

GSS20875-CRISIS_MGT
Crisis Management After Action Services
Appendix D. Sample Professional Service Agreement

PROFESSIONAL SERVICES AGREEMENT
for
Crisis Management After Action Services
CONTRACT NUMBER GSS20875-CRISIS_MGT

This Professional Services Agreement (“Agreement”) is entered into as of _____, 20__ (Effective Date) and will end on _____, 20__, by and between the State of Delaware, Office of Management and Budget, Government Support Services ("Delaware"), and _____, (the “Vendor”), with offices at _____.

WHEREAS, Delaware desires to obtain certain services to conduct an after action review of actions related to Governor John C. Carney's Declaration of a State of Emergency dated March 12, 2020 in response to the Coronavirus Disease, COVID-19.

WHEREAS, Vendor desires to provide such services to Delaware on the terms set forth below;

WHEREAS, Delaware and Vendor represent and warrant that each party has full right, power and authority to enter into and perform under this Agreement;

FOR AND IN CONSIDERATION OF the premises and mutual agreements herein, Delaware and Vendor agree as follows:

1. Services.

- 1.1. Vendor shall perform for Delaware the services specified in the Appendices to this Agreement, attached hereto and made a part hereof.
- 1.2. Any conflict or inconsistency between the provisions of the following documents shall be resolved by giving precedence to such documents in the following order: (a) this Agreement (including any amendments or modifications thereto); (b) Delaware's request for proposals, attached hereto as Appendix A; and (c) Vendor's response to the request for proposals, attached hereto as Appendix B. The aforementioned documents are specifically incorporated into this Agreement and made a part hereof.
- 1.3. Delaware may, at any time, by written order, make changes in the scope of this Agreement and in the services or work to be performed. No services for which additional compensation may be charged by Vendor shall be furnished, without the written authorization of Delaware. When Delaware desires any addition or deletion to the deliverables or a change in the Services to be provided under this Agreement, it

shall notify Vendor, who shall then submit to Delaware a "Change Order" for approval authorizing said change. The Change Order shall state whether the change shall cause an alteration in the price or the time required by Vendor for any aspect of its performance under this Agreement. Pricing of changes shall be consistent with those established within this Agreement.

- 1.4. Vendor will not be required to make changes to its scope of work that result in Vendor's costs exceeding the current unencumbered budgeted appropriations for the services. Any claim of either party for an adjustment under Section 1 of this Agreement shall be asserted in the manner specified in the writing that authorizes the adjustment.

2. Payment for Services and Expenses.

- 2.1. The term of the initial contract shall be from [REDACTED], 20[REDACTED] through [REDACTED], 20[REDACTED]. The Contract may be renewed for two (2) one (1) year periods through negotiation between the Vendor and Government Support Services. The State reserves the right to extend this contract on a month-to-month basis for a period of up to three months after the term of the full contract has been completed.
- 2.2. As a Service subscription license costs shall be incurred at the individual license level only as the individual license is utilized within a fully functioning solution. Subscription costs will not be applicable during periods of implementation and solution development prior to the State's full acceptance of a working solution. Additional subscription license requests above actual utilization may not exceed 5% of the total and are subject to Delaware budget and technical review.
- 2.3. Delaware will pay Vendor for the performance of services described in Appendix A, Statement of Work. The fee will be paid in accordance with the payment schedule attached hereto as part of Appendix B.
- 2.4. Delaware's obligation to pay Vendor for the performance of services described in Appendix A, Statement of Work will not exceed the fixed fee amount of \$[REDACTED]. It is expressly understood that the work defined in the appendices to this Agreement must be completed by Vendor and it shall be Vendor's responsibility to ensure that hours and tasks are properly budgeted so that all services are completed for the agreed upon fixed fee. Delaware's total liability for all charges for services that may become due under this Agreement is limited to the total maximum expenditure(s) authorized in Delaware's purchase order(s) to Vendor.
- 2.5. The State reserves the right to pay by Automated Clearing House (ACH), Purchase Card (P-Card), or check. Agencies that are part of the First State Financial (FSF) system are required to identify the contract number GSS20875-CRISIS_MGT on all Purchase Orders (P.O.) and shall complete the same when entering P.O. information in the state's financial reporting system.
- 2.6. The State of Delaware intends to maximize the use of the Purchase Card (P-Card) for payment for goods and services provided under contract. Vendors shall not charge additional fees for acceptance of this payment method and shall incorporate any costs into their proposals. Additionally, there shall be no minimum or maximum limits on any P-Card transaction under the contract.

