

TexasOnline 2.0 Master Agreement

Between

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

and

Texas NICUSA, LLC

Exhibit B Terms and Conditions

July 31, 2009

Exhibit B Terms and Conditions

Contents of *Exhibit B Terms and Conditions* follow:

Article 1. Introduction	2
Article 2. Definitions.....	4
Article 3. General Terms and Conditions.....	4
Article 4. Contractor Personnel Management	8
Article 5. Governing Law and Regulations.....	11
Article 6. Service Levels and Performance Measurement	12
Article 7. Amendments, Modifications, and Change Orders.	13
Article 8. Audit and Financial Compliance	13
Article 9. Terms and Conditions of Payment	15
Article 10. Disclosure and Confidentiality of Information.....	17
Article 11. Remedies and Disputes	21
Article 12. Assurances and Certifications	31
Article 13. Representations and Warranties.....	34
Article 14. Intellectual Property	35
Article 15. Liability.....	38
Article 16. Miscellaneous.....	39

Article 1. Introduction

Section 1.01 Inducements.

In making the award of this Master Agreement, the Department of Information Resources (DIR) relies on Vendor's assurances of the following:

- (1) Vendor and its agents and its Subcontractors regularly provide the types of services described in the Request for Offers (RFO) to other public or private entities;
- (2) Vendor and its agents and its Subcontractors have the skills, qualifications, expertise, financial resources and experience necessary to perform the services described in the RFO, Vendor's Proposal, and this Master Agreement in an efficient, cost-effective manner, with a high degree of quality and responsiveness, and has performed similar services for other public or private entities;
- (3) Vendor has thoroughly reviewed, analyzed, and understood the RFO, has timely raised all questions or objections to the RFO, and has had the opportunity to review and fully understand the DIR's current program and operating environment for the activities that are the subject of this Master Agreement and the needs and requirements of the State during this Master Agreement term;
- (4) Vendor has had the opportunity to review and understand the State's stated objectives in entering into this Master Agreement and, based on such review and understanding, Vendor currently has the capability to perform in accordance with the terms and conditions of this Master Agreement;
- (5) Vendor also has reviewed and understands all of the risks associated with the DIR Programs as described in the RFO, including the risk of non-appropriation of funds.

Accordingly, on the basis of the terms and conditions of this Master Agreement, DIR desires to engage Vendor to perform the Services described in this Master Agreement under the terms and conditions set forth in this Master Agreement.

Section 1.02 Construction of Agreement.

(a) Scope of Introductory Article.

These provisions are not intended to expand the scope of the Parties' obligations under this Master Agreement or to alter the plain meaning of the terms and conditions of this Master Agreement.

(b) References to the "State."

References in this Master Agreement to the "State" will mean the State of Texas unless otherwise specifically indicated and will be interpreted, as appropriate, to mean or include DIR and other agencies of the State of Texas that may participate in the administration of DIR Programs, provided, however, that no provision will be interpreted to include any entity other than DIR as the contracting agency.

(c) Severability.

If any provision of this Master Agreement is construed to be illegal or invalid, such interpretation will not affect the legality or validity of any other provisions. The illegal or invalid provision will be deemed stricken and deleted to the same extent and effect as if never incorporated in this Master Agreement, but all other provisions will remain in full force and effect.

(d) Survival of terms.

Termination or expiration of this Master Agreement for any reason will not release either Party from any liabilities or obligations set forth in this Master Agreement that:

- (1) The Parties have expressly agreed will survive any such termination or expiration; or
- (2) Remain to be performed or by their nature would be intended to be applicable following any such termination or expiration.

(e) Headings.

The article and section headings in this Master Agreement are for reference and convenience only and may not be considered in the interpretation of this Master Agreement.

(f) Global drafting conventions.

(1) The terms "include," "includes," and "including" are terms of inclusion, and where used in this Master Agreement, are deemed to be followed by the words "without limitation."

(2) Any references to "sections," "exhibits," or "attachments" are deemed to be references to sections, exhibits, or attachments to this Master Agreement.

(3) Any references to agreements, contracts, statutes, or administrative rules or regulations in this Master Agreement are deemed references to these documents as amended, modified, or supplemented from time to time during the term of this Master Agreement.

Section 1.03 No implied authority.

The authority delegated to Vendor by DIR is limited to the terms of this Master Agreement. DIR is the State agency designated by the Texas Legislature to administer the DIR Programs, and no other agency of the State grants Vendor any authority related to this program unless directed through DIR. Vendor is required to cooperate to the fullest extent possible to assist DIR in communications and negotiations with State, Local and Federal governments and agencies as directed by DIR. Vendor may not rely upon implied authority, and specifically is not delegated authority under this Master Agreement to:

- (1) make public policy;
- (2) promulgate, amend or disregard administrative regulations or program policy decisions made by State, Local and Federal agencies responsible for administration of DIR Programs; or
- (3) unilaterally communicate or negotiate with any Federal, Local or State agency or the Texas Legislature on behalf of DIR regarding the DIR Programs.

Section 1.04 Legal Authority.

(a) DIR is authorized to enter into this Master Agreement under Chapter 2054, Texas Government Code. Vendor is authorized to enter into this Master Agreement pursuant to the authorization of its governing board or controlling owner or officer.

(b) The person or persons signing and executing this Master Agreement on behalf of the Parties, or representing themselves as signing and executing this Master Agreement on behalf of the Parties, warrant and guarantee that he, she, or they have been duly authorized to execute this Master Agreement and to validly and legally bind the Parties to all of its terms, performances, and provisions.

Article 2. Definitions

As used in this Master Agreement, the capitalized terms and conditions not defined in an exhibit or attachment will have the meanings assigned in *Exhibit A Definitions*.

Article 3. General Terms and Conditions

Section 3.01 Funding.

(a) Availability of Appropriated Funds.

Based on the limits of the Texas Constitution, this Master Agreement is expressly conditioned on the availability of State and Federal appropriated funds. Vendor will have no right of action against DIR in the event that DIR is unable to perform its obligations under this Master Agreement as a result of the suspension, termination, withdrawal, or failure of funding to DIR or lack of sufficient funding of DIR for any activities or functions contained within the scope of this Master Agreement. If funds become unavailable, the provisions of Article 11 (Remedies and Disputes) and Section 3.01(b) will apply. DIR will use reasonable efforts to ensure that such funds are available, and will negotiate in good faith with Vendor to resolve any Vendor claims for payment that represent accepted Services or Deliverables that are pending at the time funds become unavailable. DIR will make reasonable efforts to provide written advance notice to Vendor upon learning that funding for this Master Agreement may be discontinued.

(b) Insolvency of TexasOnline 2.0.

Vendor may give written notice to DIR if either of the following situations occurs:

(1) Vendor's portion of Total Revenue decreases to the point that solvent financial operations of TexasOnline 2.0 (including revenues sufficient to cover Vendor's costs and fees) are not sustainable, or cease, as determined by financial results for the previous six months, and no substitute funding is available at a comparable level; or

(2) The occurrence of a significant event that is anticipated to decrease Vendor's portion of Total Revenue to the point that solvent financial operations of TexasOnline 2.0 (including revenues sufficient to cover Vendor's costs and fees) will not be sustainable over the following six months.

(A) The written notice may request a proposed reduction of certain resource levels or services, or termination of the Master Agreement. Following the written notice, the Parties

agree to meet and confer regarding alternative funding, or reduction of resources or services. If the Parties cannot agree on a solution within three months from the date of the written notice for situation 1 described above, or six months from the date of the written notice for situation 2 described above, the Master Agreement may be terminated by Vendor, with Disentanglement services provided in accordance with the Disentanglement Plan.

(B) Such termination will be classified as an expiration of the Master Agreement for all purposes of the Master Agreement, except as to each project for which a Business Case was approved, DIR may in its sole discretion either (1) pay Vendor the unamortized project value associated with the Business Case Project Value Score, or (2) cancel the project at no additional cost to DIR.

Section 3.02 Delegation of authority.

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

Section 3.03 No waiver of sovereign immunity.

The Parties expressly agree that no provision of this Master Agreement is in any way intended to constitute a waiver by DIR or the State of Texas of any immunities from suit or from liability that DIR or the State of Texas may have by operation of law.

Section 3.04 Force majeure.

Neither Party will be liable for any failure or delay in performing its obligations under this Master Agreement if such failure or delay is due to any cause beyond the reasonable control of such Party, including, but not limited to, unusually severe weather, strikes, natural disasters, fire, civil disturbance, epidemic, war, court order, or acts of God. The existence of such causes of delay or failure will extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. Each Party must give written Notice within five (5) business days of their knowledge of a Force Majeure Event.

Section 3.05 Competitive pricing.

(a) During the term of the Master Agreement, Vendor shall take care that the charges payable by DIR and the Customers are no higher than the charges charged by Vendor for the provision of the same or substantially similar services on substantially similar terms and conditions to other customers. This provision shall apply only with respect to charges for goods and services procured by Vendor from third party vendors, that may, under the terms negotiated by Vendor, be extended to DIR and Customers, and shall not include (1) purchases through state contracts, and (2) transaction, convenience, subscription and other similar fees charged by the Vendor with respect to its Services.

(b) Vendor must use master agreements between DIR and third party vendors to procure products and services for TexasOnline 2.0 unless Vendor can procure such products or services at lower cost or better value than such products or services can be procured through such master agreements. Vendor must provide reasonable documentation respecting the foregoing as may be requested by DIR.

Section 3.06 Publicity.

(a) Except as provided in the paragraphs below, Vendor must not use the name of DIR, the State of Texas, or any other State agency, or refer to DIR or any such agency directly or indirectly in any media release, or public announcement, relating to this Master Agreement or its subject matter,

including, but not limited to, in any promotional or marketing materials, customer lists, or business presentations (other than proposals or reports submitted to DIR, an administrative agency of the State of Texas, or a governmental agency or unit of another State or the Federal government). Notwithstanding the foregoing, Vendor may disclose information to its parent, NIC Inc., which will make such filings and press releases as are reasonably required in connection with its status as a publicly-traded company.

(b) Vendor may publish, at its sole expense, any media release or public announcement, relating to this Master Agreement or its subject matter, including, but not limited to, in any promotional or marketing materials, customer lists, business presentations (other than proposals or reports submitted to DIR, an administrative agency of the State of Texas, or a governmental agency or unit of another State or the Federal government), or results of Vendor performance under this Master Agreement with DIR's prior review and approval, which DIR may exercise at its sole discretion. Vendor will provide DIR a copy of any such publication no less than five (5) Business Days prior to public release unless otherwise agreed by the Parties. Vendor will provide additional copies at the request of DIR. Approval of the annual Marketing Plan will constitute approval by DIR for Vendor to publish all materials approved in connection with such Marketing Plan.

(c) Vendor may include information concerning this Master Agreement's terms, subject matter, and estimated value in any report to a governmental body to which the Vendor is required by law to report such information.

Section 3.07 Assignment.

(a) Assignment by Vendor.

Vendor will not assign all or any portion of its rights under or interests in this Master Agreement or delegate any of its duties without prior written consent of DIR. Any written request for assignment or delegation must be accompanied by written acceptance of the assignment by the assignee, or delegation by the delegate. Except where otherwise agreed in writing by DIR, assignment or delegation will not release Vendor from its obligations pursuant to this Master Agreement.

(b) Assignment by DIR.

Vendor understands and agrees DIR may in one or more transactions assign, pledge, transfer, or hypothecate this Master Agreement. DIR will provide written notification of such assignment to Vendor. This assignment will only be made to another State agency or an entity designated by the Texas Legislature.

(c) Amendment.

Each Party agrees to cooperate to amend the Master Agreement as necessary to maintain an accurate record of the contracting Parties.

(d) Assumption.

Each Party to whom an assignment or transfer is made (an "Assignee") must assume all or any part of Vendor's or DIR's interests in this Master Agreement, the services, and any documents executed with respect to this Master Agreement, including, without limitation, its obligation for all or any portion of the payments, in whole or in part.

Section 3.08 Cooperation with other vendors and prospective vendors.

(a) DIR may award supplemental contracts for work related to this Master Agreement, or any portion thereof. DIR reserves the right to award a contract as a joint venture between two or more potential vendors, if such an arrangement is in the best interest of DIR. Vendor will agree to cooperate with such other vendors, and will not commit or permit any act that may interfere with the performance of work by any other vendor.

(b) Vendor agrees that when DIR so requests, the Vendor will allow parties interested in bidding for DIR contracts, during the competitive procurement, to have reasonable access during normal business hours (Monday through Friday, 8:00 a.m. to 5:00 p.m. local time) to Software, excluding source code, and site visits to the Vendor's facilities. All such parties inspecting the facilities and Software may be required to agree in writing to use the information so obtained only in the State of Texas, and only for the purpose of bidding on the contract.

Section 3.09 Vendor's Role as Supplier.

(a) Sole supplier of existing services.

For the term of this Master Agreement, and any renewal thereof, except as otherwise provided in subparagraph (c) below, Vendor shall be the sole supplier of the existing Services that are transitioned to Vendor hereunder so long as Vendor is not in any uncured default of the Master Agreement. Any changes to such Services which result in Vendor not being the sole supplier require the mutual consent of the Parties. DIR cannot consent on behalf of, nor assert compliance with this Section 3.09 by Customers, excluding DIR. In the event Vendor defaults in the performance of specific Services and such default is not cured within the applicable cure period, DIR may elect to utilize a third party to provide such Services for which Vendor is in default.

