expiration of this Agreement; *provided, however*, such personnel shall not be hired by such a designee until the completion of the Termination Assistance Services related to such termination or expiration of this Agreement.

- (iii) **Subcontractor Employees.** With respect to Subcontractors, Successful Respondent shall (A) obtain for DIR, the DIR Customers and their designee(s) the rights specified in **Section 4.3(f)(ii)** and (B) ensure that such rights are not subject to subsequent Subcontractor approval or the payment of any fees, charges or other amounts. If Successful Respondent is unable to obtain any such rights with respect to a Subcontractor, it shall notify DIR in advance and Successful Respondent shall not subcontract any Services to such Subcontractor without DIR's prior approval (and absent such approval, Successful Respondent's use of any such Subcontractor shall obligate Successful Respondent to obtain or arrange, at no additional cost to DIR, the rights specified in **Section 4.3(f)(ii)**, for DIR, the DIR Customers and their designee(s)).
- (g) **Materials.** DIR shall have the rights and licenses set forth in **Sections 14.6(b)** and **14.6(c)** in respect of Successful Respondent Owned Materials and Third Party Materials.

(h) **Equipment**

- (i) **List of Equipment.** Successful Respondent shall promptly provide to DIR a list, organized by location, of the Equipment that is implicated by each Assistance Event. Such list shall specify information reasonably requested by DIR, including all fields tracked by Successful Respondent in any asset management system used by Successful Respondent for tracking and managing Equipment, such Equipment's function, manufacturer, model number, age, and other pertinent information.
- (ii) **Right to Acquire.** DIR, the DIR Customers and/or their designee(s) shall have the right (but not the obligation) to purchase or (subject to **Section 6(b)**) assume the lease for any or all Equipment that is owned or leased by Successful Respondent and that is implicated by the relevant Assistance Event. Subject to **Section 6(b)**, such Equipment shall be transferred in good working condition, reasonable wear and tear excepted, as of the later of the effective date of the relevant Assistance Event and the completion of the Termination Assistance Services requiring such Equipment. Successful Respondent shall maintain such Equipment through the date of transfer so as to be eligible for the applicable manufacturer's maintenance program. In the case of Successful Respondent-owned Equipment (including Equipment owned by Successful Respondent Affiliates and Subcontractors and further including any such Equipment leased to Successful Respondent), Successful Respondent (or such Affiliate or Subcontractor) shall grant to DIR, the DIR Customers, and/or their designee(s) a warranty of title and a warranty that such Equipment is free and clear of all liens, security interests, and other encumbrances. Such conveyance by Successful Respondent (or Affiliate or Subcontractor) to DIR, the DIR Customers, and/or their designee(s) shall be at fair market value (as shall be determined by an agreed-upon appraisal); *provided, however*, in the case of any item of Equipment for which the acquisition cost has been the basis of Charges to DIR (e.g., as in the case of the Hardware Service Charge provided in **Exhibit 4.0 Business Model**), such conveyance shall be at an amount not exceeding the amount of any then unrecovered acquisition cost computed in accordance with the method used to charge DIR therefor. At DIR's request, the Parties shall negotiate in good faith and agree upon the form and structure of the purchase. In the case of leased Equipment, Successful Respondent shall (1) represent and warrant that the lease is not in default, (2) represent and warrant that all payments thereunder have been made through the date of transfer and (3) notify DIR, the DIR Customers, and/or their designee(s) of any lessor defaults of which it is aware at the time.
- (i) **DIR Facilities, Equipment, and Materials.** Successful Respondent shall vacate the DIR Facilities and return to DIR, if not previously returned, any resources that are implicated by the relevant Assistance Event

and that are owned, leased or licensed by DIR, any DIR Customer, or any DIR Contractor, including DIR owned or leased Equipment, DIR Owned Materials and DIR licensed Materials, in condition at least as good as the condition of such facilities and resources when they were made available to Successful Respondent, ordinary wear and tear excepted. Such facilities and resources shall be vacated and/or returned as of the later of the effective date of the relevant Assistance Event and the completion of the Termination Assistance Services requiring such facilities or resources.

- (j) **Third Party Contracts.** Successful Respondent shall promptly, but no less than thirty (30) days from DIR's issuance of notice of an Assistance Event, provide to DIR a list of the Third Party Contracts that are implicated by the relevant Assistance Event. Except for the Third Party Contracts specified on **Exhibit 4.5**, subject to **Section 4(b)**, Successful Respondent shall, at DIR's request, cause the counter-parties to such Third Party Contracts to permit DIR, the DIR Customers, and/or their designee(s) to assume prospectively any or all such Third Party Contracts or to enter into new contracts with DIR, the DIR Customers, and/or their designees on substantially the same terms and conditions, including price. Successful Respondent shall transfer or assign those Third Party Contracts that DIR elects to assume prospectively to DIR, the DIR Customers, and/or their designee(s) as of the later of the effective date of the relevant Assistance Event and the completion of the Termination Assistance Services requiring such Third Party Contracts. Such transfers or assignments shall be on terms and conditions acceptable to all applicable parties, provided that (A) there shall be no fee, charge or other amount imposed on DIR, the DIR Customers, and/or their designee(s) by Successful Respondent or the counter-parties to such Third Party Contracts for such transfer or assignment and (B) Successful Respondent shall: (1) promptly cure and, in accordance with **Section 17.1(c)**, indemnify DIR against any default under such Third Party Contracts relating to the period prior to such transfer or assignment; (2) represent and warrant that all payments thereunder through the date of transfer or assignment are current; and (3) notify DIR, the DIR Customers, and/or their designee(s) of any counter-party's default with respect to such Third Party Contracts of which it is aware at the time of such transfer or assignment.
- (k) **Other Subcontracts and Third Party Contracts.** With respect to Third Party Contracts implicated by the relevant Assistance Event that are not otherwise transferred or assigned to DIR, the DIR Customers, and/or their designee(s) pursuant to **Section 4.4(b)**, Successful Respondent shall make available to DIR, the DIR Customers, and/or their designee(s), pursuant to reasonable terms and conditions, any Third Party services then being utilized by Successful Respondent in the performance of the Services. Successful Respondent shall retain the right to utilize any such Third Party services in connection with the performance of services for other Successful Respondent customers. DIR and the DIR Customers shall retain the right to contract directly with any third party previously utilized by Successful Respondent to perform any Services.
- (l) **Rates and Charges.** Except as provided in this Subsection and **Section 4.4(b)**, Successful Respondent shall provide all Termination Assistance Services at no additional charge. The Parties anticipate that Termination Assistance Services requested by DIR shall be provided by Successful Respondent using Successful Respondent Personnel already assigned to the performance of the Services and without adversely affecting Successful Respondent's ability to meet its performance obligations. To the extent DIR requests that Successful Respondent perform only a portion (but not all) of the Services included in a particular Charge, the amount to be paid by DIR shall be equitably adjusted downward in accordance with **Exhibit 4.0 Business Model**, to the extent applicable, or equitably adjusted downward in proportion to the portion of the Services that Successful Respondent shall not be providing to the extent that **Exhibit 4.0 Business Model** does not provide for such reduction. If and to the extent Termination Assistance Services requested by DIR cannot be provided by Successful Respondent using Successful Respondent Personnel then-assigned to the performance of the Services without adversely affecting Successful Respondent's ability to meet its performance obligations, DIR, in its sole discretion, may (i) forego or delay any work activities or temporarily or permanently adjust the work to be performed by Successful Respondent, the schedules associated therewith or the Service Levels to permit the performance of such Termination Assistance Services using such personnel or (ii) authorize Successful Respondent to use additional Successful Respondent Personnel to perform Termination Assistance Services. To the extent DIR authorizes Successful Respondent to use additional Successful Respondent Personnel to perform Termination Assistance Services requested by DIR, DIR shall pay Successful Respondent the applicable rates and charges specified in **Exhibit 4.0 Business Model** for such Full-time Positions (FTP) or Full-time Equivalents (FTEs) or, if no such rates and fees are specified in **Exhibit 4.0 Business Model**, a negotiated

fee for the additional Successful Respondent Personnel required to perform such Termination Assistance Services (determined on the basis of pricing no less favorable to DIR than the pricing and labor rates set forth herein for comparable Services), provided that Successful Respondent notifies DIR in advance of any such charges, obtains DIR's approval prior to incurring such charges, and uses commercially reasonable efforts to minimize such charges. Notwithstanding the foregoing, DIR will not be obligated to pay Successful Respondent for any such additional Successful Respondent Personnel if at any time prior to DIR's issuance of the notice of Assistance Event, Successful Respondent failed to sufficiently staff the Services that are the subject of the Assistance Event (both with respect to number of personnel and personnel with the necessary skills and training).

- (m) **Proprietary Communications Network.** If Successful Respondent uses a proprietary communications network to provide the Services, then for a period of up to two (2) years following the effective date of the relevant Assistance Event, Successful Respondent shall, if requested by DIR, continue to provide such proprietary communications network and other network Services to DIR, the DIR Customers, and/or their designee at the rates, and subject to the terms and conditions, set forth in this Agreement.
  - (i) **Information.** Upon the occurrence of any breach by Successful Respondent under this Agreement or if DIR elects to evaluate re-procurement of all or any portion of the Services, Successful Respondent will provide to and/or make available for DIR review any and all reports, data and information that DIR deems necessary in order to evaluate all options related to such breach and/or re-procurement, including without limitation, all reports, data and information specified in **Section 4.4**. For the avoidance of doubt, Successful Respondent will be obligated to provide all such reports, data and information regardless of whether DIR has provided notice of or otherwise declared an Assistance Event.

#### 4.4 Use of Third Parties.

- (a) **Right of Use.** Notwithstanding anything to the contrary contained in this Agreement, Successful Respondent acknowledges and agrees that (i) this is not a requirements contract and DIR and the DIR Customers shall not be required to obtain their requirements for any of the Services from Successful Respondent and (ii) Successful Respondent is not the exclusive provider to DIR or the DIR Customers of any of the Services and DIR and the DIR Customers may at any time themselves and/or through third parties (each, a "**DIR Contractor**") provide and/or obtain any services (including services to supplement, replace or render unnecessary the Services). Nothing in this Agreement shall be construed or interpreted as limiting DIR's right or ability to add or delete DIR Customers, or DIR's or any DIR Customer's right or ability during the Term to change requirements, move parts of Services in and out of scope, or to increase or decrease their demand for Services. To the extent DIR or a DIR Customer obtains from DIR Contractors, or provides to itself, any of the Services, the Charges and Termination Charges shall be adjusted downward in accordance with **Exhibit 4.5 Third-Party Contracts**, to the extent applicable, or equitably adjusted downward in proportion to the portion of the Services that Successful Respondent shall not be providing to the extent that **Exhibit 4.5 Third-Party Contracts** does not provide for such reduction. Such equitable adjustments shall include, if applicable, the unrecovered amounts set forth in **Section 11.1(a), (b), (c)** and **(d)** of **Exhibit 4.5 Third-Party Contracts** in proportion to the portion of the Services that Successful Respondent shall not be providing; provided, however, that such unrecovered amounts have been incurred by Successful Respondent in good faith and with a reasonable expectation of providing the Services pursuant to this Agreement.
- (b) **Successful Respondent Cooperation.** Successful Respondent shall perform the Services in a manner that shall not (i) disrupt or have an unnecessary adverse impact on the activities or operations of DIR, the DIR Customers, or a DIR Contractor, (ii) degrade the Services then being received by DIR or the DIR Customers, or (iii) disrupt or interfere with the ability of DIR or the DIR Customers to obtain the full benefit of the Services. Successful Respondent acknowledges that its provision of the Services shall require significant cooperation with third parties, and Successful Respondent shall fully cooperate and work in good faith with third parties as described in this Agreement and to the extent otherwise requested by DIR. DIR and DIR Customer personnel and DIR Contractors shall comply with Successful Respondent's reasonable security and confidentiality requirements and shall, to the extent performing work on Software, Equipment or Systems for which Successful Respondent has operational responsibility, comply with Successful Respondent's reasonable standards, methodologies, and procedures as communicated in writing

to such third parties by Successful Respondent.

- (c) **Notice by Successful Respondent.** Without limiting its obligations under this Agreement, Successful Respondent shall expeditiously notify DIR when it becomes aware that an act or omission of DIR or DIR Customer personnel or a DIR Contractor shall cause, or has caused, a problem or delay in providing the Services, and shall use commercially reasonable efforts to work with DIR, the DIR Customers and the DIR Contractor to prevent or circumvent such problem or delay. Successful Respondent shall cooperate with DIR, the DIR Customers and DIR Contractors to resolve differences and conflicts arising between the Services and other activities undertaken by DIR, the DIR Customers and DIR Contractors.

#### 4.5 Acceptance.

- (a) **Deliverables.** DIR and/or DIR Customer, as applicable shall have the right to review and accept or reject all Materials, Equipment, Systems and other deliverables and milestones (each a "**Deliverable**") to be provided by Successful Respondent to DIR and/or DIR Customers pursuant to the methodology set forth in this **Section 4.5**. DIR and/or DIR Customer, as applicable, will determine, in their reasonable discretion, when a Deliverable will be deemed "**Accepted**" following the implementation, installation, testing and execution in the production environment (as applicable) and confirmation that such Deliverables are in Compliance. Unless otherwise requested by DIR, each Deliverable shall be provided by Successful Respondent and subject to DIR (or, if designated in writing by DIR, DIR Customer's) "**Acceptance**" as described below in **Section 4.5(b)(i)** through **(v)**.
- (b) **Milestone Deliverables.** The Critical Deliverables and Transition Milestones are "**Milestone Deliverables**" for purposes of this Agreement. Other Deliverables may also be classified as Milestone Deliverables by the Parties if so agreed in writing. Each Milestone Deliverable shall be provided by Successful Respondent and subject to DIR (or, if designated in writing by DIR, DIR Customer's) "**Acceptance**" as described below in **Section 4.5(b)(i)** through **(v)**.
- (i) **Acceptance Review Period.** For each Milestone Deliverable, DIR shall have either (1) the period of time set forth in the applicable plan, if any, or (2) if no such period is set forth in a DIR-approved plan, thirty (30) days following Successful Respondent's notification to DIR that Successful Respondent has completed any Milestone Deliverable, which shall include Successful Respondent's internal testing as required under this Agreement, to determine whether it Complies with its Acceptance Criteria (such period of time, the "**Acceptance Review Period**"). Unless otherwise specified in the applicable plan, the Acceptance Review Period for Milestone Deliverables identified as Interim Milestones (in the Transition Plan) shall be ten (10) days. The Acceptance Review Period shall begin on the date that Successful Respondent provides written notification to DIR that the Milestone Deliverable is ready to be reviewed by DIR. Unless otherwise agreed, Successful Respondent shall perform comprehensive testing (e.g., unit, string, integration, stress, volume, system testing) on each such Milestone Deliverable prior to submitting such item to DIR for Acceptance. The acceptance review process for Milestone Deliverables identified as Checkpoint Deliverables (in the Transition Plan) is defined in the Service Management Manual.
- (ii) **Acceptance Review.** During the Acceptance Review Period, DIR and DIR Customers shall review and may further test each Milestone Deliverable, individually and collectively, to determine whether such item(s) contain any type of Noncompliance. Successful Respondent shall cooperate with such review and testing efforts, provide a technical environment to facilitate such review, and provide all applicable documentation that may assist in such review and testing.
- (iii) **Acceptance.** If DIR does not identify any Noncompliance relating to a Milestone Deliverable during its Acceptance Review Period, DIR shall inform Successful Respondent in writing that the Milestone Deliverable is Accepted, subject to the other provisions of this Agreement. If DIR does not Accept a Milestone Deliverable, DIR shall provide Successful Respondent a notice of Noncompliance as described below. If DIR does not Accept or deliver a notice of Noncompliance to Successful Respondent by the end of the Acceptance Review Period, Successful Respondent shall so inform the DIR Contract Manager and the DIR Representative and provide DIR an additional Acceptance Review Period of at least fourteen (14) days. If DIR

does not Accept or deliver a notice of Noncompliance by the end of such additional Acceptance Review Period, Successful Respondent may escalate such issue for resolution through governance in accordance with **Exhibit 1.2 Governance**. Neither DIR's nor any DIR Customer's use in a live production environment shall constitute Acceptance, affect any rights and remedies that may be available to DIR or a DIR Customer, and/or constitute or result in "acceptance" under general contract Laws, the State's Uniform Commercial Code or any other Laws.

- (iv) **Noncompliance.** If a Noncompliance is detected, DIR shall so notify Successful Respondent and reasonably specify the nature of the failure or deficiency giving rise to such Noncompliance. Promptly after receiving such notice from DIR and at no charge to DIR, Successful Respondent shall correct such Noncompliance, satisfy the Acceptance Criteria, and integrate the correction (including among other milestones and deliverables and previously Accepted items). Beginning upon receipt of notice from Successful Respondent that a Milestone Deliverable is again ready to be Accepted, the applicable Acceptance Review Period shall begin again and the Parties shall re-perform their obligations under **Sections 4.5(b)(i)** through **(iii)**.
- (v) **Failure to Cure a Noncompliance.** If Successful Respondent (1) requires more than two (2) attempts to cure a particular Noncompliance, (2) does not correct a Noncompliance in a reasonable period of time (not to exceed ten (10) days, unless otherwise mutually agreed), or (3) cures a particular Noncompliance and such cure results in another Noncompliance and Successful Respondent is not able to collectively cure such Noncompliance(s) within two (2) attempts, then DIR may, in its sole discretion and upon written notification to Successful Respondent, (A) provide Successful Respondent an additional cure period to fix the Noncompliance; (B) conditionally Accept the Milestone Deliverable and require Successful Respondent to develop a remediation plan, subject to DIR's acceptance and within time frames reasonably requested by DIR whereby Successful Respondent shall design and implement a workaround solution that mitigates the Noncompliance; (C) correct the Noncompliance itself or hire a third party to correct the Noncompliance at Successful Respondent's expense (all such out-of-pocket expenses and costs of DIR and/or the DIR Customer to be subject to set-off as set forth in **Section 12.4**); (D) implement and use the Milestone Deliverable despite the Noncompliance and equitably reduce the Charges; or (E) exercise any of its other rights and remedies under this Agreement or available at law or in equity. If DIR elects options (A) or (B) above and Successful Respondent fails to cure the Noncompliance in accordance with the foregoing, DIR may thereafter elect any of the foregoing options (A) through (E). The remedies above are in addition to and shall not limit DIR's other remedies, whether at Law, in equity, or under this Agreement.
- (c) **Previously Accepted Items.** In the event any modification or rework of a previously Accepted Milestone Deliverable or other Deliverable is required for the Acceptance of a subsequent deliverable, then Successful Respondent shall perform such modification or rework at no charge and each Party's obligations, rights, and remedies described herein shall continue to apply. Furthermore, in the event of a discovery of a latent defect in a previously Accepted Milestone Deliverable or other Deliverable, where such latent defect would have qualified as a Noncompliance at the time of Acceptance, upon notification by DIR or the applicable DIR Customer, Successful Respondent will, at no additional charge, repair or replace or otherwise correct the Noncompliance to the level of performance specified in the Agreement.

#### 4.6 Projects.

- (a) **Procedures and Performance.** Successful Respondent will perform Projects as directed by DIR, in accordance with the terms of this Agreement and the process described in this Article. From time to time and at DIR's sole discretion, DIR may request Successful to perform Projects. DIR may initiate a request for a new Project by providing such request in writing (each such request, a "Project Request") to Successful Respondent. Successful Respondent shall justify to DIR when it has insufficient resources to perform such work, including through reprioritization or rescheduling of Project activities of Successful Respondent Personnel. The DIR Representative will request, define and set the priority for Projects. Successful Respondent shall maintain appropriate continuity of personnel assigned to perform Projects.
- (b) **Project Work Order.** Successful Respondent shall, within the time frame specified in such Project



Request (and in no event more than five (5) DIR Business Days from receipt of such request unless another time frame is approved by DIR), at no charge to DIR, prepare and deliver to DIR a proposed Project Work Order (each, a "Project Work Order"), as described below. Each proposed Project Work Order prepared by Successful Respondent will contain the following information: (i) a detailed description of the scope of work to be performed by Successful Respondent to complete and implement the Project, including any required Deliverables; (ii) any specific performance standards that will apply to the completion and implementation of such Project, including Successful Respondent's agreement to meet applicable Service Levels; (iii) an anticipated schedule for completing and implementing the Project and any related Deliverables, including Milestones and credits for failing to achieve Acceptance of Milestones and Deliverables; (iv) a description of the Successful Respondent positions that will be assigned to each activity specified in the Project Work Order, including the location of Successful Respondent Personnel assigned to such positions (i.e., onsite, offsite, onshore) and sufficient detail to allow DIR to audit the assignment and billings related to such Successful Respondent Personnel; (v) a description of the Acceptance Criteria and Acceptance Testing procedures to be used by DIR in connection with any Acceptance Testing of such Project and any related Deliverables and Milestones; (vi) the estimated number of personnel hours needed to complete the Project; (vii) one (1) or more fee quotes, based on the following pricing mechanisms: (a) the applicable hourly rate, in accordance with the Rate Card, (b) if the Project consists of multiple units of work for which there are pre-defined one-time Charges, the number of pre-defined work units multiplied by the applicable pre-defined one-time Charge, or (c) if requested by DIR, a fixed fee or other pricing mechanism. DIR may, at its option, choose which pricing mechanism will apply to the Project. Successful Respondent will not commence performing any services in connection with a Project, and DIR will not be responsible for any Charges applicable to such Project, until the Parties have executed the applicable Project Work Order. Any change to a Project Work Order will be made pursuant to the Change Control Procedure.

- (c) **Approval of Projects; DIR and DIR Customer Requests.** The Designated DIR Representative may accept or reject Project proposals in his or her sole discretion. Successful Respondent shall not agree to provide Projects to DIR or any DIR Customers without the prior approval of Designated DIR Representative. DIR shall not be obligated to pay for any Projects not properly authorized by the Designated DIR Representative. Without limiting DIR's other rights under this Agreement or applicable Law, if Successful Respondent fails to comply strictly with this **Section 4.6(c)**, it shall receive no compensation for any services rendered to DIR or any DIR Customer in violation of this **Section 4.6(c)**.
- (d) **Reprioritization, Termination, and Suspension.** Successful Respondent acknowledges and agrees that DIR will have the right based on valid business reasons to reprioritize, terminate, or suspend any Project at any time upon informing the Successful Respondent Contract Manager. DIR will not be obligated to pay Successful Respondent any additional compensation associated with such action unless the corresponding Project Work Order expressly provides otherwise. If DIR decides to terminate a Project Work Order, Successful Respondent will stop performing the Project work in an orderly manner as of the date specified by DIR, and Successful Respondent will only be entitled to charge DIR for actual performance provided by Successful Respondent for chargeable Project work up to the date specified in DIR's notice.

## 5 REQUIRED CONSENTS

### 5.1 Successful Respondent Responsibility.

At no additional cost to DIR, Successful Respondent shall undertake all administrative activities necessary to obtain all Required Consents. At Successful Respondent's request, DIR shall cooperate with Successful Respondent in obtaining the Required Consents by executing appropriate DIR approved written communications and other documents prepared or provided by Successful Respondent. The Parties shall cooperate in minimizing or eliminating any costs associated with obtaining Required Consents.

### 5.2 Financial Responsibility.

Except to the extent expressly provided otherwise in **Exhibit 4.3 Form of Invoice**, Successful Respondent shall pay all transfer, re-licensing, termination charges and other costs or expenses associated with obtaining any Required Consents or terminating any licenses or agreements as to which Successful Respondent is unable to obtain such Required Consents.

### 5.3 Contingent Arrangements.

If, despite using commercially reasonable efforts, Successful Respondent is unable to obtain a Required Consent, then with respect to DIR and/or DIR Customer licensed Third Party Materials, Successful Respondent shall implement a work-around, reasonably satisfactory to DIR.

## 6 SERVICE FACILITIES

- (a) **Service Facilities.** The Services shall be provided at or from (i) DIR Facilities, (ii) Successful Respondent Facilities (provided they are within the confines of the continental United States), or (iii) any other service location requested by Successful Respondent and approved in advance by DIR. Notwithstanding anything to the contrary in this Agreement or otherwise directed or approved by DIR, all infrastructure services for Texas.gov applications (test, development, production, etc.) shall be provided through DIR's Data Center Services program, which includes State Data Center facilities and select public cloud options. Successful Respondent shall obtain DIR's prior approval for any proposed relocation of the performance of any Service from a new or different service location. Successful Respondent acknowledges and agrees, that unless otherwise expressly agreed by DIR in writing, that any key personnel and services necessary to provide the Services (e.g., operate the support center, and any other operational support), shall provide such Services Monday through Friday during normal business hours within the geographical boundaries of the Austin, Texas metropolitan area. In connection with its delivery of the Services, Successful Respondent shall not provide or otherwise utilize any support services situated outside the continental United States. Successful Respondent shall obtain DIR's approval prior to any relocation of Services. Failure to obtain such approval will result in a breach of this Agreement. Successful Respondent shall be financially responsible for all additional costs, taxes, or expenses related to or resulting from any Successful Respondent-initiated relocation to a new or different Successful Respondent Facility, including any costs or expenses incurred by DIR or any DIR Customer as a result of such relocation.
- (b) **DIR Facilities.** DIR shall provide Successful Respondent with the use of and access to the space in DIR Facilities for the periods of time as required. Successful Respondent shall identify to DIR's reasonable satisfaction the manner in which any DIR Facilities shall be used to provide the Services and how such use shall comply with applicable Laws and DIR Rules. All DIR-owned or leased assets or DIR Customer-owned or leased assets provided for the use of Successful Respondent under this Agreement shall remain in DIR Facilities unless DIR otherwise agrees. In addition, all improvements or modifications to DIR Facilities requested by Successful Respondent shall be (i) subject to review and approval in advance by DIR, (ii) in strict compliance with DIR Rules, and (iii) performed by and through DIR or the relevant DIR Customer at Successful Respondent's expense. Successful Respondent acknowledges and agrees that the facilities to be provided by DIR are sufficient for performing the Services and for satisfying Successful Respondent's responsibilities under this Agreement. **THE DIR FACILITIES ARE PROVIDED BY DIR TO SUCCESSFUL RESPONDENT ON AN AS-IS, WHERE-IS BASIS. DIR EXPRESSLY DISCLAIMS ANY WARRANTIES, EXPRESS OR IMPLIED, AS TO THE DIR FACILITIES, OR THEIR CONDITION OR SUITABILITY FOR USE BY SUCCESSFUL RESPONDENT.**
- (c) **Responsibilities Regarding DIR's Network.** To the extent any Equipment provided or used by Successful Respondent or Successful Respondent Personnel is connected directly to the network(s) of DIR or any DIR Customer, such Equipment (and all Software installed thereon) shall be (i) subject to review and approval in advance by DIR (Successful Respondent shall cooperate with DIR in the testing, evaluation and approval of such Equipment) and (ii) in strict compliance with DIR Rules and DIR Standards. Successful Respondent shall not install or permit the installation of any other software on such Equipment without DIR's prior approval. Successful Respondent shall promptly investigate any security breach of DIR's networks or Systems associated with Successful Respondent Personnel or the performance of the Services. Successful Respondent shall comply with all requirements of Chapter 521 of the Texas Business and Commerce Code, including sections 521.052 and 521.053. Successful Respondent shall notify DIR of each such security breach and permit DIR to participate in the planning and conducting of any audit or investigation of any such security breach. Successful Respondent shall promptly (i) report the findings of any such audit or investigation to DIR, (ii) provide DIR with a copy of any written report prepared in connection therewith, and (iii) to the extent in Successful Respondent's areas of responsibility and control, prepare and (following DIR approval) implement a remediation plan to remediate the effects of the security

breach and prevent its recurrence. Successful Respondent acknowledges and agrees that, to the extent permitted by applicable Law, DIR has the right to monitor, record and investigate all uses of DIR's networks by Successful Respondent, including all email or other communications sent to, from, or through DIR's networks, regardless of the content of such communications, and Successful Respondent hereby consents to such monitoring, recording, and investigating. Successful Respondent acknowledges and agrees that it does not have any expectation of privacy with respect to any personal information or communications made by or to it through DIR's networks.

**6.1 The Parties acknowledge there will be no facilities in Austin, Texas.**

**6.2 DIR Rules/Employee Safety.**

- (a) **DIR Rules and Compliance.** In performing the Services and using the DIR Facilities, Successful Respondent shall observe and comply with all DIR and DIR Customer policies, rules, and regulations applicable at or to DIR Facilities or the provision of the Services which have been communicated to Successful Respondent or Successful Respondent Personnel in advance in writing (which may include email communications and notices of information contained on web sites or conspicuously posted at DIR Facilities to the extent consistent with the way in which DIR or the DIR Customers disseminate such information to their own employees) or by such means as are generally used by DIR or DIR Customers to disseminate such information to its employees or contractors and those applicable to specific DIR Facilities (collectively, "**DIR Rules**"). The Parties acknowledge and agree that, as of the Commencement Date the Successful Respondent is fully informed as to the DIR Rules that have been communicated to it consistent with the foregoing. Successful Respondent shall be responsible for the promulgation and distribution of DIR Rules to Successful Respondent Personnel as and to the extent necessary and appropriate. Additions or modifications to the DIR Rules may be (i) disclosed to Successful Respondent and Successful Respondent Personnel in writing (which may include email communications and notices of information contained on web sites to the extent consistent with the way in which DIR or the DIR Customers disseminate such information to their own employees), (ii) conspicuously posted at a DIR Facility, (iii) electronically posted or (iv) communicated to Successful Respondent or Successful Respondent Personnel by means generally used by DIR and DIR Customers to disseminate such information to its employees or contractors (including oral communications in immediately applicable or emergency situations). Successful Respondent and Successful Respondent Personnel shall observe and comply with such additional or modified DIR Rules.
- (b) **Safety and Health Compliance.** Successful Respondent and Successful Respondent Personnel shall familiarize themselves with the premises and operations at each DIR Facility at, to or from which Services are rendered and the DIR Rules applicable to each such facility. Successful Respondent and Successful Respondent Personnel also shall observe and comply with all DIR Rules with respect to safety, health, security and the environment and shall take commercially reasonable precautions to avoid injury, property damage, spills or emissions of hazardous substances, materials or waste, and other dangers to persons, property or the environment. To the extent required by DIR, Successful Respondent Personnel shall receive prescribed training prior to entering certain DIR Facilities.

**7 SERVICE LEVELS**

**7.1 General.**

- (a) **General Performance Standards.** Beginning on the Commencement Date, Successful Respondent shall perform the Services at levels of accuracy, quality, completeness, timeliness, responsiveness, and resource efficiency that are at least equal to those received by DIR and the DIR Customers prior to such date. In addition, Successful Respondent shall perform the Services at levels of accuracy, quality, completeness, timeliness, responsiveness, resource efficiency, and productivity that are at least equal to accepted industry standards of first tier providers of services that are the same as or similar to the Services. The foregoing provisions of this Subsection shall not be deemed to supersede the Service Levels.
- (b) **Service Level Performance Standards.** Beginning on the Commencement Date, Successful Respondent shall perform the Services so as to meet or exceed the Service Levels set forth in or otherwise in accordance with **Exhibit 3.0 Performance Model**.

## 7.2 Service Level Credits; Deliverable Credits.

- (a) **Service Level Credits.** Successful Respondent recognizes that DIR is paying Successful Respondent to deliver the Services at specified Service Levels. If Successful Respondent fails to meet such Service Levels, then, in addition to other remedies available to DIR, Successful Respondent shall pay or credit to DIR the Service Level Credits specified in **Exhibit 3.0 Performance Model** in recognition of the diminished value of the Services resulting from Successful Respondent's failure to meet the agreed upon level of performance, and not as a penalty. Under no circumstances shall the imposition of Service Level Credits be construed as DIR's sole or exclusive remedy for any failure to meet the Service Levels Service Level Credits are not counted toward and are not subject to the overall cap on Successful Respondent's liability.
- (b) **Deliverable Credits.** Successful Respondent recognizes that DIR is paying Successful Respondent to provide certain Critical Deliverables by the time and in the manner agreed by the Parties. If Successful Respondent fails to meet its obligations with respect to such Critical Deliverables, then, in addition to other remedies available to DIR, Successful Respondent shall pay or credit to DIR the amounts specified in **Exhibits 3.0 Performance Model** as applicable, or established by DIR as part of the Project approval process on a case by case basis in recognition of the diminished value of the Services resulting from Successful Respondent's failure to meet the agreed upon level of performance, and not as a penalty (the "**Deliverable Credits**"). If DIR recovers monetary damages from Successful Respondent as a result of Successful Respondent's failure to meet its obligations with respect to one (1) or more Critical Deliverables, Successful Respondent shall be entitled to set-off against such damages any Deliverable Credits paid for the failures giving rise to such recovery. Deliverable Credits are distinct from Service Level Credits and shall not be counted toward or subject to the overall cap on Successful Respondent's liability.