- 2.7. Vendor shall submit monthly invoices to Delaware in sufficient detail to support the services provided during the previous month. Delaware agrees to pay those invoices within thirty (30) days of receipt. In the event Delaware disputes a portion of an invoice, Delaware agrees to pay the undisputed portion of the invoice within thirty (30) days of receipt and to provide Vendor a detailed statement of Delaware's position on the disputed portion of the invoice within thirty (30) days of receipt. Delaware's failure to pay any amount of an invoice that is not the subject of a good-faith dispute within thirty (30) days of receipt shall entitle Vendor to charge interest on the overdue portion at the lower of 1.0% per month. All payments should be sent to the Vendor's identified address on record with the State of Delaware's Division of Accounting as identified in the completion of the electronic W-9.
- 2.8. Unless provided otherwise in an Appendix, all expenses incurred in the performance of the services are to be paid by Vendor. If an Appendix specifically provides for expense reimbursement, Vendor shall be reimbursed only for reasonable expenses incurred by Vendor in the performance of the services, including, but not necessarily limited to, travel and lodging expenses, communications charges, and computer time and supplies.
- 2.9. Delaware is a sovereign entity and shall not be liable for the payment of federal, state and local sales, use and excise taxes, including any interest and penalties from any related deficiency, which may become due and payable as a consequence of this Agreement.
- 2.10. Delaware shall subtract from any payment made to Vendor all damages, costs and expenses caused by Vendor's negligence, resulting from or arising out of errors or omissions in Vendor's work products, which have not been previously paid to Vendor.
- 2.11. Invoices shall be submitted to:

3. Responsibilities of Vendor.

- 3.1. Vendor shall be responsible for the professional quality, technical accuracy, timely completion, and coordination of all services furnished by Vendor, its subcontractors and its and their principals, officers, employees and agents under this Agreement. In performing the specified services, Vendor shall follow practices consistent with generally accepted professional and technical standards. Vendor shall be responsible for ensuring that all services, products and deliverables furnished pursuant to this Agreement comply with the standards promulgated by the Department of Technology and Information ("DTI") published at <http://dti.delaware.gov/>, and as modified from time to time by DTI during the term of this Agreement. If any service, product or deliverable furnished pursuant to this Agreement does not conform to DTI standards, Vendor shall, at its expense and option either (1) replace it with a conforming equivalent or (2) modify it to conform to DTI standards. Vendor shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages to Delaware caused by Vendor's failure to ensure compliance with DTI standards.
- 3.2. It shall be the duty of the Vendor to assure that all products of its effort are technically sound and in conformance with all pertinent Federal, State and Local statutes, codes, ordinances, resolutions and other regulations. Vendor will not produce a work product

that violates or infringes on any copyright or patent rights. Vendor shall, without additional compensation, correct or revise any errors or omissions in its work products.

3.3. Permitted or required approval by Delaware of any products or services furnished by Vendor shall not in any way relieve Vendor of responsibility for the professional and technical accuracy and adequacy of its work. Delaware's review, approval, acceptance, or payment for any of Vendor's services herein shall not be construed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement, and Vendor shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages to Delaware caused by Vendor's performance or failure to perform under this Agreement.

3.4. Vendor shall appoint a Project Manager who will manage the performance of services. All of the services specified by this Agreement shall be performed by the Project Manager, or by Vendor's associates and employees under the personal supervision of the Project Manager. The positions anticipated include:

Project	Team	Title	% of Project Involvement
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3.5. Designation of persons for each position is subject to review and approval by Delaware. Should the staff need to be diverted off the project for what are now unforeseeable circumstances, Vendor will notify Delaware immediately and work out a transition plan that is acceptable to both parties, as well as agree to an acceptable replacement plan to fill or complete the work assigned to this project staff position. Replacement staff persons are subject to review and approval by Delaware. If Vendor fails to make a required replacement within 30 days, Delaware may terminate this Agreement for default. Upon receipt of written notice from Delaware that an employee of Vendor is unsuitable to Delaware for good cause, Vendor shall remove such employee from the performance of services and substitute in his/her place a suitable employee.