(b) Preferred provider.

For the term of this Master Agreement and any renewal thereof, except as otherwise provided in subparagraph (c) below, Vendor shall be the preferred provider for any additional new services associated with TexasOnline 2.0 so long as Vendor is not in any uncured default of the Master Agreement. DIR shall encourage Customers to secure new services associated with TexasOnline 2.0 from Vendor, as long as Vendor has the lowest prices or best value for such new services.

(c) No restrictions regarding Application Marketplace.

For purposes of clarity, Vendor's status as the sole supplier and preferred supplier as noted above does not restrict in any manner (i) the adoption of third party applications to be deployed to TexasOnline 2.0 by Customers through the TexasOnline 2.0 Application Marketplace, and (ii) use of applications developed using the Vendor's toolkit and API.

Section 3.10 RFO errors and/or omissions.

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

Section 3.11 Abandonment or Default.

Abandon means to relinquish or renunciate the Master Agreement. If the Vendor Abandons the Master Agreement, DIR reserves the right to cancel the Master Agreement without notice and either re-solicit or re-award the Contract to the next best responsive and responsible respondent. The Abandoning Vendor will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of work, unless the specifications or scope of work significantly changes.

Section 3.12 Preferences under service contracts.

Pursuant to Texas Government Code, Section 2155.4441, Vendor is required in performing this Master Agreement to purchase products and materials produced in the State of Texas when they are available at a price and time comparable to products and materials produced outside the State.

Section 3.13 Time of the essence.

In consideration of the need to ensure uninterrupted and continuous DIR Program services, time is of the essence in the performance of (1) Cutover and (2) the replacement of ePay with Vendor's proposed payment processing system no later than December 31, 2011.

Section 3.14 Place of Performance.

Unless otherwise agreed to in writing, all Services performed by Vendor, its Subcontractors and agents, under the Master Agreement must be performed in the United States.

Article 4. Contractor Personnel Management

Section 4.01 Qualifications, retention and replacement of Vendor employees.

Vendor agrees to maintain the organizational and administrative capacity and capabilities to carry out all Vendor duties and responsibilities under this Master Agreement. The personnel Vendor assigns to perform the duties and responsibilities under this Master Agreement will be properly trained and qualified for the functions they are to perform. Vendor does not warrant the quality of training for which the State is responsible. Notwithstanding transfer or turnover of personnel, Vendor remains obligated to perform all duties and responsibilities under this Master Agreement without degradation and in accordance with the terms of this Master Agreement.

Section 4.02 Responsibility for Vendor personnel.

(a) Under no circumstances will Vendor's employees, agents and Subcontractors be considered employees of DIR or the State of Texas, but will be considered Vendor's employees, agents or Subcontractors for all purposes.

(b) Except as expressly provided in this Master Agreement, neither Vendor nor any of Vendor's employees, agents or Subcontractors may act in any sense as agents or representatives of DIR or the State of Texas.

(c) Vendor's employees, agents or Subcontractors must be paid exclusively by Vendor for all services performed. Vendor is responsible for and must comply with all requirements and obligations related to such employees, agents or Subcontractors under local, State or Federal law, including minimum wage, social security, unemployment insurance, State and Federal income tax and workers' compensation obligations.

(d) Vendor assumes sole and full responsibility for its acts and the acts of its employees, agents and Subcontractors relating to the performance of this Master Agreement.

(e) Vendor agrees that any claim on behalf of any person arising out of employment, alleged employment (including, but not limited to, claims of discrimination against Vendor, its officers, or its agents), agency or subcontracts are the sole responsibility of Vendor and are not the responsibility of DIR, and that Vendor will indemnify and hold harmless the State from any and all such claims asserted against the State. Vendor understands that any person who alleges a claim arising out of employment, alleged employment, agency, or subcontract by Vendor will not be entitled to any compensation, rights, or benefits from DIR (including, but not limited to, tenure rights, medical and hospital care, sick and annual/vacation leave, severance pay, or retirement benefits).

Section 4.03 Cooperation with DIR and State administrative agencies.

(a) *Cooperation with DIR contractors.*

Vendor agrees to reasonably cooperate with and work with the State's contractors, Subcontractors, and third-party representatives as requested by DIR. To the extent permitted by DIR's financial and personnel resources, DIR agrees to reasonably cooperate with Vendor and to

use its reasonable efforts to ensure that DIR's other DIR Programs contractors reasonably cooperate with Vendor.

(b) Cooperation with State and Federal administrative agencies.

Vendor must ensure that Vendor employees, agents and Subcontractors will cooperate with DIR or other State, Local or Federal administrative agency personnel at no charge to DIR for purposes relating to the administration of DIR programs including, but not limited to the following purposes:

- (1) The investigation and prosecution of fraud, abuse, and waste in the DIR programs;
- (2) Audit, inspection, or other investigative purposes; and

(3) Testimony in judicial or quasi-judicial proceedings relating to the Services under this Master Agreement or other delivery of information to DIR or other agencies' investigators or legal staff.

(c) Subcontractor's compliance.

In all cases where Vendor is required to "ensure" any Subcontractor's compliance with a section of this Master Agreement (or must otherwise require compliance by its Subcontractor with the terms of this Master Agreement, or is responsible for or required to indemnify the State for any taxes, benefits, compliance with law or other responsibilities of its Subcontractors, other than the performance of Services), Vendor shall be deemed to have met in full all such obligations and shall have no liability or indemnity obligations under such provisions so long as Vendor (i) includes the requirement in the applicable Subcontract and (ii) in consultation with DIR regarding the relative prudence of continuing to use the Subcontractor for services versus potentially terminating the Subcontract for breach, Vendor shall, using commercially reasonable efforts, exercise contractual remedies upon such Subcontractor's non-compliance (both, the "Subcontractor Compliance Obligations").

Section 4.04 Conduct of and responsibility for Vendor employees.

(a) While performing the Services, Vendor's employees, agents and Subcontractors must:

- (1) Comply with applicable State rules, and regulations and DIR's requests regarding personal and professional conduct generally applicable to the service locations; and
- (2) Otherwise conduct themselves in a businesslike and professional manner.

(b) If DIR determines in its sole discretion that a particular employee, agent, or Subcontractor is not conducting him/herself or itself in accordance with this Section, DIR may provide Vendor with notice and documentation concerning such conduct. Upon receipt of such notice, Vendor must promptly investigate the matter and take appropriate action that may include:

- (1) Removing the employee, agent or Subcontractor from the project;
- (2) Providing DIR with written notice of such removal; and
- (3) Replacing the employee, agent or Subcontractor with a similarly qualified individual acceptable to DIR in the case of Key Employees and Subcontractors.

(c) Nothing in this Master Agreement will prevent Vendor, at the request of DIR, from replacing any employee, agent or Subcontractor who is not adequately performing assigned responsibilities or who, in the opinion of DIR, after consultation with Vendor, is unable to work effectively with the members of DIR staff. In such event, Vendor will provide replacement employee, agent, or Subcontractor with equal or greater skills and qualifications as soon as reasonably practicable. Replacement of Key Personnel will be subject to DIR review and approval, which approval will not be unreasonably withheld or delayed. The Parties will work together in the event of any such required replacement so as not to disrupt the overall project schedule. Other than in instances in which DIR believes removal must be handled immediately to avoid imminent harm to TexasOnline 2.0 or its finances, DIR and Vendor will follow the procedures set out in *Attachment H-1 Policies and Procedures Manual* which are intended to minimize staff turnover and the adverse impact any

requested removal may have on the Services and the project schedule. Nothing in this Master Agreement will prevent Vendor from replacing employees not identified as Key Personnel.

(d) Vendor agrees that anyone employed by Vendor to fulfill the terms of this Master Agreement is an employee, agent or Subcontractor of Vendor and remains under Vendor's sole direction and control.

(e) Vendor agrees to be responsible for the following in respect to its employees, agents or Subcontractors:

(1) Any and all employment taxes and/or other payroll withholding; provided, however, that as this section pertains to Subcontractors and their employees, agents and the like, Vendor's obligations hereunder shall be met by complying with the Subcontractor Compliance Obligations;

(2) Damages incurred by Vendor's employees, agents or Subcontractors within the scope of their duties under this Master Agreement; and

(3) Determination of the hours to be worked and the duties to be performed by Vendor's employees, agents or Subcontractors.

Vendor agrees and will inform its employees, agents, and Subcontractors that there is no right of action against DIR for any duty owed by Vendor pursuant to this Master Agreement. Vendor understands that DIR does not assume liability for the actions of, or judgments rendered against, the Vendor, its employees, agents, or Subcontractors. Vendor agrees that it has no right to indemnification or contribution from DIR for any judgments rendered against Vendor, agents or Subcontractors. DIR's liability to the Vendor's employees, agents, and Subcontractors, if any, will be governed by the Texas Tort Claims Act, as amended or modified (TEX. CIV. PRACT. & REM. CODE §101.001 et seq.).

Section 4.05 Responsibility for Subcontractors.

(a) Vendor remains fully responsible for obligations, services, and functions performed by its Subcontractors to the same extent as if such obligations, services, and functions were performed by Vendor's employees or agents and for purposes of this Master Agreement such work will be deemed work performed by Vendor. DIR reserves the right to require the replacement of any Subcontractor found by DIR to be unacceptable in accordance with Section 4.04.

(b) Vendor must not disclose Confidential Information of DIR or the State of Texas to a Subcontractor unless and until such Subcontractor has agreed in writing to protect the confidentiality of such Confidential Information in the manner required of Vendor under this Master Agreement.

(c) Vendor must identify any Subcontractor that is a newly-formed subsidiary or entity, whether or not an affiliate of Vendor, substantiate the proposed Subcontractor's ability to perform the subcontracted Services, and certify to DIR that no loss of service will occur as a result of the performance of such Subcontractor. The Vendor will assume responsibility for all contractual responsibilities whether or not the Vendor performs them. Further, DIR considers the Vendor to be the sole point of contact with regard to contractual matters, including payment of any and all charges resulting from this Master Agreement.

Section 4.06 DIR's ability to contract with Subcontractors.

(a) Vendor is permitted to secure from its employees performing services for TexasOnline 2.0 in Texas covenants not to compete with a term of not more than one year from the date of termination of employment (whether in employment agreements or other contractual arrangements). Other than as provided in the proceeding sentence, the Vendor may not limit or restrict, through a covenant not to compete, employment agreement or other contractual arrangement, DIR's ability to contract with former employees of the Vendor who performed services for TexasOnline 2.0 in Texas.

(b) Nothing in this Master Agreement will be construed as preventing Vendor from securing from its employees, agents and Subcontractors agreements preventing use or disclosure of Vendor's Confidential Information, and preventing such employees, agents and Subcontractors from soliciting Vendor's employees and Customers.

(c) Vendor is permitted to secure from its Subcontractors performing services for TexasOnline 2.0 in Texas covenants not to compete with Vendor with respect to the award of the particular services for which Subcontractor was engaged to perform under the Subcontract. With the exception of termination for convenience, the covenant not to compete will be coterminous with the Master Agreement. In the event the State terminates the Master Agreement for convenience, the covenant not to compete may continue for a term of not more than one year from the date of termination of the Subcontract.

Section 4.07 Security of Premises, Equipment, Data, and Personnel.

Vendor may, from time to time during the performance of the Master Agreement, have access to the premises, equipment, and other property, including data, files and/or materials (collectively referred to as "Data") belonging to DIR or Customers. Vendor will use its commercial best efforts to preserve the safety, security, and the integrity of the premises, equipment, Data and other property of DIR or Customer, in accordance with the instruction of DIR or Customers. Vendor will be responsible for damage to DIR or Customer's equipment, workplace, and its contents when such damage is caused by Vendor's employees, agents or Subcontractors.

Section 4.08 Background and/or Criminal History Investigation.

Prior to commencement of any Services, background and/or criminal history investigation of the Vendor's employees, agents and Subcontractors who will be providing Services to DIR under the Master Agreement may be performed by DIR or certain Customers having legislative authority to require such investigations. Should any employee, agent, or Subcontractor of the Vendor who will be providing Services to DIR or Customer under the Master Agreement not be acceptable to DIR or Customer as a result of the background and/or criminal history check, then DIR or Customer may immediately request replacement of the employee, agent or Subcontractor in question.

Article 5. Governing Law and Regulations

Section 5.01 Governing law and venue.

This Master Agreement is governed by the laws of the State of Texas without regard to conflict of laws principles, and interpreted in accordance with Texas law. Provided Vendor first complies with the procedures set forth in Section 11.11, Dispute Resolution, proper venue claim arising from this Master Agreement will be in a Texas State court in Travis County, Texas.

Section 5.02 Vendor responsibility for compliance with laws and regulations.

(a) Vendor is responsible for compliance with all laws, regulations, and administrative rules that govern the performance of the Services including, but not limited to, all State and Federal tax laws, State and Federal employment laws, State and Federal regulatory requirements, and licensing provisions.

(b) Vendor is responsible for ensuring each of its employees, agents, or Subcontractors who provide Services under this Master Agreement are properly licensed, certified, and/or have proper permits to perform any activity related to the Services.