## 8 SUCCESSFUL RESPONDENT PERSONNEL

### 8.1 Key Personnel.

- (a) **Approval of Key Personnel.** The positions designated by DIR to be filled by Key Personnel and the Key Personnel that have been selected and approved by DIR as of the Effective Date are identified in the Successful Respondent's Response. At least thirty (30) days prior to assigning an individual to act as one (1) of the Key Personnel, whether as an initial assignment or a subsequent assignment, Successful Respondent shall notify DIR of the proposed assignment, shall introduce the individual to appropriate DIR representatives, shall provide reasonable opportunity for DIR representatives to interview the individual and shall provide DIR with a resume and such other information about the individual as may be reasonably requested by DIR. If DIR in good faith objects to the proposed assignment, the Parties shall attempt to resolve DIR's concerns on a mutually agreeable basis. If the Parties have not been able to resolve DIR's concerns within five (5) DIR Business Days of DIR communicating its concerns, Successful Respondent shall not assign the individual to that position and shall propose to DIR the assignment of another individual of suitable ability and qualifications. DIR may add, delete, or otherwise change the positions to be filled by Key Personnel under this Agreement.
- (b) **Continuity of Key Personnel.** Successful Respondent shall ensure sufficient availability of the Key Personnel initially assigned at execution to provide Services as required under this Agreement for, at a minimum, twenty-four (24) months post Commencement. Successful Respondent shall ensure sufficient availability of all subsequent Key Personnel for the provision of Services for, at a minimum, the applicable period specified by the Successful Respondent at the time of subsequent assignment, from the date he or she assumes the position in question (provided that, in the case of Key Personnel assigned prior to the Commencement Date, the minimum period shall be measured from the Commencement Date). Successful Respondent shall not transfer, reassign or remove any of the Key Personnel (except as a result of voluntary resignation, involuntary termination for cause, illness, disability, or death) or announce its intention to do so during the minimum period without DIR's prior approval, which DIR may withhold in its reasonable discretion based on its own self-interest. In the event of the voluntary resignation, involuntary termination for cause, illness, disability or death of one (1) of its Key Personnel during or after the specified period, Successful Respondent shall (i) give DIR as much notice as reasonably possible of such development and (ii) expeditiously identify and obtain DIR's approval of a suitable replacement. In addition, even after the

initial twenty-four (24) month assignment period, Successful Respondent shall transfer, reassign, or remove one (1) of its Key Personnel only after (1) giving DIR at least thirty (30) days prior notice of such action (except to the extent such removal involves termination due to "**cause**" or "**performance**" as defined below), (2) identifying and obtaining DIR's approval of a suitable replacement at least thirty (30) days prior to such transfer, reassignment or removal, (3) providing DIR with a plan describing the steps and training (including knowledge transfer) that Successful Respondent shall perform to transition responsibility to the replacement, and (4) demonstrating to DIR's reasonable satisfaction that such action shall not have an adverse impact on Successful Respondent's performance of its obligations under this Agreement. Unless otherwise agreed, Successful Respondent shall not transfer, reassign, or remove more than one (1) of the Key Personnel in any six (6) month period; provided, however, the foregoing shall not prevent Successful Respondent from terminating a Key Personnel for "**cause**" or "**performance**" as defined below. For purposes of this Section "**cause**" means disregard of Successful Respondent's rules, insubordination, or misconduct (as defined in Successful Respondent's human resource policies), or criminal conduct, and "**performance**" means that the individual's job performance is at a level that would justify dismissal under Successful Respondent's human resources policies.

- (c) **Retention and Succession.** Successful Respondent shall implement and maintain a retention strategy designed to retain Key Personnel on DIR's and the DIR Customers' accounts for the prescribed period, such as retention bonuses. Successful Respondent shall also maintain active succession plans for each of the Key Personnel positions.

## **8.2 Successful Respondent Account Director.**

Successful Respondent shall designate a "**Successful Respondent Account Director**" who, unless otherwise agreed by DIR, shall maintain his or her office in Austin, Texas. The Successful Respondent Account Director shall (a) be one (1) of the Key Personnel, (b) be a full time employee of the Successful Respondent, (c) devote his or her full time and effort to managing the Services, (d) remain in this position for a minimum period of two (2) years from the initial assignment (except as a result of voluntary resignation, involuntary termination for cause, illness, disability, or death), (e) serve as the single point of accountability for the Services, (f) be the single point of contact to whom all DIR communications concerning this Agreement may be addressed, (g) have authority to act on behalf of Successful Respondent in all day-to-day matters pertaining to this Agreement, (h) have day-to-day responsibility for service delivery, billing and relationship management, and (i) have day-to-day responsibility for ensuring customer satisfaction and attainment of all Service Levels.

## **8.3 Compensation of Service Provider Account Manager and Key Service Provider Personnel.**

The provisions of this **Section 8.3** do not apply to this procurement.

## **8.4 Successful Respondent Personnel Are Not State, DIR or DIR Customer Employees.**

The Parties intend to create an independent contractor relationship and nothing in this Agreement shall operate or be construed as making the State, DIR, any DIR Customer and Successful Respondent partners, joint venturers, principals, joint employers, agents or employees of or with the other. No officer, director, employee, agent, affiliate, contractor or subcontractor retained by Successful Respondent to perform work hereunder shall be deemed to be an officer, director, employee, agent, affiliate, contractor or subcontractor of the State, DIR or any DIR Customer for any purpose. Successful Respondent, not the State, DIR or the DIR Customers, has the right, power, authority and duty to supervise and direct the activities of the Successful Respondent Personnel and to compensate such Successful Respondent Personnel for any work performed by them hereunder. Successful Respondent, and not the State, DIR or the DIR Customers, shall be responsible and therefore solely liable for all acts and omissions of Successful Respondent Personnel associated or related in any manner with this Agreement, the Services, DIR Facilities, Successful Respondent Facilities, DIR Confidential Information, or Equipment, including acts and omissions constituting negligence, gross negligence, willful misconduct and/or fraud.

## **8.5 Responsibility for Successful Respondent Personnel.**

- (a) Successful Respondent's employees, agents or Subcontractors shall be paid exclusively by Successful Respondent for all Services performed. Successful Respondent is responsible for and must comply with all

requirements and obligations related to such employees, agents or Subcontractors under local, State or Federal law, including minimum wage, social security, unemployment insurance, State and Federal income tax and workers' compensation obligations.

- (b) Successful Respondent assumes sole and full responsibility for its acts and the acts of its employees, agents and Subcontractors relating to the performance of this Agreement.
- (c) Successful Respondent agrees that any claim on behalf of any person arising out of employment, alleged employment, agency or subcontracts (including, but not limited to, claims of discrimination against Successful Respondent, its officers, or its agents or its Subcontractors) are the sole responsibility of Successful Respondent and are not the responsibility of DIR or any DIR Customer, and that Successful Respondent will indemnify and hold harmless the State from any and all such claims asserted against the State, DIR or any DIR Customer. Successful Respondent understands that any person who alleges a claim arising out of employment, alleged employment, agency, or Subcontract by Successful Respondent (including, but not limited to, claims of discrimination against Successful Respondent, its officers, or its agents or its Subcontractors) will not be entitled to any compensation, rights, or benefits from DIR (including, but not limited to, tenure rights, medical and hospital care, sick and annual/vacation leave, severance pay, or retirement benefits).

#### **8.6 Replacement, Qualifications, and Retention of Successful Respondent Personnel.**

- (a) **Sufficiency and Suitability of Personnel.** As a material obligation hereunder, Successful Respondent shall assign (or cause to be assigned) sufficient numbers of Successful Respondent Personnel to perform the Services in accordance with this Agreement (including applicable Service Levels), and such Successful Respondent Personnel shall possess suitable competence, ability and qualifications and shall be properly educated and trained for the Services they are to perform. Successful Respondent will maintain the organizational and administrative capacity and capabilities to carry out all Successful Respondent duties and responsibilities, including providing and supporting the Services, under this Agreement. Notwithstanding transfer or turnover of its personnel, or of its agents' or Subcontractors' personnel, Successful Respondent remains obligated to perform all duties and responsibilities, including providing and supporting the Services, without degradation and in accordance with the terms of this Agreement.
- (b) **Responsibility for Successful Respondent Personnel.** Successful Respondent agrees that anyone used by Successful Respondent to fulfill the terms of this Agreement is an employee, agent or Subcontractor of Successful Respondent and remains under Successful Respondent's sole direction and control. In addition, Successful Respondent hereby agrees to be responsible for the following with respect to its employees, agents or Subcontractors: (i) damages incurred by Successful Respondent Personnel or Subcontractors within the scope of their duties under this Agreement; and (ii) determination of the hours to be worked and the duties to be performed by Successful Respondent Personnel or Subcontractors. Successful Respondent agrees and will inform its employees, agents, and Subcontractors that there is no right of action against DIR or any DIR Customer for any duty owed by Successful Respondent pursuant to this Agreement. Successful Respondent expressly agrees that neither DIR nor any DIR Customer assumes any liability for the actions of, or judgments rendered against, the Successful Respondent, its employees, agents, or Subcontractors. DIR's liability to the Successful Respondent's employees, agents, and Subcontractors, if any, will be governed by Chapter 101, Texas Civil Practice & Remedies Code.
- (c) **Requested Replacement.** In the event that DIR determines lawfully and in good faith that the continued assignment of any individual Successful Respondent Personnel (including Key Personnel) to the performance of the Services is not in the best interests of any DIR Customer, then DIR may give Successful Respondent notice to that effect requesting that such Successful Respondent Personnel be replaced. Successful Respondent shall have ten (10) DIR Business Days following DIR's request for removal of such Successful Respondent Personnel in which to investigate the matters forming the basis of such request, correct any deficient performance, and provide DIR with assurances that such deficient performance shall not recur (provided that, if requested to do so by DIR, Successful Respondent shall immediately remove (or cause to be removed) the individual in question from all DIR Facilities pending completion of Successful Respondent's investigation and discussions with DIR). If, following such ten (10) DIR Business Day period, DIR is not reasonably satisfied with the results of Successful Respondent's efforts to correct the deficient performance and/or to prevent its recurrence, Successful Respondent shall, as soon as possible, remove and replace such Successful Respondent Personnel with an individual of suitable ability and

qualifications, at no additional cost to DIR. Nothing in this provision shall operate or be construed to limit Successful Respondent's responsibility for the acts or omissions of Successful Respondent Personnel, or be construed as joint employment of the Successful Respondent Personnel.

- (d) **Successful Respondent Personnel.** Successful Respondent shall be responsible for verifying (i) that Successful Respondent Personnel are authorized to work in any location in which they are assigned to perform Services and (ii) that it has performed pre-hire background investigations verifying that Successful Respondent Personnel had not been convicted of or accepted responsibility for a felony or a misdemeanor involving a dishonest act. Successful Respondent shall maintain policies prohibiting the use of illegal drugs. Successful Respondent represents that the Successful Respondent Personnel are not disqualified from performing their assigned work under applicable Laws.
- (e) **Background and/or Criminal History Investigations.** Prior to the date any Successful Respondent Personnel are assigned to DIR's or any DIR Customer's account, and at DIR's request from time to time thereafter, background checks (including national fingerprint record checks and drug testing) and/or criminal history investigations of such Successful Respondent Personnel specified in the Service Management Manual or the applicable Statement of Work may be performed by DIR and/or DIR Customers having the authority to require such investigations under applicable Laws. Should any Successful Respondent Personnel not be acceptable to DIR and/or any DIR Customer as a result of a background check and/or criminal history investigation, then Successful Respondent shall promptly replace the individual(s) in question. Successful Respondent Personnel who do not meet criteria acceptable to DIR shall not be assigned to work hereunder.

#### **8.7 Conduct of Successful Respondent Personnel.**

- (a) **Conduct and Compliance.** Successful Respondent Personnel shall (i) comply with applicable DIR Rules and other rules and regulations as further described in **Sections 6.2(a) and 8**, (ii) comply with reasonable requests of DIR or the DIR Customers personnel pertaining to personal and professional conduct, (iii) attend workplace training offered by DIR and/or the DIR Customers at DIR's request, and (iv) otherwise conduct themselves in a businesslike manner.
- (b) **Identification of Successful Respondent Personnel.** Except as specifically authorized by DIR, all Successful Respondent Personnel shall clearly identify themselves as Successful Respondent Personnel and not as employees or representatives of the State, DIR or any DIR Customer. This shall include any and all communications, whether oral, written or electronic, unless and to the extent authorized by DIR in connection with the performance of specific Services. Each Successful Respondent Personnel shall wear a badge issued by DIR or the relevant DIR Customer indicating that he or she is a "contractor" when at a DIR Facility.
- (c) **Restriction on Marketing Activity.** Except for marketing representatives designated in writing by Successful Respondent to DIR, none of the Successful Respondent's Personnel shall conduct any marketing activities with respect to any services specifically outside the scope of this Contract to the State, DIR, or any DIR Customer at DIR Facilities (including marketing of any New Services), other than, subject to **Section 13.1**, reporting potential marketing opportunities to Successful Respondent's designated marketing representatives.

#### **8.8 Substance Abuse.**

- (a) **Employee Removal.** To the extent permitted by applicable Laws, Successful Respondent shall immediately remove (or cause to be removed) any Successful Respondent Personnel known to be or reasonably suspected of engaging in substance abuse while at any DIR Facility, in a DIR Customer vehicle or while performing Services. In the case of reasonable suspicion, such removal shall be pending completion of the applicable investigation. Substance abuse includes the sale, attempted sale, possession or use of illegal drugs, drug paraphernalia or alcohol, or the misuse of prescription or non-prescription drugs.
- (b) **Substance Abuse Policy.** Successful Respondent represents, warrants and covenants that it has and shall maintain substance abuse policies, in each case in conformance with DIR Rules and applicable Laws, and Successful Respondent Personnel shall be subject to such policies.

## 8.9 Union Agreements.

Successful Respondent shall provide DIR not less than ninety (90) days' notice of the expiration of any collective bargaining agreement with unionized Successful Respondent Personnel if the expiration of such agreement or any resulting labor dispute could potentially interfere with or disrupt the activities or operations of DIR or a DIR Customer or impact Successful Respondent's ability to timely perform its duties and obligations under this Agreement.

## 8.10 Knowledge Transfer.

During the period following the Effective Date and prior to the Commencement Date, Successful Respondent will use its best efforts to acquire the practical skill, knowledge and expertise from the personnel who are providing the Services prior to the Effective Date in relation to the delivery of the Services, including the knowledge necessary for the Successful Respondent to perform the Services. Successful Respondent will accomplish such knowledge transfer, as appropriate, by interviewing personnel currently performing the Services as well as reviewing information, records and documents related to the provision of the Services. The information to be reviewed to affect the obligations of such knowledge transfer include, (i) copies of procedures and operations manuals, (ii) relevant system, software and/or hardware information, (iii) a list of third party suppliers of goods and services which are to be transferred to DIR or Successful Respondent, (iv) key support contact details for third party supplier employees, (v) information regarding work in progress and associated unresolved faults in progress. Successful Respondent shall promptly (within one (1) DIR Business Day) notify DIR of any lack of cooperation or assistance on the part of any DIR Customer, DIR Contractor or any third party that impedes or hinders Successful Respondent's efforts to comply with this obligation.

## 9 SUCCESSFUL RESPONDENT RESPONSIBILITIES

### 9.1 Reports, Data Correction, Re-Performance.

- (a) **Reports.** Successful Respondent shall provide DIR with (i) reports pertaining to the performance of the Services and Successful Respondent's other obligations under this Agreement sufficient to permit DIR to monitor and manage Successful Respondent's performance, (ii) those reports described in **Exhibit 1.3 Service Management Manual and Exhibit 3.4-A Reports** in the form and format and at the frequencies provided therein, (iii) those reports required elsewhere under the terms of this Agreement, (iv) those generated by DIR and the DIR Customers prior to the Commencement Date, and (v) such additional reports as DIR may reasonably identify from time to time to be generated and delivered by Successful Respondent on an ad hoc or periodic basis (all such reports, the "**Reports**").
- (b) **Back-Up Documentation.** As part of the Services, Successful Respondent shall provide DIR with such documentation and other information available to Successful Respondent (including original source documentation and data in its native format or in an alternative industry-standard format as requested by DIR) as may be requested by DIR from time to time in order to verify the accuracy of the Reports provided by Successful Respondent. In addition, Successful Respondent shall provide DIR with all documentation and other information reasonably requested by DIR from time to time to verify that Successful Respondent's performance of the Services is in compliance with the Service Levels and this Agreement.
- (c) **Correction of Errors.** Successful Respondent shall promptly correct any errors or inaccuracies in or with respect to the Reports as part of the Services and at no additional cost.

### 9.2 Governance: Meetings.

- (a) **Governance.** The parties shall comply with the governance and account management provisions set forth in **Exhibit 1.2 Governance**.
- (b) **Meetings.** During the term of this Agreement, representatives of the Parties shall meet periodically or as requested by DIR to discuss matters arising under this Agreement, including any such meetings provided for in the Transition Plan and the Service Management Manual. During the Transition Period, this may include meetings with DIR, the incumbent vendor, and other DIR Service Component Providers. Each Party shall bear its own costs in connection with the attendance and participation of such Party's representatives in such meetings.



### 9.3 DIR Customer Quality Assurance and Internal Controls.

- (a) **General.** Successful Respondent shall develop and implement Quality Assurance and internal control (e.g., financial and accounting controls, organizational controls, input/output controls, system modification controls, processing controls, system design controls and access controls) processes and procedures, including implementing tools and methodologies, to perform the Services in an accurate and timely manner (and confirm that they are so performed and accounted for) in accordance with (1) the Service Levels and other requirements of this Agreement, (2) Generally Accepted Accounting Principles (US GAAP) to the extent necessary for Successful Respondent to make its public filings with the Securities and Exchange Commission, (3) accepted industry standards of first tier providers of services that are the same as or similar to the Services, (4) the Laws applicable to DIR and the DIR Customers (without limiting the obligations of the Parties under **Section 15.11**), and (5) industry standards (e.g., QS 9000, ISO 9001/2000, ISO 14000, ISO 17799/2005, ISO 27001/2005, ISO 27002/2005) applicable to DIR and the performance of the Services to the extent described in **Section 9.3(c)**. Such processes, procedures and controls shall include verification, checkpoint reviews, testing, acceptance and other procedures for DIR and the DIR Customers to assure the quality and timeliness of Successful Respondent's performance. Without limiting the generality of the foregoing, Successful Respondent shall:
- (i) Maintain a strong control environment in day-to-day operations to assure that the following fundamental control objectives are met: (1) financial, billing and operational information is valid, timely, complete and accurate; (2) operations are performed efficiently and achieve effective results, consistent with the requirements of this Agreement; (3) assets and data are safeguarded in accordance with Successful Respondent's own internal (and in all events reasonable) practices (but without expanding Successful Respondent's obligations under **Section 13.2(b)**); and (4) actions and decisions of the organization are in compliance with Laws (without limiting the obligation of the Parties under **Section 15.11**) and the terms of this Agreement;
  - (ii) Build the following basic control activities into work processes: (1) accountability clearly defined and understood; (2) access properly controlled; (3) adequate supervision; (4) transactions properly authorized; (5) transactions properly recorded; (6) transactions recorded in proper accounting period; (7) policies, procedures and responsibilities documented; (8) adequate training and education; and (9) adequate separation of duties;
  - (iii) Develop and execute a process to perform (and confirm performance of) periodic control self-assessments with respect to all Services (such self-assessments to be performed at least annually unless and until DIR approves less frequent self-assessments);
  - (iv) Maintain an internal audit function to sufficiently monitor the processes, internal controls and Systems used to provide the Services (i.e., perform audits, track control measures, communicate status to management, drive corrective action, etc.) and provide copies of any such internal audit reports to DIR; and
  - (v) Conduct investigations of suspected fraudulent activities within Successful Respondent's organization that impact or reasonably could be expected to impact DIR or the DIR Customers. Successful Respondent shall promptly notify DIR of any such suspected fraudulent activity and a reasonable summary of the results of any such investigation as they relate to DIR or the DIR Customers and such supplemental materials as DIR may reasonably request. At Successful Respondent's request, DIR shall provide reasonable assistance to Successful Respondent in connection with any such investigation.
- (b) **Approval by DIR.** Successful Respondent shall submit such processes, procedures and controls to DIR for its review, comment and approval at least forty-five (45) days prior to the Commencement Date and shall use commercially reasonable efforts to finalize such processes, procedures and controls and obtain DIR's final approval on or before the Commencement Date. Upon DIR's approval, such processes and procedures shall be included in the Service Management Manual. Prior to the approval of such processes and procedures by DIR, Successful Respondent shall adhere strictly to DIR's and the DIR Customers' then-current policies, procedures and controls. No failure or inability of the quality assurance procedures to disclose any errors or problems with the Services shall excuse Successful Respondent's failure to comply

with the Service Levels and other terms of this Agreement.

- (c) **Industry Standards, Certifications and Compliance.** Successful Respondent shall comply with ISO 9000, ISO 9001:2000, ISO 14001, ISO 27001/2005, and ISO 27002/2005 and shall apply ITIL standards and Six Sigma processes, or thoroughly explain in their Response why compliance with the standards should not be required.

#### **9.4 Processes, Procedures, Architecture, Standards and Planning.**

- (a) **Successful Respondent Support.** As requested by DIR, Successful Respondent and without limiting the obligation of the Parties under **Section 15.11** shall assist DIR and the appropriate governance committee (as specified in **Exhibit 1.2 Governance**), on an on-going basis in defining (A) the standards, policies, practices, processes, procedures and controls to be adhered to and enforced by Successful Respondent in the performance of the Services, including those identified on **Exhibit 2** and (B) the associated IT technologies architectures, standards, products and systems to be provided, operated, managed, supported and/or used by Successful Respondent in connection therewith (collectively, the "**DIR Standards**"). The Parties acknowledge and agree that, as of the Commencement Date, Successful Respondent is fully informed as to the DIR Standards that have been communicated to it in a manner consistent with **Section 6.2**. Successful Respondent also shall assist DIR on an annual basis in preparing Strategic Plans and short-term implementation plans. The assistance to be provided by Successful Respondent shall include: (i) active participation with DIR and the appropriate governance committee (as specified in **Exhibit 1.2 Governance**), addressing such issues; (ii) assessments of the then-current DIR Standards at a level of detail sufficient to permit DIR to make informed business decisions; (iii) analyses of the appropriate direction for such DIR Standards; (iv) the provision of information to DIR regarding Successful Respondent's technology strategies for its own business; (v) recommendations regarding standards, processes, procedures and controls and associated technology architectures, standards, products and systems; and (vi) the provision of current, historical, and forecasted system capacity, performance and utilization metrics at reasonable requested levels of detail. With respect to each recommendation, Successful Respondent shall provide the following at a level of detail sufficient to permit DIR to make an informed business decision: (1) the projected cost to DIR and the DIR Customers and cost/benefit analyses; (2) the changes, if any, in the personnel and other resources Successful Respondent, DIR and/or the DIR Customers shall require to operate and support the changed environment; (3) the resulting impact on the total costs of DIR and the DIR Customers; (4) the expected performance, quality, responsiveness, efficiency, reliability, security risks and other service levels; and (5) general plans and projected time schedules for development and implementation. Any assistance provided by Successful Respondent under **Section 9.5** shall be at no additional fee or charge beyond the Charges specified in **Exhibit 4.0 Business Model** for the Services, unless an additional Charge has been approved by DIR.
- (b) **DIR Authority and Successful Respondent Compliance.** DIR shall have final authority to promulgate DIR Standards and Strategic Plans and to modify or grant waivers from such DIR Standards and Strategic Plans. Successful Respondent shall (i) comply with and implement the DIR Standards and Strategic Plans in providing the Services, (ii) work with DIR to enforce the DIR Standards and Strategic Plans, (iii) modify the Services as and to the extent necessary and on a schedule to conform to such DIR Standards and Strategic Plans, and (iv) obtain DIR's prior written approval for any deviations from such DIR Standards and Strategic Plans.

#### **9.5 Change Control.**

- (a) **Compliance with Change Control Procedures.** In making any change in the standards, processes, procedures and controls or associated technologies, architectures, standards, products, Materials, Equipment, Systems or services provided, operated, managed, supported or used in connection with the Services, the Parties shall comply with the change control procedures specified in the Service Management Manual ("**Change Control Procedures**"). The Service Management Manual shall contain a procedure that allows DIR to exercise the approval rights in this Section and complies with the following requirements:
  - (i) **Impact Assessment.** If Successful Respondent desires to make any change, upgrade, replacement or addition that may have an adverse impact or require changes as described in **Section 9.6(c)** or increase the risk of Successful Respondent not being able to provide the Services in accordance with this Agreement or violate or be inconsistent with DIR Standards or

Strategic Plans, then Successful Respondent shall prepare a written risk assessment and mitigation plan (1) describing in detail the nature and extent of such adverse impact or risk, (2) describing any benefits, savings or risks to DIR or the DIR Customers associated with such change, and (3) proposing strategies to mitigate any adverse risks or impacts associated with such change and, after consultation and agreement with DIR, implement the plan.

- (ii) **Comparison Analysis.** Each time that Successful Respondent makes a material change to the Materials, Equipment, Systems, or Services, Successful Respondent shall perform a comparison analysis at a reasonable and mutually agreed level of detail to confirm the change shall not have an adverse impact on the costs, operations or environment of DIR or a DIR Customer or on the functionality, interoperability, performance, accuracy, speed, legality, responsiveness, quality or resource efficiency of the Services. In addition, at DIR's request, Successful Respondent shall perform a comparison at a reasonable and mutually agreed level of detail, between the amount of chargeable resources required to perform a representative sample of the Services being performed for DIR immediately prior to the change and immediately after the change. DIR shall not be required to pay for increased chargeable resources usage due to a change except to the extent that such change is requested or approved by DIR after notice from Successful Respondent of such increased chargeable resources usage.
  - (iii) **Testing.** Prior to making any change or using any new (i.e., not tested in or for the DIR environment) Software, Equipment, or System to provide the Services, Successful Respondent shall verify by appropriate testing that the change or item is properly installed, operating in accordance with its specifications, performing its intended functions in a reliable manner and compatible with and capable of operating as part of the DIR environment. This obligation shall be in addition to Successful Respondent's other obligations in this Agreement, including Successful Respondent's obligation to perform any testing as part of the routine deployment or installation of Software or Equipment.
- (b) **Financial Responsibility for Changes.** Without limiting DIR's right of approval under **Section 9.6(c)**, unless otherwise set forth in this Agreement or otherwise expressly approved by DIR, Successful Respondent shall bear all charges, fees, and costs associated with any change desired by Successful Respondent, including all charges, fees and costs associated with (i) the design, installation, implementation, testing and rollout of such change, (ii) any modification or enhancement to, or substitution for, any impacted process or associated Materials, Equipment, System, or Services, (iii) any increase in the cost to DIR or the DIR Customers of operating, maintaining or supporting any impacted process or associated Materials, Equipment, System, or Services and (iv) subject to **Exhibit 4.2 Financial Responsibility Matrix**, any increase in Resource Unit usage resulting from such change.
- (c) **DIR Approval – Cost, Adverse Impact.** Other than as expressly set forth in the Transition Plan as approved by DIR, Successful Respondent shall make no change which may (i) increase DIR's total cost of receiving the Services; (ii) require material changes to, or have an adverse impact on, DIR's or any DIR Customer's operations, facilities, processes, systems, software, utilities, tools, or equipment (including those provided, managed, operated, supported and/or used on their behalf by DIR Contractors); (iii) require DIR or any DIR Customer to install, at their cost or expense, a new version, release, Upgrade of or replacement for any Software or Equipment or to modify any Software or Equipment; (iv) have an adverse impact on the functionality, interoperability, performance, accuracy, speed, responsiveness, quality or resource efficiency of the Services; (v) have an adverse impact on the cost, either actual or planned, to DIR of terminating this Agreement, in whole or in part, or on DIR's rights to insource or use third parties; (vi) have an adverse impact on DIR's or any DIR Customer's environment (including its flexibility to deal with future changes, interoperability and its stability), (vii) introduce new technology to (A) DIR's or any DIR Customer's environment or operations or (B) Successful Respondent's environment, to the extent that such introduction has or may have an adverse impact on DIR's or any DIR Customer's environment; (viii) have an adverse impact on the functionality, interoperability, performance, accuracy, speed, responsiveness, quality, cost or resource efficiency of DIR's Retained Systems and Processes, or (ix) violate or be inconsistent with DIR Standards, DIR Rules, and any Strategic Plan in all cases (i) through (ix) without first obtaining DIR's approval, which approval DIR may withhold in its sole discretion. If Successful Respondent desires to make such a change, it shall provide to DIR a written proposal describing in detail the extent to which the desired change may affect the functionality, performance, price, or resource

efficiency of the Services and any benefits, savings or risks to DIR or the DIR Customers associated with such change.

- (d) **Information for Exercise of Strategic Authority.** In order to facilitate DIR's strategic control pursuant to **Section 9.5**, Successful Respondent shall provide DIR with such information as DIR shall reasonably require prior to making any proposed change. Such information shall include, at a minimum, a description of the proposed rights of DIR and the DIR Customers with respect to ownership and licensing (including any related restrictions) relating to such Materials, Equipment, or other technology. Such description shall include the license fees, maintenance fees and/or purchase or lease terms (if any) for use of such Materials, Equipment, or other technology by DIR, the DIR Customers and their designee(s) upon termination or expiration of this Agreement or the completion of Termination Assistance Services and any limitations or conditions on such use.
- (e) **Temporary Emergency Changes.** Notwithstanding the foregoing, Successful Respondent may make temporary changes required by an emergency if it has been unable to contact the Designated DIR Representative to obtain approval after making reasonable efforts. Successful Respondent shall document and report such emergency changes to DIR not later than the next DIR Business Day after the change is made. Such changes shall not be implemented on a permanent basis unless and until approved by DIR.
- (f) **Implementation of Changes.** Successful Respondent shall schedule and implement all changes so as not to (i) disrupt or adversely impact the operations of DIR or the DIR Customers, (ii) degrade the Services then being received by them, or (iii) interfere with their ability to obtain the full benefit of the Services.

#### **9.6 Software Currency.**

- (a) **Currency of Software.** Subject to and in accordance with **Sections 9.3, 9.4**, and **Exhibit 4.2 Financial Responsibility Matrix**, Successful Respondent shall maintain reasonable currency for Software for which it is financially responsible under this Agreement and provide maintenance and support for Software (including new Upgrades, Major Releases, and Minor Releases) for which it is operationally responsible under this Agreement. Successful Respondent shall (i) maintain Software within one (1) Major Release of the then-current Major Release, unless otherwise specified pursuant to the Software Currency guidelines set out in **Exhibit 4.2 Financial Responsibility Matrix** and (ii) Successful Respondent shall install Minor Releases promptly or, if earlier, as requested by DIR.
- (b) **Evaluation and Testing.** Prior to installing a new Upgrade, Major Release, or Minor Release, Successful Respondent shall evaluate and test such Software to verify that it shall perform in accordance with this Agreement and the DIR Standards and Strategic Plans and that it shall not (i) increase DIR's or the DIR Customers' total cost of receiving the Services, (ii) have an adverse impact on performance or require changes as described in **Section 9.6(c)**, or (iii) violate or be inconsistent with DIR Standards, Strategic Plans, or applicable Laws. The evaluation and testing performed by Successful Respondent shall be at least consistent with the reasonable and accepted industry norms applicable to the performance of such Services and shall be at least as rigorous and comprehensive as the evaluation and testing usually performed by highly qualified service providers under such circumstances.
- (c) **Approval by DIR.** Notwithstanding **Section 9.6(a)**, Successful Respondent shall confer with DIR prior to installing any new Upgrade, Major Release or Minor Release, shall provide DIR with the results of its testing and evaluation of such Software and a detailed implementation plan and shall not install such Software if directed not to do so by DIR. Where specified by DIR, Successful Respondent shall not install new Upgrades, Major Releases or Minor Releases or make other Software changes until DIR has completed and provided formal signoff on successful user acceptance testing. Successful Respondent shall not install new Upgrades, Major Releases or Minor Releases or make other Software changes if doing so would require DIR or the DIR Customers to install new releases of, replace or make any other changes to any Software for which DIR is financially responsible under this Agreement unless DIR consents to such change in advance.

#### **9.7 Access to Specialized Successful Respondent Skills and Resources.**

Upon DIR's request, Successful Respondent shall provide DIR and the DIR Customers with prompt access to Successful Respondent's specialized services, personnel, and resources pertaining to standards, processes and procedures and associated software, equipment and systems on an expedited basis, taking

into account the relevant circumstances (the "**Specialized Services**"). The Parties acknowledge that the provision of such Specialized Services may, in some cases, constitute New Services for which Successful Respondent is entitled to additional compensation, but in no event shall Successful Respondent be entitled to any additional compensation for New Services under this Section unless the DIR Statewide Technology Center Services Manager and Successful Respondent Account Manager, or their authorized designees, expressly agree upon such additional compensation or Successful Respondent's entitlement to additional compensation is established through the dispute resolution process. If DIR authorizes Successful Respondent to proceed but the Parties disagree as to whether the authorized work constitutes New Services and DIR reasonably believes that such work is material and is required on an urgent basis, Successful Respondent shall proceed with such work if directed to do so by DIR. The Parties will diligently seek to resolve any such dispute, including through prompt submission of the disagreement to the dispute resolution pursuant to **Article 19**, as appropriate.