3.6. Vendor shall furnish to Delaware's designated representative copies of all correspondence to regulatory agencies for review prior to mailing such correspondence.

3.7. Vendor agrees that its officers and employees will cooperate with Delaware in the performance of services under this Agreement and will be available for consultation with Delaware at such reasonable times with advance notice as to not conflict with their other responsibilities.

3.8. Vendor has or will retain such employees as it may need to perform the services required by this Agreement. Such employees shall not be employed by Delaware or any other political subdivision of Delaware.

3.9. Vendor will not use Delaware's name, either express or implied, in any of its advertising or sales materials without Delaware's express written consent.

3.10. The rights and remedies of Delaware provided for in this Agreement are in addition to any other rights and remedies provided by law.

4. Time Schedule.

- 4.1. A project schedule is included in Appendix A.
- 4.2. Any delay of services or change in sequence of tasks must be approved in writing by Delaware.
- 4.3. In the event that Vendor fails to complete the project or any phase thereof within the time specified in the Contract, or with such additional time as may be granted in writing by Delaware, or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this Agreement or any extensions thereof, Delaware shall suspend the payments scheduled as set forth in Appendix A.

5. State Responsibilities.

- 5.1. In connection with Vendor's provision of the Services, Delaware shall perform those tasks and fulfill those responsibilities specified in the appropriate Appendices.
- 5.2. Delaware agrees that its officers and employees will cooperate with Vendor in the performance of services under this Agreement and will be available for consultation with Vendor at such reasonable times with advance notice as to not conflict with their other responsibilities.
- 5.3. The services performed by Vendor under this Agreement shall be subject to review for compliance with the terms of this Agreement by Delaware's designated representatives. Delaware representatives may delegate any or all responsibilities under the Agreement to appropriate staff members, and shall so inform Vendor by written notice before the effective date of each such delegation.
- 5.4. The review comments of Delaware's designated representatives may be reported in writing as needed to Vendor. It is understood that Delaware's representatives' review comments do not relieve Vendor from the responsibility for the professional and technical accuracy of all work delivered under this Agreement.
- 5.5. Delaware shall, without charge, furnish to or make available for examination or use by Vendor as it may request, any data which Delaware has available, including as examples only and not as a limitation:
 - a. Copies of reports, surveys, records, and other pertinent documents;
 - b. Copies of previously prepared reports, job specifications, surveys, records, ordinances, codes, regulations, other documents, and information related to the services specified by this Agreement.

Vendor shall return any original data provided by Delaware.

- 5.6. Delaware shall assist Vendor in obtaining data on documents from public officers or agencies and from private citizens and business firms whenever such material is necessary for the completion of the services specified by this Agreement.

- 5.7. Vendor will not be responsible for accuracy of information or data supplied by Delaware or other sources to the extent such information or data would be relied upon by a reasonably prudent contractor.
- 5.8. Delaware agrees not to use Vendor's name, either express or implied, in any of its advertising or sales materials. Vendor reserves the right to reuse the nonproprietary data and the analysis of industry-related information in its continuing analysis of the industries covered.