(c) Vendor warrants that the Services comply with all applicable Federal, State, County and Municipal laws, regulations, codes, ordinances, guidelines, and policies. Vendor will indemnify DIR from and against any losses, liability, claims, damages, penalties, costs, fees, or expenses arising

from or in connection with Vendor's failure to comply with or violation of any Federal, State, and County and Municipal law, regulation, code, ordinance, or policy.

(d) Vendor's obligations hereunder with respect to ensuring compliance of its Subcontractors and their employees, agents and the like shall be fulfilled by complying with the Subcontractor Compliance Obligations.

Section 5.03 Immigration Reform and Control Act of 1986.

Vendor will comply with the requirements of the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990 (8 U.S.C. §1101, *et seq.*) regarding employment verification and retention of verification forms for any individual(s) hired on or after November 6, 1986, who will perform any labor or services under this Master Agreement.

Section 5.04 Equal Opportunity Compliance.

Vendor agrees to abide by all applicable laws, regulations, and executive orders pertaining to equal employment opportunity, including Federal or State laws and the laws of the State in which its primary place of business is located. In accordance with such laws, regulations, and executive orders, the Vendor agrees that no person in the United States will, on the grounds of race, color, religion, national origin, sex, age, veteran status, or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed by Vendor under this Master Agreement. If Vendor is found to be not in compliance with these requirements during the term of this Master Agreement, Vendor agrees to take appropriate steps to correct these deficiencies. Upon request, Vendor will furnish information regarding its non discriminatory hiring and promotion policies, as well as specific information on the composition of its principals and staff, including the identification of minorities and women in management or other positions with discretionary or decision-making authority.

Article 6. Service Levels and Performance Measurement

Section 6.01 Performance measurement.

Satisfactory performance of this Master Agreement will be measured by:

- (a) Adherence to this Master Agreement, including all representations and warranties;
- (b) Compliance with project work plans, schedules, and milestones as mutually agreed in accordance with the Business Case Process;
- (c) Delivery of the Services and Deliverables in accordance with the service levels and availability agreed to in *Exhibit D Performance Criteria*;
- (d) Results of audits performed by DIR or its representatives in accordance with Article 8;
- (e) Timeliness, completeness, and accuracy of required reports agreed to in *Exhibit F Reporting*; and
- (f) Achievement of performance measures developed by Vendor and DIR and as modified from time to time by written agreement.

Section 6.02 Rolling estoppel.

DIR assumes the obligation for State resources as indicated in this Master Agreement. In the event DIR fails to fulfill any obligation for State resources under this Master Agreement, Vendor will notify DIR of the occurrence of such an alleged deficiency within (1) five (5) Business Days during Implementation or (2) thirty (30) days thereafter, of Vendor's actual knowledge of such occurrence. Vendor will use commercially reasonable efforts to identify the impact that the alleged deficiency will have to specific performance requirement(s) of Vendor, and to report to the State the anticipated

impact within such five (5) Business Days or thirty (30) day period as applicable. In the event the Vendor identifies a situation in which DIR is impairing the Vendor's ability to perform for any reason, the Vendor's deficiency report will contain the Vendor's suggested solutions to the situation(s), if any. These suggestions are intended to be in sufficient detail so DIR can make a prompt decision as to the best method of dealing with the problem and of continuing the project in an unimpeded fashion.

Article 7. Amendments, Modifications, and Change Orders.

Section 7.01 Amendments and modifications.

(a) *Amendments and modifications resulting from changes in law or contract and as mutually agreed.*

This Master Agreement may be amended by mutual written agreement of the Parties if changes in Federal or State laws, rules, regulations, policies, guidelines, or circumstances affect the performance of the work, or as otherwise agreed to in writing by the Parties. The Parties developed appropriate procedures for amending or modifying the Master Agreement in the *Master Agreement Section 5 CONTRACT AMENDMENTS*.

(b) *Modifications resulting from imposition of remedies.*

This Master Agreement may be modified under the terms of Article 11 (relating to Remedies and Disputes).

Section 7.02 Required compliance with amendment modification procedures.

No different or additional services, work, or products will be authorized or performed except pursuant to amendment or modification of this Master Agreement that is executed in compliance with the Master Agreement or pursuant to the Business Case Process in *Attachment H-1 Policies and Procedures Manual*. No waiver of any term, covenant, or condition of this Master Agreement will be valid unless executed in compliance with the Master Agreement or pursuant to the Business Case Process in *Attachment H-1 Policies and Procedures Manual*. Vendor will not be entitled to payment for any services, work, or products that are not authorized by this Master Agreement or a properly executed Master Agreement amendment or modification, authorized through the Business Case Process, or through the express written authorization of DIR.

Article 8. Audit and Financial Compliance

Section 8.01 Financial record retention and audit.

Vendor and its agents and its Subcontractors agree to maintain supporting financial information and documents that are adequate to ensure contract compliance, and are sufficient to ensure the accuracy and validity of Vendor invoices. Such documents, including all original claims forms, will be maintained and retained by Vendor, its agents and its Subcontractors for a period of four (4) years after the date of submission of the final billing or until the resolution of all litigation, claims, financial management reviews or audits pertaining to this Master Agreement, whichever is longer. Vendor agrees to timely repay any undisputed audit exceptions taken by DIR in any audit of this Master Agreement.

Section 8.02 Access to records, books, and documents.

(a) Upon reasonable notice, Vendor must provide, and cause its agents and its Subcontractors to provide, the officials and/or entities identified in this Section with prompt, reasonable, and adequate access to any records, books, documents, and papers that are directly pertinent to the performance of this Master Agreement and any Scope of Work.

(b) Vendor and its agents and its Subcontractors must provide the access described in this Section upon DIR's request. This request may be for, but is not limited to, the following purposes:

- (1) Examination;
- (2) Audit;
- (3) Investigation;
- (4) Contract administration; or
- (5) The making of copies, excerpts, or transcripts.

(c) The access required must be provided to the following officials and/or entities:

- (1) Any independent verification and validation contractor or quality assurance contractor, when acting on behalf of DIR;
- (2) The Office of the State Auditor of Texas or its designee;
- (3) A State or Federal law enforcement agency;
- (4) A special or general investigating committee of the Texas Legislature or its designee; and
- (5) Any auditor or other entity identified by DIR.

(d) Vendor agrees, and will require its agents and its Subcontractors, to provide the access described wherever Vendor maintains such books, records, and supporting documentation. Vendor further agrees, and will require its agents and its Subcontractors, to provide such access in reasonable comfort and to provide any furnishings, equipment, or other conveniences deemed reasonably necessary to fulfill the purposes described in this Section.

(e) DIR does not object to Vendor's request that any auditor, inspector or other entity identified by the State under this Master Agreement as requiring access to Vendor's Proprietary Software will be required to execute a confidentiality agreement protecting the confidentiality of Vendor's information, in form reasonably satisfactory to Vendor.

Section 8.03 Audits of Services, Deliverables and inspections.

(a) Upon notice from DIR, Vendor will provide, and will cause its agents and its Subcontractors to provide, such auditors and inspectors as DIR may from time to time designate, with access to:

- (1) Vendor, agent and Subcontractor service locations, facilities, or installations; and
- (2) Vendor, agent and Subcontractor Software and Equipment.

(b) Vendor and its agents and its Subcontractors must provide as part of the Services any assistance that such auditors and inspectors reasonably may require to complete such audits or inspections.

(c) Vendor's obligations under Article 8 with respect to ensuring compliance of its Subcontractors, or otherwise causing the Subcontractors to comply with the foregoing obligations shall be fulfilled by complying with the Subcontractor Compliance Obligations.

Section 8.04 Response/compliance with audit or inspection findings.

(a) Vendor must take action to ensure its employees', agents' or Subcontractors' compliance with or correction of any finding of noncompliance with any law, regulation, audit requirement, or generally accepted accounting principle relating to the Services and Deliverables or any other deficiency contained in any audit, review, or inspection conducted under this Article. This action will include Vendor's delivery to DIR, for DIR's approval, a Corrective Action Plan in accordance with Section 11.02(c) that addresses deficiencies identified in any audit(s), review(s), or inspection(s) within thirty (30) calendar days of the close of the audit(s), review(s), or inspection(s). As used herein, a "deficiency" means any failure of the Vendor to provide the Services as expressly required by this Master Agreement.

(b) Vendor must bear the expense of compliance with any finding of noncompliance under this Section that is:

- (1) Required by a Texas or Federal law, regulation, rule or other audit requirement relating to Vendor's business;
- (2) Performed by Vendor as part of the Services; or
- (3) Necessary due to Vendor's noncompliance with any law, regulation, rule, or audit requirement imposed on Vendor.

(c) As part of the Services, Vendor must disclose to DIR upon request, and will include in its Subcontract a requirement that each of its Subcontractors will disclose upon request, a copy of those portions of its internal audit reports relating to the Services and Deliverables provided to the State under this Master Agreement. The Parties will meet and mutually agree which of these provisions will apply to any Subcontractor performing under a Subcontract worth less than \$100,000, including HUB Subcontractors.

Section 8.05 Audit of Vendor fees.

(a) Vendor will provide, and will cause its agents and its Subcontractors to provide, to DIR and its designees access to such financial records and supporting documentation reasonably requested by DIR. Vendor's obligations hereunder with respect to its Subcontractors shall be fulfilled by complying with the Subcontractor Compliance Obligations.

(b) In addition to the normal monthly review and payment of administrative vouchers, DIR may audit the fees charged to DIR to determine that such fees are accurate and in accordance with this Master Agreement.

(c) If, as a result of such audit, DIR determines that Vendor has overcharged the State, DIR will notify Vendor in writing of the amount of such overcharge, and provide to the Vendor the work papers supporting such position. Vendor will promptly pay to DIR the undisputed amount of the overcharge, plus interest, and the Parties will use good faith efforts to resolve any disputed amounts as soon as practicable. In the event such audit reveals an error of five percent (5%) or more overcharge to DIR which is not disputed and is in excess of five percent (5%) of the total invoiced amounts for such period, Vendor will reimburse DIR for the reasonable cost of such audit.

Section 8.06 State Auditor's Office Audit

In addition to and without limitation on the other audit provisions of this Master Agreement, pursuant to Texas Government Code, Section 2262.003, acceptance of funds under the Master Agreement by Vendor acts as acceptance of the authority of the State Auditor's Office, or any successor agency, to conduct an audit or investigation in connection with those funds. Vendor, and its agents and its Subcontractors, agree to cooperate fully with the State Auditor's Office or its successor in the conduct of the audit or investigation, including providing all records requested. Vendor will ensure that this clause concerning the authority to audit funds received indirectly by Subcontractors through Vendor and the requirement to cooperate is included in any subcontract it awards pertaining to the Master Agreement. Under the direction of the Legislative Audit Committee, a vendor that is the subject of an audit or investigation by the State Auditor's Office must provide the State Auditor's Office with access to any information the State Auditor's Office considers relevant to the investigation or audit.

Article 9. Terms and Conditions of Payment

Section 9.01 Rights of set-off.

(a) *General right of set-off.*

With respect to any undisputed amount that a Party in good faith determines should be reimbursed to it or is otherwise payable to it by the other Party pursuant to this Master Agreement, the Party seeking the set-off may deduct the entire amount owed against the charges otherwise payable or expenses owed to it under this Master Agreement until such time as the entire amount determined to be owed has been paid.

(b) *Duty to make payments.*

DIR will be relieved of its obligation to make any payments to the Vendor until such time as all such amounts have been credited to DIR and the Vendor will be relieved of its obligation to make any payments to DIR until such time as such amounts have been credited to the Vendor.

Section 9.02 Expenses.

Except as provided in this Master Agreement, all other expenses incurred by the Vendor in connection with its provision of the Services or Deliverables will not be reimbursed by DIR unless agreed upon by DIR in writing. Vendor will be responsible for payment of all expenses related to salaries, benefits, employment taxes, and insurance for its employees, agents and Subcontractors. In addition, the costs associated with transportation, delivery, and insurance for each Deliverable will be paid for by Vendor. Vendor's obligations hereunder with respect to its Subcontractors shall be met by fulfillment of the Subcontractor Compliance Obligations.

Section 9.03 Disputed fees.

If DIR disputes payment of all or any portion of an invoice from the Vendor, DIR will notify the Vendor of such dispute and both Parties will attempt in good faith to resolve the dispute. DIR will not be required to pay any disputed portion of a Vendor invoice. Notwithstanding any such dispute, the Vendor must continue to perform the Services and produce Deliverables in compliance with the terms of this Master Agreement pending resolution of such dispute so long as all undisputed amounts continue to be paid to Vendor.

Section 9.04 Liability for taxes and insurance.

(a) VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS MASTER AGREEMENT, VENDOR WILL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF VENDORS', AGENTS' AND SUBCONTRACTORS' EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS MASTER AGREEMENT. VENDOR AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. VENDOR AGREES AND ACKNOWLEDGES THAT VENDOR'S EMPLOYEES, AGENTS OR SUBCONTRACTORS WILL NOT BE ENTITLED TO ANY STATE BENEFIT OR BENEFIT OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER. DIR AND/OR THE STATE WILL NOT BE LIABLE TO THE VENDOR ITS EMPLOYEES, AGENTS, SUBCONTRACTORS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER.

