**TERMS AND CONDITIONS**

**6.1 GRANT OF LICENSE TO PEBA**

**6.1.1 Scope of License.** Upon full payment to Contractor and subject to the terms herein, Contractor grants to PEBA a nonexclusive, nontransferable, non-assignable (except in conjunction with a transfer or assignment of the Contract in accordance with Section 6.2.6), worldwide, royalty-free, fully paid-up, perpetual and non-terminable license to install, execute, modify, reproduce, access and Use the Licensed Programs in conjunction with the BAS System for its own internal data processing and computing needs and to make such copies of each component of the Licensed Programs as needed for such use, including copies for archival, disaster recovery, testing, training, and backup purposes, each in accordance with and subject to the terms and conditions contained in this Contract. Such right to use extends to all Authorized Users. The license grant provided herein will not be deemed to limit PEBA’s ownership of the Work Product pursuant to Section 6.1.5. This license does not include the specific licenses granted or terms of sale for any Third Party Equipment or Third Party Software, which will be purchased separately by PEBA or by Contractor on behalf of PEBA in accordance with Section 6.3.1(c).

**6.1.2 Source Code.** Upon delivery of each Phase of the BAS System and full payment to Contractor of all amounts due for such Phase, Contractor shall provide PEBA with the then current Source Code Materials. Contractor hereby grants to PEBA a nonexclusive, fully paid up, royalty free, perpetual, and non-terminable license to install, execute, modify, configure, reproduce, and use the Source Code Materials in connection with its permitted use of the Licensed Programs. As part of such license, PEBA shall be permitted to allow its third party designees to do any of the foregoing on behalf of PEBA. During the term of this Agreement, Contractor shall update the Source Code Materials at least once per year and as frequently as a Release is made available by Contractor.

**6.1.3 Escrow.**  This Section 6.1.3 only applies if Contractor does not provide PEBA with Source Code Materials under Section 6.1.2. For the duration of this Contract and for as long as PEBA purchases Maintenance and Support Services from Contractor, Contractor will maintain an “*Escrow Agreement*” with a third-party escrow agent (the “*Escrow Agent*”) that is mutually agreed to by the parties and attached hereto as Attachment 7 Escrow Agreement. Such Escrow Agreement will designate PEBA as a third-party beneficiary and meet all the requirements of this Section. Upon the execution of this Contract, Contractor will provide the Escrow Agent with the then current versions of Source Code of the Licensed Programs, all proprietary tools used with the Licensed Programs under this Contract, all Documentation, all Open Source code utilized with the Licensed Programs, all source code of Third Party Software that is incorporated in or bundled together with the Licensed Programs, and all operation documents, including but not limited to documents describing the third-party tools and the methods and procedures utilized for the installation, configuration and operation of the Licensed Programs and Third Party Software, to the extent the same currently exist (“*Deposit Materials*”). Contractor will update the Deposit Materials at least once per year and as frequently as a Release is made available by Contractor. Contractor will bear the cost of putting the Deposit Materials in escrow and may replace such Escrow Agent; provided, however that it obtains PEBA’s advance written approval of the new Escrow Agent, which will not be unreasonably withheld by PEBA.

 Under the Escrow Agreement, PEBA will be able to obtain a copy of the Deposit Materials if: (i) Contractor ceases supporting the Licensed Programs for its customer base; (ii) Contractor fails to provide Maintenance and Support Services for the Licensed Programs to PEBA in accordance with Contractor’s obligations under this Contract; (iii) Contractor files a petition for bankruptcy or insolvency, has an involuntary petition under bankruptcy laws filed against it, commences an action providing for relief under bankruptcy laws, files for the appointment of a receiver, or is adjudicated a bankrupt concern, ceases to do business or dissolves; or (iv) this Contract is terminated by PEBA pursuant to [Section 6.11](#_bookmark38) or 6.12 (collectively, a “*Release Event*”). Upon a Release Event, Contractor hereby grants to PEBA a nonexclusive, fully paid up, royalty free, perpetual, and non-terminable license to copy, modify, create Derivative Works, reproduce, and otherwise use the Deposit Materials for PEBA’s internal business purposes. As part of such license, PEBA will be permitted to allow its third-party designees to do any of the foregoing.

**6.1.4 Documentation and Training.** In connection with its installation of the BAS System, Contractor will provide PEBA with Documentation and training for PEBA Personnel as set forth in Section 3.15. Documentation that is Work Product will be owned by PEBA upon full payment to Contractor for such Documentation. For any Documentation that is not Work Product, Contractor hereby grants to PEBA, upon full payment to Contractor for such Documentation, the perpetual, non-exclusive, irrevocable right to use, modify, create Derivative Works of, and to make copies of such Documentation to facilitate PEBA Personnel’s permitted use of the BAS System.

**6.1.5 Ownership and Software Licenses.**

(a) **Title.**

(1) All rights, title, and interest in and to any Contractor Technology (including the Licensed Programs and the Base Program) provided by the Contractor to the State under this Contract will remain perpetually with the Contractor, except as otherwise expressly provided in this Contract.

(2) All rights, title, and interest in and to the Work Product vests in PEBA as set forth herein. Contractor will thereafter have no right, title or interest in any Work Product and will be delivered to PEBA or otherwise disposed of by Contractor only as directed by PEBA. Except for the Contractor Technology that may be included, incorporated or embedded in or integrated into the Work Product, all Work Product will be considered PEBA Confidential Information. As herein used, title includes providing to PEBA all intellectual property rights to the Work Product. Except for the Contractor Technology that may be included, incorporated or embedded in or integrated into the Work Product, upon full payment for the applicable Work Product, PEBA will own, and Contractor hereby irrevocably and perpetually assigns, transfers and conveys to PEBA, all of Contractor’s worldwide rights, title and interests, including all patent rights, copyrights, trademarks, know-how, trade secrets and other intellectual property rights, in and to the Work Product (including related documentation necessary to Use and support the Work Product), except to the extent the Parties have otherwise agreed in any Statement of Work that Contractor would own such Work Product. Contractor hereby waives any and all of its rights relating to certain “moral rights” that Contractor may have in any Work Product and other rights that Contractor may have in certain resale proceeds of certain of any Work Product that may be deemed to be literary works, in each case excluding any Contractor Technology that may be included, incorporated or embedded in or integrated into the Work Product. Contractor will cooperate with PEBA or its designees and execute all documents of assignment, declarations, and other documents which may be prepared by PEBA or its designees, and take other necessary actions as reasonably directed by PEBA or its designees to effect the title transfer to all Work Product as provided under this section or to perfect, protect, or enforce any intellectual property rights resulting from this Contract. PEBA hereby grants Contractor a non-exclusive, non-transferable right to modify, publish, create Derivative Works, copy, distribute, and produce and use the Work Product during the term of this Contract and solely for the purpose of Contractor fulfilling its obligations hereunder and in support of or enhancement of the BAS System for PEBA.

Contractor hereby grants to PEBA a nonexclusive, nontransferable, non-assignable (except in conjunction with a transfer or assignment of the Contract in accordance with Section 6.2.6), worldwide, royalty-free, fully paid-up, perpetual and non-terminable license to install, execute, modify, reproduce, access and Use (and allow PEBA Authorized Users to Use) for its internal business purposes all Contractor Technology that is (i) included, incorporated or embedded in or integrated into the Work Product in connection with its use of the Work Product .

(b) **Export Control.** The State acknowledges that the products acquired hereunder may be licensable by the U. S. Government. It further acknowledges that a valid export license must be obtained from the Department of Commerce prior to export of said products.

(c) **Software Tools.** The contractor will provide to the State, simultaneous with its initial installation, and any subsequent Enhancements, upgrades, fixes, etc., any Contractor-proprietary software tools (including, but not limited to compilers, editors, etc.), if any, that the State would require to maintain or enhance the customized software subject to the same license granted above to Contractor Technology. These software tools will be provided at no additional cost to the State.

(d) This Section 6.1.5 will survive termination of this Contract for any reason.

**6.2 CONTRACTOR’S RESPONSIBILITIES**

**6.2.1** **Contractor’s Obligations.** Contractor shall provide to PEBA: (i) all the Deliverables set forth in this Agreement in the time frames required under this Contract (if any); and (ii) all services set forth in this Contract in the time frames required under this Contract. The Contractor will provide and pay for all materials, tools, equipment, labor and professional and non-professional services, and will perform all other acts and supply all other things necessary, to fully and properly perform and complete the work. The Contractor must act as the prime contractor and assume full responsibility for any Subcontractor’s performance to the same extent that Contractor would be responsible to PEBA if Contractor had performed such Services. The Contractor will be considered the sole point of contact with regard to all situations. No subcontracting will release Contractor from its responsibility or obligations under the contract.  Contractor will remain liable and responsible for any of its subcontractors’ work and activities, including its subcontractors’ compliance with and breach of the terms of the contract, and for all acts and omissions of such subcontractors. Contractor will be solely responsible for the payment of all fees and expenses to its subcontractors.

**6.2.2** **Licenses and Permits.** During the term of the contract, the Contractor will be responsible for obtaining, and maintaining in good standing, all licenses (including professional licenses, if any), permits, inspections and related fees for each or any such licenses, permits and /or inspections required by the State, county, city or other government entity or unit to accomplish the work specified in this solicitation and the contract.

**6.2.3 Maintenance and Support.** Contractor will provide the Maintenance and Support Services from the Go-Live of the first Phase to the end of the Contract Term (“Initial Term”). After the initial term for Maintenance and Support Services, PEBA will have the option to renew the Maintenance and Support Services in three (3) year increments by mutual agreement with Contractor at least ninety (90) days prior to the expiration of the then current term for such Maintenance and Support Services. The terms and conditions of the Contract will carry forward into the Maintenance and Support Services renewals.

Maintenance and Support Services may be terminated for convenience pursuant to Section 6.11.4 by PEBA at any time by providing sixty (60) days advance written notice to Contractor. If the Maintenance and Support Services are terminated at any time or are not renewed by PEBA, PEBA will pay for all Maintenance and Support Services performed through the effective date of termination or expiration and Contractor will cooperate with PEBA to transition responsibility for the Maintenance and Support from Contractor to PEBA Personnel, at Contractor’s then current hourly rates to the extent the actual time spent is outside of the scope of the current services provided in this Contract. No adjustment in any fee or rate set forth in the Contractor Proposal for Maintenance and Support Services will be made unless specifically agreed to by PEBA in a Change Order.

**6.2.4 Software Upgrades, New Releases and Versions**. As part of Maintenance and Support Services, Contractor is responsible for the testing, roll-out, installation, and implementation of all Upgrades, new releases, versions, and fixes of the Licensed Programs provided by Contractor under the Contract (including Upgrades, new releases, versions, and fixes provided as part of the maintenance support included in any third party contractor’s charges or otherwise). Contractor will carry out any roll-out, installation, or implementation Maintenance and Support Services in a manner so as to minimize disruption of the Services or PEBA’s operations. Within six months after an upgrade, new release, version, or fix to the Licensed Programs becomes available, Contractor will: (a) provide PEBA with the results of its testing and evaluation of such upgrade, new release, version, or fix; and (b) subject to the provisions of this provision, will implement each upgrade, new release, version, or fix. Contractor will not install without PEBA’s approval an upgrade, new release, version, or fix of Licensed Programs that: (i) is required to be validated or raises any validation issues (as reasonably determined by PEBA); (ii) does not comply with PEBA architecture standards or other applicable technical requirements, in each case as set forth in this Contract; or (iii) has any adverse cost, performance, integration, conversion, process, or functionality impact on PEBA or the Services. Contractor will not install an upgrade or new versions or releases of Licensed Programs or make other Licensed Programs changes if doing so would require PEBA to install upgrades or new releases of, replace, or make other changes to Software, or require PEBA to acquire new Equipment or Upgrade then-current Equipment, for which PEBA is financially responsible, without PEBA’s consent. Contractor may not install any Upgrade, new release, version, or fix of Licensed Programs that is a first installation, or an alpha or beta release, without PEBA’s consent. PEBA will have the right, but not the obligation, to install Upgrades or new releases of, replacements, or modifications to the Licensed Programs, but if the same has any adverse cost, performance, integration, conversion, process, or functionality impact on Contractor or the Services, Contractor will be relieved of its responsibility for providing the Services in accordance with applicable Service Levels.