## 9.8 Audit Rights.

- (a) **Contract Records.** Successful Respondent shall maintain complete and accurate records of, and supporting documentation for, all Charges, all DIR Data and all transactions, authorizations, changes, implementations, soft document accesses, reports, filings, returns, analyses, procedures, controls, records, data or information created, generated, collected, processed, or stored by Successful Respondent in the performance of its obligations under this Agreement ("**Contract Records**"). Successful Respondent shall maintain such Contract Records in accordance with applicable Laws and the terms of this Agreement. Successful Respondent shall retain Contract Records in accordance with the applicable DIR Customer's record retention policy (as such policies may be modified from time to time and provided to Successful Respondent in writing) during the Term and thereafter through the end of the seventh (7<sup>th</sup>) full year after the year in which Successful Respondent stopped performing any Services (the "**Audit Period**").
- (b) **Operational Audits.** During the Audit Period, Successful Respondent shall provide to DIR and DIR Customers (and internal and external auditors, inspectors, regulators, and other representatives that DIR or DIR Customers may designate from time to time, including customers, vendors, licensees, and other third parties to the extent DIR or the DIR Customers are legally or contractually obligated to submit to audits by such Entities), and the State Auditor's Office and any successor governmental authorities (collectively, "**DIR Auditors**"), provided any such external customers, vendors, licensees and other third parties agree to protect Successful Respondent's Confidential Information subject to applicable public information laws, access at reasonable hours and upon reasonable notice to Successful Respondent Personnel, to the facilities at or from which Services are then being provided and to Successful Respondent records and other pertinent information, all to the extent relevant to the Services and Successful Respondent's obligations under this Agreement. Such access shall be provided for the purpose of performing audits and inspections to (i) verify the integrity of DIR Data, (ii) examine the systems that process, store, support, and transmit that data (including system capacity, performance, and utilization), (iii) examine the internal controls (e.g., financial controls, human resources controls, organizational controls, input/output controls, system modification controls, processing controls, system design controls, and access controls) and the security, disaster recovery, and back-up practices and procedures, (iv) examine Successful Respondent's performance of the Services, (v) verify Successful Respondent's reported performance against the applicable Service Levels, (vi) examine Successful Respondent's measurement, monitoring, and management tools, and (vii) enable DIR and the DIR Customers to meet applicable legal, regulatory and contractual requirements. Successful Respondent shall (1) provide any assistance reasonably requested by DIR Auditors in conducting any such audit, including installing and operating audit software, (2) make requested Successful Respondent Personnel, records and information available to DIR Auditors, and (3) in all cases, provide such assistance, personnel, records and information in an expeditious manner to facilitate the timely completion of such audit. If an audit reveals a non-trivial breach of this Agreement, Successful Respondent shall, upon DIR's request, promptly reimburse DIR for reasonable auditors' fees including any follow-up audit to verify that such breach has been corrected.
- (c) **Financial Audits.** During the Audit Period, Successful Respondent shall provide to DIR Auditors access at reasonable hours to Successful Respondent Personnel and to Contract Records and other pertinent information to conduct financial audits, including the audit work papers of Successful Respondent's auditor to the extent applicable to the Services and obtainable by Successful Respondent, all to the extent relevant

to the performance of Successful Respondent's obligations under this Agreement. Such access shall be provided for the purpose of performing audits and inspections to (i) verify the accuracy and completeness of Contract Records, (ii) verify the accuracy and completeness of Charges and any Pass-Through Expenses and Out-of-Pocket Expenses, (iii) examine the financial controls, processes, and procedures utilized by Successful Respondent in connection with the Services, (iv) examine Successful Respondent's performance of its other financial and accounting obligations to DIR under this Agreement, and (v) enable DIR and DIR Customers to meet applicable legal, regulatory, and contractual requirements, in each case to the extent applicable to the Services and/or the Charges for such Services. Successful Respondent shall (1) provide any assistance reasonably requested by DIR Auditors in conducting any such audit, (2) make requested Successful Respondent Personnel, records, and information available to DIR Auditors, and (3) in all cases, provide such assistance, personnel, records and information in an expeditious manner to facilitate the timely completion of such audit. If any such audit reveals an overcharge by Successful Respondent, and Successful Respondent does not successfully dispute the amount questioned by such audit in accordance with **Article 19**, Successful Respondent shall promptly pay to DIR the amount of such overcharge, together with interest at the rate specified by the Texas Comptroller of Public Accounts in accordance with Section 2251.025(b), Texas Government Code, from the date of receipt by Successful Respondent of the overcharged amount until the date of payment to DIR. In addition, if any such audit reveals an overcharge of more than five percent (5%) of the audited Charges in any Charges category, Successful Respondent shall, upon DIR's request, promptly reimburse DIR for reasonable auditors' fees.

- (d) **Audits by Governmental Authorities.** Acceptance of funds under this Agreement by Successful Respondent acts as acceptance of the authority of the State Auditor's Office, the State Comptroller Claims Division and any successor governmental authorities to conduct audits and investigations in connection with those funds. The State Auditor's Office and the State Comptroller Claims Division shall at any time have access to and rights to examine, audit, excerpt and transcribe any pertinent books, documents, working papers and records of Successful Respondent relating to this Agreement, notwithstanding any other provision of this Agreement. Successful Respondent shall fully cooperate with and provide all assistance requested by the State Auditor's Office or the State Comptroller Claims Division in the conduct of such audits or investigations, including providing all records requested. In addition to and without limitation on the other audit provisions of this Agreement, pursuant to Section 2262.003, Tex. Government Code, the State Auditor may conduct an audit or investigation of Successful Respondent or any other entity or person receiving funds from the State directly through this Agreement or indirectly through a subcontract under this Agreement. The acceptance of funds by Successful Respondent or any other entity or person directly under this Agreement or indirectly through a subcontract under this Agreement acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. This Agreement may be unilaterally amended by DIR upon notice to Successful Respondent to bring this Agreement into compliance with any rules and procedures of the State Auditor's Office in the implementation and enforcement of Section 2262.003.
- (e) General Procedures.
- (i) Successful Respondent shall obtain audit rights equivalent to those specified in this **Section (i)** from all Subcontractors (and in all events shall obtain such audit rights from all Subcontractors as required under the Texas Government Code, including Texas Government Code 2262.003, or other applicable Law), and shall cause such rights to extend to DIR Auditors.
  - (ii) In performing audits, DIR Auditors shall endeavor to avoid unnecessary disruption of Successful Respondent's operations and unnecessary interference with Successful Respondent's ability to perform the Services in accordance with the Service Levels.
  - (iii) DIR Auditors shall be given adequate private workspace in which to perform an audit, plus access to photocopiers, telephones, facsimile machines, computer hook-ups, and any other facilities or equipment needed for the performance of the audit.
  - (iv) Successful Respondent recognizes that DIR must comply with applicable Laws respecting procurement of services in connection with any engagement of an audit firm or other consultant for conducting the audits contemplated in this **Section (i)**. To the extent permissible under such Laws and the reasonable practice of DIR, DIR shall consult with Successful Respondent

respecting the audit firm or other consultant and appropriate criteria related thereto (including general terms of engagement) in making its selection; provided, however, DIR reserves the right to determine, in its sole discretion, the appropriate audit firm or consultant to be engaged and the arrangement for such engagement.

- (v) DIR shall provide Successful Respondent with notice at least three (3) DIR Business Days prior to any operational or financial audit by a DIR Auditor; provided that no such notice shall be required with respect to audits conducted pursuant to **Section 9.9(d)** or to the extent limited due to extenuating circumstances. To the extent DIR has advance notice of an audit to be conducted pursuant to **Section 9.9(d)**, it shall provide reasonable notice to Successful Respondent.
- (f) **Successful Respondent Internal Audit.** If Successful Respondent determines as a result of its own internal audit that it has overcharged DIR, then Successful Respondent shall promptly pay to DIR the amount of such overcharge, together with interest at the rate specified by the Texas Comptroller of Public Accounts in accordance with Section 2251.025(b), Texas Government Code, from the date of receipt by Successful Respondent of the overcharged amount until the date of payment to DIR. In the event such an audit results in a determination that Successful Respondent has undercharged DIR, then, subject to **Section 12.2(d)** and DIR's right to dispute the amount of such undercharge, Successful Respondent shall promptly report such undercharge to DIR and may invoice DIR for such undercharged amounts.
- (g) **Successful Respondent Response.** Successful Respondent and DIR shall meet promptly upon the completion of an audit conducted pursuant to this **Section (i)** (i.e., an exit interview) and/or issuance of an interim or final report to Successful Respondent and DIR following such an audit. Successful Respondent shall respond to each exit interview and/or audit report in writing within thirty (30) days, unless a shorter response time is specified in such report. Successful Respondent and DIR shall develop and agree upon an action plan to promptly address and resolve any deficiencies, concerns and/or recommendations identified in such exit interview and/or audit report and Successful Respondent, at its own expense, shall undertake remedial action in accordance with such action plan and the dates specified therein to the extent necessary to comply with Successful Respondent's obligations under this Agreement.
- (h) **Successful Respondent Response to External Audits.** If an audit by a governmental body, standards organization, or regulatory authority having jurisdiction over DIR, a DIR Customer or Successful Respondent results in a finding that Successful Respondent is not in compliance with any applicable Law or standard, including any generally accepted accounting principle or other audit requirement relating to the performance of its obligations under this Agreement, Successful Respondent shall, if and to the extent such audit deficiency or finding of non-compliance results from Successful Respondent's failure to comply with its obligations under this Agreement, at its own expense and within the time period specified by such auditor, address and resolve the deficiency(ies) identified by such audit governmental body, standards organization or regulatory authority, in the manner approved by DIR, to the extent necessary to comply with Successful Respondent's obligations under this Agreement.
- (i) **SOC 2 Reports.**
  - (i) In addition to its other obligations under this **Section 9.8**, Successful Respondent shall cause a Service Organization Controls 2 Report, type 2, ("SOC 2 Report") (SOC 2: Attestation Standards, Section 101 of the AICPA Codification Standards (AT Section 101). "Reporting on Controls at a Service Organization Relevant to Security, Availability, Processing Integrity, Confidentiality, or Privacy (SOC 2)", as published by the AICPA in 2011) to be conducted by an independent, nationally recognized public accounting firm qualified to perform such audits at least annually, prepared in accordance with the relevant and current standards. The Successful Respondent acknowledges that each such SOC 2 Report shall cover Successful Respondent's policies, procedures, controls and systems for twelve (12) months of Successful Respondent's performance of the Services, in accordance with the State fiscal year (and each successive twelve (12) month period thereafter), and in particular those policies, procedures, controls and systems applicable to an audit of Successful Respondent's customers. Prior to initiating any such SOC 2 Report, Successful Respondent shall confer with DIR as to the scope and timing of each SOC 2 Report and shall accommodate DIR's requested modifications (if any) for each such SOC 2 Report to the extent reasonably practicable.

- (ii) Successful Respondent shall cause its Subcontractors performing the Services to allow SOC 2 Reports on their policies, procedures, controls and systems that complement the SOC 2 Report performed pursuant to clause (i) above, when requested by Successful Respondent, DIR, Customers, Texas State Auditor's Office, and other entities authorized by DIR. If Successful Respondent is unable to cause its Subcontractors to conduct such SOC 2 Reports or chooses to conduct the SOC 2 Reports of such complementary policies, procedures, contracts and systems itself, then Successful Respondent shall engage an independent, nationally recognized public accounting firm to perform such audits of its Subcontractors to ensure that the policies, procedures, controls and systems of the Subcontractor complement those of Successful Respondent. For purposes of this clause (ii), the term "complement" shall mean that the policies, procedures, controls and systems of the Subcontractors, when taken as a whole in combination with the policies, procedures, controls and systems of Successful Respondent, represent the entire control environment under this Agreement.
- (iii) Unless otherwise agreed by the Parties, such report shall be conducted so as to result in an annual final report dated as of each December 31st or such date that represented the end of the Successful Respondent's fiscal year during the Term with a copy of such final report provided by Successful Respondent to DIR and DIR Auditors ten (10) days from the date Successful Respondent receives the final report from the external firm. In all events, each report delivered by such date shall be unqualified and Successful Respondent shall respond to such report in accordance with **Section 9.8(g)**. In addition, within ten (10) Business Days of DIR's written request to Successful Respondent, Successful Respondent shall provide a letter to DIR signed by an officer of Successful Respondent certifying that there has been no change in the policies, procedures, controls and systems of Successful Respondent since the date of the most recent SOC 2 Report.
- (iv) To the extent DIR provides reasonable notice and requests that, in addition to the SOC 2 Reports described in clauses (i) and (ii) above, Successful Respondent conduct DIR-specific SOC 2 Report, Successful Respondent shall, at DIR's expense, cause such DIR-specific SOC 2 Report to be performed by a nationally recognized public accounting firm qualified to perform such Report; provided, however, that Successful Respondent timely notifies DIR of such expense, obtains DIR's prior written approval and uses commercially reasonable efforts to minimize such expense. A copy of the final report of each such DIR-specific SOC 2 Report shall be delivered to DIR by Successful Respondent ten (10) days from the date Successful Respondent receives the final audit report from the external firm. If Successful Respondent undertakes additional or different SOC 2 Reports (other than customer-specific audits requested and paid for by other Successful Respondent customers), Successful Respondent shall accord DIR the rights described in clause (i) above with respect to such reports. To the extent DIR provides reasonable notice and requests that, in addition to the SOC 2 Reports described in clauses (i) and (ii) above, DIR may, in coordination with the DIR Auditors, conduct DIR-specific SOC 2 Report on the services facility at or from which the Services are provided.
- (v) During the period when SOC 2 Reports are performed under this **Section 9.8(i)**, Successful Respondent shall provide DIR with periodic updates on the status of such reports and any issues that are specific to DIR or that are reasonably anticipated to impact in any material respect the control environment under this Agreement. Upon completion of any such SOC 2 Report that identifies any significant deficiency or material weakness, Successful Respondent shall prepare and implement a corrective action plan to correct any such deficiency or resolve any problem identified from such SOC 2 Report specific to DIR or that impact in any material respect the control environment under this Agreement. A copy of the corrective action plan shall be provided to DIR within thirty (30) days following the discovery of such deficiency or problem. If the SOC 2 Report shows a control issue that is specific to DIR or that impacts in any material respect the control environment under this Agreement (a "Control Deficiency") that has not theretofore been corrected or properly mitigated and such failure to mitigate the Control Deficiency leads to a qualified opinion being issued by Successful Respondent's auditor, then Successful Respondent's failure to promptly remedy the Control Deficiency will be deemed a material breach of this Agreement triggering a termination rights for DIR under **Section 20.1**.



- (vi) If Successful Respondent is unable to timely deliver to DIR any report described in this **Section 9.8(i)** that does not identify any significant deficiency or material weakness, Successful Respondent shall (A) provide a certificate from an officer of Successful Respondent to DIR certifying, on the date such report is delivered, or is otherwise due to be delivered, the circumstances giving rise to any delay in delivering such report, (B) promptly take such actions as deemed necessary by DIR to resolve such circumstances and deliver such report as promptly as practicable thereafter, and (C) permit DIR and the DIR Auditors (or their agents), at Successful Respondents' expense, to perform such procedures and testing of the operating effectiveness of Successful Respondent's policies, procedures, controls and systems for the period otherwise covered by such report.

(j) **Independent Annual Audit**

Pursuant to Section 2054.2721 Texas Government Code:

*"(a) Not later than August 1 of each year, any private vendor chosen to implement or manage the project shall have an audit of the vendor's finances associated with the management and operation of the project performed by an independent certified public accountant selected by the state. The vendor shall pay for the audit and shall have a copy of the audit provided to the department.*

*(b) Not later than August 15 of each year, the department shall provide a copy of the audit report to:*

*(1) the presiding officer of each house of the legislature; and*

*(2) the chair of each committee in the legislature with primary jurisdiction over the department.*

*(c) The department shall keep a copy of the audit report and make the audit report available for inspection by any interested person during regular business hours."*

(d) Vendor Controller will coordinate with DIR to deliver draft audited financial statements for DIR review by June 30 each year and will deliver final audited financial statements to DIR by July 31.

Successful Respondent understands it is required to maintain accounting records for Texas.gov Payment Services in accordance with Generally Accepted Accounting Principles (GAAP). Successful Respondent further understands the State or its designee will conduct an audit of Successful Respondent's financial statements, for the Texas.gov Payment Services in accordance with generally accepted audit standards for Successful Respondent's full fiscal year.

**9.9 Subcontractors.**

- (a) **Use of Subcontractors.** Successful Respondent shall not subcontract any of its responsibilities under this Agreement without DIR's prior written approval, which may be withheld in DIR's sole discretion. Prior to entering into a subcontract with a third party for the Services, Successful Respondent shall (i) deliver to DIR a copy of the proposed subcontract (other than charges thereunder, except to the extent such charges are the basis on which Charges are based), or (in DIR's reasonable discretion) a detailed description of the scope and material terms (other than pricing terms) of the proposed subcontract, (ii) obtain for DIR the licenses described in **Article 14**, (iii) give DIR reasonable prior notice of the subcontract, specifying the components of the Services affected, the scope of the proposed subcontract, the identity and qualifications of the proposed Subcontractor and the reasons for subcontracting the work in question, the location of the Subcontractor facilities from which the Services shall be provided, the extent to which the subcontract shall be dedicated and the Subcontractor's willingness to grant the rights described in **Section 4.3(b)(ii)** and **Article 14** and (iv) obtain DIR's prior written approval of such Subcontractor. A list of Subcontractors that DIR has approved as of the Effective Date is attached to this Agreement as **Exhibit 1.4 Subcontractors**, and the Parties acknowledge that such Subcontractors are approved to perform the Services to the extent described in **Exhibit 1.4 Subcontractors** pursuant to the subcontracts previously provided to DIR. For the purposes of this Contract, merchant processors are not considered Subcontractors.
- (b) **Right to Revoke Approval.** DIR may revoke its prior approval of a Subcontractor and direct Successful Respondent to replace any Subcontractor as soon as possible at no additional cost to DIR, if the Subcontractor's performance is materially deficient or if there are other reasonable grounds for removal. Successful Respondent shall have a reasonable opportunity to investigate DIR's concerns, correct the

Subcontractor's deficient performance and provide DIR with a written action plan to assure that such deficient performance shall not recur. If DIR is not reasonably satisfied with Successful Respondent's efforts to correct the Subcontractor's deficient performance and/or to prevent its recurrence, Successful Respondent shall, as soon as possible, remove and replace such Subcontractor. Successful Respondent shall continue to perform its obligations under this Agreement, notwithstanding the removal of the Subcontractor. DIR shall have no responsibility for any termination charges or cancellation fees that Successful Respondent may be obligated to pay to a Subcontractor as a result of the removal of such Subcontractor at DIR's request or the withdrawal or cancellation of the Services then performed by such Subcontractor as permitted under this Agreement.

- (c) **Performance by Successful Respondent Affiliates.** Successful Respondent may subcontract certain Successful Respondent obligations under this Agreement to Successful Respondent's Affiliates and, without limiting the provisions of **Sections 20.3** and **21.1**, DIR hereby approves such subcontracts, provided that Successful Respondent shall (i) provide DIR with prior notice of any such performance, (ii) obtain for DIR, the DIR Customers and their designee(s) the rights described in **Section 4.4**, and (iii) obtain for DIR, the DIR Customers and their designee(s) the licenses described in **Article 14**.
- (d) **Successful Respondent Responsibility.** Unless otherwise approved by DIR, the terms of any subcontract must be sufficient to enable Successful Respondent to perform all of its responsibilities and comply with all of its obligations under this Agreement, including: (i) confidentiality and intellectual property obligations; (ii) obtaining for DIR, the DIR Customers and their designee(s) the rights described in **Section 4.3**, (iii) obtaining for DIR, the DIR Customers and their designee(s) the licenses described in **Article 14**, (iv) DIR's approval rights (which must apply directly to the Subcontractor); (v) compliance with DIR Rules, DIR Standards, Strategic Plans and applicable Laws; (vi) audit rights as described in **Section 9.8**; (vii) Key Personnel; (viii) insurance coverage as described in **Attachment B Insurance and Risk of Loss**, with coverage limits consistent with the scope of the work to be performed by such Subcontractors; and (ix) obtaining for DIR and DIR Customers the rights specified in **Section 9.9(a)**. For purposes of this Agreement, services, functions, and responsibilities performed by Subcontractors (including their personnel) shall be deemed Services performed by Successful Respondent, the obligations of Successful Respondent hereunder related to such performance shall be deemed applicable to Subcontractors as if expressly so provided herein and references to Successful Respondent in this Agreement (including references to a "**Party**") constituting references to Successful Respondent) shall include Subcontractors. Successful Respondent shall be DIR's sole point of contact regarding the Services, including with respect to payment. Notwithstanding the terms of the applicable subcontract, the approval of any Subcontractor by DIR or the availability or unavailability of Subcontractor insurance, Successful Respondent shall be and remain responsible and liable for any failure by any Subcontractor or Subcontractor personnel to perform in accordance with this Agreement or to comply with any duties or obligations imposed on Successful Respondent under this Agreement to the same extent as if such failure to perform or comply was committed by Successful Respondent or Successful Respondent personnel. Without limiting the foregoing, Successful Respondent warrants and covenants that in no event shall any provision of this Agreement, or any right or benefit of DIR or the DIR Customers provided for under this Agreement, be reduced, limited or otherwise adversely affected (including through any increase in cost, Charge or expense, including taxes) as a consequence of the performance of any Services by or through Subcontractors.
- (e) **DIR's ability to contract with Subcontractors.** Successful Respondent is permitted to secure from its Subcontractors covenants not to compete with Successful Respondent with respect to the award of the particular Services for which Subcontractor was engaged to perform under the Subcontract, provided that any such covenant not to compete must be coterminous with the Agreement.
- (f) **Historically Underutilized Businesses.** Successful Respondent shall use commercially reasonable efforts to select subcontractors for the performance of the Services in accordance with DIR's then-current "Policy on Utilization of Historically Underutilized Businesses."

#### **9.10 Technology Evolution.**

- (a) **Obligation to Evolve.** Successful Respondent will cause the Services, Software and other assets used to deliver the Services, as approved by DIR, to evolve and to be modified, enhanced, supplemented and replaced as necessary for the Services, Software, and other assets used to deliver the Services to keep current with industry best practices and a level of technology that is: (1) compliant with all Laws applicable

to the provision and receipt of the Services; (2) used by Successful Respondent and other top-tier IT providers in providing services similar to the Services to other customers; and (3) in general use within the IT industry. Any changes to the Services, Software, and other assets used to deliver the Services implemented in accordance with this Section will be deemed to be included within the scope of the Services to the same extent and in the same manner as if expressly described in this Agreement, at no additional charge to DIR.

- (b) **Obligation to Identify Best Practices.** Throughout the Term, Successful Respondent shall (1) identify and apply best practice techniques, methods and technologies in the performance of the Services; (2) train Successful Respondent-Personnel in the use of new techniques, methods, and technologies that are in general use within Successful Respondent's organization and the IT and business consulting industries; and (3) make necessary investments to keep and maintain the Software and other assets used to deliver the Services at the level of currency defined in this Section.
- (c) **Successful Respondent Briefings.** Successful Respondent will meet with DIR at least once during every 180-day period throughout the Term to inform DIR of: (1) any investments, modifications, enhancements, and improvements that Successful Respondent is required or proposes to make to the Services, Software, and other assets used to deliver the Services pursuant to this Section; (2) new information processing technology or business processes Successful Respondent is developing; (3) any pending or actual changes in Law that could reasonably be expected to affect the provision or receipt of the Services; and (4) technology or process trends and directions of which Successful Respondent is otherwise aware that could reasonably be expected to have an impact on DIR's IT operations or business.

#### 9.11 Retained Systems and Processes.

- (a) **No Adverse Effect.** Except as otherwise expressly agreed upon by the Parties in the Transition Plan, any Project Work Order or in connection with any New Services or Contract Change, Successful Respondent shall not, by any act or omission, (i) adversely affect or alter the functionality, interoperability, performance, accuracy, speed, responsiveness, quality, cost, or resource efficiency of DIR's Retained Systems and Processes without the prior consent of DIR or (ii) require changes to DIR's Retained Systems and Processes, including associated processes, applications, systems, software, utilities, tools, or equipment, without the prior consent of DIR.
- (b) **Interface.** Successful Respondent shall provide that the processes, Systems, Software, and Equipment used by Successful Respondent to provide the Services interface and integrate with DIR's Retained Systems and Processes.
- (c) **Assistance.** As part of the Services, Successful Respondent shall provide DIR (upon DIR's written request) with Services in relation to DIR's Retained Systems and Processes, including: liaising with DIR or third parties regarding the impact of any alterations to DIR's Retained Systems and Processes and vice versa.

#### 9.12 Multi-sourcing Services Integration and Cooperation

Successful Respondent acknowledges and agrees that it will deliver the Services to DIR and DIR Customers in an environment in which there are various other Service Component Providers providing related services to DIR and DIR Customers ("Multi-sourcing Services Environment"). Successful Respondent acknowledges that its provision of the Services in a multi-supplier environment requires significant integration, cooperation, and coordination of processes and procedures with other Service Component Providers. **Exhibit 3.4 Performance Analytics** specifies certain Service Levels and obligations to DIR and DIR Customers related to the provision of the Services in a multi-supplier environment.

The Parties shall cooperate with the utmost good faith to reach reasonable and timely agreements on such further definition and clarification, and agree that such further definitions and clarifications shall in all respects be consistent with the terms of the security assessment requirements in **Exhibit 2.1.1 Cross-Functional Services Statement of Work**. In addition, to the extent that a security assessment company reasonably establishes that certain definitions, procedures and methodologies are widely used in security assessments, the Parties agree to generally rely on the security assessment company's definitions, procedures, and methodologies for guidance in reaching agreement. The Parties acknowledge that in reaching the final results of a security assessment, the security assessment company will be required to

exercise its professional judgment and discretion in certain matters and, assuming such judgments are within established industry practices for security assessments, the Parties will defer to the conclusions of the security assessment company.

Successful Respondent acknowledges that DIR views the right to conduct Assessments as a critical inducement to DIR's agreement to many of the terms of this Agreement, including the Term and termination rights provided for in the Agreement, and therefore Successful Respondent agrees that it will cooperate in good faith to accomplish the objectives contemplated by the security assessment for the benefit of DIR.

### **9.13 Merchant Processors are not Subcontractors**

Merchant processors (e.g., First Data and WorldPay) shall not be treated as Subcontractors under this Agreement. Successful Respondent will provide DIR any such reports or similar reports provided to Successful Respondent as part of the merchant processor standard product offerings, including access to SOC 1 and SOC 2 reports, as available and subject to merchant processor confidentiality restrictions, and Successful Respondent will seek DIR's approval prior to engaging a new merchant processor. In addition, Successful Respondent's merchant processors are subject to an evaluation as a Service Provider in Successful Respondent's SOC Report. Successful Respondent will remain responsible for merchant processors' fulfillment of the service levels.

### **9.14 Monitoring Tools**

As requested by DIR, Successful Respondent will provide DIR and its designee access for audit or operational reporting, on-line view, and notification components of any measurement and monitoring tools used by Successful Respondent in connection with its delivery of the Services. Each such tool must be approved by DIR prior to implementation.

## **10 DIR RESPONSIBILITIES**

### **10.1 Responsibilities.**

In addition to DIR's responsibilities as expressly set forth elsewhere in this Agreement, DIR shall be responsible for the following:

- (a) **Designated DIR Representative.** DIR shall designate one (1) individual to whom all Successful Respondent communications concerning this Agreement may be addressed (the "**Designated DIR Representative**"), who shall have the authority to act on behalf of DIR and the DIR Customers in all day-to-day matters pertaining to this Agreement. DIR may change the Designated DIR Representative upon notice to Successful Respondent. Additionally, the Designated DIR Representative may, upon notice to Successful Respondent, delegate such of his or her responsibilities to other DIR employees as the Designated DIR Representative deems appropriate.
- (b) **Cooperation.** DIR shall cooperate with Successful Respondent by, among other things, making available, as reasonably requested by Successful Respondent, management decisions, information, approvals and acceptances so that Successful Respondent may accomplish its obligations and responsibilities hereunder.
- (c) **Requirement of Writing.** To the extent Successful Respondent is required under this Agreement to obtain DIR's approval, consent, or agreement, such approval, consent, or agreement must be in writing and must be signed by, or directly transmitted by electronic mail from, the Designated DIR Representative or an authorized DIR representative. Notwithstanding the preceding sentence, the Designated DIR Representative may agree in advance in writing that as to certain specific matters oral approval, consent, or agreement shall be sufficient.
- (d) **Efforts to Coordinate PCI Compliance Requirements of DIR Customers and Other SCPs.** The Parties understand and agree certain personal and/or sensitive information may be transmitted and/or received in connection with this Agreement, and each Party is responsible for the security of cardholder data in its possession. DIR will require DIR Customers, the applicable SCPs and any of their subcontractors to comply with the Payment Card Industry Data Security Standards ("PCI-DSS") and any amendments thereto. If the requirements of the foregoing sentence are not met (1) any resulting fines incurred by

Successful Respondent as a result of such specific noncompliance are deemed “Out-of-Pocket Expenses” reimbursed in accordance with **Section 10.2** and (2) Successful Respondent may disable any associated merchant IDs.

### **10.2 Savings Clause.**

Successful Respondent’s failure to timely or otherwise perform its responsibilities under this Agreement (including failure to meet the Service Levels or Critical Milestones) shall be excused if and to the extent such Successful Respondent non-performance is caused by (i) the wrongful or tortious actions or omissions of DIR or a DIR Customer or (ii) the failure of DIR or a DIR Customer to perform DIR's obligations under this Agreement, but only if and to the extent (A) Successful Respondent, upon becoming aware of such an occurrence, immediately and expeditiously notifies DIR of such wrongful or tortious action or failure to perform and its inability to perform under such circumstances, (B) Successful Respondent provides DIR with reasonable opportunity to correct such wrongful or tortious action or failure to perform and thereby avoid such Successful Respondent non-performance, (C) Successful Respondent identifies and pursues commercially reasonable means to avoid or mitigate the impact of such wrongful or tortious action or failure to perform, (D) Successful Respondent uses commercially reasonable efforts to perform notwithstanding such wrongful or tortious action or failure to perform (with DIR reimbursing Successful Respondent for its additional reasonable Out-of-Pocket Expenses incurred in connection with such effort provided, however, that DIR has provided prior written approval of any such additional Out-of-Pocket Expenses), and (E) Successful Respondent conducts a Root Cause Analysis and thereby demonstrates that such wrongful or tortious action or failure to perform is the cause of Successful Respondent’s non-performance. Successful Respondent acknowledges and agrees that the circumstances described in this **Section 10.2**, together with **Section 18.2** are circumstances in which its failure to perform its responsibilities under this Agreement or to meet the Service Levels will be excused and that Successful Respondent will not assert that any other act or omission of DIR or a DIR Customer excuses any such failure on Successful Respondent’s part, provided, however, that upon the occurrence of a Service Level Escalation Event or a Governance Escalation Event, Successful Respondent may escalate such issue for resolution through governance in accordance with **Exhibit 1.2 Governance**, which resolution may include excusing Successful Respondent’s performance. Solely for the purposes of excusing Successful Respondent’s performance under this **Section 10.2** DIR will consider the wrongful or tortious actions or omissions of a DIR Contractor engaged by a DIR Customer provided that such DIR Contractor is not a DIR Service Component Provider.

### **10.3 Governance Escalation Event.**

A Governance Escalation Event occurs, if (a) the Successful Respondent asserts that it has been unable to perform all or a portion of the Services solely as a result of the failure by a Service Component Provider to perform certain obligations reasonably specified in the Service Management Manual or in the applicable Operating Agreement (OA), (b) the Successful Respondent has performed its own obligations as set forth in the Agreement, including the Statements of Work, Service Management Manual, and the applicable OA, and (c) the Successful Respondent, upon becoming aware of such an occurrence or failure, (i) immediately notifies the Service Component Provider of such failure and that such failure will result in a failure by the Successful Respondent to perform its obligations to DIR under such circumstances, (ii) provides the Service Component Provider with reasonable opportunity to correct such failure to perform and thereby avoid the Successful Respondent’s non-performance, (iii) uses commercially reasonable efforts to perform its obligations under the Agreement notwithstanding such failure to perform, (iv) has notified DIR that corrective action has commenced, and (v) has otherwise exhausted all other rights and remedies to cause the Service Component Provider to perform. Upon the occurrence of a Governance Escalation Event, the Successful Respondent may escalate the Service Component Provider's failure through the appropriate governance structure for resolution in accordance with **Exhibit 1.2 Governance**. If the applicable governance committee has determined that Successful Respondent has satisfied each of the requirements and obligations set forth above, such resolution shall include excusing Successful Respondent’s performance related to such failure and may include other actions as reasonably determined by DIR including appropriate changes to the Service Management Manual and/or the applicable OA.

## 11 FEES

### 11.1 General.

- (a) **Payment of Charges.** In consideration of Successful Respondent's performance of the Services and in accordance with Chapter 2251, Texas Government Code, DIR shall pay to Successful Respondent pursuant to Exhibit 4.1 Pricing Structure.
- (b) **DIR Cost Recovery Component.** The DIR cost recovery component is included in the fees charged by the Texas.gov program to each DIR Customer and Constituent for the Services, which include the Charges plus a DIR cost recovery component as authorized in Chapter 2054.2591, Texas Government Code. Such cost recovery components may change over time and DIR will provide Successful Respondent with thirty (30) days advance notice of a change in the cost recovery component when a cost recovery change results in a Texas.gov fee change. Successful Respondent consents to DIR retaining its cost recovery component from amounts collected from DIR Customers and Constituents for Services sold hereunder. Successful Respondent acknowledges that DIR is its billing agent for all Services.
- (c) **No Additional Charges.** Unless expressly set forth in this Agreement or in **Exhibit 4.0 Business Model** as a responsibility of DIR, there shall be no charges, fees, expenses, or other amounts payable to Successful Respondent for the provision of Services. Any costs incurred by Successful Respondent prior to the Commencement Date are included in the Charges and are not to be separately paid or reimbursed by DIR.
- (d) **Incidental Expenses.** Successful Respondent acknowledges that, except as expressly provided otherwise in this Agreement, expenses that Successful Respondent incurs in performing the Services (including management, travel and lodging, document reproduction and shipping, equipment, and software required by Successful Respondent Personnel, and long-distance telephone) are included in the Charges set forth in **Exhibit 4.0 Business Model**. Accordingly, such Successful Respondent expenses shall not be separately paid or reimbursed by DIR unless DIR has agreed in advance and in writing to reimburse Successful Respondent for the expenses, and in all events any such expenses shall not exceed the amounts authorized by the current State Travel Regulations or other applicable Laws.
- (e) **No Charge for Reperformance.** At no additional cost or expense to DIR and the DIR Customers, Successful Respondent shall reperform (including, subject to **Section 13.5**, any required backup or restoration of data from scheduled backups or, if not available on such backups, restoration by other means with DIR's reasonable cooperation) any Services that result in incorrect outputs or that are not correctly performed due to an error or breach of this Agreement by Successful Respondent, and the resources required for such performance shall not be counted in calculating the Charges payable or resources utilized by DIR and the DIR Customers hereunder and Successful Respondent shall be solely responsible for any additional Pass-Through Expenses and other costs and expenses incurred by DIR and the DIR Customers in connection with such performance.
- (f) **Efforts to Minimize.** Successful Respondent shall continually seek to identify methods of reducing and minimizing DIR's and the DIR Customers' total cost of receiving the Services (including the amount of Pass-Through Expenses and Retained Expenses) and shall notify DIR of such methods and the estimated potential savings associated with each such method.
- (g) **DIR Customer Services.**
  - (i) **DIR Customers.** To the extent a DIR Customer shall receive less than all of the Services, DIR shall identify the categories of Services to be provided by Successful Respondent to such DIR Customer. DIR Customers are neither authorized to direct or instruct Successful Respondent nor to act for or on behalf of DIR (including by providing notices, approvals, consents, waivers, or the like), in each case unless otherwise expressly provided in the Service Management Manual or to the extent DIR has otherwise notified Successful Respondent that a DIR Customer is so authorized. Except as otherwise expressly provided in the Service Management Manual or to the extent DIR has otherwise notified Successful Respondent, in all circumstances under this Agreement, DIR shall be Successful Respondent's sole point of contact regarding the Services.
  - (ii) **New DIR Customers.** From time to time DIR may request that Successful Respondent provide Services to Entities that qualify as DIR Customers and that were not previously receiving such

Services. Except as provided in **Section 11.5** (to the extent constituting New Services) or otherwise agreed by the Parties, all such Services shall be performed in accordance with the terms and conditions (including the Charges) set forth in this Agreement (excluding any non-recurring transition or start-up activities specific to such DIR Customers) then-applicable to Successful Respondent's provision of the same Services to existing DIR Customers.