(b) VENDOR AGREES TO INDEMNIFY AND HOLD HARMLESS DIR, THE STATE OF TEXAS AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR EXPECTATIONS OF BENEFITS BY VENDOR, ITS EMPLOYEES, AGENTS OR SUBCONTRACTORS IN THEIR PERFORMANCE UNDER THIS MASTER AGREEMENT.

VENDOR WILL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES AND OUT OF POCKET EXPENSES. THE DEFENSE WILL BE COORDINATED BY THE OFFICE OF THE ATTORNEY GENERAL FOR TEXAS STATE AGENCY CUSTOMERS AND BY CUSTOMER'S LEGAL COUNSEL FOR NON-STATE AGENCY CUSTOMERS.

(c) NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, THE PARTIES AGREE THAT TO THE EXTENT THE FOREGOING PROVISIONS IMPOSE OBLIGATIONS WITH RESPECT TO SUBCONTRACTORS UPON VENDOR, VENDOR'S OBLIGATIONS WILL BE MET BY FULFILLMENT OF THE SUBCONTRACTOR COMPLIANCE OBLIGATIONS. AFTER COMPLIANCE WITH THE SAME, VENDOR SHALL HAVE NO LIABILITY TO ANYONE UNDER THIS PROVISION WITH RESPECT TO ITS SUBCONTRACTORS.

Section 9.05 Liability for employment-related charges and benefits.

Vendor will perform work under this Master Agreement as an independent contractor and not as agent or representative of DIR. Vendor is solely and exclusively liable for all taxes and employment-related charges incurred in connection with the performance of this Master Agreement. DIR will not be liable for any employment-related charges or benefits of Vendor, such as workers compensation benefits, unemployment insurance and benefits, or fringe benefits.

Section 9.06 No additional consideration.

Vendor, its agents and its Subcontractors will not be entitled to nor receive from DIR any additional consideration, compensation, salary, wages, or any other type of remuneration for services rendered under this Master Agreement. Specifically, Vendor will not be entitled by virtue of this Master Agreement to consideration in the form of overtime, health insurance benefits, retirement benefits, disability retirement benefits, sick leave, vacation time, paid holidays, or other paid leaves of absence of any type or kind whatsoever. In addition, the costs associated with transportation, delivery, and insurance relating to the Vendor's, agents' or Subcontractors' performance of this Master Agreement will be paid for by the Vendor. Vendor's obligations regarding Subcontractor insurance hereunder shall be met by complying with the Subcontractor Compliance Obligations.

Section 9.07 Prompt Payment Act.

Should payment by DIR or Customer be necessary under this Master Agreement, payment will be made on a monthly basis and within thirty (30) days from receipt of a correct invoice or billing statement unless otherwise agreed in writing. Each invoice presented must include the Customer's contract number. The invoice must identify vendor identification number or social security number, a description of the services provided, and the name and division of the Customer contract manager. The invoices must be submitted to Customer's billing address. Payment by State agencies will be made in accordance with the Texas Prompt Payment law, Texas Government Code, Subtitle F, Chapter 2251.

Section 9.08 Payment.

During the term of this Master Agreement, Vendor will receive funds in consideration for the Services, in accordance with *Exhibit C Financial Model*. Payment for Disentanglement Services will be in accordance with *Exhibit G Plans*.

Article 10. Disclosure and Confidentiality of Information

Section 10.01 Confidentiality.

(a) Vendor, its agents and its Subcontractors under this Master Agreement must treat all information that is obtained through performance of the Services under this Master Agreement, including, but not limited to, information relating to users of DIR Programs as Confidential

Information to the extent that confidential treatment is provided under State and Federal law, regulations, or administrative rules.

(b) Vendor is responsible for understanding the degree to which information obtained through performance of this Master Agreement is confidential under State and Federal law, regulations, or administrative rules.

(c) Vendor and all agents and Subcontractors under this Master Agreement may not use any information obtained through performance of this Master Agreement in any manner except as is necessary to the proper discharge of obligations and securing of rights under this Master Agreement.

(d) Vendor must have systems in effect to protect all records and all other documents deemed confidential under this Master Agreement that are maintained in connection with the activities funded under this Master Agreement. Any disclosure or transfer of Confidential Information by Vendor, including information required by DIR, will be in accordance with applicable State and Federal law, regulations, or administrative rules. If the Vendor receives a request for information deemed confidential under this Master Agreement, the Vendor will immediately notify the State of such request, and will make best efforts to protect the information from public disclosure.

(e) In addition to the requirements expressly stated in this Section, Vendor must comply with any policy, rule, or requirement of DIR that relates to the safeguarding or disclosure of information relating to DIR Programs recipients, Vendor's operations, or the Vendor performance of this Master Agreement.

(f) In the event of the expiration or termination of this Master Agreement for any reason all Confidential Information of a Party, except for Vendor Proprietary Software and related documentation, disclosed to and all copies thereof made by the other Party will be returned to the disclosing Party or, at the disclosing Party's option, erased or destroyed. The recipient of the Confidential Information will provide the disclosing Party certificates evidencing such erasure or destruction. Notwithstanding anything in this Master Agreement to the contrary, the Vendor may retain safeguarded (and encrypted if Sensitive Personal Information as defined under the laws of Texas is included) copies of the following records and data it receives or prepares during or in connection with TexasOnline 2.0, to comply with the record keeping requirements of Section 8.01 and for archival and defense purposes: (i) supporting financial information and documents that are adequate to ensure contract compliance and are sufficient to ensure the accuracy and validity of Vendor invoices; (ii) financial information, records and reports; (iii) transaction logs; (iv) payment engine data files (excluding credit card numbers); (v) Vendor's customer database data files; (vi) human resources documentation; (vii) audit reports; (viii) operational reporting (e.g. Security logs, PCI reporting, Sarbanes-Oxley Act reporting/audits, Security Metrics reporting/audits, and Network reports/logs); (ix) application transaction data (e.g. volume, dates), and (x) data for TexasOnline 2.0 and its applications, including maintenance log files, uptime log files, network access log files, and other site analytics.

(g) The obligations in this Section will not restrict any disclosure by a Party pursuant to any order of a court or government agency, provided that the disclosing Party will give prompt written notice to the non-disclosing Party of such order.

(h) With the exception of confidential DIR Program user information, Confidential Information of a Party will not be afforded the protection of this Master Agreement if such data was:

- (1) Already known to the receiving Party without restrictions at the time of its disclosure by the furnishing Party;
- (2) Independently developed by the receiving Party without reference to the furnishing Party's Confidential Information;

- (3) Rightfully obtained by the other Party without restriction from a third party after its disclosure by the furnishing Party;
- (4) Publicly available other than through the fault or negligence of the other Party; or
- (5) Released without restriction to anyone.

(i) DIR and State will require its agents and/or Subcontractors to comply with the terms of this section as it relates to Vendor Confidential Information. Prior to disclosing Vendor Confidential Information to contractors, DIR will obtain an executed confidentiality agreement in the form of *Attachment S-1 Non-disclosure Agreement*. Additionally, prior to providing Vendor's Proprietary Software to a contractor who will be modifying such Vendor Proprietary Software, or operating TexasOnline 2.0 as provided in Section 11.09, DIR will obtain contractor's agreement to a separate form of licensing agreement, in form mutually agreed to between contractor and DIR, with agreement not to be unreasonably withheld.

Section 10.02 Disclosure of DIR's Confidential Information.

(a) Vendor will immediately report to DIR any and all unauthorized disclosures or uses of DIR's Confidential Information of which it or its agents(s) and/or its Subcontractor(s), is aware or has knowledge. Vendor acknowledges that any publication or disclosure of DIR's Confidential Information to others may cause immediate and irreparable harm to DIR and may constitute a violation of State or Federal laws. If Vendor, its agent(s) and/or its Subcontractor(s), should publish or disclose such Confidential Information to others without authorization, DIR will immediately be entitled to seek injunctive relief or any other remedies to which it is entitled under law or equity without requiring a cure period as described in Article 11. DIR will have the right to recover from Vendor all damages and liabilities caused by or arising from Vendor's, its agent(s) and/or its Subcontractors', failure to protect DIR's Confidential Information. Contractor will defend with counsel approved by DIR, indemnify and hold harmless DIR from all damages, costs, liabilities, and expenses (including without limitation reasonable attorneys' fees and costs) caused by or arising from Vendor's or its agent(s) and/or its Subcontractors', failure to protect DIR's Confidential Information.

(b) Vendor will require its agent(s) and/or its Subcontractor(s), to comply with the terms of this provision.

Section 10.03 Requests for public information.

(a) Vendor acknowledges that DIR is a government agency subject to the Public Information Act (Chapter 552 of the Texas Government Code). Vendor also acknowledges that DIR will comply with the Public Information Act, and with all opinions of the Texas Attorney General's office concerning this Public Information Act. DIR agrees that it will promptly notify Vendor of a request for disclosure of public information filed in accordance with the Public Information Act that requests any of the Vendor's Confidential Information, including data to which Vendor has a proprietary or commercial interest. DIR will deliver all copies of such requests for public information to Vendor.

(b) With respect to any information that is the subject of a request for disclosure, Vendor is required to demonstrate to the Texas Office of Attorney General the specific reasons why the requested information is confidential or otherwise excepted from required public disclosure under the Public Information Act. Vendor will provide DIR with copies of all such communications.

(c) To the extent authorized under the Public Information Act, DIR agrees to safeguard from disclosure information received from Vendor that the Vendor believes to be Confidential Information. Other than with respect to Vendor's Proprietary Software and related technical and design documentation provided by the Vendor pursuant to this Master Agreement, (excluding user-related materials that have been released by the Vendor to the public), Vendor must clearly mark such

information as Confidential Information or provide written notice to DIR that it considers the information confidential.

(d) Under the terms of the Master Agreement, DIR may provide Vendor with information related to Customers or DIR Program users. Vendor will not re-sell or otherwise distribute or release Customer information to any party in any manner without DIR's or the Customer's, as appropriate, express written consent, unless required by law or pursuant to Section 10.01(g) herein.

Section 10.04 Privileged Work Product.

(a) Vendor acknowledges that DIR asserts that Privileged Work Product may be prepared in anticipation of litigation and that Vendor may perform Services with respect to Privileged Work Product as an agent of DIR, and that all DIR documents, data, database, or communications which DIR asserts is Privileged Work Product is protected from disclosure by the Texas Rules of Civil Procedure, Texas Rules of Evidence, Federal Rules of Civil Procedure, and/or Federal Rules of Evidence.

(b) DIR will notify Vendor of any Privileged Work Product to which Vendor or its agent(s) and/or its Subcontractors have or may have access. After the Vendor is notified or otherwise becomes aware that such documents, data, database, or communications are Privileged Work Product, only Vendor, its agents and/or its Subcontractors, for whom such access is necessary for the purposes of providing the Services may have access to Privileged Work Product.

(c) If Vendor receives notice of any judicial or other proceeding seeking to obtain access to DIR's Privileged Work Product, Vendor will:

- (1) Immediately notify DIR; and
- (2) Use all reasonable efforts to resist providing such access.

(d) If Vendor resists disclosure of DIR's Privileged Work Product in accordance with this Section, DIR will, to the extent authorized under Texas Civil Practices and Remedies Code or other applicable State law, have the right and duty to represent Vendor in such resistance or to retain counsel to so represent Vendor or to reimburse Vendor for reasonable attorneys' fees and expenses incurred in resisting such access.

(e) If a court of competent jurisdiction orders Vendor to produce documents, disclose data, or otherwise breach the confidentiality obligations imposed in this Master Agreement, or otherwise with respect to maintaining the confidentiality, proprietary nature, and secrecy of Privileged Work Product, Vendor will not be liable for breach of such obligation.

Section 10.05 Unauthorized acts.

Each Party agrees to:

(1) Notify the other Party promptly of any unauthorized possession, use, or knowledge, or attempt thereof, of any Confidential Information by any person or entity that may become known to it;

(2) Promptly furnish to the other Party full details of the unauthorized possession, use, or knowledge, or attempt thereof, and use reasonable efforts to assist the other Party in investigating or preventing the recurrence of any unauthorized possession, use, or knowledge, or attempt thereof, of Confidential Information; and

(3) Cooperate with the other Party in any litigation and investigation against third parties deemed necessary by such Party to protect its proprietary rights.

Section 10.06 Legal action.

Neither Party may commence any legal action or proceeding in respect to any unauthorized possession, use, or knowledge, or attempt thereof, of Confidential Information by any person or

entity, which action or proceeding identifies the other Party or its Confidential Information without such Party's consent, which consent will not be unreasonably withheld.

Article 11. Remedies and Disputes

Section 11.01 Understanding and expectations.

The remedies described in this Section contemplate Vendor's timely and responsive performance of the Services and production of Deliverables, and to the creation of a flexible and responsive relationship between the Parties.

Section 11.02 Tailored remedies.

(a) Understanding of the Parties.

Vendor agrees and understands that DIR may pursue tailored contractual remedies for noncompliance with this Master Agreement. At any time and at its discretion, except as expressly provided in this Section, DIR may impose or pursue one or more remedies for each item of noncompliance and will determine remedies on a case-by-case basis. DIR's pursuit or non-pursuit of a tailored remedy does not constitute a waiver of any other remedy that DIR may have at law or equity. Prior to imposing any remedies, DIR will provide notice to the Vendor of the noncompliance, and a reasonable cure period in accordance with subsection (b), or the cure period specified elsewhere in this Master Agreement. In all instances under which DIR may pursue multiple remedies, it may collect either liquidated damages or actual damages, but not both, notwithstanding any provision of this Master Agreement to the contrary.