**6.2.5 Unencumbered Personnel.** All persons assigned by the Contractor to perform services for PEBA under this Contract, whether they are employees, agents, or principals of the Contractor, will not be subject to, or Contractor will not enforce, any employment contract or restrictive covenant provisions which would preclude those persons from performing the same or similar services for PEBA after the termination of this Contract, either as an employee, an independent contractor, or an employee, agent, or principal of another contractor with the State. If the Contractor provides PEBA with the services of any person subject to a restrictive covenant or contractual provision in violation of this provision, any such restrictive covenant or contractual provision will be void and unenforceable, and the Contractor will pay PEBA and any person involved all of its expenses, including attorneys’ fees, caused by attempts to enforce such provisions.

**6.2.6 Assignment, Novation, and Change of Name, Identity or Structure.**

(a) Contractor will not assign this contract, or its rights, obligations, or any other interest arising from this contract, or delegate any of its performance obligations, without the express written consent of the Procurement Officer which shall not be unreasonably withheld. The foregoing restriction does not apply to a transfer that occurs by operation of law (e.g., bankruptcy; corporate reorganizations and consolidations, but not including partial asset sales). Notwithstanding the foregoing, Contractor may assign monies receivable under the contract provided that the state will have no obligation to make payment to an assignee until thirty (30) days after Contractor (not the assignee) has provided the Procurement Officer with (i) proof of the assignment, (ii) the identity (by contract number) of the specific state contract to which the assignment applies, and (iii) the name of the assignee and the exact address or account information to which assigned payments should be made.

(b) If Contractor amends, modifies, or otherwise changes its name, its identity (including its trade name), or its corporate, partnership or other structure, or its FEIN, Contractor will provide the Procurement Officer prompt written notice of such change.

(c) Any name change, transfer, assignment, or novation is subject to the conditions and approval required by Regulation 19-445.2180, which does not restrict transfers by operation of law.

**6.2.7** **Compliance with Laws.** During the term of the contract, Contractor will comply with all provisions of laws, codes, ordinances, rules, regulations, and tariffs applicable to Contractor in the performance of it Services.

**6.3 PAYMENTS TO CONTRACTOR**

**6.3.1 Payment Types and Fixed-Fees.** The parties will recognize the following (5) types of payments for this Contract:

(a) **Payments for Licensed Program License Fees**

These payments are for Contractor’s license fees for the Licensed Programs.

(b) **Payments for Implementation Services**

These payments are for Contractor’s implementation services for the Project, which will include, but not be limited to, the Contractor providing Customizations, implementation of the BAS System, training, and Documentation. These fixed fees will include all of Contractor’s travel and out-of-pocket expenses.

(c) **Payments for Third Party Equipment and Third Party Software**

These payments are for Third Party Equipment and Third Party Software to be purchased by Contractor on behalf of and for PEBA as set forth in this Contract. The listed fees will include all shipping, delivery, maintenance and shipping related insurance expenses as agreed to in the formal request to purchase. Prior to the execution of this Contract, PEBA and Contractor will mutually agree which Third Party Equipment and Third Party Software will be procured from Contractor and which Third Party Equipment and Third Party Software will be procured by PEBA. Additionally, prior to the execution of this Contract, PEBA and Contractor will mutually agree on any deviations or variations from the Third Party Equipment and Third Party Software proposed by Contractor in its Proposal. Contractor is not obligated to procure any Third Party Software or Third Party Equipment unless and until the parties agree in writing, as contemplated herein, to the specific Third Party Software and Third Party Equipment that Contractor is obligated to procure, and any such procurement will be subject to the following terms:

1. All obligations contained in this Contract, if any, to purchase and deliver the hardware/software will be assigned by Contractor to DCPS and DCPS will perform all activities contemplated by this Contract that are or may be deemed to be a resale of tangible products for any purpose, although Contractor may serve as an agent for DCPS solely for the purposes of invoicing, and collecting payment, with respect thereto.
2. PEBA will be responsible for executing the hardware/software license agreements directly with the applicable third party vendors. Notwithstanding anything to the contrary anywhere else in this Contract, (A) PEBA’s use of such third party hardware/software and related services, and the vendor’s obligations with respect to the hardware/software and related services (e.g. warranty, support, performance/service level commitments), will be governed by those license agreements and PEBA and the third party vendors (and not Contractor) will be solely responsible for compliance with those terms and (B) Contractor’s obligations under this Contract are limited to the deliverables created by Contractor for delivery to PEBA and do not extend to any such third party hardware/software and related services.
3. PEBA’s license with each applicable third party vendor shall permit Contractor to access and use the third party hardware/software and related services as necessary for purposes of Contractor’s performance of the Services under this Contract.

(d) **Payments for Maintenance and Support Services**

These payments are for the Maintenance and Support Services as set forth in this Contract.

(e)  **Payments for Government Cloud Subcontractor Services**

These payments are for the Government Cloud Subcontractor Services as set forth in this Agreement.

(f) **Payments for Professional Services**

These payments are for professional services that may be necessary to assist PEBA in the completion of future BAS System modifications. These professional services would be in support of PEBA prior to the attainment of self-sufficiency or in augmentation of PEBA resources that are outside of the scope of implementation services and Maintenance and Support Services. Such services are not authorized without the execution of a change to this agreement pursuant to 6.3.8 or a written purchase order pursuant to 6.3.7.

(g) Contractor acknowledges and agrees that Attachment 6 Business Proposal Template lists all fees due for this Project and that Contractor will not be permitted to exceed any of the fees listed in Attachment 6 Business Proposal Template unless pre-approved by PEBA in a written amendment or written Change Order (as defined in Section 6.3.8) signed by both parties. PEBA will make payments to Contractor in accordance with the milestone-based schedule set forth in Attachment 6 Business Proposal Template schedule of payment milestones. The schedule of payment milestones includes estimated invoice dates that, for Deliverable-based milestones, are subject to completion by Contractor of the related services and Acceptance by PEBA pursuant to Section 6.3.10 of the related Deliverable noted in Attachment 6 Business Proposal Template. The estimated invoice dates are subject to change based upon updates to the Project Work Plan and Contractor’s completion of payment milestone Deliverables and PEBA’s Acceptance of such Deliverables.

**6.3.2 Invoices for Third Party Software and Third Party Equipment.** Contractor will invoice PEBA for the fees for any Third Party Equipment and Third Party Software procured by Contractor pursuant to Section 6.3.1(c) as follows: (i) in the case of Third Party Equipment, upon shipment thereof to PEBA, and (ii) in the case of Third Party Software, upon the date of license grant to PEBA. Contractor will reasonably cooperate with PEBA so that Third Party Software and Third Party Equipment are not delivered to PEBA until they are needed.

**6.3.3 Payment of Invoices**. Invoices will not be submitted to PEBA until PEBA’s Acceptance of the applicable Deliverables by issuing a Certificate of Acceptance. All invoices must be accompanied by a copy of such Certificate of Acceptance for processing of the payment. PEBA will process payment for each undisputed portion of the invoices in a manner consistent with the policies and procedures of PEBA, with payment for each properly submitted invoice no more than thirty (30) days after the receipt of the invoice unless Contractor and PEBA agree to longer payment terms. In the event PEBA withholds payment of any disputed portion of an invoice, PEBA shall notify Contractor of the reasons for such dispute in writing prior to the due date for payment thereof. Funds are not presently available for this entire contract. PEBA’s obligation under this contract is contingent upon the availability of authorized funds from which payment for contract purposes can be made. No legal liability on the part of PEBA for any payment may arise until funds are made available for this contract. It is further anticipated that funding, if authorized, will be made available over the course of several years on a year-by-year basis and funding may be subject to legislative authorizations. Therefore, PEBA shall not be in a position to pay more than twenty five percent of the total contract value in any particular year (the annual limit of PEBA liability). As indicated in the Business Proposal Template Payment Milestone worksheet, include no more than twenty five percent of the total contract value in any given calendar year based upon the projected Payment Milestones. If funding for any subsequent years is not authorized, PEBA will terminate as set forth in Section 6.11.3.

**6.3.4 Taxes.** The pricing provided by Contractor is exclusive of any taxes.PEBA will be responsible for any taxes imposed on the Services or on the engagement,to the extentPEBA is exempt from any Federal, State, and Local taxes, including, but not limited to, any sales and use taxes, on goods and services to be provided by Contractor and its Subcontractors, in which case and to such extent, PEBA will not liable for any such taxes levied on or by Contractor in performance hereunder. No payment will be made by PEBA for any taxes levied on Contractor’s wage payments. PEBA shall provide a valid tax exemption certificate to Contractor upon execution of this Contract.

**6.3.5 Hold-Back Amount.** For payment of invoices for Implementation Deliverables in each Phase, PEBA will remit payment less ten percent (10%) for such Deliverables (the “*Hold-Back Amount*”), unless otherwise indicated in the payment schedule. Half of the Hold-Back Amount for each Phase will be paid by PEBA upon the latter of (a) completion of the Warranty Period for that Phase, or (b) Contractor’s correction of Severity 1, 2 and 3 Defects reported to Contractor pursuant to Section 6.7.2 during the Warranty Period. The last half of the Hold-Back Amount for each Phase will be paid by PEBA upon the latter of (a) completion of the final Warranty Period, or (b) Contractor’s correction of Severity 1, 2 and 3 Defects reported to Contractor pursuant to Section 6.7.2 during the Warranty Period.

**6.3.6 Payment and Interest.**

(a) PEBA will pay the Contractor, after the submission of proper invoices or vouchers, the prices stipulated in this contract for Deliverables accepted pursuant to an accepted schedule of payment milestones, less any deductions provided in this contract. Unless otherwise specified herein, including the purchase order, payment will not be made on partial deliveries accepted by PEBA or on work that has not been tested and accepted by PEBA.

(b) Unless otherwise provided herein, including the purchase order, payment will be made by check mailed to the payment address on “Page Two.”

(c) Notwithstanding any other provision, payment will be made in accordance with S.C. Code Section 11-35-45, which provides the Contractor’s exclusive means of recovering any type of interest from PEBA. Contractor waives imposition of an interest penalty unless the invoice submitted specifies that the late penalty is applicable. Except as set forth in this paragraph, PEBA will not be liable for the payment of interest on any debt or claim arising out of or related to this contract for any reason.

(d) Amounts due to PEBA will bear interest at the rate of interest established by the South Carolina Comptroller General pursuant to Section 11-35-45 (“an amount not to exceed fifteen percent each year”), as amended, unless otherwise required by Section 29-6-30.

(e) Any other basis for interest, including but not limited to general (pre- and post-judgment) or specific interest statutes, including S.C. Code Ann. Section 34-31-20, are expressly waived by both parties. If a court, despite this agreement and waiver, requires that interest be paid on any debt by either party other than as provided by items (c) and (d) above, the parties further agree that the applicable interest rate for any given calendar year will be the lowest prime rate as listed in the first edition of the Wall Street Journal published for each year, applied as simple interest without compounding.

(f) PEBA will have all of its common law, equitable, and statutory rights of set-off.

**6.3.7 Purchase Orders.** Contractor will not perform any Work prior to the receipt of a purchase order from PEBA. Purchase orders may be used to elect optional professional services available under this Contract for which scope and pricing is already defined under this Contract, if any, but are subject to all terms and conditions of this Contract. Purchase orders may be electronic. No particular form is required. An order placed pursuant to the purchasing card provision qualifies as a purchase order.

**6.3.8 Change Orders.**

(a) **Requested by PEBA.** In the event PEBA requests a change to the scope of the Project, the PEBA Project Manager will deliver such request in writing to the Contractor’s Project Manager. Within ten (10) Business Days of the receipt of such a request, Contractor will provide a written change order proposal (a “Change Order Proposal”) that will include: (i) a description of the change, the tasks involved in completing the work requested, and the level of effort involved in implementing the change; (ii) the estimated date by which such change will be completed; (iii) any consequential changes that will need to occur in the Project Work Plan; (iv) the total flat fee cost for implementing such change; and (v) the latest day by which written approval can be given to Contractor so that Contractor can implement the change in line with Contractor’s Change Order Proposal.

(b) **Requested by Contractor.** In the event the Contractor desires to initiate a change to the scope of the Project, it will provide to PEBA a Change Order Proposal that meets the foregoing requirements and also clearly explains the basis under this Contract that gives rise to the need for a change.