### 11.2 Pass-Through Expenses.

- (a) **Paid by DIR Directly.** If the Parties agree that any Pass-Through Expenses are to be paid by DIR directly, Successful Respondent shall arrange that the Pass-Through Expenses are invoiced by the third party directly to DIR, and timely provided to DIR together with any documentation required by DIR to support such invoiced charges. Before any such third party invoices are submitted to DIR for payment, Successful Respondent shall review the invoiced charges and communicate with the applicable third party to correct any errors in such invoices in a timely manner and otherwise in accordance with the applicable provisions of the Service Management Manual. DIR shall pay such invoices in accordance with Chapter 2251, Texas Government Code.
- (b) **Paid by Successful Respondent.** If the Parties agree that any Pass-Through Expenses are to be paid by Successful Respondent directly, Successful Respondent shall pay the third party invoices containing such Pass-Through Expenses on behalf of DIR. Prior to making any such payment, however, Successful Respondent shall review the invoiced charges and communicate with the applicable third party to correct any errors in such invoices in a timely manner and shall provide DIR with a reasonable opportunity to review such invoices to confirm that the third party charges are proper and valid. Following such review by Successful Respondent and DIR, Successful Respondent shall pay the amounts due and shall invoice DIR for such charges.
- (c) **Generally.** No new Pass-Through Expenses may be added without DIR's prior consent, which DIR may withhold in its sole discretion. For all products or services paid for on a Pass-Through Expenses basis, DIR reserves the right to (i) obtain such products or services directly from a third party, (ii) designate the third party source for such products or services, (iii) designate the particular products or services that Successful Respondent shall obtain (provided that if Successful Respondent demonstrates to DIR that such designation shall have an adverse impact on Successful Respondent's ability to meet the Service Levels, such designation shall be subject to Successful Respondent's approval), (iv) require Successful Respondent to identify and consider multiple sources for such products or services or to conduct a competitive procurement, and (v) review and approve the Pass-Through Expense for such products or services before entering into a contract for such products or services. In addition, for all products and services paid for on a Pass-Through Expense basis, Successful Respondent shall use commercially available efforts to pass through, or otherwise provide, to DIR and/or the applicable DIR Customer(s) all benefits offered by the manufacturers and/or vendors of such products and services (including all warranties, refunds, credits, rebates, discounts, training, technical support, and other consideration offered by such manufacturers and vendors) except to the extent otherwise agreed by DIR. If Successful Respondent is unable to pass through any such benefit to DIR and/or the applicable DIR Customer(s), it shall notify DIR in advance and shall not purchase such product or service without DIR's prior approval.

### 11.3 Procurement.

- (a) Requested Purchases for DIR. Upon DIR's request, Successful Respondent shall procure products and services on DIR's or a DIR Customer's behalf by (1) purchasing the products and services on behalf of DIR, (2) leasing, or arranging for a third party to lease, such products to DIR, or (3) licensing, or arrange for a third party to license, such products to DIR. In connection with the foregoing, the following shall apply:
  - (i) **Pass-Through Expenses; Rights in Products.** DIR shall pay directly to Successful Respondent, the supplier, third party lessor, or third party licensor, as agreed by the Parties, the purchase, lease, or license fees, as applicable, in respect of products and services procured on behalf of DIR or any DIR Customer on a Pass-Through Expense basis in accordance with **Exhibit 4.0 Business Model**. Unless otherwise expressly set forth in **Exhibit 4.0 Business Model**, Successful Respondent will not add any mark-up or margin to the costs of such items procured on DIR's behalf. Except as otherwise agreed by the Parties or as otherwise provided in this Agreement, (i) all rights in and title to any products purchased by Successful Respondent on

behalf of DIR or a DIR Customer shall belong to DIR or the relevant DIR Customer, as applicable, and (ii) all products shall be new.

- (ii) **General.** Successful Respondent shall adhere to the applicable product and services standards specified by DIR or set forth in the Service Management Manual and shall not deviate from such standards without DIR's prior approval. To the extent an authorized DIR representative specifies the third party vendor, pricing and/or other terms and conditions for procuring products or services on behalf of DIR or any DIR Customer, Successful Respondent shall not deviate from such instructions without DIR's prior approval.

#### 11.4 Taxes.

Pursuant to Section 151.309, Texas Tax Code, DIR and the DIR Customers that constitute State agencies pursuant to Section 2054.003, Texas Government Code, are exempt from the assessment of State taxes. The DIR Customers that do not constitute State agencies pursuant to Section 2054.003, Texas Government Code, may also be exempt from the assessment of State taxes. In addition, DIR and the DIR Customers are exempt from federal taxes pursuant to 26 United States Code, Sections 4253(i) and (j). Successful Respondent shall not include any taxes in the Charges except as expressly provided in this Section and **Exhibit 4.0 Business Model**. Without limiting the generality of the foregoing, Successful Respondent's responsibilities in connection with taxes arising under or in connection with this Agreement include the following obligations:

- (a) **Income Taxes.** Successful Respondent shall be responsible for its own Income Taxes.
- (b) **Sales, Use and Property Taxes.** Successful Respondent shall be responsible for any sales, lease, use, personal property, stamp, duty, or other such taxes on Equipment, Materials or property it owns or leases or licenses from a third party, including any lease or license assigned pursuant to this Agreement.
- (c) **Taxes on Goods or Services Used by Successful Respondent.** Successful Respondent shall be responsible for all sales, service, value-added, lease, use, personal property, excise, consumption, and other taxes and duties payable by Successful Respondent on any goods or services used or consumed by Successful Respondent in providing the Services where the tax is imposed on Successful Respondent's acquisition or use of such goods or services and the amount of tax is measured by Successful Respondent's costs in acquiring or procuring such goods or services and not by DIR's or any DIR Customer's cost of acquiring such goods or services from Successful Respondent.
- (d) **Service Taxes.**
  - (i) Subject to **Sections 11.4(d)(ii)** and **(iii)**, Successful Respondent shall be financially responsible for all Service Taxes; provided that DIR shall be responsible for any such tax imposed on the Services after the Effective Date.
  - (ii) Notwithstanding **Section 11.4(d)(i)**, if Service Taxes imposed on the Services after the Effective Date (whether new or higher) are the result of Successful Respondent moving all or part of its operations to a different jurisdiction (e.g., relocating the performance of the Services to a new service location or Successful Respondent using an Affiliate or Subcontractor to perform all or part of the Services), Successful Respondent shall be financially responsible for such new or higher Service Taxes.
  - (iii) Notwithstanding **Section 11.4(d)(i)** and **(ii)**, if DIR shall become responsible for Service Taxes after the Effective Date (whether new or higher), the Parties shall identify and diligently seek to agree upon legally permissible means of minimizing such new or higher Service Taxes. If the financial impact of all such new or higher Service Taxes exceeds six percent (6%) of the then-current Annual Base Charges, DIR may elect to terminate this Agreement in its entirety or to terminate any portions impacted by such new or higher Service Taxes (unless Successful Respondent agrees to assume financial responsibility for such new or higher Service Taxes exceeding the six percent (6%) threshold).
  - (iv) To the extent required under applicable Laws, Successful Respondent shall invoice DIR for any such Service Taxes and then credit DIR on such invoice (to the extent permitted by law) or reimburse or otherwise credit DIR, for that portion of such Service Taxes for which Successful Respondent is financially responsible under this provision.



- (e) **Withholding.** Any withholding tax or other tax of any kind that DIR or any DIR Customer is required by applicable Law to withhold and pay on behalf of Successful Respondent with respect to amounts payable to Successful Respondent under this Agreement shall be deducted from said amount prior to remittance to Successful Respondent. DIR shall provide to Successful Respondent reasonable assistance, which shall include the provision of documentation as required by revenue authorities, to enable Successful Respondent to claim exemption from or obtain a repayment of such withheld taxes and shall, upon request, provide Successful Respondent with a copy of the withholding tax certificate.
- (f) **Tax Filings.** Successful Respondent represents, warrants, and covenants that it shall file appropriate tax returns, and pay applicable taxes owed arising from or related to the provision of the Services in all applicable jurisdictions. At DIR's request, Successful Respondent shall provide DIR with (i) written confirmation that Successful Respondent has filed all required tax forms and returns and has collected and remitted all applicable amounts, and (ii) such other information pertaining to applicable Taxes as DIR may reasonably request.

### 11.5 New Services

- (a) **Procedures.** If DIR requests that Successful Respondent perform any New Services reasonably related to the Services or other services generally provided by Successful Respondent, Successful Respondent shall promptly prepare a New Services proposal for DIR's consideration. Unless otherwise agreed by the Parties, Successful Respondent shall prepare such New Services proposal at no additional charge to DIR and shall deliver such proposal to DIR within ten (10) days of its receipt of DIR's request; provided, that Successful Respondent shall respond more quickly in the case of a pressing need or an emergency situation. DIR shall provide such information as Successful Respondent reasonably requests in order to prepare such New Service proposal. Such New Services proposal shall include, among other things, the following at a level of detail sufficient to permit DIR to make an informed business decision: (i) a project plan and fixed price or price estimate for the New Service; (ii) a breakdown of such price or estimate; (iii) a description of the service levels to be associated with such New Service; (iv) a schedule for commencing and completing the New Service; (v) a description of the new hardware or software to be provided by Successful Respondent in connection with the New Service; (vi) a description of the software, hardware and other resources, including Resource Unit utilization, necessary to provide the New Service; (vii) any additional facilities or labor resources to be provided by DIR or the DIR Customers in connection with the proposed New Service; (viii) any risks associated with the New Service and/or the integration of the New Service into the existing environment; and (ix) in the case of any Developed Materials to be created through the provision of the proposed New Services, any ownership rights therein that differ from the provisions of **Section 14.2**. The Designated DIR Representative may accept or reject proposals for New Services in his or her sole discretion. Unless the Parties otherwise agree, if the Designated DIR Representative accepts Successful Respondent's proposal, Successful Respondent shall perform the New Services and be paid in accordance with the proposal submitted by Successful Respondent and the provisions of this Agreement. Upon the Designated DIR Representative's acceptance of a Successful Respondent's proposal for New Services, the scope of the Services shall be expanded and this Agreement shall be modified to include such New Services without the need for further action by the Parties. If Successful Respondent is unable to provide such New Services using its own resources (including resources it procures through a supplier or Subcontractor), DIR may require Successful Respondent to engage (as Successful Respondent's subcontractor) a third party approved or selected by DIR to provide such services. Notwithstanding any provision to the contrary, (A) Successful Respondent shall act reasonably and in good faith in formulating such pricing proposal, (B) Successful Respondent shall use commercially reasonable efforts to identify potential means of reducing the cost to DIR, including utilizing subcontractors as and to the extent appropriate, (C) such pricing proposal shall be no less favorable to DIR than the pricing and labor rates set forth herein for comparable Services, and (D) such pricing proposal shall take into account the existing and future volume of business between DIR and Successful Respondent.
- (b) **Use of Third Parties.** DIR may elect to solicit and receive bids from third parties to perform any New Services. If DIR elects to use third parties to perform New Services, (i) such New Services shall not be deemed "**Services**" under the provisions of this Agreement and (ii) Successful Respondent shall cooperate with such third parties as provided in **Section 4.4**.
- (c) **Services Evolution and Modification.** The Parties anticipate that, as referenced in **Section 4.1(a)**, the

Services shall evolve and be supplemented, modified, enhanced or replaced over time to keep pace with technological advancements and improvements in the methods of delivering Services and changes in the operations of DIR and the DIR Customers. The Parties acknowledge and agree that these changes shall modify the Services and shall not be deemed to result in New Services unless the changed services meet the definition of New Services.

- (d) **Authorized User and DIR Customer Requests.** Successful Respondent shall promptly inform the DIR Services Manager of requests for New Services from Authorized Users or DIR Customers, and shall submit any proposals for New Services to the Designated DIR Representative. Successful Respondent shall not agree to provide New Services to DIR, any Authorized Users or any DIR Customers without the prior approval of the Designated DIR Representative. Without limiting DIR's other rights under this Agreement or applicable Law, if Successful Respondent fails to comply strictly with this **Section 11.5(d)**, it shall receive no compensation for any services rendered to any person or Entity in violation of this **Section 11.5(d)**.

### 11.6 Extraordinary Events.

- (a) **Definition.** As used in this Agreement, an "**Extraordinary Event**" means a circumstance in which an event or discrete set of events has occurred or is planned with respect to the operations of DIR or the DIR Customers that results or shall result in a change in the scope, nature or volume of the Services that DIR or the DIR Customers shall require from Successful Respondent. Examples of the kinds of events that might cause such substantial increases or decreases include the following:
- (i) changes in locations where the DIR Customers operate;
  - (ii) changes in constituencies served by, or activities or operations of, the DIR Customers;
  - (iii) privatizations, dispositions, or reorganizations of the DIR Customers;
  - (iv) changes in the method of service delivery;
  - (v) changes in the applicable regulatory environment or applicable Laws;
  - (vi) changes in DIR's or a DIR Customer's policy, technology or processes.
- (b) **Consequence.** If an Extraordinary Event occurs, DIR may, at its option, request more favorable pricing with respect to applicable Charges for any Functional Service Area specified in **Exhibit 4.0 Business Model** in accordance with the following:
- (i) Successful Respondent and DIR shall mutually determine on a reasonable basis the efficiencies, economies, savings and resource utilization reductions, if any, resulting from such Extraordinary Event and, upon DIR's approval, Successful Respondent shall then proceed to implement such efficiencies, economies, savings, and resource utilization reductions as quickly as practicable and in accordance with the agreed upon schedule. As the efficiencies, economies, savings or resource utilization reductions are realized, the Charges specified in **Exhibit 4.0 Business Model** shall be promptly and equitably adjusted to pass through to DIR the net benefit of such efficiencies, economies, savings, and resource utilization reductions; provided, that DIR shall reimburse Successful Respondent for any net costs or expenses incurred to realize such efficiencies, economies, savings, or resource utilization reductions if and to the extent Successful Respondent (i) notifies DIR of such additional costs and obtains DIR's approval prior to incurring such costs, (ii) uses commercially reasonable efforts to identify and consider practical alternatives, and reasonably determines that there is no other more practical or cost effective way to obtain such savings without incurring such expenses, and (iii) uses commercially reasonable efforts to minimize the additional costs to be reimbursed by DIR.
  - (ii) An Extraordinary Event shall not result in Charges to DIR being higher than such Charges would have been if the rates and charges then specified in **Exhibit 4.0 Business Model** had been applied. DIR may, at its sole option, elect, for each Extraordinary Event, at any time to forego its rights under this **Section 11.5** and instead, apply rates and charges specified in **Exhibit 4.0** to adjust the Charges. For the avoidance of doubt, upon the occurrence of an Extraordinary Event, DIR is entitled to request more favorable pricing with respect to the applicable Charges even if the change in consumption related to the Extraordinary Event is

associated with the applicable fixed and variable Charges set forth in **Exhibit 4.1 Pricing Structure**.

#### **11.7 Unanticipated Change.**

If an Unanticipated Change occurs, and if DIR requests any modifications to the Services to incorporate such Unanticipated Change, the Parties shall use the procedures in **Section 11.6(b)** to equitably adjust the Charges and other relevant provisions of this Agreement to take such Unanticipated Change into account. An "Unanticipated Change" shall consist of a material change in the technologies and/or processes available to provide all or any portion of the Services which is outside the normal evolution of technology experienced by the Services, that was not generally available as of the Effective Date and that would materially reduce Successful Respondent's cost of providing the Services.

#### **11.8 Proration.**

Successful Respondent shall compute periodic Charges under this Agreement on a monthly basis, and shall prorate such Charges for any partial month on a daily basis.

#### **11.9 Refundable Items.**

- (a) **Paid Amounts.** Where DIR and/or the DIR Customers have paid for a service, function, or item for which Successful Respondent is assuming financial responsibility under this Agreement, Successful Respondent shall promptly refund to DIR or such DIR Customer, upon either Party identifying the payment, that portion of such paid expense which is attributable to periods after Successful Respondent's assumption of financial responsibility.
- (b) **Refunds and Credits.** If Successful Respondent should receive a refund, credit, discount, or other rebate for goods or services paid for by DIR and/or the DIR Customers on a Pass-Through Expense, retained expense, cost-plus or cost-reimbursement basis, then Successful Respondent shall (i) notify DIR of such refund, credit, discount or rebate and (ii) pay the full amount of such refund, credit, discount, or rebate to DIR or such DIR Customer.

### **12 INVOICING AND PAYMENT**

#### **12.1 Payment Processing Services.**

The Successful Respondent will be compensated daily for Charges in **Exhibit 4.0, Section 9** as part of the payment processing settlement of funds. This daily receipt of funds eliminates the need for a monthly invoice for these Services. Subsequent adjustments will be handled in mutually agreed upon electronic remittances during the month or via the invoicing process in **Section 12.2**.

#### **12.2 Invoicing.**

- (a) **Invoice.** After the Commencement Date, and within five (5) DIR Business Days after the end of each month in which Services are provided thereafter, Successful Respondent shall meet with DIR to review any preliminary Charges (excluding Charges in **Section 12.1**) and related volumes that Successful Respondent expects to include on the Monthly Invoice. Successful Respondent shall provide variance explanations for dollar and volume fluctuations based on the thresholds established by and at the level of detail required by DIR. Within ten (10) DIR Business Days after the end of each month, Successful Respondent shall present DIR with an invoice (the "**Monthly Invoice**") for any Charges due and owing for the preceding month. In addition, Successful Respondent shall provide separate Monthly Invoices for each DIR Customer then receiving Services, with the Charges allocated among such DIR Customers based on the chargeback data generated by Successful Respondent and/or the allocation formula provided by DIR. Successful Respondent shall not invoice DIR for taxes, any advance or concurrent charges or other amounts.
- (b) **Form and Data.** Each invoice provided by Successful Respondent to DIR under this Agreement shall be presented in hard copy and electronically in the form specified in **Exhibit 4.0 Business Model** and shall (i) comply with all applicable legal, regulatory, and accounting requirements, including Chapter 2251, Texas Government Code, (ii) allow DIR and the DIR Customer to validate volumes and Charges, and (iii) comply with DIR's and each DIR Customer's accounting and billing requirements, including providing sufficient

detail for each DIR Customer to allocate costs to all federal and State programs in accordance with the relative benefits received and to make federal claims according to the federal cost plan of such DIR Customer and further including electronic billing information for amounts DIR will invoice to the DIR Customers, including cost recovery fees, via electronic feed to DIR's billing system (i.e., NetPlus). Each invoice shall include the pricing calculations and related data utilized to establish the Charges and sufficient information to validate the service volumes and associated Charges. Each invoice and the data underlying each invoice shall be delivered to DIR and each DIR Customer electronically in a form and format compatible with DIR's and the DIR Customer's accounting systems.

- (c) **Credits.** To the extent a Service Level Credit, Deliverable Credit, or other credit may be due to DIR pursuant to this Agreement, Successful Respondent shall provide DIR with an appropriate credit against amounts then due and owing. If no further payments are due to Successful Respondent, Successful Respondent shall pay such amounts to DIR within thirty (30) days of the date such amounts becomes due and owing.
- (d) **Time Limitation.** Unless otherwise requested by Successful Respondent in advance and agreed by DIR in its sole discretion, if Successful Respondent fails to provide an invoice to DIR for any amount within four (4) invoice cycles (i.e., issuance of invoices) of the month in which the Services in question are rendered or the expense incurred, or such other period designated by DIR, Successful Respondent shall waive any right it may otherwise have to invoice for and collect such amount.

### 12.3 Payment Due.

Subject to the other provisions of this **Article 12**, each Monthly Invoice provided for under **Section 12.2** and other amounts due under this Agreement shall be due and payable by DIR under and in accordance with Chapter 2251, Texas Government Code.

### 12.4 Set Off.

Subject to **Section 12.5**, DIR may set off against any and all amounts to be paid or reimbursed by DIR any amount that Successful Respondent is obligated to pay DIR hereunder, provided that DIR notifies Successful Respondent in writing of the amounts of, and the basis for, such set off.

### 12.5 Disputed Charges.

- (a) **Disputed Amounts.** DIR may withhold any amount of any invoice in dispute as provided in and in accordance with Chapter 2251, Texas Government Code. DIR shall comply with Chapter 2251, Texas Government Code, with respect to timely notice of such disputed amounts.

For invoice amounts that have been paid by DIR that become the subject of a dispute, in addition to any amounts that Successful Respondent may subsequently credit to DIR arising from resolution of such dispute, Successful Respondent shall include interest on the reimbursed amounts accrued monthly at the rate specified by the Texas Comptroller of Public Accounts in accordance with Section 2251.025(b), Texas Government Code, calculated from the ninetieth (90th) day following the date of DIR's dispute.

- (b) **No Waiver.** Neither the failure to dispute any Charges or amounts prior to payment nor the failure to withhold any amount shall constitute, operate or be construed as a waiver of any right DIR may otherwise have to dispute any Charge or amount or recover any amount previously paid.
- (c) **Prompt Resolution.** In the event DIR initiates a dispute in accordance with the Service Management Manual related to a Monthly Invoice (a "**DIR-Initiated Financial Dispute**"), Successful Respondent will promptly respond to the issue raised in such dispute, which response will include a written explanation of the charges that are the subject of the DIR-Initiated Financial Dispute, as well as any supporting documentation necessary to support Successful Respondent's position. If within one hundred eighty (180) days of the date on which DIR notifies Successful Respondent of the DIR-Initiated Financial Dispute, Successful Respondent has either (i) failed to respond to DIR or (ii) failed to provide documentation or other evidence as to the validity of the disputed charges, then such dispute will be deemed resolved in favor of DIR and the appropriate credits will be processed and the matter will be closed.

### 13 DIR DATA AND OTHER CONFIDENTIAL INFORMATION

#### 13.1 Confidentiality.

Nothing in this Section 13.1 is intended to limit the obligations of Successful Respondent under Sections 13.2 and 13.3 of this Agreement with respect to the DIR Data addressed in such Sections and, to the extent the provisions of Sections 13.2 or 13.3 conflict with the provisions of this Section 13.1 as they pertain to DIR Data, the provisions of Sections 13.2 or 13.3 shall control over the provisions of this Section 13.1, as applicable.

- (a) **Confidential Information.** Successful Respondent and DIR each acknowledge that the other possesses and shall continue to possess information that has been developed or received by it, has commercial, proprietary or other value in its or its constituents' or customers' activities or operations and is not generally available to the public, subject, however to the applicability of the Public Information Act and other applicable Law. Except as otherwise specifically agreed in writing by the Parties, "**Confidential Information**" means (i) all information marked confidential, restricted, or proprietary by either Party and (ii) any other information that is treated as confidential by the disclosing Party and would reasonably be understood to be confidential, whether or not so marked. In the case of DIR and the DIR Customers, Confidential Information also shall include Developed Materials, DIR Data, DIR Personal Data, Work Product, Authorized User information, attorney-client privileged materials, attorney work product, research information, information that contains trade secrets, human resources and personnel information, or other information or data obtained, received, transmitted, processed, stored, archived, or maintained by Successful Respondent under this Agreement. Successful Respondent's Confidential Information shall not include Confidential Information of DIR or other DIR Customers, and provided further, however characterization of information as Confidential Information of Successful Respondent shall not limit or restrict the rights of DIR or DIR Customers to exercise their rights (including rights related to auditing and benchmarking) provided for under this Agreement.
- (b) **Disclosure of Confidential Information.**
- (i) The disclosing Party represents and warrants that it has the right to disclose its Confidential Information to the Receiving Party, subject to the confidentiality obligations contained in this Section 13.1.
- (ii) During the term of this Agreement and at all times thereafter as specified in Section 13.7, each Receiving Party (A) shall hold Confidential Information received from a disclosing Party in confidence and shall use such Confidential Information only for the purposes of fulfilling its obligations or exercising its rights under this Agreement and for no other purposes, (B) shall follow all applicable security requirements, protocols, and procedures for accessing and handling such Confidential Information, and (C) shall not disclose, provide, disseminate, or otherwise make available any Confidential Information of the disclosing Party to any third party without the express written permission of the disclosing Party, unless expressly permitted by Sections 13.1(b)(iii) and 13.1(b)(iv) below or elsewhere in this Agreement. Subject to the requirements of Sections 13.2(b) and 13.3, as applicable, each Receiving Party shall use at least the same degree of care to prevent disclosure, dissemination, and misuse of the disclosing Party's Confidential Information to third parties as the Receiving Party employs to avoid unauthorized disclosure, publication, dissemination, destruction, loss or alteration of its own information (or information of its customers) of a similar nature, but not less than reasonable care.
- (iii) The Receiving Party may disclose Confidential Information of the disclosing Party to its employees, directors, attorneys, financial advisors, contractors, and agents (including DIR Auditors in the case of DIR) provided that (A) such person or Entity has a need to know the Confidential Information for purposes of performing his or her obligations under or with respect to this Agreement or as otherwise naturally occurs in such person's scope of responsibility, (B) such disclosure is made pursuant to an obligation of confidentiality upon such person or Entity that is no less stringent than that set forth in this Section 13.1 and (C) such disclosure is not in violation of Law, the Service Management Manual, or applicable DIR Standards. The Receiving

Party assumes full responsibility for the acts or omissions of any person or Entity to whom it discloses Confidential Information of the disclosing Party regarding their use of such Confidential Information and must take commercially reasonable measures to protect the Confidential Information from disclosure or use in contravention of this Agreement.

- (iv) The Receiving Party may disclose Confidential Information of the disclosing Party as required to satisfy any legal requirement of a competent government body, provided that, promptly upon receiving any such request, the Receiving Party, to the extent it may legally do so, gives notice to the disclosing Party of the Confidential Information to be disclosed and the identity of the third party requiring such disclosure prior to the making such disclosure in order that the disclosing Party may interpose an objection to such disclosure, take action to assure confidential handling of the Confidential Information, or take such other action as it deems appropriate to protect the Confidential Information. The Receiving Party shall use reasonable efforts to cooperate with the disclosing Party in its efforts to seek a protective order or other appropriate remedy or, in the event such protective order or other remedy is not obtained, to obtain assurance that confidential treatment shall be accorded such Confidential Information.
  - (v) Unless expressly permitted by this Agreement, neither Party shall (A) make any use or copies of the Confidential Information of the other Party except as expressly contemplated by this Agreement, (B) possess or acquire any right in or assert any lien against the Confidential Information of the other Party, (C) sell, assign, transfer, lease, encumber or otherwise dispose of or disclose the Confidential Information of the other Party to third parties or commercially exploit, or permit a third party to commercially exploit, such information, including through Derivative Works, or (D) refuse for any reason (including a default or material breach of this Agreement by the other Party) to promptly provide the other Party's Confidential Information (including any copies thereof) to the other Party if requested to do so.
  - (vi) Notwithstanding the provisions of this **Section 13.1(b)**, DIR may disclose Confidential Information relating to the financial or operational terms of this Agreement and/or Successful Respondent's performance hereunder (e.g., applicable Service Levels and measurements of Successful Respondent's performance with respect to such Service Levels) in connection with the solicitation of proposals for or the procurement of the same or similar services from prospective DIR Contractors provided, DIR may not disclose Confidential Information related to Successful Respondent's processes and procedures without first securing an obligation from prospective DIR Contractors to keep such information confidential.
  - (vii) Notwithstanding the provisions of this **Section 13.1(b)**, the Parties acknowledge and agree that each Party may be required to disclose Confidential Information pursuant to Chapter 552, Texas Government Code (the "**Public Information Act**"), that DIR and DIR Customers shall be required to and may disclose this Agreement and the terms hereof pursuant to the Public Information Act and that the Parties shall comply with the Public Information Act and with all applicable opinions of the Office of the Texas Attorney General concerning the Public Information Act.
  - (viii) Each Party shall take all necessary steps to cause its employees, contractors and subcontractors to comply with the provisions of **Article 13**.
- (c) **Exclusions.** Notwithstanding the above, **Section 13.1(b)** shall not apply to any particular information which the receiving Party can demonstrate: (i) is, at the time of disclosure to it, generally available to the public other than through a breach of the Receiving Party's or a third party's confidentiality obligations; (ii) after disclosure to it, is published by the disclosing Party or otherwise becomes generally available to the public other than through a breach of the Receiving Party's or a third party's confidentiality obligations; (iii) was lawfully in the possession of the Receiving Party immediately prior to the time of disclosure to it; (iv) is received from a third party having a lawful right to disclose such information; or (v) is independently developed by the Receiving Party without reference to the disclosing Party's Confidential Information. The exclusions in this **Section 13.1(c)** shall not apply to DIR Personal Data.
- (d) **Loss of Confidential Information.** Each Party shall (i) immediately notify the other Party of any possession, use, knowledge, disclosure, or loss of such other Party's Confidential Information in

contravention of this Agreement, (ii) promptly furnish to the other Party all known details and assist such other Party in investigating and/or preventing the reoccurrence of such possession, use, knowledge, disclosure, or loss, (iii) cooperate with the other Party in any investigation or litigation deemed necessary by such other Party to protect its rights and (iv) promptly use appropriate efforts to prevent further possession, use, knowledge, disclosure, or loss of Confidential Information in contravention of this Agreement. Each Party shall bear any costs it incurs in complying with this **Section 13.1(d)**.

- (e) **No Implied Rights.** Nothing contained in this **Section 13.1** shall be construed as obligating a Party to disclose its Confidential Information to the other Party, or as granting to or conferring on a Party, expressly or impliedly, any rights or license to any Confidential Information of the other Party.
- (f) **Return or Destruction of Confidential Information.** Each Party shall securely store the other Party's Confidential Information until such Confidential Information is returned or destroyed as described in this Section. Except as provided below with respect to Contract Records, each Party shall destroy all documentation in any medium that contains, refers to or relates to the other Party's Confidential Information (or the portion of such Confidential Information specified by the other Party) or shall return such documentation to the other Party or its designee, in the format and on the media reasonably prescribed by the other Party, as follows: (i) within thirty (30) days of the expiration or termination of this Agreement and completion of each Party's obligations hereunder, including, with respect to Successful Respondent, all periods of Termination Assistance Services requested by DIR; and (ii) with respect to DIR Confidential Information, at any time DIR requests such Confidential Information or, with respect to particular Confidential Information, within thirty (30) days of the date that such Confidential Information is no longer required by Successful Respondent to perform its obligations under this Agreement as identified by DIR or pursuant to the Service Management Manual. Such documentation shall include all copies of a Party's Confidential Information in the other Party's possession or under the other Party's control. The Party returning or destroying the other Party's Confidential Information shall deliver to the other Party written certification of its compliance with this paragraph signed by an authorized representative of such Party. Notwithstanding the foregoing, either Party may retain one (1) copy of the other Party's Confidential Information in its legal department as and to the extent required to comply with applicable Laws or enforce its rights under this Agreement; provided that such Confidential Information shall be returned or destroyed in accordance with this provision upon the expiration of the period specified in the applicable Law, the expiration of the applicable statute of limitations and the final resolution of any pending dispute. Contract Records shall be retained by Successful Respondent for the duration of the Audit Period unless and to the extent Successful Respondent is directed by DIR to deliver such Contract Records to DIR prior to the expiration of the Audit Period. In no event shall a party withhold any Confidential Information of the other party as a means of resolving any dispute.
- (g) **Transfer of DIR Confidential Information.** Successful Respondent shall not transfer DIR Confidential Information to any other locations, nor change the locations for storage and processing of such DIR Confidential Information, except with the express written consent of DIR, which DIR may withhold in its sole discretion.

### 13.2 DIR Data.

Nothing in this **Section 13.2** is intended to limit the obligations of Successful Respondent under **Sections 13.1** and **13.3** of this Agreement with respect to the Confidential Information addressed in such Sections.