(b) Notice and opportunity to cure for non-material breach.

(1) DIR will notify Vendor in writing of specific areas of Vendor performance that fail to meet performance expectations, standards, or schedules, but that, in the determination of DIR, do not result in a material deficiency or delay in the implementation or operation of the Services.

(2) Vendor will, within ten (10) days (or another date approved by DIR) of receipt of written notice of a non-material deficiency, provide DIR a written response that:

(A) Explains the reasons for the deficiency, Vendor's plan to address or cure the deficiency, and the date and time by which the deficiency will be cured; or

(B) If Vendor disagrees with DIR's findings, its reasons for disagreeing with DIR's findings.

(3) Vendor's proposed cure of a non-material deficiency is subject to the approval of DIR. Vendor's repeated commission of non-material deficiencies or repeated failure to resolve any such deficiencies may be regarded by DIR as a material deficiency and entitle DIR to pursue any other remedy provided in this Master Agreement or any other appropriate remedy DIR may have at law or equity.

(c) Corrective action plan.

(1) At its option, DIR may require Vendor to submit to DIR a detailed written Corrective Action Plan to correct or resolve a material breach of this Master Agreement.

(2) The Corrective Action Plan must provide:

(A) A detailed explanation of the reasons for the cited deficiency;

(B) Vendor's assessment or diagnosis of the cause; and,

(C) A specific proposal to cure or resolve the deficiency.

(3) The Corrective Action Plan must be submitted by the deadline set forth in DIR's request for a Corrective Action Plan. The Corrective Action Plan is subject to approval by DIR, which will not unreasonably be withheld.

(4) DIR will notify Vendor in writing of DIR's final disposition of DIR's concerns. If DIR accepts Vendor's proposed Corrective Action Plan, DIR may:

(A) Condition such approval on completion of tasks in the order or priority that DIR may prescribe;

(B) Disapprove portions of Vendor's proposed Corrective Action Plan; or

(C) Require additional or different Corrective Action Plan(s).

(5) At any time during this process, DIR reserves the right to:

(A) Suspend all, or part of, this Master Agreement, and to withhold further payment for the suspended portions of this Master Agreement in accordance with Section 11.02(g); or

(B) Prohibit Vendor from incurring additional obligations of funds during investigation of the alleged breach and pending corrective action, if necessary, by Vendor or a decision by DIR to terminate for cause.

(6) If DIR rejects Vendor's written explanation or proposed Corrective Action Plan, DIR may issue a written Stop Work Order to Vendor or any of its agents, or Subcontractors or suppliers. DIR may delay the implementation of the Stop Work Order if it affects the completion of any of the Services in accordance with the approved Schedule or Work Plan.

(7) DIR's acceptance of a Corrective Action Plan under this Section will not:

(A) Excuse Vendor's prior substandard performance;

(B) Relieve Vendor of its duty to comply with performance standards; or

(C) Prohibit DIR from assessing additional tailored remedies or pursuing other appropriate remedies for continued substandard performance.

(d) *Administrative remedies.*

(1) At its discretion, DIR may impose one or more of the following remedies for each item of noncompliance and will determine the scope and severity of the remedy on a case-by-case basis:

(A) Assess liquidated damages in accordance with the terms of this Master Agreement;

(B) Conduct accelerated monitoring of the Vendor including more frequent or more extensive monitoring by DIR or its agents;

(C) Require additional, more detailed, financial and/or programmatic reports to be submitted by Vendor;

(D) Decline to renew or extend this Master Agreement; or

(E) Terminate this Master Agreement in accordance with Section 11.03, provided, however, that the right to terminate hereunder shall be limited to those instances where (i) the non-compliance was material; (ii) DIR gave Vendor written notice of such material non-compliance and specified a reasonable cure period; and (iii) Vendor did not cure the material non-compliance within the applicable cure period.

(2) For purposes of this Master Agreement, an item of noncompliance means a specific action of Vendor that:

(A) Violates a provision of this Master Agreement;

(B) Fails to meet an agreed service level measure of performance; or

(C) Represents a failure of Vendor to be reasonably responsive to a reasonable request of DIR relating to the Services for information, assistance, or support within the timeframe specified by DIR provided that such request for information, assistance or support is within the Services specified to be provided in this Master Agreement, or, if outside the Master Agreement, the Parties have agreed on a written change order or amendment of the Master Agreement with respect to such additional information, assistance or support.

(3) DIR will provide notice to Vendor of the imposition of an administrative remedy in accordance with this Section, with the exception of accelerated monitoring, which may be unannounced. DIR may require Vendor to file a written response in accordance with this Section.

(4) The Parties agree that a State or Federal statute, rule, regulation, or Federal guideline will prevail over the provisions of this Section unless the statute, rule, regulation, or guidelines can be read together with this Section to give effect to both.

(e) *Damages.*

(1) DIR will be entitled to actual damages resulting from the Vendor's failure to comply with any of the terms of this Master Agreement. In some cases, the actual damage to DIR or the State of Texas as a result of Vendor's failure to meet any aspect of the responsibilities of this Master Agreement and/or to meet specific performance standards set forth in this Master Agreement are difficult or impossible to determine with precise accuracy. Therefore, liquidated damages may be assessed in writing against and in such event will be paid by the Vendor for failure to meet any aspect of the responsibilities of this Master Agreement and/or to meet the specific performance standards identified in *Exhibit D Performance Criteria*. Liquidated damages will be assessed if DIR determines such failure is the fault of the Vendor (including the Vendor's agents and/or Subcontractors) and is not materially caused or contributed to by DIR or its agents. If at any time, DIR determines the Vendor has not met any aspect of the responsibilities of this Master Agreement and/or the specific performance standards due to mitigating circumstances, DIR reserves the right to waive all or part of the liquidated damages. All such waivers must be in writing, contain the reasons for the waiver, and be signed by the appropriate executive of DIR.

(2) The liquidated damages prescribed in this Section are not intended to be in the nature of a penalty, but are intended to be reasonable estimates of DIR's projected financial loss and damage resulting from the Vendor's nonperformance, including financial loss as a result of project delays. Accordingly, in the event Vendor fails to perform in accordance with this Master Agreement, DIR may assess liquidated damages as provided in this Section.

(3) If Vendor fails to perform any of the Services described in this Master Agreement, DIR may assess liquidated damages for each occurrence of a liquidated damages event, to the extent consistent with DIR's tailored approach to remedies and State law. Notwithstanding anything contained in this Master Agreement to the contrary, if, after using its best efforts as set forth in the Implementation Plan and good faith negotiations, Vendor has not transitioned a Customer Agreement to the new form by the date specified in this Master Agreement, then the failure to transition such Customer Agreement by such date shall not constitute a breach of this Master Agreement, and Vendor shall not be liable for any damages, including liquidated damages, in connection therewith.

(4) In accordance with *Exhibit D Performance Criteria*, DIR may elect to collect liquidated damages:

(A) Through direct assessment and demand for payment delivered to Vendor; or

(B) By deduction of amounts assessed as liquidated damages as set-off against payments then due to Vendor for the Services or Deliverables or that become due at any time after assessment of the liquidated damages. DIR will make deductions until the full amount payable by the Vendor is received by the State.

(5) Notwithstanding any of the foregoing except with regard to Cutover, prior to DIR imposing any damages upon Vendor, (i) DIR must have provided Vendor with written notice of its non-compliance and specified a reasonable cure period; and (ii) Vendor must have failed to cure the non-compliance within the applicable cure period.

(6) Liquidated damages imposed under any provision of this Master Agreement will be limited to the amounts and triggering events specified in this Master Agreement.

(f) *Equitable Remedies*

(1) Vendor acknowledges that, if Vendor breaches (or attempts or threatens to breach) its obligation under this Master Agreement, the State will be irreparably harmed. In such a circumstance, DIR may proceed directly to court.

(2) If a court of competent jurisdiction finds that Vendor breached (or attempted or threatened to breach) any such obligations, Vendor agrees that without any additional findings of irreparable injury or other conditions to injunctive relief, it will not oppose the entry of an appropriate injunctive order compelling performance by Vendor and restraining it from any further breaches (or attempted or threatened breaches).

(g) *Suspension of Master Agreement*

(1) DIR may suspend performance of all or any part of this Master Agreement if:

(A) DIR determines that Vendor has committed a material breach of this Master Agreement and, after written notice from DIR, such material breach is not cured by Vendor during the cure period; however, if no specific cure period is provided under this Master Agreement, such cure period will be not less than ten (10) Business Days.

(B) DIR has reason to believe that Vendor, its agent(s) and/or its Subcontractors have committed, assisted in the commission of, or failed to take appropriate action concerning fraud, malfeasance or misfeasance concerning this Master Agreement and DIR reasonably believes that the suspension is necessary to prevent a material loss or material damages to the State, and the portion being suspended has a direct relationship to the alleged fraud, malfeasance or misfeasance concerning this Master Agreement. (C) DIR determines that suspension of this Master Agreement in whole or in part is convenient or in the best interests of the State of Texas or the DIR Programs.

(2) DIR will notify Vendor in writing of its intention to suspend this Master Agreement in whole or in part. Such notice will:

(A) Be delivered in writing to Vendor; and

(B) Include a concise description of the facts or matter leading to DIR's decision.

Section 11.03 *Termination of Master Agreement.*

In addition to other provisions of this article allowing termination, this Master Agreement will terminate upon the Expiration Date unless extended in accordance with the terms of this Master Agreement, or terminated sooner under the terms of this Master Agreement. Prior to completion of the Initial Term and any extensions or renewal thereof, all or a part of this Master Agreement may be terminated for any of the following reasons:

(a) *Termination by mutual agreement of the Parties.*

This Master Agreement may be terminated by mutual agreement of the Parties. Such agreement must be in writing.

(b) *Termination in the best interest of the State.*

DIR may terminate this Master Agreement at any time when, in its sole discretion, DIR determines that termination is in the best interests of the State of Texas. The termination will be effective on the date specified in DIR's notice of termination.

(c) *Termination for non-appropriation of funds.*

This Master Agreement is subject to termination, either in whole or in part, without penalty to DIR, subject to appropriation or availability of State funds. DIR is a State agency whose authority and appropriations are subject to actions of the Texas Legislature and whose availability of funds may be subject to governmental action. If DIR becomes subject to a legislative change, revocation of

statutory authority, lack of appropriated funds, or unavailability of funds which would render Vendor's delivery or performance under this Master Agreement impossible or unnecessary, this Master Agreement will be terminated, either in whole or in part, under this subsection. DIR will not be liable to Vendor or any other person or entity for any payments, damages, or any other amounts which were otherwise due or which may be caused or associated with such termination and DIR will not be required to give prior notice, except as otherwise provided in Section 3.01.

(d) Termination fee.

(1) In the event DIR terminates the Master Agreement prior to the expiration of the Master Agreement for any reason other than the material uncured breach by Vendor, notwithstanding any other provision contained in this Master Agreement, the provisions regarding licensing of Software, and transfer of title to Hardware to DIR, shall be contingent upon payment of a negotiated fee to Vendor.

(2) The fee will be calculated in accordance with the process set forth in *Attachment H-1 Policies and Procedures Manual* and based upon a combination of the following:

- (A) TexasOnline 2.0 build-out associated with Implementation,
- (B) Purchase price of Vendor-provided third party products and services, and
- (C) Value associated with the Business Case Project Value Score of Vendor Proprietary Software.

With the exception of TexasOnline 2.0 build-out, which will be amortized over seven years from the Effective Date, the other aspects of the fee will be amortized over five years commencing upon the date of completion of each Project.

(3) Upon expiration of the Master Agreement, at the completion of the term, a negotiated fee which includes elements (B) and (C) above shall apply only with respect to Projects described in *Attachment H-1 Policies and Procedures Manual* as End of Term Business Cases.

(e) Termination for cause.

DIR reserves the right to terminate this Master Agreement, in whole or in part, upon the following conditions:

- (1) *Assignment for the benefit of creditors, appointment of receiver, or inability to pay debts.*

DIR may terminate this Master Agreement if Vendor:

- (A) Makes an assignment for the benefit of its creditors;
- (B) Admits in writing its inability to pay its debts generally as they become due; or
- (C) Consents to the appointment of a receiver, trustee, or liquidator of Vendor or of all or any part of its property.

- (2) *Failure to adhere to laws, rules, ordinances, or orders.*

DIR may terminate this Master Agreement if a court of competent jurisdiction finds Vendor failed to adhere to any laws, ordinances, rules, regulations, or orders of any public authority having jurisdiction and such violation prevents or substantially impairs performance of Vendor's duties under this Master Agreement.

- (3) *Breach of confidentiality.*

DIR may terminate this Master Agreement if Vendor breaches Article 10 or confidentiality laws with respect to the Services and Deliverables provided under this Master Agreement.

- (4) *Failure to maintain adequate personnel or resources.*

DIR may terminate this Master Agreement if, after providing notice and an opportunity to correct, DIR determines that Vendor has failed to supply personnel or resources and such failure results in Vendor's inability to fulfill its duties under this Master Agreement.