(c) **Change Order Process.** Contractor will bear all costs in preparing a Change Order Proposal. PEBA will have no obligation to accept or agree to any Change Order Proposal, provided that Contractor may invoke the Dispute procedures set forth in Section 6.14 in the event PEBA rejects a Change Order Proposal that Contractor reasonably believes is justified. A Change Order Proposal that is acceptable to PEBA and Contractor will become a Change Order under this Contract when it is signed by the PEBA Executive Director (or his designee) and the Contractor Account Executive (or his designee). Prior to preparing a Change Order Proposal, Contractor will first determine whether the proposed change can be reasonably accommodated within the existing level of Contractor resources, not including overtime work, then being used by Contractor in performing its obligations hereunder, and if so the charges payable by PEBA for the Project will not be increased. To the extent a change proposed by either party will reduce the Contractor’s cost to fully perform its obligations hereunder, Contractor will not be required to reduce its fee but will issue a credit memo that reflects the fees and costs associated with the services and Deliverables that will not be provided. PEBA will be permitted to apply such credits against future Change Orders. Contractor will maintain a change request reporting mechanism and provide a change control plan/methodology for the duration of the Project. The fees specified in a Change Order Proposal will be tied to the payment points set forth in Attachment 6 Business Proposal Template and be subject to the Hold-Back Amount, unless otherwise agreed by the parties in the Change Order.

(d) The Contractor is not authorized or obligated to perform and will not perform any change order service until PEBA has approved the change order proposal in writing and a written change order has been executed by both parties.

(e) Completion of Deliverables delivered under change order work will be subject to Acceptance in accordance with Section 6.3.10.

(f) Notwithstanding the above, in the event of any delay encountered that is beyond the reasonable control of Contractor (including delays caused by third-party software and hardware vendors or their related products and/or services), failure by PEBA to meet its obligations under this Agreement that creates a delay or adversely impacts Contractor’s cost to perform the Services, Contractor shall be entitled to a change order to address the adverse impact of such event on Contractor. Consultant shall notify PEBA within a reasonable period after becoming aware of any such event. Notwithstanding anything to this Contract, if the parties do not sign a change order within thirty days of PEBA’s receipt of such notice, Contractor may suspend the Services upon written notice to PEBA.

**6.3.9**  **[[Change Directives.**

(a) Contract Modification.  By a written order, at any time, and without notice to any surety, the Procurement Officer may, subject to all appropriate adjustments, make changes within the general scope of this Contract in any one or more of the following:

(1)   drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for PEBA in accordance therewith;

(2)   method of shipment or packing;

(3)   place of delivery;

(4)   description of services to be performed;

(5)   time of performance (i.e., hours of the day, days of the week, etc.); or,

(6)   place of performance of the services.  Subparagraphs (1) to (3) apply only if supplies are furnished under this Contract.  Subparagraphs (4) to (6) apply only if services are performed under this Contract.

(b)   Adjustments of Price or Time for Performance.  If any such change increases or decreases the Contractor’s cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed by the order, an adjustment will be made in the Contract price, the delivery schedule, or both, and the Contract modified in writing accordingly.  Failure of the parties to agree to an adjustment will not excuse the Contractor from proceeding with the Contract as changed, provided that the State promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the Contractor will not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(c)   Time Period for Claim.  Within 30 days after receipt of a written Contract modification under Paragraph (1) of this clause, unless such period is extended by the Procurement Officer in writing, the Contractor will file notice of intent to assert a claim for an adjustment.  Later notification will not bar the Contractor’s claim unless the State is prejudiced by the delay in notification.

(d)   Claim Barred After Final Payment.  No claim by the Contractor for an adjustment hereunder will be allowed if notice is not given prior to final payment under this Contract.]]

**6.3.10 Acceptance.**

 (a) PEBA shall approve each Deliverable that conforms in all material respects with the specifications therefor set forth in this Contract or as otherwise agreed by the parties in writing (“Specifications”). Within five (5) Business Days (or such other period agreed upon in the agreed workplan) from its receipt of a Deliverable, PEBA shall provide Contractor with (i) written approval of such Deliverable or (ii) a written statement which identifies in reasonable detail, with references to the applicable Specifications, all of the deficiencies preventing approval (the “Deficiencies”).

 (b) Contractor shall complete corrective actions in order for such Deliverable to conform in all material respects to the applicable Specifications. PEBA shall complete its review of the corrected Deliverable and notify Contractor in writing of acceptance or rejection in accordance with the foregoing provisions of this Section.

 (c) Notwithstanding the foregoing provisions of this Section, approval of a Deliverable shall be deemed given by PEBA if PEBA has not delivered to Contractor a notice of Deficiencies for such Deliverable prior to the expiration of any period for PEBA review thereof as set forth in this Section, or if PEBA uses the Deliverable in production, and a Certificate of Acceptance shall not be required in order for Contractor to invoice and PEBA to pay for Deliverables acceptance under this subsection (c).

 (d) To the extent that any Deliverable has been approved by PEBA at any stage of Contractor's perform­ance under this Agreement, Contractor shall be entitled to rely on such approval for purposes of all subsequent stages of Contractor’s performance under this Agreement. PEBA agrees that, in the event an approved Deliverable differs from the Specifications for such Deliverable, the Specifications shall be deemed modified to conform with such approved Deliverable.

**6.4 PROJECT MANAGEMENT AND DELAYS**

**6.4.1 Project Management.** Contractor will be responsible for planning, scheduling, and completing all Project tasks. Contractor will provide weekly written status reports that include at least the information and documents requested by PEBA. The parties will have weekly status meetings (unless otherwise agreed) and regularly scheduled steering committee meetings. Incorporating any items provided by PEBA, Contractor will be responsible for preparing the agenda and objectives for each weekly status meeting and regularly scheduled steering committee meetings. Contractor will provide such information to all attendees three (3) Business Days in advance of the applicable meeting and conduct all meetings and prepare all follow up materials that result from such meeting. Contractor will make Key Personnel and any other requested Contractor Personnel available for all meetings. In addition to the regular status reports and meetings, Contractor agrees that it will provide all other information reasonably requested by PEBA in a timely manner and attend all other reasonably requested meetings by PEBA’s Personnel. The PEBA Project Director will have overall Project authority, working closely with the PEBA Project Manager and the assigned Contractor Project Manager who will provide project management and technical direction. Decisions that may affect the scope of the Project or delay completion will be discussed with the PEBA Project Director and the PEBA Project Manager prior to a decision being made by the Contractor Project Manager.

**6.4.2 Updating Project Documents and Reduction of PEBA Requirements.** Contractor is responsible for updating and maintaining all project management documentation, including but not limited to the Project Work Plan, Requirements Traceability Matrix, and the System Specifications throughout the implementation process; provided that no such changes will be considered agreed upon until approved in writing by PEBA. Contractor will make such updates as frequently as changes are agreed to by the parties and no less frequently than on a quarterly basis for the Implementation Plan and a bi-weekly basis for all other such materials. Contractor will submit all such updated project management documents to PEBA for its Acceptance..

**6.4.3 PEBA Caused Delay and Concurrent Delay.** If PEBA does not meet the time frames specified in the Project Work Plan or PEBA determines that it is necessary to delay and/or modify the timing and sequencing of the implementation as provided in the Project Work Plan, the parties shall agree to a Change Order under Section 6.3.8 to address any impacts associated with such delays. While PEBA is committed to the Project and will use reasonable efforts to provide staff and resources necessary to satisfy all such time frames, PEBA will not be deemed in default for any delays in the Project, provided PEBA uses its reasonable efforts to accomplish its designated responsibilities and obligations as set forth in the Project Work Plan, and provided further that PEBA executes a Change Order as contemplated in the first sentence of this Section within fifteen (15) days after notice by Contractor of its impacts associated with the delay. Contractor will continue to perform any and all activities not affected by such PEBA-caused delay. PEBA and Contractor may agree in the applicable Change Order that Contractor re-prioritize or re-sequence certain functions. Any resulting schedule adjustments will be at no additional cost to PEBA if (a) the aggregate delays are less than or equal to sixty (60) Business Days, and (b) no single delay is more than ten (10) Business Days in length. If either (i) PEBA-caused delays are more than sixty (60) Business Days in the aggregate, or (ii) if a single PEBA-caused delay is more than ten (10) continuous Business Days in length, Contractor shall be entitled to an equitable adjustment to the charges as a result of the PEBA-caused delay.

**6.4.4 Contractor Caused Delay.** If a Contractor caused delay exceeds ten (10) consecutive Business Days, PEBA may have the right to terminate this Contract for default subject to the notice and cure period pursuant to Section 6.11.5, in addition to all other remedies available to it. PEBA will not be obligate to compensate Contractor for any delays caused solely by Contractor delays.

**6.5 FORCE MAJEURE**

**6.5.1 Event of Force Majeure.** Neither party will be liable for any costs or damages due to nonperformance under this Contract arising out of any cause or event not within the reasonable control of such party and without its fault or negligence, including, but not restricted to, severe weather, earthquakes, labor disputes, fire, flood, explosion, act of God, terrorist attack, war, insurrection, riot, government regulation or act, vandalism, strike or quarantine (such causes or events hereinafter referred to as “*Events of Force Majeure*”).

**6.5.2 Notice Requirement:** Each party will give the other party prompt notice of the occurrence of any Event of Force Majeure that may cause delay hereunder, and the date of performance by any party that gives such notice will be extended for a period not exceeding the period of delay caused by the Event of Force Majeure so identified.

**6.5.3 Postponement of Deliverable, Phase, or System.** If requested by written notice received from PEBA after either party is given notice of any Event of Force Majeure, Contractor will postpone implantation of the Deliverable, Phase, or other component of the BAS System for a mutually agreed period of time. To the extent any such postponement affects the cost, scope and schedule of the Project, PEBA and Contractor will enter into an appropriate Change Order in accordance with the Change Order procedures under this Contract.

**6.5.4 Limitation on Period of Force Majeure.** No Event of Force Majeure will be an excuse for permanent nonperformance but will be an excuse only for delays in performance and only to the extent that such delays are directly attributable to such cause or otherwise mutually agreed as contemplated in Section 6.5.2. Accordingly, should any Event of Force Majeure delay performance in any material respect for a period of more than six (6) months, either party will have the option to terminate this Contract upon the provision of written notice to the other party.

**6.5.5 Exculpation.** Neither party will be liable for any delay or failure in the performance of its obligations under this Contract that directly results from any failure of the other party to perform its obligations as set forth in this Contract.

**6.6 CUSTOM PROGRAMMING**

**6.6.1 Customizations.** As may be required by this Contractor to meet the System Specifications, the parties acknowledge that the Licensed Programs must be configured and/or customized. PEBA expects a Configuration to be a design specification within the Licensed Programs that does not require custom code and that is made to align the inherent functionality of the Licensed Programs with the System Specification. A Customization would require the creation of source code and object code modifications or additions to the Base Programs in order for the Base Program to comply with the System Specifications therefore or to implement an Enhancement thereto.

The Contractor will explain to PEBA whether the requested design is classified as a Configuration, Minor Customization, Major Customization, or Other, as described in Section 3.1, and whether the requested design will result in a change in classification from what was included in the Contractor’s proposal. Additionally, the Contractor will be fully transparent and communicative on how the requested design will affect cost and to the extent reasonably known at the time for the request, the future performance, maintenance, and patching of the BAS System, to ensure PEBA has all pertinent information necessary to make an informed decision on the design.

Contractor shall develop all Configurations and Customizations for each Phase prior to installation of each Phase of the BAS System and in accordance with the Project Work Plan.

**6.7 WARRANTIES; REMEDIES**

**6.7.1 Warranty Period.** The Warranty Period for each Phase will be the period of time commencing with the Go Live of the Phase and terminating twelve (12) months after that Go Live.

(a) **Periodic Processes.** The Warranty Period will be extended to cover the Periodic Processes under Section 3.1.4.20 if the first Live Use of the functionality relating to the Periodic Processes occurs outside of the twelve (12) month Warranty Period in Section 6.7.1 such that any Defects discovered during the first 60 days following the first Live Use of the Periodic Process will be corrected as in Section 6.7.3, provided that PEBA notifies the Contractor of any Defect within such 60 day period.