6. Work Product.

- 6.1. All materials, information, documents, and reports, whether finished, unfinished, or draft, developed, prepared, completed, or acquired by Vendor for Delaware relating to the services to be performed hereunder shall become the property of Delaware and shall be delivered to Delaware's designated representative upon completion or termination of this Agreement, whichever comes first. Vendor shall not be liable for damages, claims, and losses arising out of any reuse of any work products on any other project conducted by Delaware. Delaware shall have the right to reproduce all documentation supplied pursuant to this Agreement.
- 6.2. Vendor retains all title and interest to the data it furnished and/or generated pursuant to this Agreement. Retention of such title and interest does not conflict with Delaware's rights to the materials, information and documents developed in performing the project. Upon final payment, Delaware shall have a perpetual, nontransferable, non-exclusive paid-up right and license to use, copy, modify and prepare derivative works of all materials in which Vendor retains title, whether individually by Vendor or jointly with Delaware. Any and all source code developed in connection with the services provided will be provided to Delaware, and the aforementioned right and license shall apply to source code. The parties will cooperate with each other and execute such other documents as may be reasonably deemed necessary to achieve the objectives of this Section.
- 6.3. In no event shall Vendor be precluded from developing for itself, or for others, materials that are competitive with the Deliverables, irrespective of their similarity to the Deliverables. In addition, Vendor shall be free to use its general knowledge, skills and experience, and any ideas, concepts, know-how, and techniques within the scope of its consulting practice that are used in the course of providing the services.
- 6.4. Notwithstanding anything to the contrary contained herein or in any attachment hereto, any and all intellectual property or other proprietary data owned by Vendor prior to the effective date of this Agreement ("Preexisting Information") shall remain the exclusive property of Vendor even if such Preexisting Information is embedded or otherwise incorporated into materials or products first produced as a result of this Agreement or used to develop such materials or products. Delaware's rights under this section shall not apply to any Preexisting Information or any component thereof regardless of form or media.

7. Confidential Information.

To the extent permissible under 29 *Del. C.* ' 10001, et seq., the parties to this Agreement shall preserve in strict confidence any information, reports or documents obtained, assembled or prepared in connection with the performance of this Agreement.

8. Warranty.

8.1. Recipient hereby warrants that:

8.1.1. All services and deliverables provided hereunder will be performed in a good and workmanlike manner, technically sound and in conformance with all applicable federal, state and local statutes, Executive Orders and Declarations, codes, ordinances, resolutions and other regulations applicable to the services. Recipient agrees to correct or re-perform any services not in compliance with this warranty.

8.1.2. Recipient will not provide access to a portal or other software, or produce work product, that violates or infringes on any copyright, trademark, patent or other intellectual property rights. Recipient shall, without additional compensation, correct or revise any errors or omissions in the portal, software or work product.

8.1.3. Third-party products within the scope of this Agreement shall be governed by the terms and conditions of the licenses or other Agreement(s) by which such products are governed. With respect to all third-party products and services purchased by Recipient for the Government in connection with the provision of the Services, Recipient shall pass through or assign to the Government the rights Recipient obtains from the manufacturers and/or Recipients of such products and services (including warranty and indemnification rights), all to the extent that such rights are assignable.

9. Indemnification

9.1. Recipient shall indemnify and hold harmless the Government, its agents and employees, from any and all liability, suits, actions or claims, together with all reasonable costs and expenses (including attorneys' fees), arising out of:

9.1.1. the negligence or other wrongful conduct of the Recipient, its agents or employees; or

9.1.2. Recipient's breach of any material provision of this Agreement that is not cured after notice and opportunity to cure.

9.2. Subject to the exceptions stated in subparagraph (c) below, if the Government promptly notifies Recipient in writing of a third party claim against the Government that any deliverable infringes a copyright or a trade secret of any third party, Recipient shall (i) defend such claim at its expense and (ii) pay any costs or damages that may be finally awarded against the Government.

9.3. Recipient shall not be required to indemnify Government, however, to the extent the claim of infringement stems from:

9.3.1. Government's misuse or modification of the deliverable;

9.3.2. Government's failure to use corrections or enhancements explicitly made available to Government by Recipient;

9.3.3. Government's use of the deliverable in combination with any product or information not owned or developed by Recipient;

9.3.4. Government's distribution, marketing or use for the benefit of third parties of the deliverable; or

9.3.5. Information, direction, specification or materials provided by Government.

- 9.4. In addition to remedies stated in subparagraph a above, if any deliverable is, or in Recipient's opinion is likely to be, held to be infringing, Recipient shall at its expense and option either
- 9.4.1. Procure the right for Government to continue using it;
 - 9.4.2. Replace it with a non-infringing equivalent; or
 - 9.4.3. Modify it to make it non-infringing.