(5) *Termination for gifts and gratuities.*

(A) DIR may terminate this Master Agreement following the determination by a competent judicial or quasi-judicial authority and Vendor's exhaustion of all legal remedies that Vendor, its employees, agents or Subcontractors have either offered or given any thing of value to an officer or employee of DIR or the State of Texas in violation of State law.

(B) Vendor must include a similar provision in each of Customer Agreement and Subcontracts and will enforce this provision against an agent or a Subcontractor who has offered or given any thing of value to any of the persons or entities described in this Section, whether or not the offer or gift was in Vendor's behalf.

(C) Termination of an agent or Subcontract by Vendor pursuant to this provision will not be a cause for termination of this Master Agreement unless:

- (1) Vendor fails to replace such terminated Subcontractor within a reasonable time; and
- (2) Such failure constitutes Cause as described in this Section.

(D) For purposes of this Section, a "thing of value" means any item of tangible or intangible property that has a monetary value of more than fifty dollars (\$50.00) and includes, but is not limited to, cash, food, lodging, entertainment, and charitable contributions. The term does not include contributions to holders of public office or candidates for public office that are paid and reported in accordance with State or Federal law.

(6) *Judgment and execution.*

(A) DIR may terminate this Master Agreement if judgment for the payment of money in excess of \$500,000.00 that is not covered by insurance, is rendered by any court or governmental body against Vendor, and Vendor does not:

- (1) Discharge the judgment or provide for its discharge in accordance with the terms of the judgment;
- (2) Procure a stay of execution of the judgment within thirty (30) days from the date of entry thereof; or
- (3) Perfect an appeal of such judgment and cause the execution of such judgment to be stayed during the appeal, providing such financial reserves as may be required under generally accepted accounting principles.

(B) If a writ or warrant of attachment or any similar process is issued by any court against all or any material portion of the property of Vendor, and such writ or warrant of attachment or any similar process is not released or bonded within thirty (30) days after its entry, DIR may terminate this Master Agreement in accordance with this Section.

(7) *Termination for insolvency.*

(A) DIR may terminate this Master Agreement if Vendor:

- (1) Files for bankruptcy;
- (2) Becomes or is declared insolvent, or is the subject of any proceedings related to its liquidation, insolvency, or the appointment of a receiver or similar officer for it which are not dismissed within ninety (90) days from the date of filing;
- (3) Makes an assignment for the benefit of all or substantially all of its creditors; or
- (4) Enters into an agreement for the composition, extension, or readjustment of substantially all of its obligations.

(B) Vendor agrees to pay for all reasonable expenses of DIR including the cost of counsel, incident to:

(1) The enforcement of payment of all obligations of the Vendor by any action or participation in, or in connection with a case or proceeding under Chapters 7, 11, or 13 of the United States Bankruptcy Code, or any successor statute;

(2) A case or proceeding involving a receiver or other similar officer duly appointed to handle the Vendor's business; or

(3) A case or proceeding in a State court initiated by DIR when previous collection attempts have been unsuccessful.

(8) *Termination for Vendor's material breach of this Master Agreement.*

DIR has the right to terminate this Master Agreement in whole or in part if DIR determines, at its sole discretion, that Vendor has materially breached this Master Agreement. Prior to exercising its right to terminate all or a part of this Master Agreement, the State will provide the Vendor not less than thirty (30) days' prior written notice and an opportunity to cure the deficiency, and if such cure is made and accepted by DIR, (such acceptance not to be unreasonably withheld or delayed), the State will not terminate the Master Agreement.

(9) *Prohibited Vendor's List*

DIR has the absolute right to terminate this Master Agreement without recourse in the event that: (i) Vendor becomes listed on the prohibited vendors list authorized by Executive Order #13224, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism," published by the United States Department of the Treasury, Office of Foreign Assets Control, or (ii) Vendor becomes suspended or debarred from doing business with the Federal government as listed in the Excluded Parties List System (EPLS) maintained by the General Services Administration or (iii) Vendor is found by DIR to be ineligible to hold this Master Agreement under Subsection (b) of Section 2155.006, Texas Government Code. Vendor will be provided written notice in accordance with Article 11, of intent to terminate.

Section 11.04 *Effective date of termination.*

Except as otherwise provided in this Master Agreement, termination will be effective as of the date specified in the notice of termination.

Section 11.05 *Extension of termination effective date.*

Any termination date may be extended upon the mutual agreement of the Parties.

Section 11.06 *Payment and other provisions at Master Agreement termination.*

(a) If DIR terminates this Master Agreement, DIR will pay Vendor on the effective date of termination (or as soon as practical thereafter taking into account appropriation and fund accounting requirements) any undisputed amounts due for all completed, approved, and accepted Services or Deliverables.

(b) DIR further agrees to negotiate in good faith with Vendor to equitably adjust and settle any accrued or outstanding liabilities for any unaccepted Service or Deliverable that:

(1) Is due or delivered prior to or upon termination of this Master Agreement;

(2) Is complete or substantially complete, or for which Vendor can document to the satisfaction of DIR substantial progress of completion; and

(3) Benefits DIR or the State of Texas, notwithstanding its unaccepted status.

(c) Vendor must provide DIR all reasonable access to records, facilities, and documentation as is required to efficiently and expeditiously close out the Services under this Master Agreement.

(d) Vendor must prepare a Disentanglement Plan (*Attachment G-2*) which is acceptable to and approved by DIR. That Disentanglement Plan will be implemented during the time period between receipt of notice and the termination date in accordance with *Exhibit G Plans*.

(e) Subsections (a) and (b), shall only be applicable to time and materials ("T&M") work performed under the Master Agreement. For non-T&M services, Vendor will continue to receive its portion of Total Revenue through the termination date.

Section 11.07 Modification of Master Agreement in the event of remedies.

DIR may propose a modification of this Master Agreement in response to the imposition of a remedy under this article. Any modifications under this Section must be reasonable, limited to the matters causing the exercise of a remedy, and in writing. Vendor must negotiate such proposed modifications in good faith.

Section 11.08 Disentanglement assistance.

Upon receipt of notice of full or partial termination of this Master Agreement by DIR, Vendor will provide any Disentanglement assistance reasonably necessary to enable DIR or its designee to effectively close out this Master Agreement and move the work to another vendor or DIR may perform the work by itself, as provided in the Disentanglement Plan (*Attachment G-2*).

Section 11.09 Rights upon termination or expiration of Master Agreement.

(a) Notwithstanding anything in this Master Agreement to the contrary, Vendor will retain all ownership rights in Vendor's Proprietary Software (including, without limitation, source code and documentation, and all modifications and updates made under this Master Agreement) and DIR will receive a fully paid up (in the instances described in this Master Agreement) perpetual, non-exclusive license to use such Software as necessary to operate, maintain and improve TexasOnline 2.0 at the Expiration Date, or upon termination of the Master Agreement by DIR as a result of the uncured material breach by Vendor. Such license will include the right to make modifications to the Vendor's Proprietary Software for use in the operation of TexasOnline 2.0, and the right to allow contractors engaged by the State to use and modify the Vendor's Proprietary Software as necessary for the operation of TexasOnline 2.0, provided such contractors must execute a confidentiality agreement for that express purpose in form acceptable to Vendor. Third party Software will be transferred to DIR subject to the manufacturer's or vendor's license agreement, provided such transfer is permitted.

(b) In all other instances in which DIR terminates this Master Agreement, including termination for convenience, termination for non-appropriation of funds, and in which Vendor terminates the Master Agreement based on insufficient Total Revenue, DIR will receive a license to use Vendor's Proprietary Software and Deliverables, (or, in the case of termination under Section 3.01, to Vendor's Proprietary Software excluding such for which DIR chooses not to pay the unamortized project value associated with the Business Case Project Value Score under Section 3.01(b)) and a transfer of title to the Hardware, used in TexasOnline 2.0, subject to payment of the negotiated fee in accordance with Section 11.03(d).

Section 11.10 Vendor responsibility for associated costs.

If DIR terminates this Master Agreement for Cause, the Vendor will be responsible to DIR for all costs incurred by DIR, the State, or any of its administrative agencies to replace the Vendor. These costs include, but are not limited to, the costs of procuring a substitute vendor and the cost of any claim or litigation that is reasonably attributable to Vendor's failure to perform any Service in accordance with the terms of this Master Agreement. For purposes of clarity, the Vendor's liability for State's costs of procuring a substitute vendor will be limited to the administrative and legal costs of procuring a substitute vendor.

Section 11.11 Dispute resolution.

(a) *General agreement of the Parties.*

The Parties mutually agree that the interests of fairness, efficiency, and good business practices are best served when the Parties employ all reasonable and informal means to resolve any dispute under this Master Agreement. The Parties express their mutual commitment to using all reasonable and informal means of resolving disputes prior to invoking a remedy provided elsewhere in this Section.

(b) *Duty to negotiate in good faith.*

Any dispute that in the judgment of any Party to this Master Agreement may materially or substantially affect the performance of any Party will be reduced to writing and delivered to the other Party. The Parties must then negotiate in good faith and use reasonable efforts to resolve such dispute and the Parties will not resort to filing any lawsuit unless they have reasonably determined that a negotiated resolution is not possible. The resolution of any dispute disposed of by agreement between the Parties will be reduced to writing and delivered to all Parties within ten (10) Business Days.

(c) *Claims for breach of Master Agreement.*

(1) *General requirement.* As required by and in accordance with Chapter 2260, Texas Government Code, Vendor's claim for breach of this Master Agreement must be resolved in accordance with the dispute resolution process established by DIR.

(2) *Negotiation of claims.* The Parties expressly agree that the Vendor's claim for breach of this Master Agreement that the Parties cannot resolve in the ordinary course of business or through the use of all reasonable and informal means will be submitted to the negotiation process provided in Chapter 2260, Subchapter B, Texas Government Code.

(A) The Parties expressly agree that the Vendor's compliance with Chapter 2260, Subchapter B, Texas Government Code, will be a condition precedent to the filing of a contested case proceeding under Chapter 2260, Subchapter C, of the Texas Government Code.

(3) *Contested case proceedings.* The contested case process provided in Chapter 2260, Subchapter C, Texas Government Code, will be Vendor's sole and exclusive process for seeking a remedy for any and all alleged breaches of the Master Agreement by DIR if the Parties are unable to resolve their disputes under Subsection (c)(2) of this Section.

(A) The Parties expressly agree that compliance with the contested case process provided in Chapter 2260, Subchapter C, Texas Government Code, will be a condition precedent to seeking consent to sue from the Texas Legislature under Chapter 107, Texas Civil Practices & Remedies Code. Neither the execution of this Master Agreement by DIR nor any other conduct of any representative of DIR relating to this Master Agreement will be considered a waiver of the State's sovereign immunity to suit.

(4) *DIR rules.* The submission, processing and resolution of Vendor's claim is governed by the rules adopted by DIR pursuant to Chapter 2260, Texas Government Code, found at Title 1, Chapter 201, of the Texas Administrative Code.

(5) *Vendor's duty to perform.* Neither the occurrence of an event constituting an alleged breach of contract nor the pending status of any claim for breach of contract is grounds for the suspension of performance, in whole or in part, by Vendor of any duty or obligation with respect to the performance of this Master Agreement. Any changes to this Master Agreement as a result of a Dispute Resolution will be implemented in accordance with Article 7, Amendments, Modifications and Change Orders.

Section 11.12 Liability of Vendor.

(a) Vendor bears all risk of loss or damage due to:

(1) Defects in Software, products, Services or Deliverables;

(2) Unfitness or obsolescence of Software, products, Services or Deliverables;

(3) The negligence or intentional misconduct of Vendor or its employees, agents, or Subcontractors (in each case, excluding those items provided by Team for Texas and TEX-AN NG).

(4) Notwithstanding the foregoing, with respect to any Software or Deliverables that consists of commercial off the shelf third party software (COTS), Vendor agrees to assign to the State any manufacturer's warranties, to the extent transferable. Vendor agrees that it will use its best efforts to obtain assignable license rights with respect to non-COTS Software. Otherwise, Vendor transfers all third party Software and Deliverables "AS IS." Vendor's entire liability for any defects, unfitness or obsolescence in the Software and other materials provided by the Current Contractor shall be limited to repair or replacement of such Software or materials during the term, provided all necessary authorizations and source code materials are provided by DIR. Additionally, Vendor is not responsible for any defects, unfitness or obsolescence in Software or materials provided to Vendor by any Customer unless Vendor expressly agrees to undertake responsibility for such and all necessary authorizations and materials required are provided by the Customer.

(b) Vendor must, at the Vendor's own expense, defend with counsel approved by the State, indemnify, and hold harmless the State and State employees, officers, directors, contractors and agents from and against any losses, liabilities, damages, penalties, costs, fees and expenses arising out of, or resulting from, any acts or omissions of the Vendor, or its agents or its Subcontractors, in the execution or performance of this Master Agreement EXCLUDING TO THE EXTENT CAUSED BY OR ARISING OUT OF THE NEGLIGENCE OR WILLFUL MISCONDUCT OF DIR, THE STATE AND/OR THEIR EMPLOYEES, AGENTS, OR CONTRACTORS. THE DEFENSE WILL BE COORDINATED BY THE OFFICE OF THE ATTORNEY GENERAL FOR TEXAS STATE AGENCIES AND BY CUSTOMER'S LEGAL COUNSEL FOR NON-STATE AGENCY CUSTOMERS.