**6.7.2 Warranty of Conformity to Specifications.** During the Warranty Period, Contractor represents and warrants that the final system implementation software Deliverable for the applicable Phase will operate in material conformity with the System Specifications. Contractor, at its own expense, upon receipt of written notice from PEBA within the Warranty Period, will make all corrections and modifications necessary to such Deliverable and each component or portion thereof, so that such Deliverable will so operate. If a Defect is discovered during the Warranty Period but, despite the exercise of reasonable diligence by PEBA, written notification of such Defect reaches Contractor within a reasonable time after the conclusion of the Warranty Period (not to exceed two (2) Business Days), such Defect will be deemed to have been reported during the Warranty Period. Contractor shall have no obligation to make warranty modifications or provide any associated warranty services under this Section 6.7.2 or Section 6.7.3, below, attributable to any of the follow: (i) modification of the Deliverable other than by Contractor or its subcontractors, or use thereof in a manner not contemplated by this Agreement; (ii) PEBA’s failure to use any corrections or modifications made available by Contractor; (iii) a failure to fulfill any PEBA obligation under the Agreement or and the applicable SOW with respect to such Deliverable; (iv) PEBA’s failure to reasonably cooperate with Contractor in the resolution of the Defect; (v) the quality or integrity of data from other automated or manual systems with which the Deliverable interfaces; (vi) hardware or software that is supplied by a third party to PEBA; or (vii) hardware, software, networks or systems not a part of the Deliverable which is inadequate to allow proper operation of the Deliverable. If any such exception applies, PEBA shall compensate Contractor for Contractor’s effort in validating and remedying such condition on a time and materials basis.

**6.7.3 Correction of Warranty Period Defects.** Contractor will use reasonable efforts to perform all warranty services in a manner which minimally disrupts PEBA’s daily operations.

 Upon PEBA reporting a Defect in a Deliverable warranted under Section 6.7.2 during its applicable Warranty Period, the parties will categorize the Defect Severity and Priority as documented in Section 3.17.4.

 Without limiting the parties’ ability to agree to a different timeframe as circumstances warrant, the parties acknowledge the following to be Contractor’s target timeframes for initiating verification of a Defect, identification of potential workarounds, identification of potential resolutions, identification and assignment of Contractor Personnel to address Defects and the commencement of work to resolve such Defects:

(i) for Critical Defects, two (2) hours after they are reported to Contractor during Business Hours and 4 hours for Critical Defects reported after Business Hours;

(ii) for Major Defects, four (4) hours after they are reported to Contractor during Business Hours and 6 hours for High Defects reported after Business Hours; and

(iii) for Moderate Defects, five (5) Business Days after they are reported to Contractor.

For purposes of reporting a Critical or Major Defect to Contractor, the parties will establish an agreed to process, including an afterhours process. Where effective and practicable given the nature of the Critical or Major Defect, Contractor will provide the Defect Correction for a Critical or Major Defect by means of a “temporary fix” consisting of sufficient programming and operating instructions to implement the Defect Correction consistent with the agreed plan. Contractor agrees that it will initiate work toward Defect Correction for a Moderate or Low Defect in a diligent manner consistent with the agreed to plan, either on a remote basis or on-site, as is most effective, efficient and practicable given the nature of the Defect. Contractor may provide the Defect Correction for a Moderate or Low Defect by means of a “temporary fix” consisting of sufficient programming and operating instructions to implement the Defect Correction in a timely manner.

. Contractor will provide reasonable diagnostic assistance for all Defects, and Contractor will resolve such Defects in accordance with its warranty obligations hereunder at no additional charge to PEBA.

**6.7.4 Complete System.** Contractor represents and warrants that no additional third-party software or equipment is required or necessary to operate the BAS System in accordance with System Specifications and the Performance Specifications, other than as is listed in Attachment 6 Business Proposal Template. In the event any additional equipment or software is needed to comply with this Section, Contractor will promptly provide, test, install, and appropriately configure the additional software and hardware at the Government Cloud Services Subcontractor hosting facilities or PEBA Premises, free of charge and at no additional cost to PEBA and PEBA will reasonably cooperate with Contractor in its fulfillment of these obligations.

**6.7.5 [[Warranty of Right to License; Noninfringement.** Contractor represents and warrants that it is the owner of the Licensed Programs and that it has the right to convey the licenses set forth in this Contract, and that PEBA’s use of such Licensed Programs, the design of the BAS System as a whole, and the execution of the Licensed Programs on Contractor approved Equipment do not infringe, misappropriate, or otherwise violate any third-party rights, including but not limited to any patent rights, copyrights, trade secret rights, trademark rights, or other proprietary rights. Notwithstanding the foregoing, it is agreed that Contractor will not be in breach of this warrant for any infringement arising solely from the use of the Third-Party Equipment or Third-Party Software.]]

**6.7.6 No Claims.** Contractor represents and warrants that, as of the effective date of this Contract, there is no action, suit, claim, investigation or proceeding pending, or to the best of Contractor’s knowledge, threatened against, by or affecting Contractor or the Licensed Programs or any component thereof in any court, or by or before any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, or before any arbitrator of any kind which, if adversely determined, might materially adversely affect the State’s use of the Licensed Programs or any component thereof or restrict Contractor’s ability to consummate the transactions contemplated hereby or provide the services under this Contract. Contractor further represents and warrants that it knows of no basis for any such action, suit, claim, investigation or proceeding.

**6.7.7 Warranty.** Contractor represents and warrants that it complies with, at all times during the term of the Contract will continue to comply with, all federal, state, and local laws, statutes, rules, regulations, and ordinances applicable to Contractor in the performance of its services hereunder, including, but not limited to, professional services and Maintenance and Support Services. Contractor represents and warrants that it will perform all services, including, but not limited to, professional services and Maintenance and Support Services, in support of the creation of the Deliverables required by this Contract in a professional and workmanlike manner, and in accordance with prevailing industry practices and standards; provided, however, that where this Contract specifies a particular standard or criteria for performance, this warranty is not intended to and does not diminish that standard or criteria for performance.

**6.7.8 Software Warranties**. For all Licensed Programs provided hereunder, Contractor represents and warrants that (i) except as contemplated in Section 6.7.12, contractual terms and conditions included in any “clickwrap,” “browsewrap,” “shrinkwrap,” or other license agreement that accompanies any Licensed Programs are void and have no effect; (ii) the Licensed Programs do not contain any hidden files not known and approved by PEBA; (iii) no Licensed Program will replicate, transmit or activate itself without control of a human operating the computing equipment on which it resides in a manner not known and approved by PEBA; and (iv) the Licensed Programs do not alter, damage or erase any data or computer programs without control of a human operating the computing equipment on which it resides in a manner not known and approved by PEBA.

**6.7.9 Single Point of Contact**. The Contractor will be the initial contact point for all warranty notifications and support requests, regardless of the perceived source of the problem.

**6.7.10 Scalability**. The Contractor represents and warrants that the BAS System has the capacity to scale up to meet PEBA’s anticipated and mutually agreed processing load.

**6.7.11 Hardware Sizing**. The Contractor represents and warrants that the Equipment and any related technological infrastructure that the Contractor provides is of sufficient capacity and capabilities to meet the anticipated and mutually agreed requirements of the Contract.

**6.7.12 Open Source Code.** Contractor covenants that it will not use any Open Source code as part of the License Programs or any other Software Deliverable component of the BAS System unless it specifically identifies the Open Source code in Attachment 6 Business Proposal Template, provides a copy of the applicable Open Source code license agreement to PEBA, and secures PEBA’s written consent to provide such Open Source code. PEBA’s execution of this contract constitutes PEBA’s written consent, as required in the preceding sentence, for Contractor to use such Open Source code.

**6.7.13 Date Compliance.** Contractor represents and warrants that the License Programs are designed to be used prior to, during, and after any transition from one year to another, one century to another and one fiscal year to another forever and that the Licensed Programs will operate during each time period without error relating to date data or computations related thereto, specifically including any error relating to, or the product of, date data which represents or references different years, centuries, fiscal years or more than one year, century, or fiscal year. PEBA represents and warrants that all existing interfaces, files and data stored or currently used contain valid century information.

**6.7.14 Disabling Code.** Contractor represents and warrants that, in the performance of its Services, it shall not intentionally or knowingly, without PEBA’s consent, install any virus, malware, worm, trap door, back door, timer, clock, counter or other limiting routine, copy protection mechanism, dongle key, instruction or design that would erase data or programming or otherwise cause the BAS System or any component thereof to become inoperable or incapable of being used in the full manner for which it was designed and created including, without limitation, any such timers or other limiting routines that Contractor may configure within the BAS System, any limitations that are triggered by: (a) the Licensed Programs being used or copied certain number of times, or after the lapse of a certain period of time; (b) the Licensed Programs being installed on or moved to a central processing unit or system that has serial number, model number or other identification different from the central processing unit or system on which Licensed Programs were originally installed; or (c) the occurrence or lapse of any similar triggering factor (each, a “*Disabling Code*”). Contractor will use reasonable care to protect PEBA’s Equipment from the introduction of a Disabling Code and ensure that all Contractor Personnel take all reasonable precautions to ensure that it does not introduce any Disabling Code while performing services under this Contract. Notwithstanding anything contained herein to the contrary, in the event Disabling Codes are identified by Contractor or PEBA and were introduced therein as a result of Contractor’s breach of this Section, Contractor will take all reasonable steps necessary, at no additional cost to PEBA to: (i) restore any and all data lost by PEBA as a result of such Disabling Code, to PEBA’s latest backup thereof, and to the extent that such recovery is technically feasible, provided that PEBA, at all relevant times, had used industry standard virus-checking software and back-up procedures; (ii) and for components of the BAS System that are not Third Party Software, (a) provide a replacement component of the BAS System without Disabling Code, (b) test the replacement component of the BAS System for the presence of Disabling Codes to ensure it is free of Disabling Code; and (c) install and implement such replacement component of the BAS System.

**6.7.15 New Equipment.** Contractor represents and warrants that all Third Party Equipment and replacement or repair parts delivered by Contractor to PEBA hereunder, if any, will be new (i.e., unused and not reconditioned or refurbished). To the extent that the passage of time, prior to Contractor’s purchase of hardware of software, results in improved products being available for the same cost to Contractor as the Third Party Equipment originally proposed by Contractor, Contractor will provide the improved product to PEBA at no additional charge.

**6.7.16 Legal Requirements.** For changes to the Software Deliverables required to comply with federal law or other legal requirements, Contractor will make all necessary changes to the such Deliverables agreed to with PEBA pursuant to a Change Request. When the necessity of such changes are known by Contractor Key Personnel, Contractor will promptly notify PEBA of changes to the legal requirements that may impact the Software Deliverables, but Contractor will not provide legal advice.

**6.7.17 Security Controls.** Contractor confirms it will to implement or as appropriate enable (and in the case of Third Party Software, where permitted) industry standard security features in the BAS System as agreed by the parties as part of the System Specifications.

**6.7.18 Limitation of Liability.**

(a) **Warranties.** EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN THIS CONTRACT OR REFERENCED HEREIN, EACH PARTY DISCLAIMS ALL WARRANTIES RESPECTING PEBA, ALL SERVICES PROVIDED UNDER THIS CONTRACT AND THE PARTIES’ OBLIGATIONS, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(b) **Damages.** Except for: (i) damages that arise from Contractor’s bad faith or willful misconduct; or (ii) Contractor’s indemnification obligations set forth in Sections 6.8.2 and 6.8.4, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY DAMAGES, OR ANY LOST PROFITS ARISING OUT OF OR OTHERWISE RELATING TO THIS CONTRACT OR THE USE OR PERFORMANCE OF PEBA OR ANY COMPONENTS THEREOF, HOWEVER CAUSED, EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES.

(c) **Contractor’s Liability.** Except for (i) damages that arise from Contractor’s bad faith or willful misconduct; or (ii) Contractor’s indemnification obligations set forth in Sections 6.8.2 and 6.8.4, the Parties agree the Contractor’s liability under this Contract will be limited to an amount equal to two (2) times the fees paid under this Contract, including the amounts paid pursuant to any modifications due to Change Orders, but excluding any amounts paid for any Third Party Equipment and Third Party Software. In no event will this section limit the liability of the Contractor for intentional torts, criminal acts, or fraudulent conduct.