10. Indemnification

10.1. Vendor shall indemnify and hold harmless the State, its agents and employees, from any and all liability, suits, actions or claims, together with all reasonable costs and expenses (including attorneys' fees) directly arising out of:

- a. the negligence or other wrongful conduct of the Vendor, its agents or employees, or
- b. Vendor's breach of any material provision of this Agreement not cured after due notice and opportunity to cure, provided Vendor shall have been notified promptly in writing by Delaware of any notice of such claim.

10.2. If Delaware promptly notifies Vendor in writing of a third party claim against Delaware that any Deliverable infringes a copyright or a trade secret of any third party, Vendor will defend such claim at its expense and will pay any costs or damages that may be finally awarded against Delaware. Vendor will not indemnify Delaware, however, if the claim of infringement is caused by:

- a. Delaware's misuse or modification of the Deliverable;
- b. Delaware's failure to use corrections or enhancements made available by Vendor;
- c. Delaware's use of the Deliverable in combination with any product or information not owned or developed by Vendor;
- d. Delaware's distribution, marketing or use for the benefit of third parties of the Deliverable or
- e. Information, direction, specification or materials provided by Client or any third party. If any Deliverable is, or in Vendor's opinion is likely to be, held to be infringing, Vendor shall at its expense and option either
 - i. Procure the right for Delaware to continue using it,
 - ii. Replace it with a non-infringing equivalent,
 - iii. Modify it to make it non-infringing.

The foregoing remedies constitute Delaware's sole and exclusive remedies and Vendor's entire liability with respect to infringement.

11. Employees.

- 11.1. Vendor has and shall retain the right to exercise full control over the employment, direction, compensation and discharge of all persons employed by Vendor in the performance of the services hereunder; provided, however, that it will, subject to scheduling and staffing considerations, attempt to honor Delaware's request for specific individuals.
- 11.2. Except as the other party expressly authorizes in writing in advance, neither party shall solicit, offer work to, employ, or contract with, whether as a partner, employee or independent contractor, directly or indirectly, any of the other party's Personnel during their participation in the services or during the twelve (12) months thereafter. For purposes of this Section, Personnel includes any individual or company a party employs as a partner, employee or independent contractor and with which a party comes into direct contact in the course of the services.
- 11.3. Possession of a Security Clearance, as issued by the Delaware Department of Safety and Homeland Security, may be required of any employee of Vendor who will be assigned to this project.

12. Independent Contractor.

- 12.1. It is understood that in the performance of the services herein provided for, Vendor shall be, and is, an independent contractor, and is not an agent or employee of Delaware and shall furnish such services in its own manner and method except as required by this Agreement. Vendor shall be solely responsible for, and shall indemnify, defend and save Delaware harmless from all matters relating to the payment of its employees, including compliance with social security, withholding and all other wages, salaries, benefits, taxes, exactions, and regulations of any nature whatsoever.
- 12.2. Vendor acknowledges that Vendor and any subcontractors, agents or employees employed by Vendor shall not, under any circumstances, be considered employees of Delaware, and that they shall not be entitled to any of the benefits or rights afforded employees of Delaware, including, but not limited to, sick leave, vacation leave, holiday pay, Public Employees Retirement System benefits, or health, life, dental, long-term disability or workers' compensation insurance benefits. Delaware will not provide or pay for any liability or medical insurance, retirement contributions or any other benefits for or on behalf of Delaware or any of its officers, employees or other agents.
- 12.3. Vendor shall be responsible for providing liability insurance for its personnel.
- 12.4. As an independent contractor, Vendor has no authority to bind or commit Delaware. Nothing herein shall be deemed or construed to create a joint venture, partnership, fiduciary or agency relationship between the parties for any purpose.

13. Dispute Resolution.

- 13.1. At the option of the parties, they shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of

management than the persons with direct responsibility for administration of this Agreement. All offers, promises, conduct and statements, whether oral or written, made in the course of the negotiation by any of the parties, their agents, employees, experts and attorneys are confidential, privileged and inadmissible for any purpose, including impeachment, in arbitration or other proceeding involving the parties, provided evidence that is otherwise admissible or discoverable shall not be rendered inadmissible.