(c) Vendor will not be liable to DIR for any loss, damages or liabilities attributable to or arising from:

(1) The failure of DIR or any State agency to perform a service or activity in connection with this Master Agreement; or

(2) Vendor's prudent and diligent performance of the Services in compliance with instructions given by DIR in accordance with Section 1.03 (relating to implied authority) and Section 3.02 (relating to delegation of authority) of this Master Agreement.

(3) Vendor shall not be responsible for or assume any liability to the State or any third party for the acts or omissions, whether negligent or intentional, of the State, DIR or the State's or DIR's other contractors.

(d) Vendor will ship all Equipment and Software purchased and Third Party Software licensed pursuant to this Master Agreement, freight prepaid, FOB DIR's destination or other designated location. The method of shipment will be consistent with the nature of the Equipment, Software and hazards of transportation. Regardless of FOB point, Vendor agrees to carry adequate freight insurance and bear all risks of loss, damage, or destruction of Deliverables, in whole or in part, ordered hereunder that occurs prior to written acceptance, except loss or damage attributable to DIR's fault or negligence; and such loss, damage, or destruction will not release Vendor from any obligation hereunder. After written acceptance, the risk of loss or damage will be borne by DIR, except loss or damage attributable to Vendor's fault or negligence. Nothing herein shall be construed

as requiring Vendor to update any Software or Deliverables following termination or expiration of this Master Agreement.

Article 12. Assurances and Certifications

Section 12.01 Proposal certifications.

Vendor certifies that it: (i) has not given, offered to give, and does not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this Master Agreement, (ii) is not currently delinquent in the payment of any franchise tax owed the State, and relating to child support obligations is not ineligible to receive payment under §231.006 of the Texas Family Code and acknowledge this Master Agreement may be terminated and payment withheld if this certification is inaccurate, and furthermore, any Offer submitted under the RFO shall contain the names and social security numbers of person or entity holding at least a twenty-five percent (25%) ownership interest in the business entity submitting the Offer, (iii) neither it, nor anyone acting for it, has violated State or Federal antitrust laws, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage, (iv) under Texas Government Code, Section 2155.004, no person who prepared the specifications or this RFO has any financial interest in Vendor's Offer, (v) under Section 2155.004, Texas Government Code, Vendor certifies that the individual or business entity named in this Proposal or Master Agreement is not ineligible to receive the specified Master Agreement and acknowledges that this Master Agreement may be terminated and payment withheld if this certification is inaccurate, (vi) to the best of its knowledge and belief, there are no suits or proceedings pending or threatened against or affecting it, which if determined adversely to it will have a material adverse effect on the ability to fulfill its obligations under this Master Agreement, (vii) is not suspended or debarred from doing business with the Federal government as listed in the Excluded Parties List System (EPLS) maintained by the General Services Administration, (viii) as of the effective date of this Master Agreement, is not listed in the prohibited vendors list authorized by Executive Order #13224, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism", published by the United States Department of the Treasury, Office of Foreign Assets Control and (ix) under Section 2155.006, Government Code, Vendor certifies that the individual or business entity in this Master Agreement is not ineligible to receive the specified agreement and acknowledges that this Master Agreement may be terminated and payment withheld if this certification is inaccurate. In addition, Vendor acknowledges the applicability of §2155.444 and §2155.4441, Texas Government Code, in fulfilling the terms of this Master Agreement.

Section 12.02 Conflicts of interest.

(a) Representation.

Vendor agrees to comply with applicable State and Federal laws, rules, and regulations regarding conflicts of interest in the performance of its duties under this Master Agreement. Vendor warrants that it has no interest and will not acquire any direct or indirect interest that would conflict in any manner or degree with its performance under this Master Agreement.

(b) General duty regarding conflicts of interest.

Vendor will establish safeguards to prohibit employees, agents, and Subcontractors from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain. Vendor, agents, and Subcontractors will operate with complete independence and objectivity without actual, potential or apparent conflict of interest with respect to the activities conducted under this Master Agreement with the State.

Section 12.03 Organizational conflicts of interest.

(a) *Definition.*

An organizational conflict of interest is a set of facts or circumstances, a relationship, or other situation under which Vendor, agent or Subcontractor has past, present, or currently planned personal or financial activities or interests that either directly or indirectly:

- (1) Impairs or diminishes Vendor's, agent's or Subcontractor's ability to render impartial or objective assistance or advice to DIR; or
- (2) Provides the Vendor, agent or Subcontractor an unfair competitive advantage in future DIR procurements.

(b) *Warranty.*

Except as otherwise disclosed and approved by DIR prior to the Effective Date of this Master Agreement, Vendor warrants that, as of the Effective Date and to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to organizational conflict of interest affecting this Master Agreement. Vendor affirms that it has neither given, nor intends to give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant or any employee or representative of same, at any time during the procurement process or in connection with the procurement process except as allowed under relevant State and Federal law.

(c) *Continuing duty to disclose.*

(1) Vendor agrees that, if after the Effective Date, Vendor discovers or is made aware of an organizational conflict of interest, Vendor will immediately and fully disclose such interest in writing to DIR. In addition, Vendor must promptly disclose any relationship that might be perceived or represented as a conflict after its discovery by Vendor or by DIR as a potential conflict. DIR reserves the right to make a final determination regarding the existence of conflicts of interest, and Vendor agrees to abide by DIR's decision.

(2) The disclosure will include a description of the action(s) that Vendor has taken or proposes to take to avoid or mitigate such conflicts.

(d) *Remedy.*

If DIR determines that an organizational conflict of interest exists, DIR may, at its discretion, terminate the Master Agreement. If DIR determines that Vendor was aware of an organizational conflict of interest before the award of this Master Agreement and did not disclose the conflict to the contracting officer, such nondisclosure will be considered a material breach of this Master Agreement. Furthermore, such breach may be submitted to the Texas Office of the Attorney General, Texas Ethics Commission, or appropriate State or Federal law enforcement officials for further action.

(e) *Flow down obligation.*

Vendor must include the provisions of this Section 12.03 in all agent agreements and subcontracts for work to be performed similar to the service provided by Vendor, and the terms "Master Agreement," "Vendor," and "project manager" modified appropriately to preserve the State's rights.

Section 12.04 DIR personnel recruitment prohibition.

Vendor has not retained or promised to retain any agent, Subcontractor, person, or company, or utilized or promised to utilize an agent, or a Subcontractor that participated in DIR's development of specific criteria of this Master Agreement or who participated in the selection of the Vendor for this Master Agreement.

Vendor will not recruit or employ any DIR professional or technical personnel who have worked on projects relating to the subject matter of this Master Agreement, or who have had any influence on decisions affecting the subject matter of this Master Agreement, for two (2) years following the completion of this Master Agreement.

Section 12.05 Anti-kickback provision.

Vendor certifies that it will comply with the Anti-Kickback Act of 1986, 41 USC §51-58 and Federal Acquisition Regulation 52.203-7.

Section 12.06 Debt or back taxes owed to the State of Texas.

In accordance with Section 403.055 of the Texas Government Code, Vendor agrees that any payments due to Vendor under this Master Agreement will be first applied toward any debt and/or back taxes Vendor owes the State. Vendor further agrees that payments will be so applied until such debts and back taxes are paid in full.

Section 12.07 Certification regarding status of license, certificate, or permit.

Article IX, Section 163 of the Texas General Appropriations Act for the 1998/1999 State fiscal biennium prohibits an agency that receives an appropriation under either Article II or V of the General Appropriations Act from awarding a Master Agreement with the owner, operator, or administrator of a facility that has had a license, certificate, or permit revoked by another Article II or V agency. Vendor certifies it is eligible for an award under this provision.

Section 12.08 Outstanding debts and judgments.

Vendor certifies that it is not presently indebted to the State, and that Vendor is not subject to an outstanding judgment in a suit by the State against Vendor for collection of the balance. For purposes of this Section, an indebtedness is any amount sum of money that is due and owing to the State and is not currently under dispute. A false statement regarding Vendor's status will be treated as a material breach of this Master Agreement and may be grounds for termination at the option of DIR.

Section 12.09 Antitrust.

In submitting a proposal, and in accepting this Master Agreement, Contractor certifies and agrees as follows:

- (1) Neither the Vendor, nor agent, nor Subcontractor, nor the person represented by the Vendor, nor any person acting for the represented person has:
 - (a) violated the antitrust laws codified by Chapter 15, Texas Business & Commerce Code, or the Federal antitrust laws; or
 - (b) directly or indirectly communicated the Proposal or Offer associated with this Master Agreement to a competitor or other person engaged in the same line of business.
- (2) Vendor hereby assigns to DIR any and all claims for overcharges associated with this contract arising under the antitrust laws of the United States, 15 U.S.C. Section 1, *et seq.* (1973), as amended, and the anti trust laws of the State of Texas, TEX. BUS. & COMM. CODE ANN. Section 15.01, *et seq.* (1967), as amended.

Section 12.10 Agency Executive.

Under Texas Government Code, Section 669.003, relating to contracting with an executive of a state agency, Vendor represents that no person who, in the past four years, served as an executive of the Texas Comptroller of Public Accounts, DIR, or any other State agency, was involved with or has any interest in this Offer or any Master Agreement resulting from this RFO. If Vendor employs or

has used the services of a former executive head of DIR or other State agency, then Vendor shall provide the following information: Name of former executive, name of State agency, date of separation from State agency, position with Vendor, and date of employment with Vendor.

Section 12.11 Deceptive Trade Practices; Unfair Business Practices.

Vendor represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Tex. Bus. & Com. Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit and that Vendor has not been found to be liable for such practices in such proceedings. Vendor certifies that it has no officers who have served as officers of other entities who have been the subject allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

Article 13. Representations and Warranties

Section 13.01 Authorization.

(a) The execution, delivery and performance of this Master Agreement has been duly authorized by Vendor and no approval, authorization or consent of any governmental or regulatory agency is required to be obtained in order for Vendor to enter into this Master Agreement and perform its obligations under this Master Agreement.

(b) Vendor has obtained all licenses, certifications, permits, and authorizations necessary to perform the Services under this Master Agreement and currently is in good standing with all regulatory agencies that regulate any or all aspects of Vendor's performance of this Master Agreement. Vendor will maintain all required certifications, licenses, permits, and authorizations during the term of this Master Agreement.

Section 13.02 Ability to perform.

Vendor warrants that it has the financial resources to fund the capital expenditures required under this Master Agreement without advances by DIR or assignment of any payments by DIR to a financing source.

Section 13.03 Workmanship and performance.

(a) All Services and Deliverables provided under this Master Agreement will be provided in a manner consistent with the standards of quality and integrity as outlined in this Master Agreement.

(b) All Services and Deliverables must meet or exceed the required levels of performance specified in or pursuant to this Master Agreement, and will meet or exceed DIR's Objectives, as set forth in the RFO.

(c) Vendor, agents, and Subcontractors will perform the Services in a workmanlike manner, in accordance with best practices and high professional standards used in well-managed operations performing services similar to the services described in this Master Agreement.

Section 13.04 Warranty of deliverables.

(a) Subject to the provisions of Section 13.04 (b), Vendor warrants that Deliverables developed and delivered under this Master Agreement will meet the specifications as agreed to in the Business Case during the period following their acceptance by DIR, through the term of this Master Agreement, including any extensions as provided in this Master Agreement, that are subsequently negotiated by Vendor and DIR. Vendor will promptly repair or replace any such Deliverables not in compliance with this warranty at no charge to DIR.

(b) As provided in Section 11.12(a)(4), Vendor will assign to DIR all of the manufacturers' warranties and indemnities relating to all products, including without limitation, Third Party Software to the extent Vendor is permitted by the manufacturers to make such assignments to DIR. Such assignment is subject to all of the terms and conditions imposed by the manufacturers with respect thereto.

Section 13.05 Compliance with agreement.

Vendor will not take any action substantially or materially inconsistent with any of the terms and conditions set forth in this Master Agreement without the express written approval of DIR.

Article 14. Intellectual Property

Section 14.01 Infringement and misappropriation.

(a) Vendor warrants that all Deliverables provided by Vendor will not infringe or misappropriate any right of, and will be free of any claim of, any third person or entity based on copyright, patent, trade secret, or other intellectual property rights. Notwithstanding anything in the Master Agreement to the contrary, Vendor will not be required to warrant to the State, or to indemnify the State or any third party for any claims arising with respect to Third Party Software or Equipment or other third party materials that are provided or used under this Master Agreement (including, without limitation, the Current Contractor Software). Vendor agrees that it shall include the indemnity provision provided for in Section 14.01(b) into its Subcontracts, in which Subcontractors participate in the development of Deliverables or Software.

(b) Vendor will, at its expense, defend with counsel approved by DIR, indemnify, and hold harmless DIR, its employees, officers, directors, contractors, and agents from and against any losses, liabilities, damages, penalties, costs, fees, including without limitation reasonable attorneys' fees and expenses, from any claim or action against DIR that is based on a claim of breach of the warranty set forth in the preceding paragraph. DIR will promptly notify Vendor in writing of the claim, provide Vendor a copy of all information received by DIR with respect to the claim, and cooperate with Vendor in defending or settling the claim.