 [[Contractor acknowledges that the following will be considered “direct damages” and Contractor will not assert that they are indirect, incidental, collateral, consequential or special damages or lost profits to the extent they result from Contractor’s failure to perform in accordance with this Agreement. Contractor may be liable to PEBA for the following direct damages in the event of breach (i) costs and expenses of recreating or reloading any lost, stolen or damaged Government Information; (ii) costs and expenses of implementing a work-around in respect of a failure to provide the BAS System or related Services or any part thereof; (iii) cover damages, including the costs and expenses incurred to procure the BAS System, the Services, or corrected Services from an alternate source, to the extent in excess of Contractor’s charges under this Contract; (iv) costs and expenses incurred to bring the BAS System or hosting Services in-house or to contract to obtain the BAS System or hosting Services from an alternate source, including the costs and expenses associated with the retention of external consultants and legal counsel to assist with any re-sourcing; or (v) payments, fines, penalties, interest, sanctions, or other remedies imposed by a governmental body or regulatory agency or required by an applicable law for Contractor’s failure to comply with legal requirements or deadlines.]]

(d) **PEBA’s Liability.** In no event will PEBA’s liability under this Contract exceed the amount paid and owed by PEBA to Contractor.

**6.7.19 [[No Withholding of Services.** The Contractor warrants that during the Term of this Contract it will not withhold the BAS System to be provided hereunder, for any reason, including but not limited to a dispute between the parties arising under this Contract, except as may be specifically authorized herein. **Due to the serious impact and irreparable harm any suspension or termination of this vital and critical services Contract would have on the continuing operations of PEBA and the State entities, employees and retirees relying on PEBA, in which case an adequate remedy at law is highly unlikely to be available, PEBA’s failure to perform its responsibilities set forth in the Contract will not be grounds for suspension or termination by Contractor. CONTRACTOR ACKNOWLEDGES AND AGREES THAT PEBA WOULD NOT BE WILLING TO ENTER INTO THIS CONTRACT WITHOUT CONTRACTOR’S COVENANT AND ASSURANCES THAT THE (1) CONTRACTOR’S SERVICES AND PERFORMANCE WILL NOT BE SUSPENDED OR TERMINATED BY CONTRACTOR, AND (2) CONTRACTOR WILL NOT SUSPEND PERFORMANCE EVEN IF PEBA FAILS TO PERFORM ANY OF ITS DUTIES UNDER THE CONTRACT OR CONTRACTOR ALLEGES PEBA IS IN BREACH OF THIS AGREEMENT. ANY TERMINATION HEREUNDER, WHETHER FOR DEFAULT OR CONVENIENCE WILL NOT AFFECT ANY LICENSES GRANTED TO PEBA. Notwithstanding the foregoing, Contactor’s promise not to terminate or suspend its performance will not relieve PEBA from its obligations to pay Contactor for acceptable goods and services provided pursuant to this agreement. Contractor’s remedy shall be to initiate proceedings for recovery of payments pursuant to the Disputes provision of this agreement (6.14) and shall continue to perform during the pendency of any disputes. Contractor agrees that this provision will flow down and be included in any subcontract including without limitation the Government Cloud Service Provider Subcontract.]]**

**6.8 INDEMNIFICATION**

**6.8.1 No Indemnity or Defense.** Any term or condition is void to the extent it requires the State to indemnify, defend, or pay attorney’s fees to anyone for any reason.

**6.8.2 Third Party Claims – General.** Notwithstanding any limitation in this agreement, and to the fullest extent permitted by law, Contractor will defend, indemnify, and hold harmless Indemnitees for and against any and all suits or claims of any character (and all related damages, settlement payments, attorneys’ fees, costs, expenses, losses or liabilities) by a third party which are attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible personal property to the extent either arising out of or in connection with the goods or services acquired hereunder or caused in whole or in part by any act or omission of Contractor, its Subcontractors, their employees, workmen, servants, agents, or anyone directly or indirectly employed by them or anyone for whose acts any of them may be liable, regardless of whether or not caused in part by an Indemnitee, and whether or not such claims are made by a third party or an Indemnitee; however, if an Indemnitee’s negligent act or omission is subsequently determined to be the sole proximate cause of a suit or claim, the Indemnitee will not be entitled to indemnification hereunder. Contractor will be given timely written notice of any suit or claim. Contractor’s obligations hereunder are in no way limited by any protection afforded under workers’ compensation acts, disability benefits acts, or other employee benefit acts. This clause will not negate, abridge, or reduce any other rights or obligations of indemnity which would otherwise exist. The obligations of this paragraph will survive termination, cancelation, or expiration of the parties’ agreement. This provision will be construed fairly and reasonably, neither strongly for nor against either party, and without regard to any clause regarding insurance. As used in this clause, “Indemnitees” means the State of South Carolina, its instrumentalities, agencies, departments, boards, political subdivisions and all their respective officers, agents and employees.

# 6.8.3 [[Third Party Claims – Disclosure of Information.

# (a) Without limitation, Contractor will defend, indemnify, and hold harmless Indemnitees from and against any and all suits, claims, investigations, or fines (hereinafter “action”) of any character (and all related damages, settlement payments, attorneys’ fees, costs, expenses, losses or liabilities) by a third party which arise out of or in connection with a disclosure of Government Information (as defined in the clause titled Information Security - Definitions) caused in whole or in part by any act or omission of Contractor, its Subcontractors at any tier, their employees, workmen, servants, agents, or anyone directly or indirectly employed by them or anyone for whose acts any of them may be liable, regardless of whether or not caused in part by an Indemnitee, and whether or not such action is brought by a third party or an Indemnitee, but only if the act or omission constituted a failure to perform some obligation imposed by the Contract or the law.

(b) Indemnitee must notify Contractor in writing within a reasonable period of time after Indemnitee first receives written notice of any action. Indemnitee’s failure to provide or delay in providing such notice will relieve Contractor of its obligations under this clause only if and to the extent that such delay or failure materially prejudices Contractors ability to defend such action. Indemnitee must reasonably cooperate with Contractor’s defense of such actions (such cooperation does not require and is without waiver of an Indemnitees attorney/client, Work Product, or other privilege) and, subject to Title 1, Chapter 7 of the South Carolina Code of Laws, allow Contractor sole control of the defense, so long as the defense is diligently and capably prosecuted. Indemnitee may participate in Contractor’s defense of any action at its own expense. Contractor may not, without Indemnitee’s prior written consent, settle, compromise, or consent to the entry of any judgment in any such commenced or threatened action unless such settlement, compromise or consent (i) includes an unconditional release of Indemnitee from all liability related to such commenced or threatened action, and (ii) is solely monetary in nature and does not include a statement as to, or an admission of fault, culpability or failure to act by or on behalf of, an Indemnitee or otherwise adversely affect an Indemnitee. Indemnitee’s consent is necessary for any settlement that requires Indemnitee to part with any right or make any payment or subjects Indemnitee to any injunction.

(c) Notwithstanding any other provision, Contractor’s obligations pursuant to this clause are without any limitation whatsoever. Contractor’s obligations under this clause will survive the termination, cancellation, rejection, or expiration of the Contract. This provision will be construed fairly and reasonably, neither strongly for nor against either party, and without regard to any clause regarding insurance.

(d) “Indemnitee” means the State of South Carolina, its instrumentalities, agencies, departments, boards, political subdivisions and all their respective officers, agents and employees.]]

**6.8.4 Intellectual Property.**

(a) Without limitation and notwithstanding any provision in this agreement, Contractor will, upon receipt of notification, defend, indemnify, and hold harmless the State of South Carolina, its instrumentalities, agencies, departments, boards, political subdivisions and all their respective officers, agents and employees (collectively “State” in this clause) against all actions, proceedings or claims of any nature (and all damages, settlement payments, attorneys’ fees (including inside counsel), costs, expenses, losses or liabilities attributable thereto) by any third party asserting or involving an intellectual property (“IP”) right related to an acquired item. State will allow Contractor to defend such claim so long as the defense is diligently and capably prosecuted. State will allow Contractor to settle such claim so long as (i) all settlement payments are made by Contractor, and (ii) the settlement imposes no non-monetary obligation upon State. State will reasonably cooperate with Contractor’s defense of such claim.

(b) In the event an injunction or order will be obtained against State’s use of any acquired item, or if in Contractor’s opinion, the acquired item is likely to become the subject of a claim of infringement or violation of an IP right, Contractor will, without in any way limiting the foregoing, and at its option and expense, either: (i) procure for State the right to continue to use, or have used, the acquired item, or (ii) replace or modify the acquired item so that it becomes non-infringing but only if the modification or replacement does not adversely affect the specifications for the acquired item or its use by State. If neither (i) nor (ii), above, is practical, State may require that Contractor remove the acquired item from State, refund to State any charges paid by State therefor, and take all steps necessary to have State released from any further liability. The foregoing provisions of this sub-section constitute the sole and exclusive remedy of the State, and the sole and exclusive obligation of the Contractor, relating to a claim that any of Contractor’s Deliverables infringes any patent, copyright, or other intellectual property right of a third party.

(c) Contractors obligations under this paragraph do not apply to a claim to the extent such infringement or unauthorized use arises from (i) modification of the Deliverable other than by Contractor or its subcontractors, or use thereof in a manner not contemplated by this Agreement, (ii) the failure of the State to use any corrections or modifications made available by Contractor, (iii) the use of the Deliverable in combination with any platform, product, network or data not provided by Contractor (iv) Contractor’s compliance with specifications furnished by the State, or (v) Contractor’s compliance with information, materials, instructions, specifications, requirements or designs furnished by the State.

(d) As used in this paragraph, these terms are defined as follows: “IP right(s)” means a patent, copyright, trademark, trade secret, or any other proprietary right. “Acquired item(s)” means the rights, goods, or services furnished under this Contract. “Specification(s)” means a detailed, exact statement of particulars such as a statement prescribing materials, dimensions, and quality of work.

(e) Contractor’s obligations under this clause will survive the termination, cancellation, rejection, or expiration of this Contract.

**6.9 INSURANCE**

**6.9.1 Umbrella Excess Liability.** Contractor will provide umbrella excess liability insurance on an “occurrence” basis providing “following form” coverage pursuant to policy terms and conditions for the underlying coverages outlined above with the following minimum limits:

 Each Occurrence Limit $5,000,000

 Aggregate Limit $10,000,000

Contractor will confirm that PEBA must be covered as additional insured on Umbrella Excess in a form equal or equivalent to the Additional Insured and endorsements referenced in the underlying CGL (both Premises/Operations and Products/Completed Operations) specific to Contractor’s act or omissions in performance under this Agreement.

**6.9.2 Contractor’s Liability Insurance – General.**

(a) Without limiting any of the obligations or liabilities of Contractor, Contractor will procure from a company or companies lawfully authorized to do business in South Carolina and with a current A.M. Best rating of no less than A-: VII, or the equivalent rating from another nationally recognized ratings provider and maintain for the duration of the Contract, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work and the results of that work by the Contractor, his agents, representatives, employees or Subcontractors.

(b) Coverage will be at least as broad as:

(1) **Commercial General Liability (CGL):** Insurance Services Office (ISO) Form CG 00 01 12 07 covering CGL on an “occurrence” basis, including products-completed operations, personal and advertising injury, with limits no less than $1,000,000 per occurrence. If a general aggregate limit applies, the general aggregate limit will be twice the required occurrence limit. This Contract will be considered to be an “insured contract” as defined in the policy.

(2) **Worker’s Compensation:** As required by the State of South Carolina, with Statutory Limits, and Employer’s Liability Insurance with limit of no less than $1,000,000 per accident for bodily injury or disease.

(b) PEBA, its officers, officials, employees and volunteers, must be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an blanket endorsement to the Contractor’s insurance at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10 and CG 20 37 if a later edition is used.

(c) For any claims related to this Contract, the Contractor’s insurance coverage will be primary insurance as respects the State, PEBA, and its officers, officials, employees and volunteers additional insured status and Contractor’s activities hereunder. Any insurance or self-insurance maintained by the State, PEBA, or its officers, officials, employees and volunteers, will be excess of the Contractor’s insurance and will not contribute with it.

(d) Prior to commencement of the work, the Contractor will furnish the State with original industry standard Acord certificates and amendatory blanket endorsements effecting coverage required by this section. All certificates are to be received and approved by the State before work commences. However, failure to obtain the required documents prior to the work beginning will not waive the Contractor’s obligation to provide them. The State reserves the right to require blanket endorsements required by this section, at any time.

(e) Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions. In addition, the Contractor will notify the State immediately upon receiving any information that any of the coverages required by this section are or will be adversely changed, cancelled, or replaced unless Contractor obtains replacement coverage meeting the terms and conditions hereunder without lapse.