13.2. If the matter is not resolved by negotiation, as outlined above, or, alternatively, OMB elects to proceed directly to mediation, then the matter will proceed to mediation as set forth below. Any disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to mediation by a mediator selected by the parties. If the matter is not resolved through mediation, it may be submitted for arbitration or litigation. OMB reserves the right to proceed directly to arbitration or litigation without negotiation or mediation. Any such proceedings held pursuant to this provision shall be governed by Delaware law and venue shall be in Delaware. Each party shall bear its own costs of mediation, arbitration or litigation, including attorneys' fees.

14. Remedies

14.1. Except as otherwise provided in this Agreement, including but not limited to Section 12 above, all claims, counterclaims, disputes, and other matters in question between the State of Delaware and the Contractor arising out of, or relating to, this Agreement, or a breach of it may be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State of Delaware.

15. Suspension.

15.1. Delaware may suspend performance by Vendor under this Agreement for such period of time as Delaware, at its sole discretion, may prescribe by providing written notice to Vendor at least 30 working days prior to the date on which Delaware wishes to suspend. Upon such suspension, Delaware shall pay Vendor its compensation, based on the percentage of the project completed and earned until the effective date of suspension, less all previous payments. Vendor shall not perform further work under this Agreement after the effective date of suspension. Vendor shall not perform further work under this Agreement after the effective date of suspension until receipt of written notice from Delaware to resume performance.

15.2. In the event Delaware suspends performance by Vendor for any cause other than the error or omission of the Vendor, for an aggregate period in excess of 30 days, Vendor shall be entitled to an equitable adjustment of the compensation payable to Vendor under this Agreement to reimburse Vendor for additional costs occasioned as a result of such suspension of performance by Delaware based on appropriated funds and approval by Delaware.

16. Termination.

16.1. This Agreement may be terminated in whole or in part by either party in the event of substantial failure of the other party to fulfill its obligations under this Agreement through no fault of the terminating party; but only after the other party is given:

- a. Not less than 20 calendar days written notice of intent to terminate; and
 - b. An opportunity for consultation with the terminating party prior to termination.
- 16.2. This Agreement may be terminated in whole or in part by Delaware for its convenience, but only after Vendor is given:
- a. Not less than 20 calendar days written notice of intent to terminate; and
 - b. An opportunity for consultation with Delaware prior to termination.
- 16.3. If termination for default is effected by Delaware, Delaware will pay Vendor that portion of the compensation which has been earned as of the effective date of termination, but:
- a. No amount shall be allowed for anticipated profit on performed or unperformed services or other work, and
 - b. Any payment due to Vendor at the time of termination may be adjusted to the extent of any additional costs occasioned to Delaware by reason of Vendor's default.
 - c. Upon termination for default, Delaware may take over the work and prosecute the same to completion by agreement with another party or otherwise. In the event Vendor shall cease conducting business, Delaware shall have the right to make an unsolicited offer of employment to any employees of Vendor assigned to the performance of the Agreement, notwithstanding the provisions of Section 10.2.
- 16.4. If after termination for failure of Vendor to fulfill contractual obligations it is determined that Vendor has not so failed, the termination shall be deemed to have been effected for the convenience of Delaware.
- 16.5. The rights and remedies of Delaware and Vendor provided in this section are in addition to any other rights and remedies provided by law or under this Agreement.
- 16.6. Gratuities.
- a. Delaware may, by written notice to Vendor, terminate this Agreement if it is found after notice and hearing by Delaware that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by Vendor or any agent or representative of Vendor to any officer or employee of Delaware with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending or making of any determinations with respect to the performance of this Agreement.
 - b. In the event this Agreement is terminated as provided in 14.6.a hereof, Delaware shall be entitled to pursue the same remedies against Vendor it could pursue in the event of a breach of this Agreement by Vendor.
 - c. The rights and remedies of Delaware provided in Section 14.6 shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

17. Severability.

If any term or provision of this Agreement is found by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable, the same shall not affect the other terms or provisions hereof or the whole of this Agreement, but such term or provision shall be deemed modified to the extent necessary in the court's opinion to render such term or provision enforceable, and the rights and obligations of the parties shall be construed and enforced accordingly, preserving to the fullest permissible extent the intent and agreements of the parties herein set forth.