- (a) **Ownership of DIR Data.** DIR Data shall be and shall remain, as between the Parties, the property of DIR and/or the applicable DIR Customers. Successful Respondent shall not sell, assign, lease, or encumber DIR Data. Successful Respondent shall not disclose to or allow access by third parties to DIR Data, unless expressly provided for in this Agreement. Successful Respondent shall not commercially exploit, or permit a third party to commercially exploit, DIR Data on behalf of Successful Respondent or any other person or Entity. DIR Data shall be made available to DIR, upon its request, in the form and format as reasonably requested by DIR.
- (b) Safeguarding of DIR Data.
  - (i) Successful Respondent shall maintain a comprehensive data security program, which shall include reasonable and appropriate technical, organizational and security measures against the

destruction, loss, unauthorized access or alteration of DIR Data in the possession of Successful Respondent, and which shall be (A) no less rigorous than those maintained (or required to be maintained) by DIR or the relevant DIR Customer as of the Commencement Date (or required or implemented by DIR or the relevant DIR Customer in the future to the extent deemed necessary by DIR or such DIR Customer and communicated to Successful Respondent in accordance with **Section 6.2**), (B) no less rigorous than those maintained by Successful Respondent for its own information of a similar nature (subject, however, to **Section 11.5** and implementation through Change Control upon approval by DIR, as applicable, but without limiting Successful Respondent's obligations respecting Technology Evolution), (C) no less rigorous than accepted security standards in the industry (subject, however, to **Section 11.5** and implementation through Change Control upon approval by DIR, as applicable, but without limiting Successful Respondent's obligations respecting Technology Evolution), and (D) (without limiting the Parties' obligations under **Section 15.11**) compliant with all applicable DIR Rules and DIR Standards, including the requirements of DIR's and the relevant DIR Customer's then-current privacy, security and records retention policies (such as Internal Revenue Service guidelines contained within IRS Publication 1075 (found at <http://www.irs.gov/pub/irs-pdf/p1075.pdf>) and the rules pertaining to information technology security standards found at 1 Texas Administrative Code (TAC), Chapter 202). Successful Respondent acknowledges and agrees that certain DIR Customers are legally prohibited from disclosing or allowing access to certain DIR Data, including disclosures to and access by DIR, other DIR Customers and Successful Respondent. The content and implementation of such data security program and associated technical, organizational and security measures shall be fully documented by Successful Respondent in the Service Management Manual, including the process DIR Customers shall follow to identify DIR Data they are legally prohibited from disclosing and the confidentiality requirements of DIR Customers. Successful Respondent shall permit DIR Auditors to review such documentation and/or to inspect Successful Respondent's compliance with these provisions in accordance with this **Section (i)**. DIR acknowledges that elements of Successful Respondent's data security program involve customized services offerings regarding the specific means and levels of security protection selected by a customer (regarding, for example, desired levels of host and network intrusion detection services, methods for monitoring and limiting access to data, extent of desired encryption, etc.), and DIR agrees that the specific services selected by DIR pursuant to this Agreement establish the contract requirements with respect to those activities, subject to Technology Evolution and other applicable provisions of this Agreement. From time to time, but not less frequently than two (2) time per Contract Year, Successful Respondent shall proactively provide technical information regarding security best practices in the industry, and upon DIR's approval Successful Respondent shall, subject to **Section 11.5** (but without limiting Successful Respondent's obligations respecting Technology Evolution) implement any changes to the above security requirements through Change Control.

- (ii) Under no circumstances shall Successful Respondent make any changes that materially weaken any technical, organizational or security measures in place to safeguard DIR Data, or result in Successful Respondent's failure to meet any of the minimum standards set forth above without DIR's prior approval. Under no circumstances shall Successful Respondent or Successful Respondent Personnel attempt to access or allow access to DIR Data that is not required for the performance of Successful Respondent's obligations or otherwise permitted under this Agreement.
- (iii) Subject to any restriction in contracts with Successful Respondent's other customers, Successful Respondent shall regularly advise DIR of data security practices, procedures, and safeguards in effect for other Successful Respondent customers that, in Successful Respondent's reasonable judgment, are (A) relevant to the Services being provided under this Agreement and (B) define or exceed relevant industry standards relevant to the Services. If requested by DIR, Successful Respondent shall, to the extent reasonably practicable and subject to the Change Control Procedures, implement such enhanced practices, procedures and safeguards with respect to its provision of Services to DIR hereunder.



- (iv) DIR shall have the right to establish backup security for any DIR Data and to keep backup and files for such Data in its possession if it chooses. Successful Respondent shall provide DIR with downloads of DIR Data, as requested and directed by DIR, to enable DIR to maintain such backup copies.
- (v) In the event Successful Respondent discovers or is notified of a breach or potential breach of security relating to DIR Data, Successful Respondent shall, in addition to its obligations pursuant to **Sections 6.2**, immediately once Successful Respondent knows or should have known such a breach or potential breach has occurred (A) notify DIR of such breach or potential breach, (B) investigate (with DIR's participation if so desired by DIR) such breach or potential breach and perform a risk assessment, Root Cause Analysis and corrective action plan thereon, (C) provide a written report to DIR of such risk assessment, Root Cause Analysis and action plan, (D) remediate the effects of such breach or potential breach of security as soon as practicable or coordinate such remediation if Successful Respondent does not have responsibility for the matters which are the source of the breach or potential breach, and (E) provide DIR with reasonable assurances that such breach or potential breach shall not recur.
- (vi) To the extent Successful Respondent removes DIR Data from any media that is taken out of service that is under Successful Respondent's control, Successful Respondent shall destroy or securely erase such media in accordance with the Service Management Manual. Under no circumstances shall Successful Respondent use or re-use media on which DIR Data has been stored to store data of any other customer of Successful Respondent or to deliver data to a third party, including another Successful Respondent customer, unless such DIR Data has been securely erased in accordance with the Service Management Manual.

### **13.3 DIR Personal Data.**

In addition to the provisions of **Sections 13.1** and **13.2**, the following privacy and data protection provisions shall apply to DIR Personal Data.

- (a) Successful Respondent shall hold any DIR Personal Data that it receives in confidence and in compliance with (i) Successful Respondent's obligations under this Agreement, the Exhibits and Attachments hereto and the Service Management Manual and (ii) subject to **Section 15.11**, all Laws regarding its use of and access to such DIR Personal Data.
- (b) Successful Respondent agrees that Successful Respondent and Successful Respondent Personnel shall not use any DIR Personal Data for any purpose other than the fulfillment of the terms and conditions of this Agreement. Successful Respondent shall not process or disseminate DIR Personal Data to any third party or transfer DIR Personal Data without the approval of DIR unless expressly provided for in this Agreement. Successful Respondent shall take appropriate action to cause:
  - (i) Any Successful Respondent Personnel who have access to DIR Personal Data pursuant to this Agreement to be advised of, and comply with, the terms and conditions of this **Section 13.3**; and; and
  - (ii) Any Successful Respondent Personnel who have access to DIR Personal Data to be trained regarding their handling of such DIR Personal Data.

Successful Respondent shall be responsible for any failure of Successful Respondent Personnel to comply with the terms and conditions regarding DIR Personal Data set forth in this **Section 13.3**.

- (c) When interfacing with DIR or the applicable DIR Customer regarding DIR Personal Data, Successful Respondent shall only disclose or transmit DIR Personal Data to those DIR or DIR Customer employees and DIR Contractors authorized by the Designated DIR Representative or identified in the Service Management Manual.
- (d) With respect to Personal Medical Data, Successful Respondent shall not need to obtain authorizations from the persons to whom such Personal Medical Data pertains unless DIR determines that such authorizations are necessary and advises Successful Respondent to obtain such authorization. In such case, Successful Respondent agrees to reasonably assist DIR or the applicable DIR Customer in obtaining an authorization,

or in confirming that such authorization has been obtained, from each person before viewing any Personal Medical Data of such person contained in DIR's files or systems. The authorization form to be used for this purpose shall be provided by DIR.

- (e) With respect to Personal Medical Data, a person may request to inspect, copy, amend and restrict disclosure of his or her Personal Medical Data when and as permitted by Law. Any such requests that are received by Successful Respondent shall be directed to, and any actions required shall be determined by, DIR.
- (f) DIR shall notify Successful Respondent of any:
  - (i) Limitation in any privacy notice used by DIR to the extent that such limitation may affect Successful Respondent's use or disclosure of DIR Personal Data; and
  - (ii) Restriction on the use or disclosure of DIR Personal Data to which DIR agreed to the extent that such restriction may affect Successful Respondent's use or disclosure of such DIR Personal Data.

Successful Respondent agrees to promptly implement any such limitation or restriction as directed by DIR.

- (g) If Successful Respondent has knowledge of any unauthorized disclosure of or access to DIR Personal Data, Successful Respondent shall:
  - (i) Expeditiously report such unauthorized disclosure or access to DIR,
  - (ii) Mitigate, to the extent practicable, any harmful effect of such disclosure or access that is known to Successful Respondent or its agents, and
  - (iii) Cooperate with DIR in providing any notices regarding impermissible disclosures caused by such disclosure or access which DIR deems appropriate.

To the extent such unauthorized disclosure or access is attributable to a breach by Successful Respondent or Successful Respondent Personnel of Successful Respondent's obligations under this Agreement with respect to DIR Personal Data, Successful Respondent shall bear (A) the costs incurred by Successful Respondent in complying with its legal obligations relating to such breach and (B) in addition to any other damages for which Successful Respondent may be liable for under this Agreement (except to the extent such disclosure is due to DIR's failing to provide (including through authorization to provide as part of the Services) the level of encryption required under applicable Law to protect such Data), the following costs incurred by DIR or the DIR Customer in complying with their legal obligations relating to such breach, to the extent applicable, (1) the cost of providing notice to affected individuals, (2) the cost of providing such affected individuals with credit monitoring services for thirty-six (36) months, (3) *Intentionally left blank*. (4) creating a call center support for such affected individuals for thirty (30) days, (5) any related governmental fees or fines assessed against DIR or DIR Customers, and (6) any other Losses for which Successful Respondent would be liable under **Section 17.1(d)**.

- (h) As reasonably requested by DIR, Successful Respondent shall deliver to DIR all or any specified Personal Medical Data in the format and on the media reasonably prescribed by DIR and promptly deliver such Data to DIR or a designated DIR Contractor.
- (i) With respect to Personal Medical Data constituting "protected health information" ("**PHI**"), as such term is defined by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, Successful Respondent shall:
  - (i) Subject to **Section 15.11**, implement the technical, organizational and security measures, including administrative, physical and technical safeguards, to protect the confidentiality, integrity and availability of Personal Medical Data constituting electronic PHI ("ePHI") implement the technical, organizational and security measures, including administrative, physical and technical safeguards, to protect the confidentiality, integrity and availability of Personal Medical Data constituting electronic PHI ("**ePHI**") created, received, maintained or transmitted by Successful Respondent or Successful Respondent Personnel in compliance with

the HIPAA Security Rule. Successful Respondent shall cause any Successful Respondent Personnel who have access to ePHI to agree in writing to protect the confidentiality, integrity and availability of ePHI as required by the HIPAA Security Rule. Successful Respondent shall expeditiously report to DIR any successful unauthorized access, use, disclosure, modification or destruction of ePHI or interference with system operations in an information system containing PHI of which Successful Respondent becomes aware:

- (A) such reports shall be provided only as frequently as the Parties mutually agree, but no more than once per calendar quarter, and
  - (B) if the HIPAA Security Rule is amended to remove the requirement for reporting "unsuccessful" attempts to use, disclose, modify or destroy ePHI from the definition of "Security Incident," this paragraph shall no longer apply as of the effective date of such amendment. For purposes of this provision, "Security Incident" shall have the meaning given in HIPAA Security Regulations, 45 CFR Part 164, as such regulations may be amended from time to time.
- (ii) Subject to **Section 15.11**, at DIR's request, Successful Respondent shall provide access to Personal Medical Data contained in a "designated record set" (as such terms are defined by the HIPAA Privacy Rule) of a person currently or formerly covered by a DIR benefit plan subject to HIPAA (the "**Plan**") to DIR or the person currently or formerly covered by the Plan who is requesting such Data. Successful Respondent also shall amend Personal Medical Data in its possession as directed by DIR. Subject to **15.11**, such access and amendment shall be provided at a time and in a format permitted by the HIPAA Privacy Rule **15.11**, such access and amendment shall be provided at a time and in a format permitted by the HIPAA Privacy Rule.
  - (iii) Subject to **Section 15.11**, Successful Respondent shall document all disclosures of Personal Medical Data to provide a person currently or formerly covered by the Plan with an accounting of disclosures as required by the HIPAA Privacy Rule. Successful Respondent shall, upon DIR's request, provide such an accounting to DIR or the person currently or formerly covered by the Plan who requested such Data at a time and in a format permitted by the HIPAA Privacy Rule.
  - (iv) Without limiting DIR's obligations under **Section 15.11**, DIR shall notify Successful Respondent of any (A) limitations in the Plan's privacy notice to the extent that such limitation may affect Successful Respondent's use or disclosure of Personal Medical Data; (B) changes in, or revocation of, permission by a person currently or formerly covered by the Plan to use or disclose Personal Medical Data to the extent that such change may affect Successful Respondent's use or disclosure of the Data; and (C) restrictions on the use or disclosure of Personal Medical Data to which the Plan agreed to the extent that such restriction may affect Successful Respondent's use or disclosure of the Data. Successful Respondent agrees to implement such limitation, change, or restriction as required by HIPAA and in accordance with **15.11**.
  - (v) In addition to permitting audits by DIR as described above, Successful Respondent shall permit the Secretary of the United States Department of Health and Human Services to conduct audits of Personal Medical Data to determine compliance with the HIPAA Privacy Rule and/or the HIPAA Security Rule. If the Secretary contacts the Successful Respondent directly regarding such an audit, Successful Respondent shall provide DIR with written notice of the audit as soon as possible after Successful Respondent received its audit notice from the Secretary.

#### 13.4 File Access.

DIR shall have secure access to, and the right to review and retain the entirety of, all DIR Confidential Information in the possession or control of Successful Respondent. Such access shall be provided to DIR in near-real time and by the means and in the format reasonably requested by DIR. At no time shall any of such files or other materials or information be stored or held in a form or manner not readily accessible to DIR in this manner. Successful Respondent shall provide to the Designated DIR Representative, or his or her designee, all passwords, codes, comments, keys, documentation and the locations of any such files and other materials promptly upon his or her request, including Equipment and Software keys and such information as to format, encryption (if any) and any other specification or information necessary for DIR

to retrieve, read, revise and/or maintain such files and information. Upon the request of the Designated DIR Representative, or his or her designee, Successful Respondent shall confirm that, to the best of its knowledge, all files and other information provided to DIR are complete and that no material element, amount, or other fraction of such files or other information to which DIR may request access or review has been deleted, withheld, disguised or encoded in a manner inconsistent with the purposes and intent of providing full and complete access to DIR as contemplated by this Agreement.

### 13.5 DIR Data – Correction and Restoration.

- (a) **Corrections.** The correction of any errors or inaccuracies in or with respect to DIR Data shall be performed by the Party that has operational responsibility for inputting such DIR Data into the applicable System. To the extent (i) Successful Respondent is operationally responsible for inputting such data or (ii) such errors or inaccuracies are attributable to the failure of Successful Respondent or Successful Respondent Personnel to comply with Successful Respondent's obligations under this Agreement, Successful Respondent shall bear the cost of correcting such errors or inaccuracies.
- (b) **Re-running of Corrected Data.** If the correction of errors or inaccuracies as described above necessitates the re-running of corrected DIR Data and thereby results in the usage of additional Resource Units, DIR shall pay the applicable Charge as set forth in **Exhibit 4.0 Business Model**, unless the underlying errors or inaccuracies are attributable to the failure of Successful Respondent or Successful Respondent Personnel to comply with Successful Respondent's obligations under this Agreement (including the failure of Successful Respondent or Successful Respondent Personnel to adhere to applicable processes and controls that, if adhered to, would have enabled Successful Respondent or Successful Respondent Personnel to identify and timely correct such errors or inaccuracies, even if caused by DIR), in which case Successful Respondent shall be financially responsible for any additional Resource Units usage resulting from the re-running of corrected data.
- (c) **Restoration of Data.** The restoration of any destroyed, lost or altered DIR Data shall be performed through generally accepted data restoration techniques by the Party that has operational responsibility under **Exhibit 4.2 Financial Responsibility Matrix** for maintaining the System on which such DIR Data resides and for creating and maintaining backup copies of such DIR Data. To the extent (i) Successful Respondent is operationally responsible for performing such restoration or (ii) such destruction, loss or alteration is attributable to the failure of Successful Respondent or Successful Respondent Personnel to comply with Successful Respondent's obligations under this Agreement, Successful Respondent shall bear the cost of restoring such data to the most recent required back-up.
- (d) **Cardholder Data.** Successful Respondent shall comply with the Payment Card Industry Data Security Standard ("PCI DSS") with respect to Cardholder Data as defined therein. With respect to Services provided from a Consolidated Data Center or that support a Consolidated Data Center, Successful Respondent shall have access to Cardholder Data only for the limited purpose of performing the Services or as specifically agreed to by Visa, MasterCard, American Express, and/or Discover (collectively, the "Issuers"), DIR, or as required by applicable law. In the event of a breach or intrusion of, or otherwise unauthorized access to, Cardholder Data stored by or for Successful Respondent, Successful Respondent shall immediately notify DIR, in the manner required, and provide DIR or its designee, the Issuers, and the acquiring financial institution and their respective designees access to Successful Respondent's facilities and all pertinent records to conduct a review of Successful Respondent's compliance with these requirements. Successful Respondent shall maintain appropriate business continuity procedures and systems to ensure security of Cardholder Data in the event of a disruption, disaster, or failure of Successful Respondent's primary data systems which involve a risk to Cardholder Data. Successful Respondent shall provide access to its security systems and procedures, as reasonably requested by DIR or its designee. Successful Respondent shall cooperate fully with any reviews of their facilities and records provided for in this **Section 13.5(d)**. Successful Respondent will comply with any assessment, validation, or verification of PCI DSS rules and regulations.

### 13.6 FTI Compliance.

The following provisions are included in accordance with IRS Publication 1075 ("**Pub 1075**"). For purposes of this section only, all words in this section shall have the meaning provided in Pub 1075, notwithstanding any other definition that may be provided elsewhere in this Agreement. The following

terms and conditions shall apply to Successful Respondent's performance of the Services to the extent provided by Pub 1075. Affected DIR Customer(s) shall be responsible for identifying to Successful Respondent the location of Federal Tax Information (FTI) that is subject to the following provisions (e.g., the databases, servers, mainframes, etc.). DIR and Successful Respondent will amend this section from time to time as needed to maintain currency with the then-current requirements of Pub 1075.

In performance of this contract, the Successful Respondent agrees to comply with and assume responsibility for compliance by his or her employees with the following requirements:

- (e) All work will be done under the supervision of the Successful Respondent or the Successful Respondent's employees.
- (f) The Successful Respondent and the Successful Respondent's employees with access to or who use FTI must meet the background check requirements defined in IRS Publication 1075.
- (g) Any return or return information made available in any format shall be used only for the purpose of carrying out the provisions of this contract. Information contained in such material will be treated as confidential and will not be divulged or made known in any manner to any person except as may be necessary in the performance of this contract. Disclosure to anyone other than an officer or employee of the contractor will be prohibited.
- (h) All returns and return information will be accounted for upon receipt and properly stored before, during, and after processing. In addition, all related output will be given the same level of protection as required for the source material.
- (i) The Successful Respondent certifies that the data processed during the performance of this contract will be completely purged from all data storage components of his or her computer facility, and no output will be retained by the contractor at the time the work is completed. If immediate purging of all data storage components is not possible, the contractor certifies that any IRS data remaining in any storage component will be safeguarded to prevent unauthorized disclosures.
- (j) Any spoilage or any intermediate hard copy printout that may result during the processing of IRS data will be given to the agency or his or her designee. When this is not possible, the contractor will be responsible for the destruction of the spoilage or any intermediate hard copy printouts, and will provide the agency or his or her designee with a statement containing the date of destruction, description of material destroyed, and the method used.
- (k) All computer systems receiving, processing, storing or transmitting FTI must meet the requirements defined in IRS Publication 1075. To meet functional and assurance requirements, the security features of the environment must provide for the managerial, operational, and technical controls. All security features must be available and activated to protect against unauthorized use of and access to FTI.
- (l) No work involving FTI furnished under this contract will be subcontracted without prior written approval of the IRS.
- (m) The Successful Respondent will maintain a list of employees with authorized access. Such list will be provided to the agency and, upon request, to the IRS reviewing office.
- (n) In addition to including the above provisions into the Services Management Manual to be drafted by the Successful Respondent pursuant to the Agreement, the Services Management Manual should also include details concerning the Successful Respondent's responsibilities during a safeguard review and the support required to resolve identified findings.
- (o) DIR will have the right to void the Agreement, in whole or in part, if Successful Respondent fails to provide the safeguards described above.
- (p) Each officer or employee of any person to whom returns or return information is or may be disclosed will be notified in writing by such person that returns or return information disclosed to such officer or employee can be used only for a purpose and to the extent authorized herein, and that further disclosure of any such returns or return information for a purpose or to an extent unauthorized herein constitutes a felony punishable upon conviction by a fine of as much as \$5,000 or imprisonment for as long as five (5) years, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee

that any such unauthorized further disclosure of returns or return information may also result in an award of civil damages against the officer or employee in an amount not less than \$1,000 with respect to each instance of unauthorized disclosure. These penalties are prescribed by IRC sections 7213 and 7431 and set forth at 26 CFR 301.6103(n)-1.

- (q) Each officer or employee of any person to whom returns or return information is or may be disclosed shall be notified in writing by such person that any return or return information made available in any format shall be used only for the purpose of carrying out the provisions of this Agreement. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of the Agreement. Inspection by or disclosure to anyone without an official need to know constitutes a criminal misdemeanor punishable upon conviction by a fine of as much as \$1,000 or imprisonment for as long as one (1) year, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized inspection or disclosure of returns or return information may also result in an award of civil damages against the officer or employee United States for Federal employees in an amount equal to the sum of the greater of \$1,000 for each act of unauthorized inspection or disclosure with respect to which such defendant is found liable or the sum of the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure plus in the case of a willful inspection or disclosure which is the result of gross negligence, punitive damages, plus the costs of the action. These penalties are prescribed by IRC section 7213A and 7431.
- (r) Additionally, it is incumbent upon Successful Respondent to inform its officers and employees of the penalties for improper disclosure imposed by the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, 5 U.S.C. 552a(i)(1), which is made applicable to contractors by 5 U.S.C. 552a(m)(1), provides that any officer or employee of a contractor, who by virtue of his/her employment or official position, has possession of or access to agency records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established thereunder, and who knowing that disclosure of the specific material is prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.
- (s) Granting a contractor access to FTI must be preceded by certifying that each individual understands the affected DIR Customer's security policy and procedures for safeguarding IRS information. Contractors must maintain their authorization to access FTI through annual recertification. The initial certification and recertification must be documented and placed in the affected DIR Customer's files for review. As part of the certification and at least annually afterwards, contractors should be advised of the provisions of IRC Sections 7431, 7213, and 7213A. The training provided before the initial certification and annually thereafter must also cover the incident response policy and procedure for reporting unauthorized disclosures and data breaches. For both the initial certification and the annual certification, Successful Respondent should sign, either with ink or electronic signature, a confidentiality statement certifying their understanding of the security requirements.
- (t) The IRS, DIR, and the affected DIR Customer shall have the right to send its officers and employees into the offices and plants of Successful Respondent for inspection of the facilities and operations provided for the performance of any work under this Agreement. On the basis of such inspection, specific measures may be required in cases where Successful Respondent is found to be noncompliant with Agreement safeguards.

### **13.7 Survival.**

Notwithstanding the expiration or any termination of this Agreement, (a) the limitations on use and disclosure by Successful Respondent under this Article with respect to DIR Personal Data shall survive the expiration or any termination of this Agreement and shall be perpetual and (b) each Party's confidentiality obligations under this Agreement shall continue for any period required by applicable Law, or in the absence of a required period for seven (7) years after the expiration or termination of this Agreement, or, if sooner, until such time as the Confidential Information is publicly known and made generally available through no action or inaction of the receiving Party.

### 13.8 Requirements for Information in Legal Proceedings.

- (a) **Preservation of Legal Privilege.** If DIR notifies Successful Respondent, or Successful Respondent is otherwise aware, that particular DIR Confidential Information may be within DIR attorney-client or work-product privileges of DIR, then regardless of any applicable exclusions, Successful Respondent (i) shall not disclose such DIR Confidential Information or take any other action that would result in waiver of such privileges and (ii) shall instruct all Successful Respondent Personnel who may have access to such communications to maintain privileged material as strictly confidential and otherwise protect DIR privileges.
- (b) **Successful Respondent Responsibility for DIR Information.** To the extent requested by DIR, Successful Respondent shall comply with DIR litigation response plan, including policies and procedures to prepare for and respond to discovery requests, subpoenas, investigatory demands, and other requirements for information related to legal and regulatory proceedings, as such plan may be revised from time to time, including preparing for and complying with requirements for preservation and production of data in connection with legal and regulatory proceedings and government investigations. Upon receipt of any request, demand, notice, subpoena, order or other legal information request relating to legal proceedings or investigations by third parties relating to any Materials, DIR Confidential Information or related Systems in Successful Respondent's possession, Successful Respondent shall immediately notify DIR and provide DIR with a copy of all documentation of such legal information request, to the extent Successful Respondent legally may do so and shall cooperate with DIR in responding to such request, demand, notice, subpoena, order or other legal information request.
- (c) **Cost of Compliance.** Successful Respondent's cost of complying with this **Section 13.8** shall be at no additional charge to DIR. shall be at no additional charge to DIR.

## 14 MATERIALS

### 14.1 DIR Owned and Licensed Materials.

- (a) **Ownership of DIR Owned Materials.** As between the Parties, DIR shall be the sole and exclusive owner of (i) all Materials and other intellectual property owned by DIR or any DIR Customer as of the Effective Date, (ii) all Materials and other intellectual property acquired by DIR or any DIR Customer on or after the Effective Date, and (iii) certain Developed Materials as provided in **Section 14.2** (collectively, "**DIR Owned Materials**"), including all United States and foreign patent, copyright, trade secret and other intellectual property rights in the DIR Owned Materials.
- (b) **License to DIR Owned Materials.** As of the Commencement Date, DIR hereby grants to Successful Respondent and, if and to the extent necessary for Successful Respondent to provide the Services, to Subcontractors designated by Successful Respondent, a non-exclusive, non-transferable, royalty-free limited right and license during the Term to Use the DIR Owned Materials provided by DIR and/or the DIR Customers to Successful Respondent for the express and sole purpose of providing the Services, subject to any conditions or limitations arising from the financial participation of United States federal government authorities in the development or acquisition of such DIR Owned Materials or otherwise imposed under applicable Laws. Successful Respondent shall have no right to the source code to such DIR Owned Materials unless and to the extent approved in advance in writing by DIR. DIR Owned Materials shall remain the property of DIR. Successful Respondent shall not (i) use any DIR Owned Materials for the benefit of any person or Entity other than DIR or the DIR Customers, (ii) separate or uncouple any portions of the DIR Owned Materials, in whole or in part, from any other portions thereof, or (iii) reverse assemble, reverse engineer, translate, disassemble, decompile, or otherwise attempt to create or discover any source or human readable code, underlying algorithms, ideas, file formats or programming interfaces of the DIR Owned Materials by any means whatsoever, without the prior approval of DIR, which may be withheld at DIR's sole discretion. Except as otherwise requested or approved by DIR, Successful Respondent shall cease all use of DIR Owned Materials upon the end of the Term and shall certify such cessation to DIR in a notice signed by an officer of Successful Respondent. THE DIR OWNED MATERIALS ARE PROVIDED BY DIR TO Successful Respondent ON AN AS-IS, WHERE-IS BASIS. DIR EXPRESSLY DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AS TO THE DIR OWNED MATERIALS OR THE CONDITION OR SUITABILITY OF THE DIR OWNED MATERIALS FOR

USE BY SUCCESSFUL RESPONDENT TO PROVIDE THE SERVICES, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

- (c) **License to DIR Third Party Materials.** Subject to Successful Respondent having obtained any Required Consents, DIR hereby grants to Successful Respondent, for the sole purpose of performing the Services and subject to DIR's and/or the DIR Customers' underlying rights and any conditions or limitations imposed under applicable Laws, the same rights of access and use as DIR and/or the applicable DIR Customer possesses under the applicable licenses with respect to the DIR licensed Third Party Materials provided by DIR and/or DIR Customers to Successful Respondent. Subject to Successful Respondent having obtained any Required Consents, DIR shall also grant such rights to Subcontractors designated by Successful Respondent if and to the extent necessary for Successful Respondent to provide the Services. Except as otherwise expressly agreed by the applicable third party licensors, Successful Respondent shall comply with the duties, including use restrictions and nondisclosure obligations, imposed on DIR and/or the DIR Customers by such licenses. Except as otherwise requested or approved by DIR (or the relevant licensor), Successful Respondent shall cease all use of such Third Party Materials upon the end of the Term. THE DIR LICENSED THIRD PARTY MATERIALS ARE PROVIDED BY DIR TO SUCCESSFUL RESPONDENT ON AN AS-IS, WHERE-IS BASIS. DIR EXPRESSLY DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AS TO THE DIR LICENSED THIRD PARTY MATERIALS OR THE CONDITION OR SUITABILITY OF THE DIR LICENSED THIRD PARTY MATERIALS FOR USE BY SUCCESSFUL RESPONDENT TO PROVIDE THE SERVICES, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

#### 14.2 Developed Materials.

- (a) **DIR Ownership.** Except as otherwise expressly provided in [Sections 14.2\(c\)](#) and [14.2\(d\)](#), DIR shall be the sole and exclusive owner of all (i) Developed Materials that are modifications, enhancements, improvements, or Upgrades to or Derivative Works of DIR Owned Materials, including all United States and foreign patent, copyright, trade secret and other intellectual property rights therein, and (ii) the copyright in all other Developed Materials that are provided to DIR as a Deliverable (as defined in [Section 14.2\(c\)](#)). All Developed Materials owned (or to be owned) by DIR pursuant to this [Section 14.2\(a\)](#) shall be considered "**works made for hire**" (as that term is used in the United States Copyright Act, 17 U.S.C. Section 101, or in analogous provisions of other applicable Laws). Successful Respondent hereby irrevocably and perpetually assigns, and shall assign, to DIR without further consideration to the extent of such ownership by DIR all of Successful Respondent's right, title and interest in and to such Developed Materials, including all United States and foreign patent, copyright, trade secret and other intellectual property rights. Successful Respondent acknowledges that DIR and the successors and assignees of DIR shall have the right to obtain and hold in their own name all rights, title and interest in and to all such rights in such Developed Materials. Successful Respondent agrees to execute any documents and take any other actions reasonably requested by DIR to effectuate the purposes of this [Section 14.2\(a\)](#). DIR hereby grants Successful Respondent certain license and other rights with respect to such Developed Materials, as described in [Section 14.1\(b\)](#).
- (b) **Source Code and Documentation.** Successful Respondent shall, promptly as it is developed by Successful Respondent, provide DIR with the source code, if any, and object code and documentation for all Developed Materials owned by DIR pursuant to [Section 14.2\(a\)](#). Such source code and technical documentation shall be sufficient to allow a reasonably knowledgeable and experienced programmer to maintain and support such Materials. The user documentation for such Materials shall accurately describe in terms understandable by a typical Authorized User the functions and features of such Materials and the procedures for exercising such functions and features.
- (c) **Successful Respondent Owned Developed Materials.** Successful Respondent shall be the sole and exclusive owner of all Developed Materials that are modifications, enhancements, improvements, or Upgrades, to or Derivative Works of, Successful Respondent Owned Materials or to the extent not owned by DIR pursuant to [Section 14.2\(a\)](#), including all United States and foreign patent, copyright, trade secret and other intellectual property rights in such Materials; provided, however, that if the creation of any such Developed Material is specifically requested by DIR or a DIR Customer and is provided through performance of the Services, it shall be treated as commercially available Successful Respondent Owned



Developed Material for purposes of all license and other rights of DIR and DIR Customers therein granted pursuant to this Agreement, including under **Section 14.6**. DIR acknowledges that Successful Respondent and the successors and assignees of Successful Respondent shall have the right to obtain and hold in their own name all rights, title and interest in and to Developed Materials owned by Successful Respondent pursuant to this **Section 14.2(c)**. DIR agrees to execute any documents and take any other actions reasonably requested by Successful Respondent to effectuate the purposes of this **Section 14.2(c)**. Successful Respondent hereby grants DIR and the DIR Customers certain license and other rights with respect to such Developed Materials, as described in **Sections 14.3(b)** and **14.6**.