(f) Contractor hereby grants to the State and PEBA a waiver of any right to subrogation which any insurer of said Contractor may acquire against the State or PEBA by virtue of the payment of any loss under such insurance as permitted by. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the State or PEBA has received a waiver of subrogation endorsement from the insurer.

(g) ~~.~~

(h) The State reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

**6.9.3** **Contractor’s Liability Insurance – Information Security and Privacy.**

(a) Without limiting any other obligations or liabilities of Contractor, Contractor will procure from a company or companies lawfully authorized to do business in South Carolina and with a current A.M. Best rating of no less than A-: VII, or the equivalent rating from another nationally recognized ratings provider and maintain for the duration of the Contract, a policy or policies of insurance against claims which may arise from or in connection with the performance of the work and the results of that work by the Contractor, his agents, representatives, employees, Subcontractors or any other entity for which the Contractor is legally responsible.

(b) Coverage must include claims for:

(1) information security risks, including without limitation, failure to prevent unauthorized access to, tampering with or unauthorized use of a computer system; introduction of malicious codes, computer viruses, worms, logic bombs, etc., into data or systems; or theft, damage, unauthorized disclosure, destruction, or corruption of information in whatever form;

(2) privacy risks, including (A) failure to properly handle, manage, store, destroy, or otherwise control personally identifiable information in any format; (B) loss or disclosure of confidential information; and (C) any form of invasion, infringement or interference with rights of privacy, including breach of security/privacy laws or regulations;

(3) contractual liability pursuant to policy terms and conditions for the Contractor’s obligations described in the clauses titled “Indemnification - Third Party Claims – Disclosure Of Information” and “Information Use And Disclosure;” and

(4) errors, omissions, or negligent acts in the performance, by the Contractor or by any entity for which the Contractor is legally responsible, of professional services included in the work.

(c) If the work includes content for internet web sites or any publications or media advertisements, coverage must also include claims for actual or alleged infringement of intellectual property rights, invasion of privacy, as well as advertising, media and content offenses.

(d) If the work includes software, coverage must also include claims for intellectual property infringement arising out of software or content (with the exception of patent infringement and misappropriation of trade secrets)

(e) Coverage will have limits no less than ten million ($10,000,000.00) dollars per claim for wrongful acts and ten million ($10,000,000.00) dollars aggregate. The Contractor’s Information Security and Privacy policy is embedded in their Professional Liability coverage form.

(f) If the insurance required by this clause is procured on a form affording “claims-made” coverage, then (i) all limits stated above as “per occurrence” will be understood to mean “per claim” or “per occurrence,” as is consistent with the terms of the “claims-made” policy; and (ii) such claims-made insurance will provide for a retroactive date no later than the date the Contract is awarded.

(g) All terms of this clause will survive termination of the Contract and will continue until thirty (30) days past the final completion of the work, including the performance of any warranty work. In addition, Contractor will maintain in force and effect any “claims- made” coverage for a minimum of two (2) years after final completion of all work or services to be provided hereunder. Contractor will purchase an extended reporting period, or “tail coverage,” if necessary to comply with the latter requirement.

(h)

(i) For any claims related to this Contract, the insurance coverage required by this clause will be primary insurance as respects the State, PEBA, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the State, PEBA, or its officers, officials, employees and volunteers, will be excess of the Contractor’s insurance and will not contribute with it.

(j) Prior to commencement of the work, the Contractor will furnish the State with original industry standard Acord certificates of insurance for every applicable policy effecting the coverage required by this clause. All certificates are to be received and approved by the Procurement Officer before work commences. However, failure to obtain the required documents prior to the work beginning will not waive the Contractor’s obligation to provide them. The State reserves the right any blanket endorsements required by this section, at any time.

(k) Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions. In addition, the Contractor will notify the State immediately upon receiving any information that any of the coverages required by this clause are or will be adversely changed, cancelled, or replaced unless Contractor obtains replacement coverage meeting the terms and conditions hereunder without lapse.

(l) Contractor hereby grants to the State and PEBA a waiver of any right to subrogation which any insurer of said Contractor may acquire against the State or PEBA by virtue of the payment of any loss under such insurance as is required by this clause as permitted by law. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the State or PEBA has received a waiver of subrogation endorsement from the insurer.

(m) ~~.~~

# 6.10 INFORMATION SECURITY

**6.10.1** **Service Provider Security Assessment Questionnaire – Required.** The Contractor must demonstrate that programs, policies and procedures are in place to adequately provide for the confidentiality, integrity, and availability of the information systems used by Contractor to process, store, transmit, and access all Government Information. In order for the State to accurately evaluate the strength and viability of the Contractor’s security policies, procedures and practices related to confidentiality, integrity and availability, Offerors must submit with their offers a thorough and complete written response to Attachment 3 Service Provider Security Assessment Questionnaire (“Response to SPSAQ”), which must address all applicable organizations and applicable information systems. The terms used in this clause will have the same meaning as the terms defined in the clause titled Information Security – Definitions.

**6.10.2 Service Provider Security Representation.** The following obligations are subordinate to any other Contract clause to the extent the other clause specifically provides for enhanced safeguarding of Government Information, applicable information systems, or applicable organizations. Offeror (i) will perform work, and any applicable information system (as defined in the clause titled “Information Security - Definitions”) will be established and maintained in substantial conformity with the information provided in Offeror’s Response to SPSAQ; (ii) agrees to provide PEBA with prompt notice of any material variation in operations from that reflected in the Response to SPSAQ that may adversely impact Government Information under Contractor’s control; and (iii) agrees to comply with all other obligations involving either information security or information use and disclosure imposed by the Contract, consistent with the statements in Offeror’s Response to SPSAQ.

# 6.10.3 Definitions. The following definitions are used in those clauses that cross reference this clause:

1. **Clearing** means removal of data from an information system, its storage devices, and other peripheral devices with storage capacity, in such a way that the data may not be reconstructed using common system capabilities (i.e., through the keyboard); however, the data may be reconstructed using laboratory methods.
2. **Compromise** means disclosure of information to unauthorized persons, or a violation of the security policy of a system in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object may have occurred. Without limitation, the term “compromise” includes copying the data through covert network channels, or copying the data to unauthorized media, or disclosure of information in violation of any obligation imposed by this Contract.
3. **Data** means a subset of information in an electronic format that allows it to be retrieved or transmitted.
4. **Government Information** means information (i) provided to Contractor by, or generated by Contractor for, PEBA, pursuant to performance of Work or (ii) acquired or accessed by Contractor as a result of performing the Work. Without limiting the foregoing, Government Information includes any information that Contractor acquires or accesses by software or web-based services, which includes, without limitation, any metadata or location data. Government Information excludes unrestricted information.
5. **Information** means any communication or representation of knowledge such as facts, statistics, or opinions, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual.
6. **Information system** means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.
7. **Intrusion** means an unauthorized act of bypassing the security mechanisms of a system.
8. **Media** means physical devices or writing surfaces including but not limited to magnetic tapes, optical disks, magnetic disks, large scale integration memory chips, and printouts (but not including display media, e.g., a computer monitor, cathode ray tube (CRT) or other (transient) visual output) onto which information is recorded, stored, or printed within an information system.
9. **Public information** means any specific information, regardless of form or format, that the State has actively and intentionally disclosed, disseminated, or made available to the public. Information is not public information solely because it may be subject to inspection pursuant to an unfulfilled public records request.
10. **Safeguarding** means measures or controls that are prescribed to protect information.
11. **Software** means any computer program accessed or used by PEBA or a third party pursuant to or as a result of this Contract.
12. **Third party** means any person or entity other than PEBA, the Contractor, or any Subcontractors at any tier.
13. **Unrestricted information** means (1) public information acquired other than through performance of the work, (2) information acquired by Contractor prior to contract formation, (3) information incidental to your contract administration, such as financial, administrative, cost or pricing, or management information, and (4) any ideas, concepts, know-how, methodologies, processes, technologies, techniques which Contractor develops or learns in connection with Contractor’s performance of the work.
14. **Voice** means all oral information regardless of transmission protocol.
15. **Web-based service** means a service accessed over the Internet and acquired, accessed, or used by the using governmental unit or a third party pursuant to or as a result of this Contract, including without limitation, cloud services, software-as-a-service, and hosted computer services.

# 6.10.4 Safeguarding Requirements.

(a) **Safeguarding Information.** Without limiting any other legal or contractual obligations, Contractor will implement and maintain reasonable and appropriate administrative, physical, and technical safeguards (including without limitation written policies and procedures) for protection of the security, confidentiality and integrity of the Government Information in its possession. In addition, Contractor will apply security controls when the Contractor reasonably determines that safeguarding requirements, in addition to those identified in paragraph (c) of this clause, may be required to provide adequate security, confidentiality and integrity in a dynamic environment based on an assessed risk or vulnerability.

(b) **Safeguarding requirements and procedures.** Contractor will apply the following basic safeguarding requirements to protect Government Information from unauthorized access and disclosure:

(1) *Protecting information on public computers or web sites.* Do not process Government Information on public computers (e.g., those available for use by the general public in kiosks, hotel business centers) or computers that do not have access control. Government Information will not be posted on web sites that are publicly available or have access limited only by domain/Internet Protocol restriction. Such information may be posted to web pages that control access by user ID/password, user certificates, or other technical means, and that provide protection via use of security technologies. Access control may be provided by the intranet (versus the web site itself or the Application it hosts).

(2) *Transmitting electronic information.* Transmit email, text messages, blogs, and similar communications that contain Government Information using technology and processes that provide the appropriate level of security and privacy available, given facilities, conditions, and environment.

(3) *Transmitting voice and fax information.* Transmit Government Information via voice and fax only when the sender has a reasonable assurance that access is limited to authorized recipients.

(4) *Physical and electronic barriers.* Protect Government Information by at least one physical and one electronic barrier (e.g., locked container or room, login and password) when not under direct individual control.

(5) *Sanitization.* At a minimum, clear information on media that have been used to process Government Information before external release or disposal. Overwriting is an acceptable means of clearing media in accordance with National Institute of Standards and Technology 800–88, Guidelines for Media Sanitization, at http://csrc.nist.gov/ publications/nistpubs/800-88/NISTSP800-88\_with-errata.pdf.

(6) *Intrusion protection.* Provide at a minimum the following protections against intrusions and compromise:

(i) Current and regularly updated malware protection services, e.g., anti-virus, antispyware.

(ii) Prompt application of security-relevant software upgrades, e.g., patches, service packs, and hot fixes.

(7) *Transfer limitations.* Transfer Government Information only to those Subcontractors that both require the information for purposes of contract performance and provide at least the same level of security as specified in this clause.

(c) **Subcontracts***.* Any reference in this clause to Contractor also includes any Subcontractor at any tier. Contractor is responsible for, and will impose by agreement requirements at least as secure as those imposed by this clause on, any other person or entity that contractor authorizes to take action related to Government Information.

(d) **Other contractual requirements regarding the safeguarding of information***.* This clause addresses basic requirements and is subordinate to any other Contract clauses or requirements to the extent that it specifically provides for enhanced safeguarding of information or information systems.

**6.10.5** **Data Location.** Contractor is prohibited from accessing, processing, transmitting, or storing Government Information, as defined in the clause titled Information Security, outside the United States. This obligation is a material requirement of this Contract.

# 6.10.6 Use and Disclosure. Except to the extent necessary for performance of the work, citizens should not be required to share information with those engaged by the government in order to access services provided by the government and such information should be used by those engaged by the government only to the extent necessary to perform the work acquired; accordingly, this clause addresses basic requirements for the Contractor’s use and disclosure of Government Information, which expressly includes, but is not limited to, information provided by or obtained from the citizens. Anonymizing information does not resolve the foregoing concern. This clause should be broadly interpreted to effectuate this intent. Every obligation in this clause is material. Absent express reference to this clause, this clause supersedes any other clause to the extent of any inconsistency unless and to the extent the other clause provides greater protection for Government Information.

(a) **Definitions.** The terms used in this clause will have the same meaning as the terms defined in the clause titled Information Security – Definitions.

(b) **Legal mandates.** Contractor will be permitted to use, disclose, or retain Government Information to the limited extent necessary to comply with any requirement imposed on Contractor by law. If it is necessary for Contractor to use, disclose, or retain Government Information in order to comply with a law, Contractor will provide PEBA with written notice, including a description of the circumstances and applicable law, in advance of such use, disclosure or retention except to the extent expressly prohibited by law.