(c) In case the Deliverables, or any one or part thereof, is in such action held to constitute an infringement or misappropriation, or the use thereof is enjoined or restricted or if a proceeding appears to Vendor to be likely to be brought, Vendor will, at its own expense, either:

- (1) Procure for DIR the right to continue using the Deliverables; or
- (2) Modify or replace the Deliverables to comply with the specifications in the Business Case and to not violate any intellectual property rights.

Section 14.02 Exceptions.

Vendor is not responsible for any claimed breaches of the warranties set forth in Section 14.01 to the extent caused by:

(a) Modifications made to the item in question by anyone other than Vendor or its agents or Subcontractors, or DIR or its agents working at Vendor's direction and in accordance with an other vendors' specifications; or

(b) The combination, operation, or use of the item with other items if Vendor did not supply or approve for use with the item; or

(c) DIR's failure to use any new or corrected versions of the item made available by Vendor.

Section 14.03 *Rights in data.*

(a) DIR or Customer will be and remain the owner of all data made available by DIR or Customer to Vendor or its agents, its Subcontractors or representatives pursuant to the Master Agreement. Vendor will not use DIR or Customer data for any purpose other than providing the Services, nor will any part of DIR or Customer data be disclosed, sold, assigned, leased or otherwise disposed of to the general public or to specific third parties (other than with respect to providing the Services) or commercially exploited by or on behalf of Vendor, nor will any employee of Vendor other than those on a strictly need to know basis have access to DIR or Customer data. Vendor will not possess or assert any lien or other right against DIR or Customer data. Without limiting the generality of this Section, Vendor will only use personally identifiable information as strictly necessary to provide the Services and will disclose such information only to its employees who have a strict need to know such information. Vendor will comply at all times with all State and Federal laws and regulations applicable to such personally identifiable information. Additionally, Vendor may disclose such information to its Subcontractors who have a need to know in connection with the performance of Services, provided Vendor obtains such Subcontractors' written agreement to keep such information confidential and to use it only as required in the performance of Services.

(b) DIR or Customer is and will remain the owner of all DIR or Customer-specific data pursuant to the Master Agreement. Except as otherwise provided in this Master Agreement, or as otherwise restricted by law, and excluding Vendor Confidential Information, DIR and Customer may use the data provided by the Vendor for any purpose relating to the operation and enhancement of TexasOnline 2.0. DIR or Customer will not possess or assert any lien or other right against the Vendor's data.

Section 14.04 *Ownership of pre-existing materials.*

DIR or Customer and Vendor will continue to own their respective proprietary technologies developed before entering into the Master Agreement. Any equipment bought through the Vendor by DIR or Customer, and paid for by DIR or Customer, will be owned by DIR or Customer. Any software licensed through the Vendor and sold to DIR or Customer, will be licensed directly to DIR or Customer.

Section 14.05 *Third-party commercial software.*

If applicable and necessary, all third-party commercial software used in performing the Services will be provided to DIR or Customer under a separate license agreement between DIR or Customer and the owner (or authorized licensor) of such software.

Section 14.06 *Pre-existing materials for custom software deliverables.*

Neither Vendor nor any of its agents, or representatives, or its Subcontractors will incorporate any pre-existing materials (including third-party commercial software) into Custom Software Deliverables or use any pre-existing materials to produce Custom Software Deliverables if such pre-existing materials will be needed by DIR or Customer in order to use the Custom Software Deliverables unless (i) such pre-existing materials and their owners are identified to DIR or Customer in writing, and (ii) such pre-existing materials are either readily commercially available products for which Vendor or its Subcontractor, as the case may be, has obtained a license (in form and substance approved by DIR) in the name of DIR or Customer, or are materials that Vendor or its Subcontractor, as the case may be, has the right to license to DIR or Customer and has agreed to license to DIR or Customer on terms and conditions approved by DIR prior to using such pre-existing materials to perform the Services. DIR warrants and represents that DIR has obtained the right for DIR, Vendor and its Subcontractors, if applicable, to use, copy, modify and enhance the Current Contractor's software and other materials provided via the Texas Electronic Framework Agreement, including without limitation, source code, and the source code of its subcontractors, in

the performance of Services. DIR hereby permits all such uses. Vendor warrants and represents that it shall not, during the term of the Master Agreement or any time afterwards, assert any ownership rights, in the DIR-owned software, source code, and other materials.

Section 14.07 Ownership of work product by DIR or Customer.

(a) The Software and Deliverables shall not be considered “work for hire” for DIR; however, the same shall be subject to licensing, on the same terms and provisions, as provided for herein.

(b) Except as expressly provided for otherwise herein, Vendor will give written assignment, and upon creation of each Deliverable automatically assigns, to DIR or Customer, a license, on the terms and conditions provided for herein, in any Deliverable (excluding Software) delivered pursuant to this Master Agreement.

Section 14.08 DIR warrants all rights secured.

DIR warrants to Vendor that it has secured all rights necessary to permit Vendor, in the performance of Services under this Master Agreement, to copy, use, modify and enhance the software and other materials in use under the Texas Electronic Framework Agreement as of the date of execution of this Master Agreement, or provided by any other vendor of the State.

Section 14.09 License to Intellectual Property

(a) DIR grants, and Vendor accepts, a fully paid up, limited non-exclusive license to use, copy, and modify DIR owned and DIR licensed Software and documentation as necessary to operate, maintain and improve Texas Online 2.0, during the full term of the Master Agreement.

(b) If a Project has been approved under the Business Case Process, and DIR determines to use a different contract vehicle to procure Project services as provided in Section 2.03 (d) of *Exhibit H Governance*, Vendor will grant to the third party selected by DIR a non-exclusive, limited license to use for such Project the portions of the Vendor Proprietary Software (if any) as are required to incorporate such Project into TexasOnline 2.0. Such license shall expire upon completion of the Project.

(c) Ownership of modifications. “Modifications” means modifications, enhancements, improvements, corrections, translations, or other changes to software which constitute derivative works of the software or incorporate any portion of the software.

(d) In the event the Vendor makes or has made any Modifications to any software owned by the State under this Master Agreement, the State shall own the Modifications, and Vendor hereby assigns all of its rights (including intellectual property rights) to such Modifications to the State. Upon the request of the State, Vendor will give a written assignment of the Modifications to the State. The Vendor retains a non-exclusive, perpetual and paid-up license to use the Modifications in performing services for the State under this Master Agreement, and to use the Modifications to provide services to other governments, including the right to sub-license or further license those Modifications to other governments.

(e) The Vendor shall own all Modifications to the Vendor Proprietary Software made by the Vendor and any Modifications to the Vendor Proprietary Software made by or on behalf of the State. The State hereby assigns its rights (including intellectual property rights) to such Modifications to the Vendor, and agrees to obtain from any contractor authorized to provide Modifications to the Vendor Proprietary Software on behalf of the State, an executed assignment of all rights (including intellectual property rights) to the Modifications to the Vendor. The Vendor's non-exclusive license to use Vendor Proprietary Software granted to the State under this Master Agreement shall extend to such Modifications; provided, however, Vendor's warranties and indemnities with respect to Vendor Proprietary Software do not extend to any Modifications made by the State or on behalf of the State by contractors other than Vendor and its Subcontractors.

Article 15. Liability

Section 15.01 Property damage.

(a) Vendor will protect DIR's real and personal property from damage arising from Vendor's, its agent's, and its Subcontractors' performance of this Master Agreement, and Vendor will be responsible for any loss, destruction, or damage to DIR's property that results from or is caused by Vendor's, its agents', or its Subcontractors' negligent or wrongful acts or omissions. Upon the loss of, destruction of, or damage to any property of DIR, Vendor will notify DIR thereof and, subject to direction from DIR, will take all reasonable steps to protect that property from further damage.

(b) Vendor agrees to observe and encourage its employees, agents, and Subcontractors to observe safety measures and proper operating procedures at DIR sites at all times.

(c) Vendor will distribute a policy statement to all of its employees, agents, and Subcontractors that directs the employee, agent, or Subcontractor to immediately report to DIR or to Vendor any special defect or unsafe condition encountered while on DIR premises. Vendor will immediately report to DIR any special defect or an unsafe condition it encounters or otherwise learns about.

Section 15.02 Risk of Loss.

During the period Deliverables are in transit and in possession of Vendor, its carriers or DIR prior to being accepted by DIR, Vendor will insure and bear the risk of loss or damage thereto, unless such loss or damage is caused by the negligence or intentional misconduct of DIR. After DIR accepts a Deliverable, the risk of loss or damage to the Deliverable will be borne by DIR, except loss or damage attributable to the negligence or intentional misconduct of Vendor's agents, employees or Subcontractors.

Section 15.03 Limitation of Liability.

(a) For any claim or cause of action arising under or related to the Master Agreement, none of the Parties will be liable to the other for indirect, punitive, special, or consequential damages, even if it is advised of the possibility of such damages.

(b) DIR'S LIABILITY TO VENDOR UNDER THE MASTER AGREEMENT WILL NOT EXCEED THE VENDOR PORTION OF TOTAL REVENUE GENERATED UNDER THE MASTER AGREEMENT IN THE TWELVE (12) MONTHS PRECEEDING THE FILING OF A LAWSUIT.

(c) Exceptions to Limitations of Liability. This Section will not apply with respect to:

(1) Losses occasioned by the fraud, willful misconduct, or gross negligence of a Party.

(2) Losses that are the subject of indemnification under this Master Agreement.

(3) Losses occasioned by the wrongful termination of this Master Agreement by Vendor.

(4) Losses occasioned by Vendor's refusal to provide Services (including Disentanglement assistance services). For purposes of this provision, "refusal" means the intentional cessation by Vendor, in a manner impermissible under this Master Agreement, of the performance of all or a material portion of the Services then required to be provided by Vendor under this Master Agreement.

(5) Losses occasioned by any breach of a Party's representations or warranties under this Master Agreement.

(6) Losses occasioned by any breach of a Party's obligations under Article 10.

(d) Items Not Considered Damages. The following will not be considered damages subject to, and will not be counted toward the liability exclusion or cap specified herein:

- (1) Service level credits assessed against Vendor pursuant to this Master Agreement.
- (2) Amounts withheld by DIR in accordance with this Master Agreement due to incorrect charges or services not provided.
- (3) Amounts paid by DIR but subsequently recovered from Vendor due to incorrect charges or services not provided.
- (4) Invoiced Charges and other amounts that are due and owing to Vendor for services under this Master Agreement.
- (e) Notwithstanding anything in this Master Agreement to the contrary, Vendor shall not be responsible for, shall have no liability with respect to, and shall suffer no penalty (including, without limitation, the imposition of liquidated damages or other monetary remedy) due to the use or other issues regarding any software supplied by DIR or its contractors (other than Vendor its agents or its Subcontractors) under this Master Agreement.

Article 16. Miscellaneous

Section 16.01 Bidding on Outside Projects.

(a) Prior to submitting an offer for an Outside Project, whether through a formal procurement process or through a quote process, Vendor must receive approval from the Project Review Board or Executive Steering Committee using the process outlined below. An Outside Project is defined as a project undertaken by Vendor which may reasonably be expected to affect Texas Online 2.0 equipment or resources and is entered into through a contract separate from this Master Agreement and any Customer Agreement.

(1) Vendor will submit to the Chairs of the Project Review Board a written statement identifying: (i) the Customer for which the proposed Outside Project will be performed; (ii) the period of performance for the Outside Project, (iii) the Business Case for the proposed Outside Project; (iv) what changes, if any would be required to the hardware and software then in use; and (v) what repercussions for TexasOnline 2.0 performance are anticipated. Such written statement will be submitted as soon as reasonably practicable prior to submission of the Proposed Bid, such that the Project Review Board will have ample time to consider the proposal and the impact of the project, if possible. The Parties acknowledge that there may be instances in which the Vendor has limited time to prepare a Proposed Bid and to submit it to the Project Review Board. In such instances, the Vendor will notify the Project Review Board of the need for expedited review, as defined in *Attachment H-1 the Policies and Procedures Manual* immediately upon Vendor's decision to prepare a bid for the Outside Project.

(2) The Chairs will promptly circulate the Vendor's written statement to all of the members of the Project Review Board, along with notice of the meeting (which meeting may be conducted by virtual means) at which the Board will consider the proposal.

(3) The Project Review Board will meet as soon as reasonably possible to consider the proposed Outside Project. The Project Review Board will notify Vendor as soon as reasonably possible of its decision to either (i) approve, or (ii) disapprove the proposed Outside Project because it will have an impact on TexasOnline 2.0. If the decision is to disapprove the proposed Outside Project, the Project Review Board will identify specifically the impact on TexasOnline 2.0 that will be caused by the proposed Outside Project and what steps, if any, by the Vendor would mitigate the perceived affect(s) and thus remove the Board's objection(s). If the Vendor agrees with the steps required by the Project Review Board, Vendor may proceed with the Proposed Bid without further review.

(4) Any disapproval of the proposed Outside Project by the Project Review Board may be appealed by Vendor to the Executive Steering Committee.

(5) Notwithstanding the foregoing, for Proposed Bids for Outside Projects in which the Vendor's efforts will entail less than 160 staff hours of work or cost less than \$25,000, (a "Minor Project") Vendor is not required to receive pre-approval of its proposal, but will instead submit a quarterly report to the Project Review Board summarizing any such Minor Projects accomplished during such period.