- (d) **Third Party Materials.** The ownership of Derivative Works of Third Party Materials created by Successful Respondent in connection with the Services shall, as between Successful Respondent and DIR, be considered Developed Materials owned by DIR. DIR's ownership of such Derivative Works may be subject to, or limited by, the terms of the underlying agreement with the owner of the underlying Third Party Materials; provided that Successful Respondent shall notify DIR in advance if the terms of any such agreement will preclude or limit DIR's ownership of such Derivative Work and shall obtain DIR's consent prior to proceeding with such Derivative Work.
- (e) **Disclosure by Successful Respondent of Developed Materials.** Successful Respondent shall promptly disclose in writing to DIR the Developed Materials that are developed under this Agreement. With respect to each disclosure, Successful Respondent shall indicate the features or concepts that it believes to be new or different.
- (f) **Waiver of Moral Rights.** To the extent permitted by Law, Successful Respondent hereby waives and shall cause Successful Respondent Personnel who will provide any Services to waive any moral rights in the DIR owned Developed Materials, such as the right to be named as author, the right to modify, the right to prevent mutilation and the right to prevent commercial exploitation, whether arising under the Berne Convention or otherwise. Successful Respondent acknowledges the receipt of equitable compensation for its assignment and waiver of such moral rights and agrees to provide equitable compensation to Successful Respondent Personnel for any assignment or waiver of moral rights.
- (g) **SaaS Solutions.** Notwithstanding anything to the contrary set forth herein, (a) Successful Respondent grants DIR or any DIR Customers access to the functionality of and the right to use the TPE® payment processing solution (the "SaaS Solution") during the term of the MSA, (b) the SaaS Solution will not be included within the definition of Successful Respondent Owned Materials for purposes of escrow requirements and other license grants set forth herein, and (c) Successful Respondent will include the SaaS Solution in its PCI DSS assessment

### **14.3 Successful Respondent Owned and Licensed Materials.**

- (a) **Ownership of Successful Respondent Owned Materials.** As between the Parties, Successful Respondent shall be the sole and exclusive owner of the (i) Materials and other intellectual property lawfully owned by it or its Affiliates prior to the Effective Date, (ii) Materials and other intellectual property acquired by Successful Respondent or its Affiliates on or after the Effective Date (including any such Materials and intellectual property purchased from DIR pursuant to this Agreement) other than Materials and other intellectual property obtained by Successful Respondent or its Affiliates from third parties specifically for or on behalf of DIR or a DIR Customer, (iii) certain Developed Materials as provided in **Sections 14.2(c)** and **14.2(d)**, and (iv) Materials and other intellectual property that are not developed by or on behalf of Successful Respondent pursuant to this Agreement or otherwise paid for by DIR or any DIR Customer under this Agreement (to the extent provided as part of the Services, collectively, "**Successful Respondent Owned Materials**"), including all United States and foreign patent, copyright, trade secret and other intellectual property rights in the Successful Respondent Owned Materials.
- (b) **License to Successful Respondent Owned Materials.** As of the Commencement Date, Successful Respondent hereby grants to DIR and the DIR Customers during the Term, at no additional charge, a world-wide, non-exclusive, irrevocable, royalty-free right and license to Use, with the right to allow, Service Component Providers, DIR Contractors and other third parties to Use for the benefit of or Use by DIR and DIR Customers, the Successful Respondent Owned Materials (including all modifications, replacements, Upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto), including to (i) receive the full benefit of the Services, (ii) perform or have

performed services of the nature of the Services, including in-scope processes and services, (iii) monitor, access, interface with or use the Materials then being used in the performance of the Services, and (iv) perform or have performed ancillary services and functions, including related information technology services and functions. Successful Respondent Owned Materials shall remain the property of Successful Respondent. The rights and obligations of DIR, the DIR Customers, Entities that qualify as DIR Customers and their designee(s) with respect to such Successful Respondent Owned Materials following the expiration or any termination of this Agreement, in whole or in part, are set forth in **Section 14.6**.

- (c) **License to Successful Respondent Third Party Materials.** As of the Commencement Date, and subject to Successful Respondent having obtained any Required Consents, Successful Respondent hereby grants to DIR and the DIR Customers during the Term, at no additional charge, a world-wide, non-exclusive, irrevocable, royalty-free right and license to Use, with the right to grant sublicenses to DIR Contractors and other third parties to Use, the Third Party Materials for which Successful Respondent holds the license or for which Successful Respondent is financially responsible under this Agreement (including all modifications, replacements, Upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto) for the benefit of DIR and the DIR Customers, including to (i) receive the full benefit of the Services, (ii) perform or have performed services of the nature of the Services, including in-scope processes and Services, (iii) monitor, access, interface with or use the Materials then being used in the performance of the Services, and (iv) perform or have performed ancillary services and functions, including related information technology services and functions. To the extent a DIR Contractor requires a license to Successful Respondent licensed Third Party Materials for the performance of services or functions previously performed by Successful Respondent in circumstances in which the services or functions in question have not been terminated or taken completely away from Successful Respondent and such Third Party Software is generally commercially available at established market rates, if Successful Respondent is required to buy additional licenses to accommodate such use by a DIR Contractor, then DIR or the DIR Contractor shall pay shall reimburse Successful Respondent for such license fees, provided that Successful Respondent notifies DIR of such fee, obtains DIR's approval prior to incurring it; and uses commercially reasonable efforts (including providing DIR the benefit of discounted license fees that are available to Successful Respondent under the circumstances) to minimize any fee to be paid or reimbursed by DIR or the DIR Contractor. Except as provided in this provision, neither DIR or the DIR Customers nor the DIR Contractors shall be required to pay any other fees or expenses in connection with such licenses to such Third Party Software. The rights and obligations of DIR, the DIR Customers, Entities that qualify as DIR Customers and their designee(s) with respect to such Successful Respondent licensed Third Party Materials following the expiration or any termination of this Agreement, in whole or in part, are set forth in **Section 14.6**.
- (d) **Embedded and Dependent Materials.** To the extent that Successful Respondent Owned Materials or Third Party Materials are either (i) embedded in or (ii) dependent on or necessary for the Use of any Developed Materials owned by DIR pursuant to **Section 14.2(a)** or any Third Party Materials that DIR or any DIR Customer licenses, then subject to **Section 14.2(d)** Successful Respondent shall not be deemed to have assigned its or any third party's intellectual property rights in such Materials to DIR, but Successful Respondent hereby grants to DIR, the DIR Customers and Entities that qualify as DIR Customers a world-wide, non-exclusive, perpetual, irrevocable, royalty-free right and license to Use, with the right to allow Service Component Providers, DIR Contractors and other third parties the right to Use for the benefit of or Use by DIR, the DIR Customers and Entities that qualify as DIR Customers, such Materials (including all modifications, replacements, Upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto); provided, however, such license shall not extend to DIR's, any DIR Customer's or any Entity that qualifies as a DIR Customer's commercial exploitation of such Successful Respondent Owned Materials or Third Party Materials on a stand-alone basis. Following the expiration or any termination of this Agreement and the termination of the Service(s) for which such Successful Respondent Owned Materials were used, Successful Respondent shall, at DIR's request, provide Upgrades, maintenance, support and other services for such Successful Respondent Owned Materials or Third Party Materials in accordance with **Section 14.6(b)** or **14.6(c)**, as applicable.
- (e) **Source Code Escrow.** At DIR's request, Successful Respondent shall deposit in escrow with an escrow agent selected by DIR the source code and related documentation for Successful Respondent Owned Materials consisting of Software in any of the following circumstances:

- (i) in the case of any such Software that is no longer routinely supported by Successful Respondent; or
- (ii) in the case of any such Software for which source code is made available to other Successful Respondent customers (including through such escrow arrangements).

In the event of the occurrence of any event giving rise to termination of this Agreement by DIR pursuant to **Section 20.4**, Successful Respondent shall provide reasonable assurance to DIR that such occurrence has not and shall not jeopardize Successful Respondent Owned Materials continuing to be routinely supported by Successful Respondent comparable to that provided prior to such occurrence. If Successful Respondent shall be unable to comply with the foregoing to DIR's reasonable satisfaction, Successful Respondent shall, upon direction from DIR, comply with the obligations of this **Section 14.3(e)** as if such Successful Respondent Owned Materials were then no longer routinely supported by Successful Respondent.

At DIR's request, Successful Respondent shall deposit in escrow, with an escrow agent selected by DIR, the source code and related documentation, to the extent available to Successful Respondent, for any Third Party Materials consisting of Software used by Successful Respondent to perform the Services; provided, however, that this obligation will not be applicable to Commercial Off-the-Shelf (COTS) Third Party Materials. Any such escrow shall be governed by and subject to the terms and conditions appearing in the Escrow Agreement attached hereto as **Attachment C Form of Source Code Escrow Agreement**, as such terms and conditions may be modified by DIR and the escrow agent. Unless approved by DIR, Successful Respondent shall not use any Third Party Materials consisting of Software for the performance of the Services without obtaining the right to the source code for such software, other than COTS Third Party Materials as permitted above, whether by escrow or otherwise. While Successful Respondent shall not be required to escrow third party COTS software, Successful Respondent shall ensure that Successful Respondent provides all licenses and other rights required under this Agreement.

#### 14.4 Work Product; Other Materials.

Except as otherwise set forth in **Sections 14.2** and **14.3**, all Work Product shall be owned by DIR. DIR shall have all right, title, and interest in and to the Work Product and all copies made from them. To the extent any Work Product is not deemed a "**work made for hire**" by operation of law, Successful Respondent hereby irrevocably assigns, transfers, and conveys, and shall cause its employees, contractors, and agents to assign, transfer and convey, to DIR without further consideration all of its and their right, title, and interest in and to such Work Product, including all rights of copyright, trade secret, moral rights, and other similar rights in such materials. Successful Respondent acknowledges, and shall cause its employees, contractors, and agents to acknowledge that DIR and the successors and permitted assignees of DIR shall have the right to obtain and hold in their own name any such intellectual property rights in and to such Work Product. Successful Respondent agrees to execute, and shall cause its employees, contractors, and agents to execute, any documents or take any other actions as may reasonably be necessary, or as DIR may reasonably request, to perfect DIR's ownership of any such Work Product. This Agreement shall not confer upon either Party intellectual property rights in Materials of the other Party (to the extent not covered by this **Article 14**) unless otherwise so provided elsewhere in this Agreement.

#### 14.5 General Rights.

- (a) **Copyright Legends.** Each Party agrees to reproduce copyright legends which appear on any portion of the Materials which may be owned by the other Party or third parties.
- (b) **No Implied Licenses.** Except as expressly specified in this Agreement, nothing in this Agreement shall be deemed to grant to one (1) Party, by implication, estoppel or otherwise, license rights, ownership rights or any other intellectual property rights in any Materials owned by the other Party, any Affiliate of Successful Respondent or any DIR Customer.
- (c) **Incorporated Materials.** Without limiting the provisions of **Section 14.3(d)**, should either Party incorporate into Developed Materials any intellectual property subject to third party patent, copyright or license rights, any ownership or license rights granted herein with respect to such Materials shall be limited

by and subject to any such patents, copyrights or license rights; provided that, prior to incorporating any such intellectual property in any Materials, the Party incorporating such intellectual property in the Materials has disclosed this fact and obtained the prior approval of the other Party.

- (d) **Residuals.** This Agreement shall not restrict an individual who is an employee or representative of a Party from using ideas, concepts, or know-how relating to the provision of information technology, network management and data processing products and services that are retained solely in the unaided memory of such individual after performing the obligations of such Party under this Agreement, except to the extent that such use infringes upon any patent, copyright or trademark right of a Party (or in the case of DIR any DIR Customer) or its Affiliates; provided, however, that this **Section 14.5(d)** shall not operate or be construed as permitting an employee or representative of Successful Respondent to disclose, publish, disseminate, or use (i) the source of any proprietary information of DIR or a DIR Customer, (ii) any financial, statistical or personnel information of DIR or a DIR Customer, or (iii) the operational plans of DIR or the DIR Customers. An individual's memory is unaided if the individual has not intentionally memorized the information for the purpose of retaining and subsequently using or disclosing it as otherwise permitted under this **Section 14.5(d)** and does not identify the information as Confidential Information upon recollection.

#### 14.6 Ongoing DIR Rights.

As part of Termination Assistance Services, Successful Respondent shall provide the following to DIR, DIR Customers and their designee(s) with respect to Materials:

- (a) **DIR Customer Owned and Licensed Materials.** With respect to DIR Owned Materials and DIR Customer licensed Third Party Materials, Successful Respondent shall, at no cost to DIR:
- (i) deliver to DIR all such Materials and all copies thereof in the format and medium in use to provide the Services; and
  - (ii) following confirmation by DIR that the copies of such Materials delivered by Successful Respondent are acceptable and the completion by Successful Respondent of any Termination Assistance Services for which such Materials are required, destroy or securely erase all other copies of such Materials then in Successful Respondent's possession, and cease using such Materials and any information contained therein for any purpose.
- (b) **Successful Respondent Owned Materials.**
- (i) **Commercially Available Successful Respondent Owned Materials.** With respect to those Materials owned by Successful Respondent or Successful Respondent Affiliates or Subcontractors that are implicated by the Assistance Event that are used to provide the Services (including all modifications, replacements, Upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto) and that are commercially licensed or otherwise commercially available:
    - (A) Successful Respondent hereby grants to DIR, the DIR Customers and Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) a worldwide, perpetual, non-exclusive, irrevocable, royalty-free, fully paid-up license on standard terms and conditions no less favorable than those offered generally by Successful Respondent to commercial licensees of such Materials (or at DIR election under then current terms and conditions applicable between Successful Respondent and DIR for similar items) to Use, with the right to grant sublicenses to Use, such Materials; provided that, in all events, such terms and conditions shall be at least broad enough to permit DIR and the DIR Customers to use such Materials to provide for the Services and uses for which such Materials are in use at the time of such expiration or termination;
    - (B) Successful Respondent shall deliver to DIR, the DIR Customers and Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) (A) a copy of such Materials and related documentation, (B) the source code and object code for such Materials to the extent such code is reasonably necessary to permit them to Use such Materials, (C) the source code and object code for such Materials that are not Commercial Off The Shelf products

and (D) the source code and object code for such Materials that are Commercial Off The Shelf products if Successful Respondent does not offer or provide upgrades, maintenance, support and other services for such Successful Respondent Owned Materials as provided in **Section 14.6(b)(ii)**; and

- (C) Successful Respondent shall offer to provide to DIR, the DIR Customers and Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) Upgrades, maintenance, support and other services for such Materials on reasonable commercial terms and conditions and for reasonable fees and charges (on the basis of most favored customer pricing based on Successful Respondent customers receiving similar volumes of services similar to such Upgrades, maintenance, support and other services).
- (ii) **Non-Commercially Available Successful Respondent Owned Materials.** With respect to those Materials owned by Successful Respondent or Successful Respondent Affiliates or Subcontractors that are implicated by the Assistance Event that are used to provide the services (including all modifications, replacements, Upgrades, enhancements, improvements, methodologies, tools, documentation, materials and media related thereto) and that are not then commercially licensed or otherwise commercially made available, unless otherwise expressly agreed by DIR in writing prior to the first use of such Materials, Successful Respondent hereby grants to DIR (or, at DIR's direction, its designee) a worldwide, perpetual, irrevocable, non-exclusive, non-transferable (except to the extent this Agreement is assigned in accordance with this Agreement) a fully paid-up license, to Use such Materials following the expiration or termination of the term or termination of the Service(s) for which such Materials were in use. Such license shall be limited to the use of such Materials by DIR (or, at DIR's direction, its designee) to provide for the DIR Customers and Entities that qualify as DIR Customers or have provided for them by a third party, services similar to the Services and such other uses permitted therefor under this Agreement. Unless DIR has otherwise consented prior to the first use of such Materials, DIR (or, at DIR's direction, its designee) shall not be obligated to pay any license or transfer fees in connection with its receipt of the licenses and other rights specified above; provided that, if a DIR Contractor uses such Materials for such purpose for more than one (1) year after the expiration or termination of the Term or termination of the Service(s) for which such Materials were used, DIR or such DIR Contractor shall thereafter pay Successful Respondent a commercially reasonable license fee to be agreed upon by the Parties.

Without limiting or altering Successful Respondent's obligations under **Section 9.12**, if S Successful Respondent is unwilling or unable to grant DIR or its designee the license and other rights described in the preceding paragraph, Successful Respondent shall so notify DIR and shall not use such non-commercially available Materials to provide the Services without DIR's prior written approval. In seeking DIR's approval, Successful Respondent may propose alternative terms, such as a fee for such license, a limitation on the use of such Materials by DIR Contractors, or a limitation on the license period and/or the substitution of a functionally equivalent product.

At DIR's request, Successful Respondent shall provide Upgrades, maintenance, support and other services for such non-commercially available Materials on reasonable commercial terms and conditions, which shall include pricing no less favorable than the pricing customarily charged to other commercial customers receiving equivalent services. If Successful Respondent fails to offer or provide Upgrades, maintenance, support or other services, Successful Respondent shall deliver source code and object code for such Materials to the extent such materials include source code, together with the right to modify, enhance and create derivative works of such materials (provided that, in such event, the licensed Successful Respondent owned materials shall thereafter be provided on an "as is" basis).

Notwithstanding the foregoing, during the Termination Assistance Services period, Successful Respondent may substitute a license for Third Party Software or Materials sufficient to perform, without additional cost, support or resources and at the levels of performance and efficiency required by this Agreement, the functions of such non-commercially available Materials. If it

proposes to do so, Successful Respondent shall notify DIR and describe in detail the features, functionality and cost of the substitute product. DIR may, in its sole discretion, elect to use a different product for such purpose. In such case, Successful Respondent shall direct the amount it would have expended in procuring the proposed substitute product toward the procurement of the product selected by DIR.

Unless DIR has otherwise agreed in advance, DIR, the DIR Customers and Entities that qualify as DIR Customers (and, to the extent applicable, their designee(s)) shall not be obligated to pay any fees or costs in connection with their receipt of the licenses and other rights contained in this **Section 14.6(b)**. Successful Respondent's use of any such Materials to provide the Services shall obligate Successful Respondent to provide, at no additional cost, the license and other rights set forth in this **Section 14.6(b)** to DIR, the DIR Customers, Entities that qualify as DIR Customers and their designees.

(c) **Third Party Materials.** With respect to Third Party Materials for which Successful Respondent holds the license or for which Successful Respondent is financially responsible under this Agreement, upon the effective date of an Assistance Event, Successful Respondent hereby grants to DIR, the DIR Customers and Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) a sublicense (with the right to grant sublicenses) on the same rights and terms (including warranties) that are available to Successful Respondent (or Successful Respondent's Affiliates or Subcontractors) to such Third Party Materials that are implicated by that Assistance Event for the benefit of DIR, the DIR Customers and Entities that qualify as DIR Customers; provided that, during the applicable period of time in which Successful Respondent performs the relevant Termination Assistance Services, Successful Respondent may, with DIR's approval, substitute one of the following for such sublicense:

- (i) the transfer or assignment to DIR, any DIR Customer or Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) of the underlying license for such Third Party Materials on terms and conditions acceptable to all applicable parties;
- (ii) the procurement for DIR, any DIR Customer or Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) of a new license (with terms at least as favorable as those in the license held by Successful Respondent or its Affiliates or Subcontractors and with the right to either grant sublicenses or allow a third party the right to access and Use such Materials for the benefit of or Use by DIR, DIR Customers, and Entities that qualify as DIR Customers) to such Third Party Materials for the benefit of DIR, the DIR Customers, and Entities that qualify as DIR Customers; or
- (iii) the procurement for DIR, any DIR Customer or Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) of a substitute license for new Third Party Materials sufficient to perform, without additional cost, support or resources and at the levels of performance and efficiency required by this Agreement, the functions of such Third Party Materials.

Successful Respondent shall deliver to DIR, the DIR Customers, and Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) a copy of such Third Party Materials (including source code, to the extent it has been available to Successful Respondent) and related documentation and shall cause maintenance, support and other services to continue to be available to DIR, the DIR Customers, and Entities that qualify as DIR Customers (or, at DIR's election, to their designee(s)) to the extent it has been available to Successful Respondent.

Unless DIR has otherwise agreed in advance in accordance with **Section 6(b)**, DIR, the DIR Customers, and Entities that qualify as DIR Customers shall not be obligated to pay any fees or costs in connection with their receipt of the licenses, sublicenses and other rights specified in this **Section 14.6(c)**. Successful Respondent shall not use any Third Party Materials in connection with the Services for which it is unable to offer the license or other rights set forth in this **Section 14.6(c)** without DIR's prior written approval (and absent such approval, Successful Respondent's use of any such Third Party Materials shall obligate Successful Respondent to provide, at no additional cost, such license and other rights to DIR, the DIR Customers, Entities that qualify as DIR Customers and their designees). DIR, however, shall be obligated to make

monthly or annual payments attributable to periods after Successful Respondent's completion of all Termination Assistance Services with respect to the Services for which such Third Party Materials were used for the right to use and receive maintenance or support related thereto, but only to the extent Successful Respondent would have been obligated to make such payments if it had continued to hold the licenses in question or DIR has agreed in advance to make such payments.

To the extent DIR has agreed in advance to pay any fees or costs in connection with its receipt of the licenses, sublicenses or other rights set forth in this **Section 14.6(c)**, Successful Respondent shall, at DIR's request, identify the licensing and sublicensing options available to DIR, the DIR Customers, Entities that qualify as DIR Customers and their designee(s), and the fees and costs associated with each. Successful Respondent shall use commercially reasonable efforts to obtain the most favorable options and the lowest possible fees and costs for Third Party Materials. Successful Respondent shall not commit DIR, the DIR Customers or Entities that qualify as DIR Customers to paying any such fees or expenses without DIR's prior approval. If the licensor offers more than one form of license, DIR (not Successful Respondent) shall select the form of license to be received by DIR, the DIR Customers, Entities that qualify as DIR Customers and their designee(s).

- (d) **Ownership of Deliverables.** Except as otherwise set forth in **Sections 14.2** and **14.3**, all Deliverables shall be owned by DIR, and DIR shall have all right, title and interest, including worldwide Intellectual Property rights (that exist now or may exist in the future) in and to the Deliverables and all copies made from it, and all Deliverables are considered "works made for hire" by DIR as the "author" and owner. Successful Respondent shall document appropriately all Deliverables created by Successful Respondent. Successful Respondent further acknowledges, certifies, and agrees that: (i) DIR is and shall be deemed the exclusive owner throughout the world of all rights (including Intellectual Property rights) in and to the Deliverables for any and all purposes; (ii) DIR has the unencumbered right to reproduce, reuse, alter, modify, edit, prepare derivative works based on, or to change the Deliverables as it sees fit and for any purpose; and (iii) DIR has the right to exploit any or all of the foregoing in any and all media, now known or hereafter devised, throughout the universe, in perpetuity, in all configurations as DIR determines in its sole discretion. Successful Respondent hereby irrevocably and unconditionally waives any and all "moral rights" and any analogous rights, including rights of attribution, paternity and integrity, arising under any Law, that Successful Respondent has in the Deliverables, and any contribution thereto, and hereby agrees not to make any claim against DIR or any party authorized by DIR to exploit the Deliverables based on such "moral rights" and any analogous rights. Unless otherwise permitted by Law, Successful Respondent shall not, at any time during or after the Term, dispute or contest, directly or indirectly, DIR's exclusive right and title to the Deliverables and the Intellectual Property rights related thereto or the validity thereof. Notwithstanding anything in this Agreement to the contrary, DIR shall have a non-exclusive, royalty-free, fully paid-up, irrevocable, non-transferable license to any Successful Respondent Intellectual Property incorporated or embedded in Deliverables.

## 15 REPRESENTATIONS, WARRANTIES, AND COVENANTS

### 15.1 Work Standards.

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

## 15.2 Maintenance.

**Successful Respondent Responsibility.** Successful Respondent represents, warrants, and covenants that, unless otherwise agreed and to the extent it has operational responsibility under this Agreement, it shall maintain the Equipment and Software so that they operate substantially in accordance with the Service Levels and their Specifications, including (i) maintaining Equipment in good operating condition, subject to normal wear and tear, (ii) undertaking repairs and preventive maintenance on Equipment in accordance with the applicable Equipment manufacturer's recommendations and requirements, and (iii) performing Software maintenance in accordance with the applicable Software supplier's documentation, recommendations and requirements.

## 15.3 Efficiency and Cost Effectiveness.

Successful Respondent represents, warrants, and covenants that it shall use commercially reasonable efforts to provide the Services in a cost-effective and efficient manner consistent with the required level of quality and performance. Without limiting the generality of the foregoing, such efforts shall include:

- (a) **Timing of Actions.** Making adjustments in the timing of actions (consistent with DIR priorities and schedules for the Services and Successful Respondent's obligation to meet the Service Levels).
- (b) **Timing of Functions.** Delaying or accelerating, as appropriate, the performance of non-critical functions within limits acceptable to DIR.
- (c) **Systems Optimization.** Tuning or optimizing the Systems (including memory), Applications Software, databases and/or processes to optimize performance and minimize costs.
- (d) **Usage Scheduling.** Controlling its use of the System and/or the DIR data network by scheduling usage, where possible, to low utilization periods.
- (e) **Alternative Technologies.** Subject to **Section 9.4**, using alternative technologies to perform the Services.
- (f) **Efficiency.** Efficiently using resources for which DIR is charged hereunder, consistent with industry norms, and compiling data concerning such efficient use in segregated and auditable form whenever possible.

## 15.4 Intellectual Property.

- (a) **Ownership and Use.** Successful Respondent represents, warrants, and covenants that it is either the owner of, or is authorized to use, and possesses sufficient rights to grant the rights and licenses contained in this Agreement to, any and all Materials, Equipment, Systems and other resources or items provided by Successful Respondent. As to any such Materials, Equipment, Systems, resources, or items that Successful Respondent does not own, Successful Respondent shall advise DIR as to the ownership and extent of Successful Respondent's rights with regard to such Materials, Equipment, Systems, resources, or items to the extent any limitation in such rights would materially impair Successful Respondent's performance of its obligations under this Agreement or the right and licenses granted by Successful Respondent under this Agreement.
- (b) **Performance.** Successful Respondent represents, warrants and covenants that any Successful Respondent Owned Materials consisting of Software and any Equipment provided by Successful Respondent shall Comply in all material respects with their applicable documentation and Specifications and shall provide the functions and features and operate in the manner described therein.
- (c) **Developed Materials Compliance.** Successful Respondent warrants and covenants that Developed Materials shall be free from material errors in operation and performance, shall Comply in all material respects with the applicable documentation and Specifications, and shall provide the functions and features and operate in the manner described in **Exhibit 2.0 Service Model** or otherwise agreed by the Parties (including in the Transition Plan), for the later of one hundred twenty (120) days and the completion of three (3) full production cycles involving such Developed Material. During such warranty period, Successful Respondent shall correct any failure to Comply at no additional charge to DIR and shall use commercially reasonable efforts to do so as expeditiously as possible. In the event that Successful Respondent fails or is unable to repair or replace such nonconforming Developed Material, DIR shall, in addition to any and all other remedies available to it hereunder, be entitled to obtain from Successful



Respondent a copy of the source code and/or object code and/or other applicable documentation to such Developed Material, provided that with respect to any such provided source code for Successful Respondent owned Developed Materials, DIR (or its designee) may utilize such source code only for the repair or maintenance of such Successful Respondent owned Developed Material, and/or to facilitate the Termination Assistance Services to be provided by Successful Respondent during the Termination Assistance period (to the extent reasonably necessary for DIR to continue to have Services performed for it pursuant to the terms of this Agreement). The foregoing will not extend to any failure to Comply attributable to (i) any change or modification to the Developed Material not contemplated by this Agreement, performed by Successful Respondent or its Affiliate or Subcontractor, or recommended or approved by Successful Respondent or (ii) DIR operating such Developed Material other than (A) in accordance with the applicable documentation and Specifications, (B) for the purpose(s) contemplated by this Agreement, or (C) on types of hardware contemplated by this Agreement or recommended, supplied or approved by Successful Respondent.

- (d) **Nonconformity of Successful Respondent Owned Software.** In the event that the Successful Respondent Owned Materials consisting of Software (excluding Successful Respondent Owned Developed Materials that are addressed in **Section 15.4(c)**) or any Equipment provided by Successful Respondent do not Comply with their applicable documentation and Specifications and/or materially adversely affects the Services provided hereunder, Successful Respondent shall expeditiously repair such Software or Equipment, or replace such Software or Equipment with conforming Software or Equipment.

### 15.5 Non-Infringement.

- (a) **Performance of Responsibilities.** Except as otherwise provided in this Agreement, each Party represents, warrants and covenants that it shall perform its obligations and responsibilities under this Agreement in a manner that does not infringe or misappropriate, or constitute an infringement or misappropriation of, any patent, copyright, trademark, trade secret or other intellectual property, proprietary or privacy rights of any third party; provided, however, that the performing Party shall not have any obligation or liability to the extent any infringement or misappropriation is caused by (i) modifications made by the other Party or its contractors or subcontractors, without the approval of the performing Party, (ii) the other Party's combination of the performing Party's work product or Materials with items not furnished, specified, recommended, or approved by the performing Party or contemplated by this Agreement, (iii) a breach of this Agreement by the other Party, (iv) the failure of the other Party to use corrections or modifications provided by the performing Party offering equivalent features and functionality, (v) adherence to detailed specifications provided by the other Party that the performing Party is required to comply with (provided the performing Party notifies the other Party of the possibility of infringement or misappropriation if and to the extent it knows or reasonably should know of such possibility), or (vi) Third Party Materials, except to the extent that such infringement or misappropriation arises from the failure of the performing Party to obtain the necessary licenses or Required Consents or to abide by the limitations of the applicable Third Party Materials licenses. Each Party further represents, warrants and covenants that it shall not use or create Materials in connection with the Services which are libelous, defamatory or obscene.
- (b) **Third Party Materials Indemnification.** In addition, with respect to Third Party Materials provided by Successful Respondent pursuant to this Agreement, Successful Respondent covenants that it shall obtain and provide intellectual property indemnification for DIR and the DIR Customers (or obtain intellectual property indemnification for itself and enforce such indemnification on behalf of DIR and the DIR Customers) from the suppliers of such Materials. Unless otherwise approved in advance by DIR, such indemnification shall be (i) comparable to the intellectual property indemnification provided by Successful Respondent to DIR and the DIR Customers under this Agreement or (ii) the best indemnification reasonably available in the industry for the same or substantially similar types of products for the intended use of such Materials.

### 15.6 General.

- (a) **Successful Respondent.** Successful Respondent represents, warrants, and covenants to DIR that:
- (i) It is a corporation duly incorporated, validly existing and in good standing under the Laws of its state of incorporation;
  - (ii) It has the requisite corporate power and authority to execute, deliver, and perform its obligations

under this Agreement;

- (iii) Except as otherwise provided in **Article 5**, it has obtained all licenses, authorizations, approvals, consents, or permits required to perform its obligations under this Agreement under all applicable federal, state, or local Laws and under all applicable rules and regulations of all authorities having jurisdiction over the Services, including under all applicable Laws of the State;
  - (iv) The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated by this Agreement have been duly authorized by the requisite corporate action on the part of such Party;
  - (v) The execution, delivery and performance of this Agreement shall not constitute a violation of any judgment, order or decree; a material default under any material contract by which it or any of its material assets are bound; or an event that would, with notice or lapse of time, or both, constitute such a default; and
  - (vi) As of the Effective Date there is, to Successful Respondent's knowledge, no pending claim, suit or proceeding against or affecting Successful Respondent or any of its Affiliates or Subcontractors that would reasonably be expected to adversely affect Successful Respondent's ability to perform and fulfill its obligations under this Agreement including, without limitation, actions pertaining to the proprietary rights described in **Sections 15.4** and **15.5**. Successful Respondent shall notify DIR within fifteen (15) days of Successful Respondent's knowledge of any such claim, suit, or proceeding. Without limiting the terms of **Section 13.1(b)(iv)**, Successful Respondent shall notify DIR, within forty-eight (48) hours, if process is served on Successful Respondent in connection with this Agreement where such matter may reasonably affect the Services or a Party's rights including any subpoena for Successful Respondent's records, and shall send a written notice of the service together with a copy of the same to DIR within seventy-two (72) hours of such service.
- (b) **DIR**. DIR represents, warrants, and covenants to Successful Respondent that:
- (i) DIR has statutory authority to enter into this Agreement, perform its obligations hereunder and offer its contracted services to the DIR Customers; and
  - (ii) The execution, delivery, and performance of this Agreement shall not constitute a violation of any judgment, order, or decree; a material default under any material contract by which it or any of its material assets are bound; or an event that would, with notice or lapse of time, or both, constitute such a default.

### 15.7 Certifications.

Successful Respondent, for itself and on behalf of its Subcontractors, certifies that it:

- (a) Has not given, offered to give, and does not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the Agreement,
- (b) Is not currently delinquent in the payment of any franchise tax owed the State of Texas and is not ineligible to receive payment under Section 231.006, Texas Family Code and acknowledges the Agreement may be terminated and payment withheld if this certification is inaccurate,
- (c) Neither it, nor anyone acting for it, has violated the antitrust Laws of the United States or the State of Texas, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage,
- (d) Has not received payment from DIR or any of its employees for participating in the preparation of the Agreement,
- (e) Under Sections 2155.004 and 2155.006, Texas Government Code, is not ineligible to receive the specified contract and acknowledges that this Agreement may be terminated and payment withheld if this certification is inaccurate,

- (f) To the best of its knowledge and belief, knows there are no suits or proceedings pending or threatened against or affecting it, which if determined adversely to it will have a material adverse effect on the ability to fulfill its obligations under the Agreement,
- (g) Successful Respondent and its principals are not suspended or debarred from doing business with the federal government as listed in the System for Award Management (SAM) maintained by the General Services Administration;
- (h) As of the Effective Date, is not listed in the prohibited vendors list authorized by Executive Order #13224, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism," published by the United States Department of the Treasury, Office of Foreign Assets Control;
- (i) Agrees that any payments due under this Agreement will be applied towards any debt, including but not limited to delinquent taxes and child support, that is owed to the State;
- (j) Is in compliance Section 669.003, Texas Government Code, relating to contracting with executive head of a state agency;
- (k) For itself and on behalf of its Subcontractors, has identified (and will identify, for the duration of the Term)
  - (i) all current or former employees of the State assigned or proposed to work on the Agreement twenty percent (20%) or more of their time and has disclosed them to DIR and has disclosed or does not employ any relative of a current or former state employee within two (2) degrees of consanguinity, and, if these facts change during the course of the Agreement, Successful Respondent certifies for itself and on behalf of its Subcontractors, it shall disclose the name and other pertinent information about the employment of current and former employees and their relatives within two (2) degrees of consanguinity and (ii) any former executive head of a State agency employed by Successful Respondent;
- (l) Represents and warrants that the provision of Services or other performance under the Agreement will not constitute an actual or potential conflict of interest and certifies that it will not create the appearance of impropriety, and, if these facts change during the course of the Agreement, Successful Respondent certifies it shall disclose for itself and on behalf of Subcontractors, the actual or potential conflict of interest and any circumstances which create the appearance of impropriety;
- (m) Represents and warrants that DIR and/or the Customer's payment to Successful Respondent and Successful Respondent's receipt of appropriated or other funds under this Agreement are not prohibited by Sections 556.005 or 556.008, Texas Government Code; and
- (n) Successful Respondent acknowledges the applicability of Sections 2155.444 and 2155.4441, Texas Government Code, in fulfilling the terms of the Agreement.
- (o) Successful Respondent shall comply with the requirements related to federal immigration laws and regulations, to include but not limited to Immigration and Reform Act of 1986, of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("**IIRIRA**"), and the Immigration Act of 1990 (8 U.S.C.1101, et seq.) regarding employment verification and retention of verification forms for any individual(s) hired on or after the effective date of 1996 Act, who will perform any labor or services under this Agreement. Nothing herein is intended to exclude compliance by Successful Respondent with all other relevant federal immigration statutes and regulations promulgated pursuant thereto.