(c) **Flow down.** Any reference in this clause to Contractor also includes any Subcontractor at any tier. Contractor is responsible for, and will impose by agreement the requirements as least as secure as those of this clause on, any other person or entity that contractor authorizes to take action related to Government Information.

(d) **Collecting Information.** Contractor must gather and maintain Government Information only to the minimum extent necessary to accomplish the work.

(e) **Rights, Disclosure, and Use.** Except as otherwise expressly provided in this solicitation, Contractor agrees NOT to either (1) use or disclose Government Information, or (2) retain Government Information after termination or expiration of this Contract. Contractor acquires no rights in any Government Information except the limited rights to use, disclose and retain the Government Information in accordance with the terms of this solicitation. To the extent reasonably necessary to perform the work, Contractor may: (i) use (including access, process, transmit, and store) and maintain the Government Information itself; and (ii) disclose Government Information to persons having a need-to-know (e.g., Subcontractors). Before disclosing Government Information to a Subcontractor or third party, Contractor will give PEBA detailed written notice of both the reason for disclosure and the identity and location of the recipient. The notice will be provided no later than fifteen (15) Business Days in advance of the disclosure.

(f) **Return.** Notwithstanding PEBA’s failure to perform or the pendency of a dispute, Contractor agrees to promptly deliver to PEBA (or destroy, at PEBA’s option) all Government Information in its possession as and upon written request of PEBA (provided that, if the Contract has not expired or been terminated, Contractor will be excused from the performance of any work reasonably dependent on Contractor’s further access to such Government Information).

(g) **Privacy Policy & Applicable Laws.** Without limiting any other legal or contractual obligations imposed by this Contract or the law, Contractor will (a) comply with its own privacy policies and written privacy statements relevant to the work, and (b) comply with (1) all laws applicable to Contractor in the performance of its Services regarding Government Information, and (2) all laws and standards identified in the clause, if included, entitled Information Use and Disclosure – Standards applicable to Contractor in the performance of its Services.

(h) **Actions Following Disclosure.** Promptly upon discovery of a compromise or improper use of Government Information in Contractor’s possession or control, Contractor will take such action as may be necessary to preserve forensic evidence and eliminate the cause of the compromise or improper use. As soon as practicable, but no later than forty-eight hours after discovery, Contractor will notify PEBA of the compromise or improper use, including a description of the circumstances of the use or compromise, to the extent then known. As soon as practicable after discovery, Contractor will undertake a thorough forensic investigation of any compromise or improper use and provide upon request by PEBA all information reasonably necessary to enable PEBA to fully understand the nature and extent of the compromise or improper use.

With regard to any compromise or improper use of Government Information in Contractor’s possession or control, to the extent caused by Contractor, Contractor will:

(1) provide any notification to third parties legally required to be provided such notice by Contractor, and if not (e.g., if legally required of PEBA), Contractor will reimburse PEBA for the cost of providing such notifications;

(2) pay all costs and expenses for at least two years of identity theft monitoring services (including without limitation, credit monitoring) and identity theft restoration services for any such affected individuals receiving notice where such services are appropriate given the circumstances of the incident and the nature of the information compromised;

(3) undertake any other measures to remedy the root cause or prevent the recurrence of such compromise that are customary and reasonable for an entity to take when experiencing a similar disclosure,

(4) pay any related fines or penalties imposed on PEBA to the extent directly resulting from the compromise or improper use, and

(5) reimburse PEBA all costs reasonably incurred up to an aggregate of $200,000 for communications and public relations services involved in responding to the compromise or improper use.

Notwithstanding any other provision, but subject to the limitations contained herein and in Section 6.8.3 above, contractor’s obligations pursuant to this item (h) are without limitation.

(i) **Survival & Remedy.** All the obligations imposed by this paragraph are material. The obligations of this section will survive termination or expiration of the Contract to the extent Contractor retains Government Information. Without limiting any rights PEBA may have, and notwithstanding any other term of this Contract, Contractor agrees that PEBA may have no adequate remedy at law for a breach of Contractor’s obligations under this clause and therefore PEBA will be entitled to pursue equitable remedies in the event of a breach of this clause.

# 6.10.7 Standards. To the extent applicable to Contractor in its performance of the Work: (a) Breach of security of state agency data; notification; rights and remedies of injured parties; penalties; notification of Consumer Protection Division, S.C. Code Ann. § 1-11-490; (b) South Carolina Financial Identity Fraud and Identity Theft Protection Act (FIFITPA), 2008 Act 190, as amended. Solely for purposes of Section 39-1-90 of the South Carolina Code of Laws, as amended, Contractor agrees to reasonably assist PEBA, the owner of Government Information, as defined herein, with PEBA’s notification requirements to the extent applicable, in accordance with Section 6.10.6(h); (c) The South Carolina Family Privacy Protection Act of 2002, S.C. Code Ann. §§ 30-2-10, *et seq ;* (d) Personal Identifying Information Privacy Protection, S.C. Code Ann. §§ 30-2-310 *et seq. ;*(e) Data Breach Notification, Proviso 117.105 of the 2018-2019 Appropriations Act. H.R. 3701 § 117.110. 121st Cong. (S.C. 2015) (Act 91), as revised in any future annual appropriations act.

**6.10.8** **HIPAA Compliance/Confidentiality.** The Contractor will keep confidential all non-public information and material which has or will come into its possession or knowledge in connection with the performance of services under this Contract; and will not release, use or disclose any such information without prior written consent of PEBA. In addition, the Contractor will comply with all applicable State and federal laws and regulations concerning the confidentiality of medical records, including, but not limited to, the Privacy Act of 1974, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended, and any federal regulations concerning the confidentiality of alcohol and drug abuse patient records. Furthermore, the Contractor will adhere to the applicable provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended, and sign Attachment 4 Business Associate Agreement, prior to award of the Contract, which has been constructed in accordance with the requirements of the HIPAA Privacy and Security Rules and the requirements of the HITECH Act.

**6.11 TERM AND TERMINATION**

**6.11.1** **Term of Contract; Effective Date.**

**Maximum Contract Term: January 1, 2020 through December 31, 2026.**

The effective date of this Contract is the first day of the Maximum Contract Term as specified on the final statement of award. The initial term of this agreement is 12 weeks for the completion of the Proof of Concept. At the end of the initial term, one Contract will be extended for the balance of the Maximum Contract Term upon written notice to Contractor prior to the expiration of the initial term.

**6.11.2 Contract Services Transition.** Upon notice of termination of this Contract for whatever reason (expiration, termination, or transfer), the Contractor will:

(a) Assist PEBA to ensure an orderly transfer of responsibility and continuity of those services required under the terms of the Contract to an organization designated by PEBA, if requested in writing;

(b) Advise PEBA of the extent to which performance has been completed through the date of expiration or termination;

(c) Continue to provide access to the Licensed Programs until the earlier of notification by PEBA the access is no longer needed or the effective date of termination or expiration; and

(d) Coordinate with PEBA to return property belonging to PEBA, including, without limitation any information that is confidential to PEBA.

**6.11.3** **Termination Due to Unavailability of Funds.** Payment and performance obligations for succeeding fiscal periods will be subject to the availability and appropriation of funds therefore.  When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the Contract will be terminated for convenience pursuant to Section 6.11.4 below.

**6.11.4** **Termination for Convenience.**

(a) **Termination.**  The Procurement Officer may terminate this Contract in whole or in part, for the convenience of the State upon fifteen (15) days’ advance note to Contractor.  The Procurement Officer will give written notice of the termination to the Contractor specifying the part of the Contract terminated and when termination becomes effective.

(b) **Contractor’s Obligations.**  The Contractor will incur no further obligations in connection with the terminated work and on the date set in the notice of termination the Contractor will stop work to the extent specified.  The Contractor will also terminate outstanding orders and subcontracts as they relate to the terminated work..  The Contractor will settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work.  The Contractor will work in good faith with the State to facilitate the assignment of Contractor’s right, title, and interest under terminated orders or subcontracts to the State.  The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

(c) **Right to Deliverables.**  The Procurement Officer may require the Contractor to transfer title and deliver to the State in the manner and to the extent directed by the Procurement Officer:  (a) any completed Deliverables; and (b) such partially completed Deliverables as Contractor has specifically produced or specially acquired for the performance of the terminated part of this Contract without any obligation or liability on the part of Contractor with respect to the content, performance or operation of any incomplete Deliverable that remains incomplete as a result of an early termination.  The Contractor will, upon direction of the Procurement Officer, protect and preserve Deliverables in the possession of the Contractor in which the State has an interest.

(d) **Compensation.**

(1) The Contractor will submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data required by Section 11-35-1830 bearing on such claim.  If the Contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the Contractor, if at all, an amount set in accordance with Subparagraph (3) of this Paragraph.

(2) The Procurement Officer and the Contractor may agree to a settlement and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by the State and the Contract price of the work not terminated;

(3) Absent complete agreement under Subparagraph (2) of this Paragraph, the Procurement Officer will pay the Contractor the following amounts, provided payments agreed to under Subparagraph (2) will not duplicate payments under this Subparagraph:

(i) Contract prices for supplies or services accepted under the Contract;

(ii) costs reasonably incurred in performing the terminated portion of the acceptable work less amounts paid or to be paid for accepted Deliverables or Services;

(iii) reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph (2) of this clause.  These costs must not include costs paid in accordance with Subparagraph (3)(ii) of this paragraph;

(iv) any other reasonable costs that have resulted from the termination.  The total sum to be paid the Contractor under this Subparagraph will not exceed the total Contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made.

(4) Contractor must demonstrate any costs claimed, agreed to, or established under Subparagraphs (2) and (3) of this Paragraph using its standard record keeping system, provided such system is consistent with accounting procedures and practices consistently applied.

(e) Contractor’s failure to include an appropriate termination for convenience clause in any subcontract will not (i) affect the state’s right to require the termination of a subcontract, or (ii) increase the obligation of the state beyond what it would have been if the subcontract had contained an appropriate clause.

**6.11.5** **Default.**

(a)

(1) Either party may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the other party, terminate this Contract in whole or in part if the other party fails to:

(i) Perform its obligations within the time specified in this contract or any extension (but see paragraph (a)(2) of this clause); or

(iii) Perform any of the other material provisions of this Contract (but see paragraph (a)(2) of this clause).

(2) A party’s right to terminate this Contract under subdivisions (a)(1)(i) and (1)(ii) of this clause, may be exercised if the breaching party does not cure such failure within thirty (30) days (or more if authorized in writing by the non-breaching party) after receipt of the notice from the breaching party specifying the failure.

(b) If the State terminates this Contract in whole or in part, it may acquire, under the terms and in the manner the Procurement Officer considers appropriate, replacement services to those terminated.  However, the Contractor will continue the work not terminated.

(c) Except for defaults of Subcontractors at any tier, the Contractor will not be liable for any excess costs if Contractor’s failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor.  Examples of such causes include acts of God or of the public enemy, acts of the State in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather.  In each instance Contractor’s failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If Contractor’s failure to perform is caused by the default of a Subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and Subcontractor, and without the fault or negligence of either, the Contractor will not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this Contract is terminated by the State for default, following payment in accordance with subsection (f), below, the State may require the Contractor to transfer title in accordance with Section 6.11.4(c) and deliver to the State, as directed by the Procurement Officer, any (1) completed Deliverables, and (2) partially completed Deliverables and Materials that Contractor has specifically produced, acquired, or licensed for the terminated portion of this Contract, on an as-is basis without warranty.  Upon direction of the Procurement Officer, the Contractor will also protect and preserve Work Product in its possession in which the State has an interest.

(f) The State will pay Contract price for completed services delivered and accepted. The Contractor and Procurement Officer will agree on, and the State will pay, the reasonable, pro-rata amount for the in-progress Work Product delivered and for the protection and preservation of the property; if the parties fail to agree, the Procurement Officer will set an amount subject to the Contractor’s rights under the Disputes clause.  Failure to agree will be a dispute under the Disputes clause.  The State may withhold from these amounts any sum the Procurement Officer determines to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination by the State under this provision, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties will, if the Contract contains a clause providing for termination for convenience of the State, be the same as if the termination had been issued for the convenience of the State.