18. Assignment; Subcontracts.

18.1. To the extent that sub-contracting or assignments are authorized by a contract or other written Agreement, Recipient agrees that each of its reporting, auditing, invoicing, and certification requirements shall be expressly required of any such subcontractor or assignee.

18.2. Use of subcontractors must be clearly explained in the proposal, and subcontractors must be identified by name. Any sub-contractors must be approved by State of Delaware.

19. Force Majeure

19.1. Neither the Recipient nor the Government shall be held liable for non-performance under the terms and conditions of this Agreement due, but not limited to:

19.1.1. Acts of God; labor disturbances; accidents; failure of a governmental entity to issue a permit or approval required for performance when the Contractor has filed proper and timely application with the appropriate government entity; civil disorders; acts of aggression; changes in any law or regulation adopted or issued by a governmental entity after the date of this Agreement; a court order; explosions; failure of utilities; material shortages;

19.1.2. Diseases, plagues, quarantine, epidemics or pandemics;

19.1.3. Federal, state, or local work or travel restrictions to control, mitigate, or reduce transmission of diseases, plagues, epidemics or pandemics; or

19.1.4. The State's need to occupy, utilize, or repurpose an active or prospective work area due to diseases, plagues, quarantine, epidemics, pandemics, work or travel restrictions, and the need to control, mitigate, or reduce transmission of diseases, plagues, epidemics or pandemics.

19.1.5. Each party shall notify the other in writing of any situation that may prevent performance under the terms and conditions of this contract within 2 business days of the party's knowledge of significant non-performance risk.

19.1.6. Notwithstanding the content of subparagraphs (A) through (D) of this paragraph, Recipient agrees that any event giving rise to Force Majeure as defined herein shall not relieve the Recipient of the obligation to perform and carry out any of the Mandatory Terms and Conditions set forth in this document.

20. Non-Appropriation of Funds.

20.1. Validity and enforcement of this Agreement is subject to appropriations by the General Assembly of the specific funds necessary for contract performance. Should such funds not be so appropriated Delaware may immediately terminate this Agreement, and

absent such action this Agreement shall be terminated as to any obligation of the State requiring the expenditure of money for which no specific appropriation is available, at the end of the last fiscal year for which no appropriation is available or upon the exhaustion of funds.

20.2. Notwithstanding any other provisions of this Agreement, this Agreement shall terminate and Delaware's obligations under it shall be extinguished at the end of the fiscal year in which Delaware fails to appropriate monies for the ensuing fiscal year sufficient for the payment of all amounts which will then become due.

21. State of Delaware Business License.

Vendor and all subcontractors represent that they are properly licensed and authorized to transact business in the State of Delaware as provided in 30 *Del. C.* ' 2502.

22. Complete Agreement.

22.1. This agreement and its Appendices shall constitute the entire agreement between Delaware and Vendor with respect to the subject matter of this Agreement and shall not be modified or changed without the express written consent of the parties. The provisions of this agreement supersede all prior oral and written quotations, communications, agreements and understandings of the parties with respect to the subject matter of this Agreement.

22.2. If the scope of any provision of this Agreement is too broad in any respect whatsoever to permit enforcement to its full extent, then such provision shall be enforced to the maximum extent permitted by law, and the parties hereto consent and agree that such scope may be judicially modified accordingly and that the whole of such provisions of the Agreement shall not thereby fail, but the scope of such provision shall be curtailed only to the extent necessary to conform to the law.

22.3. Vendor may not order any product requiring a purchase order prior to Delaware's issuance of such order. Each Appendix, except as its terms otherwise expressly provide, shall be a complete statement of its subject matter and shall supplement and modify the terms and conditions of this Agreement for the purposes of that engagement only. No other agreements, representations, warranties or other matters, whether oral or written, shall be deemed to bind the parties hereto with respect to the subject matter hereof.