Pursuant to Executive Order No. RP-80, issued by the Governor of Texas on December 3, 2014, and as subsequently clarified, the Successful Respondent shall, as a condition of this Contract, also comply with the United States Department of Homeland Security's E-Verify system to determine the eligibility of:

1. all persons 1) to whom the E-Verify system applies, and 2) who are hired by the Successful Respondent during the term of this Contract to perform duties within Texas; and
2. all Subcontractors' employees 1) to whom the E-Verify system applies, and 2) who are hired by the Subcontractor during the term of this Contract and assigned by the Subcontractor to perform work pursuant to this Contract.

The Successful Respondent shall require its Subcontractors to comply with the requirements of this Section and the Successful Respondent is responsible for the compliance of its Subcontractors. Nothing herein is intended to exclude compliance by Successful Respondent and its Subcontractors with all other relevant federal immigration statutes and regulations promulgated pursuant thereto.

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

#### **15.8 Inducements; DIR Code of Ethics.**

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

- (a) **Reliance.** In executing this Agreement, the DIR relies on Successful Respondent's representations, warranties, and covenants regarding the following: (i) Successful Respondent regularly provides the types of Services described in the RFO to other public or private entities; (ii) Successful Respondent has the skills, qualifications, expertise, financial resources, and experience necessary to perform the Services described in this Agreement in an efficient, cost-effective manner, with a high degree of quality and responsiveness, and has performed similar Services for other public or private entities; (iii) Successful Respondent has thoroughly reviewed, analyzed, and understood the RFO, has timely raised all questions or objections to the RFO, and has had the opportunity to review and fully understand the current program, operating environment for the Services, this Agreement and the needs and requirements of DIR, the DIR Customers, and the State during the Term; (iv) Successful Respondent has had the opportunity to review and understand the State's stated objectives in entering into this Agreement and, based on such review and understanding, Successful Respondent has the ability and capacity to perform the Services for the Term in accordance with the terms and conditions of this Agreement; (v) Successful Respondent also has reviewed and understands all of the risks associated with the Texas.gov Payment Services program as described in the RFO and the Agreement, including the risk of non-appropriation of funds; (vi) Successful Respondent shall at all times be capable of and legally authorized to provide the Services; and (vii) the Charges assessed to DIR and the DIR Customers shall be true and correct.
- (b) **Inducements.** Successful Respondent represents, warrants, and covenants that neither Successful Respondent nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee has, shall have, or shall give commissions, payments, kickbacks, lavish or extensive entertainment, or other inducements of more than minimal value to any employee or agent of DIR in connection with this Agreement. Successful Respondent also represents, warrants, and covenants that, to the best of its knowledge, neither Successful Respondent nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee has given any such payments, gifts, entertainment or other thing of value to any employee or agent of DIR. Successful Respondent also acknowledges that the giving of any such payments, gifts, entertainment, or other thing of value is strictly in violation of DIR policy on conflicts of interest, and may result in the cancellation of this Agreement and other existing and future contracts between the Parties.
- (c) **DIR Code of Ethics.** Successful Respondent represents, warrants, and covenants that, in the performance of the Services and its other contractual obligations hereunder, it shall comply with the DIR Code of Ethics, as modified from time to time.
- (d) **No Financial Interest.** Successful Respondent represents, warrants, and covenants that neither Successful Respondent nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee has, shall have, or shall acquire, any contractual, financial, business or other interest or advantage, direct or indirect, that would conflict in any manner or degree with Successful Respondent's performance of its duties and responsibilities to DIR under this Agreement or otherwise create an appearance of impropriety with respect to this Agreement; and Successful Respondent shall promptly inform DIR of any such interest that may be incompatible with the interests of DIR.

- (e) **No Abuse of Authority for Financial Gain.** Successful Respondent represents, warrants, and covenants that neither Successful Respondent nor any of its Affiliates, nor any employee of either, has used or shall use the authority provided or to be provided under this Agreement to improperly obtain financial gain, advantage or benefit for Successful Respondent, any of its Affiliates, any of their employees or any member of the immediate family of any such employee.
- (f) **No Use of Information for Financial Gain.** Successful Respondent represents, warrants, and covenants that neither Successful Respondent nor any of its Affiliates, nor any employee of either, has used or shall use any DIR Confidential Information acquired in connection with this Agreement to obtain financial gain, advantage, or benefit for Successful Respondent, any of its Affiliates, any of their employees, nor any member of the immediate family of any such employee, or any member of the immediate family of any such employee.
- (g) **Independent Judgment.** Successful Respondent represents, warrants, and covenants that neither Successful Respondent nor any of its Affiliates, nor any employee of either, has accepted or shall accept another DIR contract that would impair the independent judgment of Successful Respondent in the performance of this Agreement.
- (h) **No Influence.** Successful Respondent represents, warrants, and covenants that neither Successful Respondent nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee, has accepted or shall accept anything of value, or an inducement that would provide a financial gain, advantage or benefit, based on an understanding that the actions of Successful Respondent, any such Affiliates or any such employees on behalf of DIR would be influenced thereby; and neither Successful Respondent nor any of its Affiliates shall attempt to influence any DIR employee by the direct or indirect offer of anything of value.
- (i) **No Payment Tied to Award.** Successful Respondent represents, warrants and covenants that neither Successful Respondent nor any of its Affiliates, nor any employee of either, nor any member of the immediate family of any such employee, has paid or agreed to pay any person or Entity, other than bona fide employees working solely for Successful Respondent or such Affiliates or any Subcontractors, any fee, commission, percentage, brokerage fee, gift or any other consideration, that is contingent upon or resulting from the award or execution of this Agreement.
- (j) **No Collusion.** Successful Respondent represents, warrants, and covenants that the prices presented in Successful Respondent's response to the RFO were arrived at independently, without consultation, communication, or agreement with any other proposer for the purpose of restricting competition, the prices quoted were not knowingly disclosed by Successful Respondent to any other proposer and no attempt was made by Successful Respondent to induce any other person or Entity to submit or not to submit a proposal for the purpose of restricting competition.

#### 15.9 Malicious Code.

Each Party shall cooperate with the other Party and shall take commercially reasonable actions and precautions consistent with **Exhibit 2 Service Model** to prevent the introduction and proliferation of Malicious Code into DIR's or a DIR Customer's environment or any System used to provide the Services and to notify the other Party expeditiously of any Malicious Code in any such environment or System of which it become aware. Without limiting Successful Respondent's other obligations under this Agreement, in the event Malicious Code is found in Equipment, Software, or Systems managed or supported by Successful Respondent, Successful Respondent shall, at no additional charge to DIR, eliminate or permanently quarantine such Malicious Code and reduce the effects of such Malicious Code and, if the Malicious Code causes a loss of operational efficiency or loss of data, mitigate such losses and restore such data with generally accepted data restoration techniques.

#### 15.10 Disabling Code.

Successful Respondent represents, warrants, and covenants that, without the prior written consent of DIR, Successful Respondent shall not insert into the Software any code that could be invoked to disable or otherwise shut down all or any portion of the Software, Equipment, and/or Systems. Successful Respondent further represents, warrants, and covenants that, with respect to any disabling code that may be part of the Software, Successful Respondent shall not invoke or cause to be invoked such disabling code at any time,

including upon expiration or any termination of this Agreement, without DIR's prior written consent. Successful Respondent also represents, warrants, and covenants that it shall use commercially reasonable efforts to not use Third Party Materials consisting of Software containing disabling code without the prior approval of DIR. For purposes of this provision, code that serves the function of ensuring software license compliance (including passwords) shall not be deemed disabling code, provided that Successful Respondent will use commercially reasonable efforts to attempt to learn from third parties whether such code is included in third party products and will notify DIR accordingly and obtain DIR's approval prior to installing such code in any Software, Equipment, or System.

#### 15.11 Compliance with Laws.

- (a) **Compliance by Successful Respondent.** Subject to **Sections 15.11(d)** and **(e)**, Successful Respondent represents, warrants and covenants that, with respect to the provision of the Services and the performance of any of Successful Respondent's other legal and contractual obligations hereunder, Successful Respondent is and shall be in compliance in all material respects with all applicable Laws and shall remain in compliance with such Laws during the Term, including identifying and procuring applicable permits, certificates, approvals, and inspections required under such Laws. If any charge of non-compliance by Successful Respondent with any such Laws occurs or Successful Respondent is aware that it is not in compliance with such Laws that could have a material adverse impact on the performance, receipt, or use of the Services, Successful Respondent shall promptly notify DIR of such charge or non-compliance, as applicable.
- (b) **Compliance Data and Reports.** At no additional charge, Successful Respondent shall provide DIR with data and reports in Successful Respondent's possession as reasonably necessary for DIR to comply with all Laws applicable to the Services (including the Equipment, Materials, and other resources it provides or has assumed operational responsibility hereunder).
- (c) **Materials, Equipment, and Systems Compliance.** Successful Respondent represents, warrants, and covenants that the Materials, Equipment, and Systems owned, developed, implemented, provided or used by Successful Respondent in providing the Services are in compliance with all applicable Laws and shall remain in compliance with such Laws during the Term.
- (d) **Notice of Laws.** Successful Respondent shall notify DIR of any Laws and changes in Laws applicable to the providers of services similar to the Services or to the performers of activities or functions similar to any of Successful Respondent's other legal and contractual obligations hereunder ("**Successful Respondent Laws**"). DIR shall notify Successful Respondent of any other Laws applicable to DIR, including those specific to DIR's business that are supported by Successful Respondent under this Agreement ("**DIR Laws**"), that would reasonably be expected to materially affect the Services or Successful Respondent's performance of its obligations under this Agreement. Successful Respondent shall undertake reasonable efforts, including through Successful Respondent Personnel, to maintain general familiarity with DIR Laws, and shall bring requirements of any such Laws known to Successful Respondent to DIR's attention. Subject to its non-disclosure obligation under other customer contracts, Successful Respondent shall use commercially reasonable efforts to obtain information regarding such requirements from other outsourcing customer engagements and to communicate such information to DIR in a timely manner. Each Party shall further use commercially reasonable efforts to advise the other of Laws and changes in Laws about which such Party becomes aware in any way impacting the performance, provision, receipt, and use of the Services, but without assuming an affirmative obligation of inquiry, except as otherwise provided herein, and without relieving the other Party of its obligations hereunder. At DIR's request, Successful Respondent Personnel shall participate in DIR provided compliance training programs.
- (e) **Interpretation of Laws or Changes in Laws.** Successful Respondent shall be responsible for interpreting and agrees to interpret Successful Respondent Laws and shall make adjustments to the Services as needed to maintain compliance with such Successful Respondent Laws. DIR shall be responsible for interpreting and agrees to interpret DIR Laws and, with Successful Respondent's cooperation, advise Successful Respondent of changes that must be made to the Services or Successful Respondent's other obligations under this Agreement that are required to maintain DIR's compliance with DIR Laws. In the event a change to the Services or other Successful Respondent's obligations under this Agreement is required in order to comply with applicable Laws, the Parties shall timely comply, with such implementation to be undertaken

in accordance with Change Control and **Section 15.11(f)**, as applicable. For purposes of clarity, DIR maintains final approval rights, in its sole discretion, to interpret any such change needed under this **Section 15.11(e)** relating to all applicable Laws provided, however, that such approval rights in the case of Successful Respondent Laws will be limited to those Successful Respondent Laws impacting or otherwise related to DIR or a DIR Customer's operating environment. To the extent the impact of any Law (including change in Law) applicable to the provision of the Services and the performance of any of Successful Respondent's other legal and contractual obligations hereunder cannot be readily identified by Successful Respondent, the Parties shall cooperate in interpreting such Law and shall seek in good faith to identify and agree upon the impact on the performance, provision, receipt and use of the Services. If the Parties are unable to agree upon such impact, DIR shall retain the right, in its sole discretion, to interpret such Law and determine its impact. In addition, if Successful Respondent reasonably concludes, after due inquiry, that the compliance obligations associated with any Law applicable to the provision of the Services and the performance of any of Successful Respondent's other legal and contractual obligations hereunder are unclear or that there is more than one (1) reasonable approach to achieving compliance, Successful Respondent shall escalate the issue to DIR for a final decision. In no event shall either Party be obligated to interpret and/or offer legal advice regarding Laws applicable to the other Party.

Without limiting either Party's obligations under this **Section 15.11(e)**, the Parties intend to proactively cooperate with each other in understanding DIR Laws and Successful Respondent Laws, and the impact such laws may have on the Services and DIR's use or receipt of the Services.

- (f) **Implementation of Changes in Laws.** In the event of any changes in Laws (including laws other than applicable to the provision of the Services and the performance of any of Successful Respondent's other legal and contractual obligations hereunder, to the extent Successful Respondent has knowledge of such Laws, including from DIR), Successful Respondent shall implement any necessary modifications to the Services, Materials, Equipment, and Systems prior to the deadline imposed by the regulatory or governmental body having jurisdiction for such requirement or change. Without modifying the Parties' respective financial obligations set forth in **Exhibit 4.0 Business Model**, Successful Respondent shall bear the costs associated with compliance with (A) Successful Respondent Laws, and (B) DIR Laws unless the change(s) required for compliance meets the definition of New Service, in which case it shall be treated as a Project.
- (g) **Termination.** In the event that any change(s) in Laws results in an increase of ten percent (10%) or more in the estimated average monthly Charges or otherwise has a material adverse impact on Successful Respondent's ability to perform the Services and DIR would not have incurred such additional cost or impact if it had not outsourced the Services in question to Successful Respondent, then DIR may, within one hundred eighty (180) days of such aggregate increase being attained and upon at least ninety (90) days prior notice to Successful Respondent, terminate this Agreement in its entirety or the impacted Service as of the termination date specified in the notice.
- (h) **Responsibility.** Subject to **Section 15.11(e)**, Successful Respondent will be responsible for any Losses imposed on Successful Respondent, DIR, or the DIR Customers resulting from any failure of Successful Respondent or any third party engaged by Successful Respondent to comply with applicable Laws or respond in a timely manner to changes in such Laws.

#### **15.12 Equal Opportunity Compliance.**

Successful Respondent represents, warrants, and covenants that it shall abide by all applicable Laws pertaining to equal employment opportunity, including state and federal Laws. In accordance with such Laws, Successful Respondent agrees that no individual in the United States shall, on the grounds of race, color, religion, national origin, sex, age, veteran status, or disability, be excluded from employment with or participation in, be denied the benefits of or be otherwise subjected to discrimination under any program or activity performed by Successful Respondent under this Agreement. If Successful Respondent is found to be in non-compliance with these requirements, Successful Respondent agrees to take appropriate steps to correct these deficiencies. Upon request, Successful Respondent shall furnish to DIR information regarding Successful Respondent's nondiscriminatory hiring and promotion policies, as well as specific information on the composition of its principals and staff, including the identification of minorities and women in management or other positions with discretionary or decision-making authority.

### **15.13 Information Furnished to DIR.**

Successful Respondent represents that, based on the knowledge of the undersigned after reasonable due diligence, all written information made a part of this Agreement is true, accurate, and complete, and contains no untrue statement of a material fact or omits any material fact necessary to make such information not misleading. Successful Respondent hereby agrees to provide DIR with notice within two (2) DIR Business Days in the event it discovers that any information that has been provided to DIR becomes or turns out not to be true and correct. Such notice shall identify the information as incorrectly provided and shall set forth the correct information.

### **15.14 Previous Contracts.**

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

### **15.15 Completeness of Due Diligence Activities.**

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

### **15.16 Interoperability.**

Successful Respondent represents, warrants, and covenants that the Software, Equipment, and Systems provided by Successful Respondent and/or used to provide the Services shall be interoperable with the software, equipment, and systems used by DIR or the DIR Customers to the extent necessary to provide the same or similar services and/or to deliver records to, receive records from, or otherwise interact with the Software, Equipment, and Systems to receive the Services.

### **15.17 Prohibition on Contracts with Companies Boycotting Israel.**

As required by Texas Government Code section 2270.002, by executing the above referenced Contract, Successful Respondent represents and warrants that it does not, and will not during the term of this Contract, boycott Israel. Successful Respondent further represents and warrants that no subcontractor of the Successful Respondent boycotts Israel, or will boycott Israel during the term of this Contract. Successful Respondent agrees to take all necessary steps to ensure this representation and warranty remains true during the term of this Contract.

## **16 INSURANCE AND RISK OF LOSS**

Successful Respondent shall continuously maintain the insurance coverages set forth in **Attachment B Insurance and Risk of Loss**. This attachment contains provisions or other information applicable to Successful Respondent's obligations respecting insurance and to the Parties' allocation of certain risks of loss.



## 17 INDEMNITIES

### 17.1 Indemnity by Successful Respondent.

Successful Respondent agrees to indemnify, defend, and hold harmless DIR and the DIR Customers and their respective officers, directors, employees, agents, representatives, successors and assignees from and against any and all Losses and threatened Losses due to non-Party claims arising from or in connection with any of the following:

- (a) **Representations, Warranties and Covenants.** Successful Respondent's breach of any of its representations, warranties, or obligations set forth in Sections 15.6(a), 15.7, 15.8, 15.9, 15.10, and 15.11.
- (b) **Assumed Contracts.** Successful Respondent's decision to terminate or failure to observe or perform any duties or obligations to be observed or performed by Successful Respondent under any of the Third Party Materials licenses, Equipment Leases, or Third Party Contracts assigned to Successful Respondent or for which Successful Respondent has assumed financial or operational responsibility pursuant to this Agreement.
- (c) **Licenses, Leases and Contracts.** Successful Respondent's failure to observe or perform any duties or obligations to be observed or performed by Successful Respondent under Third Party Materials licenses, Equipment Leases, or Third Party Contracts used by Successful Respondent to provide the Services (other than Third Party Materials Successful Respondent is required to use by a Service Component Provider pursuant to a license held by such Service Component Provider), including any action undertaken by DIR or a DIR Customer in conformity with the request or direction of Successful Respondent with respect to any such license, lease or contract, including pursuant to Section 14.6(c).
- (d) **DIR Data or Confidential Information.** Successful Respondent's breach of its obligations with respect to DIR Data or DIR Confidential Information.
- (e) **Infringement.** Infringement or misappropriation or alleged infringement or alleged misappropriation of a patent, trade secret, copyright, or other intellectual property or other proprietary rights in contravention of Successful Respondent's representations, warranties and covenants in Sections 15.4 and 15.5.
- (f) **Compliance with Laws; Government Claims.** Losses, including government fines, penalties, sanctions, interest, or other remedies, resulting from Successful Respondent's failure to perform its responsibilities under this Agreement in compliance with applicable Laws as required by this Agreement.
- (g) **Taxes.** Taxes, together with interest and penalties, that are the responsibility of Successful Respondent under Section 11.4.
- (h) **Claims Arising in Shared Facility Services.** Any claim for damage, interruption, delay or loss of service (not constituting Services provided pursuant to this Agreement) by a third party receiving services from a shared Successful Respondent facility or using shared Successful Respondent resources.
- (i) **Affiliate, Subcontractor, or Assignee Claims.** Any claim, other than an indemnification claim under this Agreement, initiated by (i) a Successful Respondent Affiliate or Subcontractor asserting rights under this Agreement or (ii) any Entity to which Successful Respondent assigned, transferred, pledged, hypothecated, or otherwise encumbered its rights to receive payments from DIR under this Agreement.
- (j) **Personal Injury and Property Loss or Damage.** Personal injury (including death) or any loss or damage to real or tangible personal property resulting from Successful Respondent's negligent or wrongful acts or omissions.
- (k) **Employment Claims.** Any claim resulting from any (i) violation by Successful Respondent or its officers, directors, employees, representatives, or agents, of any applicable Laws or any common Law protecting persons or members of protected classes or categories, including Laws prohibiting discrimination or harassment on the basis of a protected characteristic; (ii) liability resulting from any failure by Successful Respondent to collect and withhold any social security or other employment taxes, workers' compensation claims, and premium payments and contributions applicable to the wages and salaries of such Successful Respondent Personnel; (iii) payment or failure to pay any salary, wages, or other cash compensation due and owing to any Successful Respondent Personnel, (iv) employee pension or other benefits of any

Successful Respondent Personnel, (v) other aspects of the employment relationship of Successful Respondent Personnel with Successful Respondent or the termination of such relationship, including claims for wrongful discharge, claims for breach of express or implied employment contract, and claims of joint employment; and/or (vi) liability resulting from representations (oral or written) by Successful Respondent or its respective officers, directors, employees, representatives, or agents made in connection with the interview, selection, hiring and/or transition process, the offers of employment made to such employees, the failure to make offers to any such employees, or the terms and conditions of such offers (including compensation and employee benefits).

- (l) **Government Claims.** Any claim by any government or any authority, department or agency thereof (excluding the State, DIR and the DIR Customers) resulting from Successful Respondent's failure to comply with its obligations under this Agreement.

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

## 17.2 Infringement.

In the event that (1) any Materials, Equipment, Systems, Services, and other resources or items provided by Successful Respondent or used by Successful Respondent in the performance or delivery of the Services (other than Third Party Materials Successful Respondent is required to use by a Service Component Provider) are found, or in DIR's reasonable opinion are likely to be found, to infringe upon the patent, copyright, trademark, trade secrets, intellectual property, or proprietary rights of any third party in any country in which Services are to be performed or received under this Agreement or (2) the continued use of such Materials, Equipment, Systems, Services, and other resources or items is enjoined, Successful Respondent shall, in addition to defending, indemnifying, and holding harmless DIR as provided in **Section 17.1(e)** and to the other rights DIR may have under this Agreement, promptly and at its own cost and expense and in such a manner as to minimize the disturbance to DIR's and the DIR Customers' operations and activities do one of the following:

- (a) **Obtain Rights.** Obtain for DIR and the DIR Customers the right to continue using and receiving the benefits of such Materials, Equipment, or Services.
- (b) **Modification.** Modify the item(s) in question so that it is no longer infringing (provided that such modification does not degrade the performance or quality of the Services or adversely affect DIR's and the DIR Customers' intended use as contemplated by this Agreement).
- (c) **Replacement.** Replace such item(s) with a non-infringing functional equivalent acceptable to DIR.
- (d) **Discontinued Use.** If, despite Successful Respondent's commercially reasonable efforts to effect the alternatives set forth in **Sections 17.2(a)-(c)** above, the Parties determine that none of such alternatives are feasible, Successful Respondent may discontinue its use of such infringing or potentially infringing Materials, Equipment, or Services; provided, however, neither such right or such discontinuation shall limit nor expand DIR's rights or Successful Respondent's obligations under the Agreement; nor shall such right or such discontinuation excuse any breach by Successful Respondent of its obligation to provide the Services and to provide the Services in a non-infringing manner.

## 17.3 Indemnification Procedures.

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

- (a) **Notice.** Promptly after receipt by any Entity entitled to indemnification under this Agreement of notice of the commencement or threatened commencement of any civil, criminal, administrative, or investigative action or proceeding involving a claim in respect of which the indemnitee shall seek indemnification hereunder, the indemnitee shall notify the indemnitor of such claim. No delay or failure to so notify an

indemnitor shall relieve it of its obligations under this Agreement except to the extent that such indemnitor has suffered actual prejudice by such delay or failure. Within fifteen (15) days following receipt of notice from the indemnitee relating to any claim, but no later than five (5) days before the date on which any response to a complaint or summons is due, the indemnitor shall notify the indemnitee that the indemnitor elects to assume control of the defense and settlement of that claim (a "**Notice of Election**").

- (b) **Procedure Following Notice of Election.** If the indemnitor delivers a Notice of Election within the required notice period, the indemnitor shall assume sole control over the defense and settlement of the claim; provided, however, that (i) the indemnitor shall keep the indemnitee reasonably apprised at all times as to the status of the defense, and (ii) the indemnitor shall obtain the prior written approval of the indemnitee before entering into any settlement of such claim asserting any liability against the indemnitee or imposing any obligations or restrictions on the indemnitee or ceasing to defend against such claim. The indemnitor shall not be liable for any legal fees or expenses incurred by the indemnitee following the delivery of a Notice of Election; provided, however, that (A) the indemnitee shall be entitled to employ counsel at its own expense to participate in the handling of the claim, and (B) the indemnitor shall pay the fees and expenses associated with such counsel if the indemnitor has an actual or apparent conflict of interest with respect to such claim which is not otherwise resolved or if the indemnitor has requested the assistance of the indemnitee in the defense of the claim or the indemnitor has failed to defend the claim diligently and the indemnitee is prejudiced or likely to be prejudiced by such failure. Successful Respondent acknowledges that DIR's counsel is the Office of the Texas Attorney General, and Successful Respondent shall coordinate and cooperate with the Office of the Texas Attorney General on all defense and settlement matters relating to claims which are subject to indemnification under this Agreement. The indemnitor shall not be obligated to indemnify the indemnitee for any amount paid or payable by such indemnitee in the settlement of any claim if (1) the indemnitor has delivered a timely Notice of Election and such amount was agreed to without the written consent of the indemnitor, (2) the indemnitee has not provided the indemnitor with notice of such claim and a reasonable opportunity to respond thereto, or (3) the time period within which to deliver a Notice of Election has not yet expired.
- (c) **Procedure Where No Notice of Election Is Delivered.** If the indemnitor does not deliver a Notice of Election relating to any claim within the required notice period, the indemnitee shall have the right to defend the claim in such manner as it may deem appropriate. The indemnitor shall promptly reimburse the indemnitee for all such reasonable costs and expenses incurred by the indemnitee, including reasonable attorneys' fees.

#### 17.4 Subrogation.

Except as otherwise provided in **Attachment B Insurance and Risk of Loss**, in the event that an indemnitor shall be obligated to indemnify an indemnitee pursuant to any provision of this Agreement, the indemnitor shall, upon payment of such indemnity in full, be subrogated to all rights of the indemnitee with respect to the claims to which such indemnification relates.

## 18 LIABILITY

### 18.1 General Intent.

Subject to the specific provisions and limitations of this **Article 18** and, to the extent allowed by applicable Laws (including the constitution of the State), it is the intent of the Parties that each Party shall be liable to the other Party for any actual damages incurred as a result of the breaching Party's failure to perform its obligations in the manner required by this Agreement.

### 18.2 Force Majeure.

- (a) **General.** Subject to **Section 18.2(d)**, no Party shall be liable for any default or delay in the performance of its obligations under this Agreement if and to the extent such default or delay is caused, directly or indirectly, by fire, flood, earthquake, elements of nature or acts of God, wars, riots, civil disorders, rebellions or revolutions, acts of terrorism, epidemics, or any other similar cause beyond the reasonable control of such Party except to the extent that the non-performing Party is at fault in failing to prevent or causing such default or delay, and provided that such default or delay cannot reasonably be circumvented by the non-performing Party through the use of alternate sources, workaround plans or other means. A

strike, lockout, or labor dispute involving Successful Respondent Personnel shall not excuse Successful Respondent from its obligations hereunder. In addition, the refusal of Successful Respondent Personnel to enter a facility that is the subject of a labor dispute shall excuse Successful Respondent from its obligations hereunder only if and to the extent such refusal is based upon a reasonable fear of physical harm.

- (b) **Duration and Notification.** In the event of a force majeure event the non-performing Party shall be excused from further performance or observance of the obligation(s) so affected for as long as such circumstances prevail and such Party continues to use commercially reasonable efforts to recommence performance or observance whenever and to whatever extent possible without delay. Any Party so prevented, hindered, or delayed in its performance shall, as quickly as practicable under the circumstances, notify the Party to whom performance is due by telephone (to be confirmed in writing within one (1) day of the inception of such delay) and describe at a reasonable level of detail the circumstances of the force majeure event, the steps being taken to address such force majeure event, and the expected duration of such force majeure event.
- (c) **Substitute Services; Termination.** If any event described in Section 18.2(a) has substantially prevented, hindered, or delayed, or is reasonably expected to substantially prevent, hinder, or delay the performance by Successful Respondent of Services necessary for the performance of critical DIR or DIR Customer functions for longer than the recovery period specified in the applicable disaster recovery plan or, if there is no such specified recovery period, twenty-four (24) hours, Successful Respondent shall, unless and until otherwise directed by DIR, use commercially reasonable efforts to procure such Services from an alternate source at Successful Respondent's expense for so long as the delay in performance shall continue, up to the Charges actually paid to Successful Respondent for the Services with respect to the period of non-performance. If Successful Respondent is unable to procure such substitute services on an expedited basis or DIR elects to contract directly for such services, DIR may procure such Services from an alternate source at DIR's expense. In addition, if any event described in Section 18.2(a) substantially prevents, hinders or delays the performance by Successful Respondent of Services necessary for the performance of critical DIR functions (i) for more than seven (7) days, then DIR may, upon notice to Successful Respondent, terminate all or any portion of the Services so affected (including portions that are no longer required if the impacted portion is terminated) as of the termination date specified in the notice; or (ii) for more than fifteen (15) days, then DIR may, upon notice to Successful Respondent, terminate this Agreement, in whole or in part, as of the termination date specified in the notice. Successful Respondent shall not have the right to additional payments or increased usage charges as a result of any force majeure occurrence affecting Successful Respondent's ability to perform.
- (d) **Disaster Recovery.** Upon the occurrence of a force majeure event that constitutes a disaster under the applicable disaster recovery plan and as declared at DIR's discretion, Successful Respondent shall promptly implement, as appropriate, the applicable business continuity and disaster recovery plan and provide business continuity and Disaster Recovery Services, including as described in Exhibit 2.1 Multi-sourcing Services Integrator Statement of Work and Exhibit 2.3 IT Service Management Continuity. The occurrence of a force majeure event shall not relieve Successful Respondent of its obligation to implement, as appropriate, the applicable business continuity and disaster recovery plan and provide business continuity and Disaster Recovery Services, except to the extent execution of the disaster recovery plan is itself prevented by the force majeure event.
- (e) **Payment Obligation.** If Successful Respondent fails to provide Services in accordance with this Agreement due to the occurrence of a force majeure event, all amounts payable to Successful Respondent hereunder shall be equitably adjusted downward so that DIR is not required to pay any amounts for Services that DIR and/or any DIR Customer is not receiving, whether from Successful Respondent or from an alternate source at Successful Respondent's expense pursuant to Section 18.2(c).
- (f) **Allocation of Resources.** Without limiting Successful Respondent's obligations under this Agreement, whenever a force majeure event or disaster causes Successful Respondent to allocate limited resources between or among Successful Respondent's customers and Affiliates, DIR and the DIR Customers shall receive at least the same treatment as comparable Successful Respondent customers. In no event shall Successful Respondent re-deploy or re-assign any Key Personnel to another customer or account in the event of the occurrence of a force majeure event.

### 18.3 Limitation of Liability.

- (a) Items Not Considered Damages. The following shall not be considered damages subject to, and shall not be counted toward the liability exclusion or cap specified in, **Section 18.3(a)** or **(b)**:
- (i) Service Level Credits or Deliverable Credits assessed against Successful Respondent pursuant to **Exhibit 3.0 Performance Model** and **Exhibit 3.1 Service Levels Matrix**.
  - (ii) Amounts withheld by DIR in accordance with this Agreement due to incorrect Charges or Services not provided.
  - (iii) Amounts paid by DIR but subsequently recovered from Successful Respondent due to incorrect Charges or Services not provided.
  - (iv) Invoiced Charges and other amounts that are due and owing to Successful Respondent for Services under this Agreement.
- (b) Acknowledged Direct Damages. For the avoidance of doubt, the following shall be considered direct damages and neither Party shall assert that they are indirect, incidental, collateral, consequential or special damages, or lost profits to the extent they result directly from the breaching Party's failure to perform in accordance with this Agreement:
- (i) Costs and expenses of restoring or reloading any lost, stolen, or damaged DIR Data.
  - (ii) Costs and expenses of implementing a work-around in respect of a failure to provide the Services or any part thereof.
  - (iii) Costs and expenses of replacing lost, stolen, or damaged Equipment and Materials.
  - (iv) Cover damages, including the costs and expenses incurred to procure the Services or corrected Services from an alternate source.
  - (v) Costs and expenses incurred to bring the Services in-house or to contract to obtain the Services from an alternate source.
  - (vi) Straight time, overtime or related expenses incurred by either Party in performing (i) through (v) above, including overhead allocations for employees, wages, and salaries of additional employees, travel expenses, overtime expenses, telecommunication charges, and similar charges.
  - (vii) Subject to **Section 15.11**, fines, penalties, sanctions, interest or other monetary remedies incurred as a result of a failure to comply with applicable Laws.
  - (viii) Service Level Credits or Deliverable Credits assessed against Successful Respondent.  
Costs and expenses of protecting and compensating the State and its constituents after a Security Incident, including but not limited to notifications, fines and penalties, and 36 months of credit monitoring for effected individuals.
- (c) **Overall Cap on Liability.** Notwithstanding anything to the contrary set forth herein, with respect to any claim, damage, Loss, indemnification obligation or cause of action arising out of or related to the Agreement, (a) none of the Parties will be liable to the other for indirect, punitive, special or consequential damages, even if advised of the possibility of such damages, and (b) each Party's aggregate liability to the other Party under this Agreement will not exceed \$15,000,000.

The absence of direct damages listed in this **Section 18.3** shall not be construed or interpreted as an agreement to exclude it as a direct damage under this Agreement.