(h) The rights and remedies of the State in this clause are in addition to any other rights and remedies provided by law or under this Contract.

(i) Termination under this clause triggers the provisions in Section 6.1.2, Escrow, if such section is applicable.

**6.12 BANKRUPTCY**

**6.12.1 General.**

(a) **Notice**. In the event the Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Contractor agrees to furnish written notification of the bankruptcy to PEBA.  This notification will be furnished within ten (10) days of the initiation of the proceedings relating to the bankruptcy filing.  This notification will include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of all State contracts against which final payment has not been made.  This obligation remains in effect until final payment under this Contract and all subsequent Maintenance and Support Services contracts.

(b) **Termination**. This Contract is subject to immediate termination upon written notification by the State upon the Contractor’s insolvency, including the filing of proceedings in bankruptcy.

**6.12.2 Government Information.**

(a) All Government Information (as defined in the clause herein entitled “Information Security - Definitions”) will belong exclusively to the State, and Contractor has no legal or equitable interest in, or claim to, such information. Contractor acknowledges and agrees that in the event Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, Government Information in its possession and/or under its control will not be considered property of its bankruptcy estate.

(b) Contractor agrees to promptly notify the State of any determination that it makes to file for bankruptcy protection, and Contractor further agrees to turn over to the State, before such filing, all Government Information that is in Contractor’s possession in a format that can be readily utilized by the State.

(c) In order to protect the integrity and availability of Government Information, Contractor will take reasonable measures to evaluate and monitor the financial circumstances of any Subcontractor that will process, store, transmit or access Government Information.

**6.13 DISPUTES**

(a) **Choice-of-Forum.**  All disputes, claims, or controversies relating to the Contract will be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina.  Contractor agrees that any act by the Government regarding the Contract is not a waiver of either the Government’s sovereign immunity or the Government’s immunity under the Eleventh Amendment of the United States’ Constitution.

(b) **Service of Process.** Both parties consent that any papers, notices, or process necessary for the initiation or continuation of any disputes, claims, or controversies relating to the Contract; for any court action in connection therewith; or for the entry of judgment on any award made, may be served on Contractor by certified mail (return receipt requested) addressed to Contractor or PEBA at the address provided as the Notice Address on Page Two or by personal service or by any other manner permitted by law, in or outside South Carolina.  Notice by certified mail is deemed duly given upon deposit in the United States mail.

**6.14 MISCELLANEOUS**

**6.14.1 Choice of Law.** The Contract, any dispute, claim, or controversy relating to the Contract, and all the rights and obligations of the parties will, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice of law rules.

**6.14.2 Contract Documents and Order of Precedence.**

(a) Any Contract resulting from this solicitation will consist of the following documents:

(1) a Record of Negotiations, if any, executed by you and the Procurement Officer,

(2) the solicitation, as amended,

(3) documentation of clarifications [11-35-1520(8)] or discussions [11-35-1530(6)] of an offer, if applicable,

(4) your offer,

(5) any statement reflecting the state’s final acceptance (a/k/a “award”), and

(6) purchase orders.

 These documents will be read to be consistent and complementary.  Any conflict among these documents will be resolved by giving priority to these documents in the order listed above.

(b) The terms and conditions of documents (1) through (5) above will apply notwithstanding any additional or different terms and conditions in any other document, including without limitation, (i) a purchase order or other instrument submitted by the State, (ii) any invoice or other document submitted by Contractor, or (iii) any privacy policy, terms of use, or end user agreement. Except as otherwise allowed herein, the terms and conditions of all such documents will be void and of no effect.

(c) No contract, license, or other agreement with Contractor containing contractual terms and conditions will be signed by PEBA.  Any document signed or otherwise agreed to by persons other than the Procurement Officer will be void and of no effect.

**6.14.3 Discount for Prompt Payment.**

(a) Discounts for prompt payment will not be considered in the evaluation of offers.  However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the Offeror.  As an alternative to offering a discount for prompt payment in conjunction with the offer, Offerors awarded contracts may include discounts for prompt payment on individual invoices.

(b) In connection with any discount offered for prompt payment, time will be computed from the date of the invoice.  If the Contractor has not placed a date on the invoice, the due date will be calculated from the date the designated billing office receives a proper invoice, provided the State annotates such invoice with the date of receipt at the time of receipt.  For the purpose of computing the discount earned, payment will be considered to have been made on the date that appears on the payment check or, for an electronic funds transfer, the specified payment date.  When the discount date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following Business Day.

**6.14.4 Equal Opportunity.** Contractor is referred to and will comply with all applicable provisions, if any, of Title 41, Part 60 of the Code of Federal Regulations, including but not limited to Sections 60-1.4, 60-4.2, 60-4.3, 60-250.5(a), and 60-741.5(a), which are hereby incorporated by reference.

**6.14.5 False Claims.** According to the S.C. Code of Laws Section 16-13-240, “a person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty” of a crime.

**6.14.6 Fixed Pricing Required.** Any pricing provided by Contractor will include all costs for performing the work associated with that price. Except as otherwise provided in this Contract, Contractor’s price will be fixed for the duration of this Contract, including option terms, based on the scope of services and Deliverables hereunder, the expected resource and responsibility commitments from PEBA, the State and other third parties, Contractor’s solution and approach proposed in connection with the services, and the anticipated schedule.  This clause does not prohibit Contractor from offering lower pricing after award.

**6.14.7 Notice.**

(a) After award, any notices will be in writing and will be deemed duly given:

(1) upon actual delivery, if delivery is by hand,

(2) upon receipt by the transmitting party of automated confirmation or answer back from the recipient’s device if delivery is by telex, telegram, facsimile, or electronic mail, or

(3) upon deposit into the United States mail, if postage is prepaid, a return receipt is requested, and either registered or certified mail is used.

(b) Notice to Contractor will be to the address identified as the Notice Address on Page Two.  Notice to the state will be to the Procurement Officer’s address on the Cover Page.  Either party may designate a different address for notice by giving notice in accordance with this paragraph.

**6.14.8 Open Trade.** During the Contract term, including any renewals or extensions, Contractor will not engage in the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in SC Code Section 11-35-5300.

**6.14.9 Publicity.** Contractor will not publish any comments or quotes by State employees or include the State in either news releases or a published list of customers, without the prior written approval of the Procurement Officer, except to respond to public comments made by the State related to Contractor or this Agreement.

**6.14.10 Survival of Obligations.** The Parties’ rights and obligations which, by their nature, would continue beyond the termination, cancellation, rejection, or expiration of this Contract will survive such termination, cancellation, rejection, or expiration, including, but not limited to, the rights and obligations created by the following clauses:  Section 6.7.11 Limitation of Liability, Section 6.8.2, Third Party Claims – General; Section 6.8.4, Intellectual Property; Section 6.9.3, Contractor’s Liability Insurance –Information Security and Privacy; Section 6.10.6, Use and Disclosure; Section 6.10.8, HIPAA Compliance/Confidentiality; Section 6.15.2, Contract Documents and Order of Precedence; and any provisions regarding payment obligations, warranty or audit.

**6.14.11 Taxes.** Any tax the Contractor may be required to collect or pay upon the sale, use or delivery of the products will be paid by the State, and such sums will be due and payable to the Contractor upon Acceptance.  Any personal property taxes levied after delivery will be paid by the State.  It will be solely the State’s obligation, after payment to Contractor, to challenge the applicability of any tax by negotiation with, or action against, the taxing authority. Contractor agrees to refund any tax collected, which is subsequently determined not to be proper and for which a refund has been paid to Contractor by the taxing authority.  In the event that the Contractor fails to pay, or delays in paying, to any taxing authorities, sums paid by the State to the Contractor, Contractor will be liable to the State for any loss (such as the assessment of additional interest) caused by virtue of this failure or delay. Taxes based on the Contractor’s net income or assets will be the sole responsibility of the Contractor.

**6.14.12 Third Party Beneficiary.** This Contract is made solely and specifically among and for the benefit of the parties hereto, and their respective successors and assigns, and no other person will have any rights, interest, or claims hereunder or be entitled to any benefits under or on account of this Contract as a third-party beneficiary or otherwise.

**6.14.13** **Waiver.** The State does not waive any prior or subsequent breach of the terms of the Contract by making payments on the Contract, by failing to terminate the Contract for lack of performance, or by failing to strictly or promptly insist upon any term of the Contract.  Only the Procurement Officer has actual authority to waive any of the State’s rights under this Contract.  Any waiver must be in writing.

**6.14.14** **Pre-performance Conference.** Unless waived by the Procurement Officer, a pre-performance conference between the Contractor, PEBA and Procurement Officer will be held at a location selected by PEBA within five (5) days after final award, and prior to commencement of work under the Contract. The responsibilities of all parties involved will be discussed to assure a meeting of the minds of all concerned. The Contractor or his duly authorized representative will be required to attend at Contractor’s expense.

**6.14.15 Pricing Data; Audit; Inspection**

(a) **Cost or Pricing Data.**  Upon Procurement Officer’s request, you will submit cost or pricing data, as defined by 48 C.F.R. Section 2.101 (2004), prior to either (1) any award to contractor pursuant to 11-35-1530 or 11-35-1560, if the total Contract price exceeds $500,000, or (2) execution of a change order or Contract modification with Contractor which exceeds $100,000. Your price, including profit or fee, will be adjusted to exclude any significant sums by which the State finds that such price was increased because you furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between parties, unless such finding is contested by Contractor, in which case it will be a dispute under the Disputes clause and prices will only be adjusted pending resolution of such dispute.

(b) **Records Retention.** You will maintain your records for three years from the date of final payment, or longer (not to exceed seven (7) years) if requested by the Chief Procurement Officer in writing reasonably in advance of the end of the three year period. Upon reasonable advance notice, the State may audit your records at reasonable times and places. As used in this subparagraph (b), the term “records” means any books or records that relate to cost or pricing data submitted pursuant to subparagraph (a). Any records available to the State under this Section may be redacted by Contractor to the extent necessary to protect its proprietary and confidential information and to avoid any invasion of personal privacy.  In addition to the obligation stated in this subparagraph (b), you will retain all records and allow any audits provided for by 11-35-2220(2).

(c) **Inspection.**  At reasonable times, the State may be permitted escorted access by Contractor to inspect any part of Contractor’s project worksite which is related to performance of the work. Such inspection rights shall entail observing Contractor’s performance of the Services and a Contractor-led tour of the Contractor personnel’s workspaces used to perform the Services, but shall not extend to Contractor’s software, hardware (including laptops or other devices), workpapers or any access to Contractor information/computer systems.

(d) **Instructions Certification.** When you submit data pursuant to subparagraph (a), you will (1) do so in accordance with the instructions appearing in Table 15-2 of 48 C.F.R. Section 15.408 (2004) (adapted as necessary for the state context), and (2) submit a Certificate of Current Cost or Pricing Data, as prescribed by 48 CFR Section 15.406-2(a) (adapted as necessary for the State context).

(e) **Subcontracts.** You will include the above text of this clause in all of your subcontracts.

(f) Nothing in this clause limits any other rights of the state.

**6.14.16** **Relationship of the Parties.** Neither party is an employee, agent, partner, or joint venturer of the other.  Neither party has the right or ability to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party.

**6.14.17 Restrictions on Presenting Terms of Use or Offering Additional Services.**

(a) Citizens, as well as public employees (acting in their individual capacity), should not be unnecessarily required to agree to or provide consent to policies or contractual terms in order to access services acquired by the government pursuant to this Contract (hereinafter “applicable services”) or, in the case of public employees, to perform their job duties; accordingly, in performing the work, Contractor will not require or invite any citizen or public employee to agree to or provide consent to, in their individual capacity, any end user contract, privacy policy, or other terms of use (hereinafter “terms of use”) not previously approved in writing by the procurement officer in connection with their use of the Licensed Programs. Contractor agrees that any terms of use regarding applicable services are void and of no effect.

(b) Unless expressly provided in the solicitation, public contracts are not intended to provide contractors an opportunity to market additional products and services; accordingly, the Licensed Program will not collect data– for Contractor or on behalf of any third party – for the purpose of marketing to citizens or public employees (other than the procurement officer) any additional products or services not required by the Contract.

(c) Any reference to contractor in items (a) or (b) also includes any Subcontractor at any tier. Contractor is responsible for compliance with these obligations by any person or entity that contractor authorizes to take any action related to the work.

(d) Any violation of this clause may be a material breach of contract.