## 19 DISPUTE RESOLUTION

### 19.1 Informal Dispute Resolution.

Subject to compliance with Chapter 2260, Texas Government Code, prior to the initiation of formal dispute resolution procedures with respect to any dispute, other than as provided in **Section 19.1(e)**, the Parties shall first attempt to resolve such dispute informally, as follows:

- (a) **Initial Effort.** The Parties agree that the Designated DIR Representative and the Successful Respondent Account Manager shall attempt in good faith to resolve all disputes (other than those described in **Section 19.1(e)** or **20.8**). In the event the Designated DIR Representative and the Successful Respondent Account Manager are unable to resolve a dispute in an amount of time that either Party deems reasonable under the circumstances, such Party may refer the dispute for resolution to the senior executives specified in **Section 19.1(b)** below upon notice to the other Party.
- (b) **Escalation.** Within five (5) DIR Business Days of a notice under **Section 19.1(a)** above referring a dispute for resolution by senior executives, the Designated DIR Representative and the Successful Respondent Account Manager shall each prepare and provide to the designated senior executive of DIR and the designated senior executive of Successful Respondent, respectively, summaries of the non-privileged relevant information and background of the dispute, along with any appropriate non-privileged supporting documentation, for their review. The designated senior executives shall confer as often as they deem reasonably necessary in order to gather and furnish to the other all non-privileged information with respect to the matter in issue which the Parties believe to be appropriate and germane in connection with its resolution. The designated senior executives shall discuss the problem and negotiate in good faith in an effort to resolve the dispute without the necessity of any formal proceeding. The specific format for the discussions shall be left to the discretion of the designated senior executives, but may include the preparation of agreed-upon statements of fact or written statements of position.
- (c) **Provision of Information.** During the course of negotiations under **Section 19.1(a)** or **(b)** above, all reasonable requests made by one (1) Party to another for non-privileged information, reasonably related to the dispute, shall be honored in order that each of the parties may be fully advised of the other's position. All negotiations shall be strictly confidential and used solely for the purposes of settlement. Any materials prepared by one (1) Party for these proceedings shall not be used as evidence by the other Party in any subsequent arbitration or litigation; provided, however, the underlying facts supporting such materials may be subject to discovery.
- (d) **Prerequisite to Formal Proceedings.** Upon the earlier to occur of (i) the designated senior executives under **Section 19.1(b)** concluding in good faith that amicable resolution through continued negotiation of a dispute does not appear likely and (ii) the thirty-first (31<sup>st</sup>) day following the date of the notice provided under **Section 19.1(a)** referring the dispute to senior executives, then the Parties shall be entitled to discontinue negotiations and to seek to resolve the dispute through the dispute resolution process provided for in Chapter 2260, Texas Government Code, and DIR Rule Number 1, TAC Section 201.1(b).
- (e) **Equitable Remedies.** Notwithstanding the provisions and time periods specified in this **Section 19.1**, at any time the Parties may use formal proceedings pursuant to the process set forth in Chapter 2260, Texas Government Code, and DIR Rule Number 1, TAC Section 201.1(b), in order to (i) avoid the expiration of any applicable limitations period, (ii) preserve a superior position with respect to other creditors, (iii) address a claim arising out of the breach of a Party's obligations under **Article 13**, (iv) pursue claims for injunctive relief with respect to a Party's obligations to the extent resulting in irreparable injury, or (v) address a claim arising out of the breach or attempted or threatened breach of the obligations described in the following sentence. Successful Respondent acknowledges that, in the event it breaches (or attempts or threatens to breach) its obligation to provide any Services (including Termination Assistance Services) in accordance with this Agreement, its obligation respecting continued performance in accordance with **Section 19.3**, or its obligation to provide access to computers or files containing DIR Data in accordance with **Section 13.4**, DIR and/or the DIR Customers may be irreparably harmed and DIR may proceed directly to court. If a court of competent jurisdiction should find that Successful Respondent has breached (or attempted or threatened to breach) any such obligations, Successful Respondent agrees that DIR shall be entitled to seek injunctive relief, including entry of an appropriate order compelling performance by

Successful Respondent and restraining it from any further breaches (or attempted or threatened breaches).

## 19.2 Jurisdiction.

Except as otherwise expressly provided in this **Article 19**, each Party irrevocably agrees that any legal action, suit or proceeding brought by it in any way arising out of this Agreement must be brought solely and exclusively in the United States District Court for the Western District of Texas, Austin Division, or in the state courts of the State of Texas and irrevocably accepts and submits to the sole and exclusive jurisdiction of each of the aforesaid courts *in personam*, generally and unconditionally with respect to any action, suit or proceeding brought by it or against it by the other Party; provided, however, that this Section shall not prevent a Party against whom any legal action, suit or proceeding is brought by the other Party in the state courts of the State of Texas from seeking to remove such legal action, suit or proceeding, pursuant to applicable federal Law, to the United States District Court for the Western District of Texas, Austin Division, and in the event an action is so removed each Party irrevocably accepts and submits to the jurisdiction of the aforesaid district court.

## 19.3 Continued Performance.

- (a) **General.** Each Party agrees that it shall, unless otherwise directed by the other Party, continue performing its obligations under this Agreement while any dispute is being resolved; provided, that this provision shall not operate or be construed as extending the Term of this Agreement or prohibiting or delaying a Party's exercise of any right it may have to terminate this Agreement as expressly provided herein. For purposes of clarification, DIR Data may not be withheld by Successful Respondent pending the resolution of any dispute.
- (b) **Non-Interruption of Service.** Successful Respondent acknowledges and agrees that any interruption to the Service may cause irreparable harm to DIR and/or the DIR Customers and may adversely impact the ability of the State to carry out vital public safety and other governmental functions (including homeland security matters), in which case an adequate remedy at Law would not be available. Except to the extent expressly permitted under Chapter 2251, Texas Government Code, Successful Respondent expressly acknowledges and agrees that, pending resolution of any dispute or controversy, it shall not deny, withdraw, or restrict Successful Respondent's provision of the Services to DIR and/or the DIR Customers under this Agreement.

## 19.4 Governing Law.

This Agreement and the rights and obligations of the Parties under this Agreement shall be governed by and construed in accordance with the Laws of the State of Texas, without giving effect to the principles thereof relating to the conflicts of Laws. The Parties expressly disclaim, to the fullest extent permitted by Law, any application of the Uniform Computer Information Transactions Act which may otherwise be or become applicable (including through enactment subsequent to the Effective Date) during the Term.

## 20 TERMINATION

### 20.1 Termination for Cause.

- (a) **By DIR.** If Successful Respondent:
  - (i) commits a material breach of its obligations with respect to the Transition Services as provided in **Sections 4.2(c)** as applicable and such breach is not cured within the applicable timeframe for cure provided in such provision;
  - (ii) commits a material breach of this Agreement, which breach is not cured within thirty (30) days after notice of the breach from DIR;
  - (iii) commits a material breach of this Agreement which is not capable of being cured within the period specified pursuant to **Section 20.1(a)(ii)**;
  - (iv) commits numerous breaches of its duties or obligations (excluding Service Level Defaults) which collectively constitute a material breach of this Agreement and Successful Respondent fails to do both of the following: (A) cure each such breach within thirty (30) days of notice thereof; and (B) develop within fifteen (15) days following written notice of breach from DIR a

complete plan reasonably acceptable to DIR for curing the breach and correcting the deficiencies causing such breaches on a permanent basis; provided, however, this **Section 20.1(a)(iv)** shall in no manner limit (X) DIR's right of termination pursuant to any other provision of this **Section 20.1(a)**, or (Y) Successful Respondent's obligation to cure individual nonmaterial breaches of this Agreement;

- (v) becomes liable for or incurs Service Level Credits under this Agreement that, in the aggregate, exceed seventy-five percent (75%) of the cumulative At Risk Amount during any rolling six (6) month period (exclusive of any earnback during such period);
- (vi) fails to perform in accordance with the Minimum Service Level for same Critical Service Level for three (3) consecutive Measurement Windows or during four (4) of any six (6) consecutive Measurement Windows (provided that the applicable Measurement Window is at least one (1) month in duration); or
- (vii) commits a material breach of **Section 15.8** of this Agreement.

then DIR may, upon notice to Successful Respondent, terminate this Agreement, in whole or in part, as of the termination date specified in the notice. The express acknowledgment that a certain amount of Service Level Credits or number of Service Level Defaults constitutes grounds for termination under **Sections 20.1(a)(v)** and **(vi)** does not imply that a lesser amount or number cannot constitute a material breach of this Agreement and therefore grounds for termination under other Subsections. For the period beginning on the Commencement Date and ending twelve (12) months from such date, Successful Respondent's failure to perform in accordance with **Section 20.1(a)(vi)** will not constitute a breach of this Agreement.

- (b) **By Successful Respondent.** In the event that DIR fails to pay Successful Respondent amounts due and owing in accordance with Chapter 2251, Texas Government Code exceeding in the aggregate two (2) months of Charges by the specified due date and fails to cure such default within thirty (30) days of notice from Successful Respondent of its intention to terminate for failure to make such payment, Successful Respondent may, upon further notice to DIR specifying Successful Respondent's intention to terminate this Agreement in accordance with this provision following an additional thirty (30) days, terminate this Agreement in its entirety as of the termination date specified in the further notice (provided that DIR has not cured the default prior to the effective date of termination). Successful Respondent acknowledges and agrees that this **Section 20.1(b)** describes Successful Respondent's sole right to terminate this Agreement and Successful Respondent hereby waives any other rights it may have to terminate this Agreement.

## **20.2 Termination for Convenience.**

DIR may, upon at least ninety (90) days prior notice to Successful Respondent, terminate this Agreement, in whole or in part, for convenience and without cause as of the termination date specified in the notice without cost or penalty and without payment of any termination charges.

## **20.3 Termination Upon Successful Respondent Change of Control.**

In the event of a change in Control of Successful Respondent (or that portion of Successful Respondent providing all or any material portion of the Services under this Agreement) or the Entity that Controls Successful Respondent (if any), where such control is acquired, directly or indirectly, in a single transaction or series of related transactions, or all or substantially all of the assets of Successful Respondent (or that portion of Successful Respondent providing all or any material portion of the Services under this Agreement) are acquired by any Entity, or Successful Respondent (or that portion of Successful Respondent providing all or any material portion of the Services under this Agreement) is merged with or into another Entity to form a new Entity, then at any time within twelve (12) months after the last to occur of such events, then DIR may, upon at least ninety (90) days prior notice to Successful Respondent, terminate this Agreement, in whole or in part, as of the termination date specified in the notice.

## **20.4 Termination for Insolvency.**

If Successful Respondent (a) files for bankruptcy, (b) becomes or is declared insolvent, or is the subject of any bona fide proceedings related to its liquidation, administration, provisional liquidation, insolvency or the appointment of a receiver or similar officer for it, (c) passes a resolution for its voluntary liquidation,



(d) has a receiver or manager appointed over all or substantially all of its assets, (e) makes an assignment for the benefit of all or substantially all of its creditors, or (f) enters into an agreement or arrangement for the composition, extension, or readjustment of substantially all of its obligations or any class of such obligations, then DIR may, upon notice to Successful Respondent (and during the period such proceeding, condition, event or situation continues or otherwise remains open or unresolved), terminate this Agreement, in whole or in part, as of the termination date specified in the notice.

## **20.5 DIR Rights Upon Successful Respondent's Bankruptcy.**

- (a) **General Rights.** In the event of Successful Respondent's bankruptcy or other formal procedure referenced in **Section 20.4** or of the filing of any petition under bankruptcy Laws affecting the rights of Successful Respondent which is not stayed or dismissed within thirty (30) days of filing, in addition to the other rights and remedies set forth herein, to the maximum extent permitted by Law, DIR shall have the immediate right to retain and take possession for safekeeping all DIR Data, DIR Confidential Information, DIR licensed Third Party Materials, DIR owned Equipment, DIR owned Materials, DIR-owned Developed Materials and all other Materials, Equipment or Systems to which DIR and/or the DIR Customers are or would be entitled during the Term or upon the expiration or any termination of this Agreement. Successful Respondent shall cooperate fully with DIR and the DIR Customers and assist DIR and the DIR Customers in identifying and taking possession of the items listed in the preceding sentence. DIR shall have the right to hold such DIR Data, Confidential Information, Materials, Equipment and Systems until such time as the trustee or receiver in bankruptcy or other appropriate insolvency office holder can provide adequate assurances and evidence to DIR that they shall be protected from sale, release, inspection, publication, or inclusion in any publicly accessible record, document, material or filing. Successful Respondent and DIR agree that without this material provision, DIR would not have entered into this Agreement or provided any right to the possession or use of DIR Data, DIR Confidential Information or DIR Materials covered by this Agreement.
- (b) **DIR Rights in Event of Bankruptcy Rejection.** Notwithstanding any other provision of this Agreement to the contrary and to the maximum extent permitted by applicable Laws, in the event that Successful Respondent becomes a debtor under the United States Bankruptcy Code (11 U.S.C. §101 et. seq. or any similar Law in any other country (the "**Bankruptcy Code**")) and rejects this Agreement pursuant to Section 365 of the Bankruptcy Code (a "**Bankruptcy Rejection**"), (i) any and all of the licensee and sublicensee rights of DIR and the DIR Customers arising under or otherwise set forth in this Agreement, including the rights of DIR, the DIR Customers, and Entities that qualify as DIR Customers referred to in **Section 14.6**, shall be deemed fully retained by and vested in DIR, the DIR Customers and Entities that qualify as DIR Customers as protected intellectual property rights under Section 365(n)(1)(B) of the Bankruptcy Code and further shall be deemed to exist immediately before the commencement of the bankruptcy case in which Successful Respondent is the debtor; (ii) DIR, the DIR Customers, and Entities that qualify as DIR Customers shall have all of the rights afforded to non-debtor licensees and sublicensees under Section 365(n) of the Bankruptcy Code; and (iii) to the extent any rights of DIR, the DIR Customers and/or Entities that qualify as DIR Customers under this Agreement which arise after the expiration or any termination of this Agreement are determined by a bankruptcy court not to be "intellectual property rights" for purposes of Section 365(n), all of such rights shall remain vested in and fully retained by DIR, the DIR Customers and/or Entities that qualify as DIR Customers after any Bankruptcy Rejection as though this Agreement were terminated or expired. DIR shall under no circumstances be required to terminate this Agreement, in whole or in part, after a Bankruptcy Rejection in order to enjoy or acquire any of its rights under this Agreement, including any of the rights of DIR, the DIR Customers, or Entities that qualify as DIR Customers set forth in **Section 14.6** unless and to the extent required by applicable Laws.

## **20.6 Termination for Material Adverse Change in Successful Respondent's Financial Condition.**

If (i) Successful Respondent receives a "going concern" qualification from its external auditor, or (ii) Standard & Poor's lowers Successful Respondent's long term credit rating to lower than BB- and in the reasonable opinion of DIR such change in the financial condition of Successful Respondent may impair or otherwise compromise the ability of Successful Respondent to perform its obligations under this Agreement, then DIR may, in its sole discretion, terminate this Agreement by giving Successful Respondent at least thirty (30) days prior notice. With respect to the events described in (ii) above, prior to exercising its right to terminate, DIR shall meet with Successful Respondent within ten (10) days following

notification (or awareness) of such event and permit Successful Respondent to submit to DIR within fifteen (15) days of such meeting a plan that comprehensively addresses DIR's concerns related to Successful Respondent's ability to perform its obligations under this Agreement (the "**Service Delivery Plan**"). DIR shall not unreasonably withhold its approval of such Service Delivery Plan. If DIR does not approve the initial Service Delivery Plan it shall inform the Successful Respondent of its reasons and the Successful Respondent shall take those reasons into account in the preparation of a further Service Delivery Plan, which shall be resubmitted to DIR within ten (10) days. If in DIR's reasonable discretion the updated Service Delivery Plan does not address DIR's concerns related to Successful Respondent's ability to continue delivering the Services, then DIR will have the right to terminate this Agreement as described above.

#### **20.7 Critical Services.**

Without limiting DIR's rights under **Section 20.1**, if Successful Respondent commits a material breach which has a significant impact on the ability of DIR or any DIR Customer to conduct a material aspect of its operations, and Successful Respondent is unable to cure such breach within forty-eight (48) hours, DIR may, in addition to its other remedies at Law and in equity, obtain from a third party or provide for itself comparable services which shall allow DIR and the DIR Customers to conduct their operations until Successful Respondent has cured the breach or this Agreement is terminated. Successful Respondent shall reimburse DIR for all costs and expenses of obtaining or providing such services up to the Charges actually paid to Successful Respondent for the Services with respect to the period of non-performance but in no event longer than the earlier to occur of (a) one hundred twenty (120) days from the start of such delay, or (b) the remaining Term, provided that DIR continues to pay Successful Respondent for such Charges. The express inclusion of this remedy in this **Section 20.7** does not limit DIR's right to use a similar remedy for other breaches by Successful Respondent of this Agreement.

#### **20.8 Absolute Right.**

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

#### **20.9 Lack of Sufficient Funds or Statutory Authority.**

If funding for DIR's and the DIR Customers' obligations under this Agreement is reduced by Law or funds sufficient to pay Successful Respondent for the Services provided hereunder are not appropriated by applicable governing bodies or otherwise made available by Law, then DIR may, upon at least thirty (30) days prior notice to Successful Respondent, decrease the amount and types of the Services in such manner and for such periods of time as DIR may elect. In such event, the Charges shall be adjusted downward in accordance with **Exhibit 4.0 Business Model**, to the extent applicable, or equitably adjusted downward in proportion to the portion of the Services that Successful Respondent shall not be providing to the extent that **Exhibit 4.0 Business Model** does not provide for such reduction. DIR shall promptly notify Successful Respondent if DIR believes that the necessary funding or authorizations shall not be obtained. If partial funding sufficient only for a portion of the Services shall be made available, the Parties may agree to perform their respective obligations relative to such Services, and this Agreement shall be amended accordingly. DIR and many of the DIR Customers are State agencies whose authority is subject to the actions of the State legislature. Some DIR Customers may additionally be subject to the actions of the United States Congress or other governmental authorities. If funds sufficient to pay DIR's and the DIR Customers' obligations under this Agreement are not appropriated by applicable governmental authorities or if DIR's statutory authority to enter into this Agreement is repealed by the State legislature or ruled unconstitutional by a court of competent jurisdiction, then DIR may, upon notice to Successful Respondent, terminate this Agreement, in whole or in part, as of the termination date specified in the notice. If DIR, any

DIR Customer(s), and/or the subject matter of this Agreement become subject to a legislative or regulatory change or the revocation of statutory or regulatory authority that would (a) render the continued provision of the Services impossible or unnecessary, (b) render this Agreement invalid, illegal or otherwise unenforceable, (c) substantially decrease the amount and types of the Services or (d) terminate the appropriations for this Agreement, then DIR may, upon notice to Successful Respondent, terminate this Agreement, in whole or in part, as of the termination date specified in the notice.

## **21 GENERAL**

### **21.1 Delegation of Authority.**

Whenever, by any provision of this Agreement, any right, power, or duty is imposed or conferred on DIR, the right, power, or duty so imposed or conferred is possessed and exercised by the DIR Executive Director unless any such right, power, or duty is specifically delegated to the duly appointed agents or employees of DIR. The DIR Executive Director will reduce any such delegation of authority to writing and provide a copy to Successful Respondent on request.

### **21.2 No Waiver of Sovereign Immunity.**

The Parties expressly agree that no provision of this Agreement shall be construed as or constitute a waiver by DIR or the State of Texas of any immunities from suit or from liability that DIR or the State of Texas have by operation of law.

### **21.3 RFO Errors and/or Omissions.**

Successful Respondent will not take advantage of or exploit any errors and/or omissions in the RFO or the resulting Agreement. Successful Respondent must promptly notify DIR of any such errors and/or omissions that are discovered.

### **21.4 Abandonment or Default.**

Abandon means to relinquish or renounce the Agreement for any reason other than for a force majeure event. If Successful Respondent abandons the Agreement, DIR reserves the right to cancel the Agreement without notice and either re-solicit and re-award the Agreement, or take such further action, or no action, in the best interest of the State. The abandoning Successful Respondent will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of Services, unless the specifications or scope of work significantly changes.

### **21.5 Place of Performance.**

Unless otherwise agreed to in writing, all Services performed by Successful Respondent, its Subcontractors and agents must be performed in the United States.

### **21.6 Binding Nature and Assignment.**

- (a) **Binding Nature.** This Agreement shall be binding on the Parties and their respective successors and permitted assigns. Except in the instance of an assignment or transfer by DIR of all or any portion of this Agreement pursuant to **Section 21.6(b)**, the assigning Party shall remain liable for the performance of any assigned or transferred obligations hereunder.
- (b) **Assignment.** Successful Respondent may not assign all or any portion of its rights under or interests in this Agreement (including by operation of law) or delegate any of its duties without the prior written consent of DIR, which consent may be withheld in DIR's sole discretion. Any written request for assignment or delegation must be accompanied by written acceptance of the assignment by the Assignee, in a form acceptable to DIR in its sole discretion. Except where otherwise specifically agreed in writing by DIR, DIR's acceptance of any assignment or delegation does not release Successful Respondent from its obligations pursuant to this Agreement. DIR may, without the approval of Successful Respondent, assign or transfer its rights or obligations under this Agreement, in whole or in part, to any other State agency as directed by the State legislature or as otherwise required under Law. The consent of a Party to any

assignment of this Agreement shall not constitute such Party's consent to further assignment. Each party to whom an assignment or transfer is made must assume all or any part of Successful Respondent's or DIR's interests in this Agreement, the Services, and any documents executed with respect to this Agreement, including, without limitation, its obligation for all or any portion of the payments due hereunder.

- (c) **Impermissible Assignment.** Any attempted assignment that does not comply with the terms of this Section shall be null and void *ab initio*; provided, however, that if Successful Respondent assigns this Agreement in contravention of this Section by operation of Law, such assignment shall be voidable at the option of DIR.

#### **21.7 Entire Agreement; Amendment.**

This Agreement, including any Exhibits and attachments referred to herein or attached hereto, each of which is incorporated herein for all purposes, constitutes the entire agreement between the Parties with respect to the subject matter hereof. There are no agreements, representations, warranties, promises, covenants, commitments or undertakings other than those expressly set forth herein. This Agreement supersedes all prior agreements, representations, warranties, promises, covenants, commitments or undertaking, whether written or oral, with respect to the subject matter contained in this Agreement. No amendment, modification, change, waiver, or discharge hereof shall be valid unless in writing and signed by an authorized representative of the Party against which such amendment, modification, change, waiver or discharge is sought to be enforced.

#### **21.8 Notices.**

- (a) **Primary Notices.** Any notice, notification, request, demand or determination provided by a Party pursuant to the following:
- (i) **Section 4.2** (Termination Assistance Services);
  - (ii) **Section 4.3(a)** (Use of Third Parties – Right of Use);
  - (iii) **Section 10.2** (Savings Clause);
  - (iv) **Section 11.6** (Extraordinary Events);
  - (v) **Section 13.1(d)** (Loss of Confidential Information);
  - (vi) **Sections 17.3** (Indemnification Procedures);
  - (vii) **Section 18.2** (Force Majeure);
  - (viii) **Section 18.3(e)** (Waiver of Liability Cap);
  - (ix) **Section 19.1** (Informal Dispute Resolution);
  - (x) **Article 20** (Termination); and
  - (xi) **Section 21.6** (Binding Nature and Assignment);

shall be in writing and shall be delivered in hard copy using one of the following methods and shall be deemed delivered upon receipt: (i) by hand, (ii) by an express courier with a reliable system for tracking delivery or (iii) by registered or certified mail, return receipt requested, postage prepaid. Unless otherwise notified, the foregoing notices shall be delivered as follows:

In the case of DIR:

Texas Department of Information Resources  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
Attention: Texas.gov Payment Services Contract Manager  
Telephone: 512.475.4700

With a copy to:

Texas Department of Information Resources  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
Attention: Martin Zelinsky, General Counsel  
Telephone: 512.475.4759  
E-mail Address: martin.zelinsky@dir.texas.gov

And

Texas Department of Information Resources  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
Attention: Aiko Neill, Interim Director, Enterprise Contracts Division (or, successor)  
Telephone: 512.475.0515  
E-mail Address: aiko.neill@dir.texas.gov

In the case of Successful Respondent:

Texas NICUSA, LLC  
25501 W. Valley Parkway, Suite 300  
Olathe, Kansas 66061  
Attention: Executive Director  
Telephone: (512) 983-1994  
Email: erin@egov.com

With Copy to:

Texas NICUSA, LLC  
25501 W. Valley Parkway, Suite 300  
Olathe, Kansas 66061  
Attention: General Counsel  
Telephone: (913) 498-3468  
Email: legal@egovcom

- (b) **Other Notices.** All notices, notifications, requests, demands or determinations required or provided pursuant to this Agreement, other than those specified in **Section 21.9(a)**, may be sent in hard copy in the manner specified in **Section 21.9(a)**, or by e-mail transmission (where receipt is acknowledged by the recipient) or facsimile transmission (with acknowledgment of receipt from the recipient's facsimile machine) to the addresses set forth below:

In the case of DIR:

Texas Department of Information Resources  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
Attention: Texas.gov Payment Services Contract Manager  
Telephone: 512.475.4700

With a copy to:

Texas Department of Information Resources  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
Attention: Martin Zelinsky, General Counsel  
Telephone: 512.475.4759  
E-mail Address: [martin.zelinsky@dir.texas.gov](mailto:martin.zelinsky@dir.texas.gov)

And

Texas Department of Information Resources  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
Attention: Aiko Neill, interim Director, Enterprise Contracts Division (or, successor)  
Telephone: 512.475.0515  
E-mail Address: [aiko.neill@dir.texas.gov](mailto:aiko.neill@dir.texas.gov)

In the case of Successful Respondent:

Texas NICUSA, LLC  
25501 W. Valley Parkway, Suite 300  
Olathe, Kansas 66061  
Attention: Executive Director  
Telephone: (512) 983-1994  
Email: erin@egov.com

With Copy to:

Texas NICUSA, LLC  
25501 W. Valley Parkway, Suite 300  
Olathe, Kansas 66061  
Attention: General Counsel  
Telephone: (913) 498-3468  
Email: legal@egovcom

- (c) **Written Complaints.** In addition to other remedies contained in this Agreement, Successful Respondent may direct its written complaints regarding DIR to the following office:

Public Information Office  
Texas Department of Information Resources  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
Attention: Public Information Officer  
Facsimile Number: (512) 475-4759

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

### **21.9 Counterparts.**

This Agreement may be executed in several counterparts, all of which taken together shall constitute one (1) single agreement between the Parties hereto.

### **21.10 Headings.**

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

### **21.11 Relationship of Parties.**

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

### **21.12 Severability.**

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

### **21.13 Consents and Approval.**

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

### **21.14 Waiver of Default; Cumulative Remedies.**

- (a) **Waiver of Default.** A delay or omission by either Party hereto to exercise any right or power under this Agreement shall not be construed to be a waiver thereof. A waiver by either of the Parties hereto of any of the covenants to be performed by the other or any breach thereof shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant herein contained. All waivers must be in writing and signed by the Party waiving its rights.
- (b) **Cumulative Remedies.** Except as expressly set forth herein, all remedies provided for in this Agreement shall be cumulative and in addition to and not in lieu of any other remedies available to either Party at Law, in equity or otherwise. The election by a Party of any remedy provided for in this Agreement or otherwise available to such Party shall not preclude such Party from pursuing any other remedies available to such Party at Law, in equity, by contract or otherwise.

### **21.15 Survival.**

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

**21.16 Publicity.**

- (a) Except as provided in Subsection (b) below, Successful Respondent must not use the name of DIR, the State, or any other DIR Customer, or refer to DIR or any such DIR Customers directly or indirectly in any media release, or public announcement, relating to this Agreement or its subject matter, including, in any promotional or marketing materials, customer lists, or business presentations (other than proposals or reports submitted to DIR, a DIR Customer, an administrative agency of the State, or the Federal government.)
- (b) Successful Respondent may publish, at its sole expense, any media release or public announcement, relating to this Agreement or its subject matter, including, in any promotional or marketing materials, customer lists, business presentations (other than proposals or reports submitted to DIR or a DIR customer, an administrative agency of the state, or a governmental agency or unit of another state or the federal government), or results of Successful Respondent's performance under this Agreement only with DIR's prior review and approval, which DIR may exercise at its sole discretion. Successful Respondent will provide DIR a copy of any such publication no less than five (5) DIR Business Days prior to its intended public release unless otherwise agreed by the parties. Successful Respondent will provide additional copies at the request of DIR.

**21.17 Service Marks.**

Successful Respondent agrees that it shall not, without DIR's prior consent, use any of the names, service marks or trademarks of DIR or the DIR Customers in any of its advertising or marketing materials.

**21.18 Export.**

The Parties acknowledge that certain Equipment, Materials and technical data to be provided hereunder and certain transactions hereunder may be subject to export controls under the Laws of the United States, the European Union, the United Nations and other jurisdictions. Without limiting the Parties' respective obligations under **Section 15.11**, no Party shall export or re-export any such items or any direct product thereof or undertake any transaction or service in violation of any such Laws and, to the extent within Successful Respondent's control, Successful Respondent shall be responsible for, and shall coordinate and oversee, compliance with such export Laws in respect of such items exported or imported hereunder.

**21.19 Third Party Beneficiaries.**

The Parties acknowledge and agree that DIR Customers that are agencies or other Entities of the State are intended third party beneficiaries of this Agreement and are entitled to enforce the terms of this Agreement to the extent provided in and in accordance with the Service Management Manual (which shall provide, at a minimum that DIR shall participate and seek the reasonable participation of the Office of the Texas Attorney General, along with any such DIR Customer in evaluating and presenting any claim or dispute). Except as expressly provided in the preceding sentence, this Agreement is entered into solely between, and may be enforced only by, DIR and Successful Respondent and shall not be deemed to create any rights or causes of action in or on behalf of any third parties, including employees, suppliers and customers of a Party, or to create any obligations of a Party to any such third parties.

**21.20 Covenant Against Pledging.**

Successful Respondent agrees that, without the prior written consent of DIR, it shall not assign, transfer, pledge, hypothecate or otherwise encumber its rights to receive payments from DIR under this Agreement for any reason whatsoever. To the extent DIR permits Successful Respondent to assign, transfer, pledge, hypothecate, or otherwise encumber its rights to receive payments from DIR under this Agreement, Successful Respondent shall continue to be DIR's sole point of contact with respect to this Agreement, including with respect to payment. The person or Entity to which such rights are assigned, transferred, pledged, hypothecated, or otherwise encumbered shall not be considered a third party beneficiary under this Agreement and shall not have any rights or causes of action against DIR.

**21.21 Hiring of Employees.**

- (a) **Solicitation and Hiring.** Except as expressly set forth herein, during the Term and for a period of twelve



(12) months thereafter, Successful Respondent shall not directly or indirectly recruit for employment in a position involved in the performance of Successful Respondent's obligations under this Agreement, any employees of DIR or a DIR Customer or individual DIR Contractors without the prior approval of DIR. Except as expressly set forth herein, including, without limitation, in connection with the expiration or any termination of this Agreement, during the Term and for a period of twelve (12) months thereafter, DIR shall not solicit for employment, directly or indirectly any employee of Successful Respondent involved in the performance of Successful Respondent's obligations under this Agreement without the prior consent of Successful Respondent. In each case, the prohibition on solicitation and hiring shall extend ninety (90) days after the termination of the employee's employment or, in the case of Successful Respondent's employees, the cessation of his or her involvement in the performance of Services under this Agreement. This provision shall not operate or be construed to prevent or limit any employee's right to practice his or her profession or to utilize his or her skills for another employer or to restrict any employee's freedom of movement or association.

- (b) **Publications.** Neither the publication of classified advertisements in newspapers, periodicals, Internet bulletin boards, or other publications of general availability or circulation nor the consideration and hiring of persons responding to such advertisements shall be deemed a breach of this **Section 21.21**, unless the advertisement and solicitation is undertaken as a means to circumvent or conceal a violation of this provision and/or the hiring party acts with knowledge of this hiring prohibition.

#### **21.22 Further Assurances.**

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

#### **21.23 Liens.**

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

#### **21.24 Covenant of Good Faith.**

Each Party agrees that, in its respective dealings with the other Party under or in connection with this Agreement, it shall act in good faith.

#### **21.25 Acknowledgment.**

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

#### **21.26 References.**

Unless otherwise directed by DIR, Successful Respondent shall regularly use DIR as a reference for all prospective Successful Respondent customers interested in purchasing services that include the same or substantially similar services to the Services. The Parties anticipate that, unless otherwise directed by DIR, Successful Respondent shall use DIR as a reference for all major state and local sector efforts within the United States and not less than one (1) major non-state and local sector pursuit per year. Notwithstanding **Section 13.1**, but subject to appropriate confidentiality arrangements and applicable Law, Successful Respondent acknowledges and agrees that DIR may freely discuss all aspects of Successful Respondent's performance and DIR's satisfaction with such performance with prospective Successful Respondent customers. Successful Respondent shall provide such prospective Successful Respondent customers with appropriate DIR contact information.

**21.27 Guaranty**

As a material condition to the effectiveness of this Agreement, Successful Respondent shall cause to be executed and deliver to DIR the guaranty set forth in **Attachment E Form of Parent Guaranty**.

***Authority to Execute.***

IN WITNESS WHEREOF, the Parties have executed this Master Services Agreement in their capacities as stated below with authority to bind their organizations on the dates set forth by their signatures. This Agreement shall be effective from the date of the last signature thereto (the "**Effective Date**").

**Department of Information Resources**

**Successful Respondent**

Signature on File

Signature on File

\_\_\_\_\_  
Stacey Napier  
Executive Director

\_\_\_\_\_  
Erin Hutchins

\_\_\_\_\_  
General Manager

\_\_\_\_\_  
3/15/2018  
Date

\_\_\_\_\_  
3/14/2018  
Date

\_\_\_\_\_  
Signature on File                      3/15/2018  
Legal