23. Miscellaneous Provisions.

23.1. In performance of this Agreement, Vendor shall comply with all applicable federal, state and local laws, ordinances, codes and regulations. Vendor shall solely bear the costs of permits and other relevant costs required in the performance of this Agreement.

23.2. Neither this Agreement nor any appendix may be modified or amended except by the mutual written agreement of the parties. No waiver of any provision of this Agreement shall be effective unless it is in writing and signed by the party against which it is sought to be enforced.

- 23.3. The delay or failure by either party to exercise or enforce any of its rights under this Agreement shall not constitute or be deemed a waiver of that party's right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right.
- 23.4. Vendor covenants that it presently has no interest and that it will not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. Vendor further covenants, to its knowledge and ability, that in the performance of said services no person having any such interest shall be employed.
- 23.5. Vendor acknowledges that Delaware has an obligation to ensure that public funds are not used to subsidize private discrimination. Vendor recognizes that if they refuse to hire or do business with an individual or company due to reasons of race, color, gender, ethnicity, disability, national origin, age, or any other protected status, Delaware may declare Vendor in breach of the Agreement, terminate the Agreement, and designate Vendor as non-responsible.
- 23.6. Vendor warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, or a percentage, brokerage or contingent fee. For breach or violation of this warranty, Delaware shall have the right to annul this contract without liability or at its discretion deduct from the contract price or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.
- 23.7. This Agreement was drafted with the joint participation of both parties and shall be construed neither against nor in favor of either, but rather in accordance with the fair meaning thereof.
- 23.8. Vendor shall maintain all public records, as defined by 29 *Del. C.* § 502(1), relating to this Agreement and its deliverables for the time and in the manner specified by the Delaware Division of Archives, pursuant to the Delaware Public Records Law, 29 *Del. C.* Ch. 5. During the term of this Agreement, authorized representatives of Delaware may inspect or audit Vendor's performance and records pertaining to this Agreement at the Vendor business office during normal business hours.
- 23.9. The State reserves the right to advertise a supplemental solicitation during the term of the Agreement if deemed in the best interest of the State.

24. Audit Access to Records

- 24.1. Government Auditing Rights. Recipient shall hold the Recipient's, and any applicable agent, subcontractor, or subconsultant's work and records open at all times for the inspection and/or audit by the Government, any applicable state or federal agency, the U.S. Inspector General, the Comptroller General of the United States, the State of Delaware Department of Justice, or any of their duly authorized representatives, including, any private firm of certified public accountants engaged by the entity, to any books, documents, papers, financial and accounting reports, schedules and records, and any other material of the Recipient and any applicable agent, subcontractor, or subconsultant which relate to this Agreement. The location of the inspection and/or audit will be at the Government's discretion and the inspection may be preceded by the

Government's demand for the production of documents to facilitate the performance of preliminary planning, analytic and examination procedures by the Government. Such access for an on-site inspection and/or audit shall be granted by Recipient during its normal business hours, after receipt by Recipient of at least ten (10) business days advance written notice of a request for such access, at its offices in the State of Delaware, or at such other place or places agreed to by Recipient and the requesting person; provided, however, that this notice provision shall not apply to the execution of any search warrants or subpoenas or where the Government has determined to conduct an unannounced site visit. Absent good cause for more frequent site visits, the Government agrees to conduct no more than one unannounced site visit per calendar year. The provisions of this section shall survive termination or cancellation of this Agreement.

- 24.2. **Mandatory Record Retention.** Recipient, and any applicable agent, subcontractor, or subconsultant retained by Recipient, must retain all books, documents, papers, financial and accounting reports, schedules and records, and any other material pertaining to costs incurred under this Agreement for not less than 6 years after the Government makes final payment and all other pending matters are closed and shall make the material available upon request for inspection and/or audit by the Government or any of the entities provided for in this Agreement. The entire Agreement includes all tasks regardless of individual task completion date. The Recipient, or any applicable agent, subcontractor, or subconsultant, shall be liable for Government costs incurred for subsequent audit reviews requested by the Recipient.
- 24.3. **Audited Financial Statements.** Recipient shall provide the Government with annual, audited financial statements, including all footnotes, prepared in accordance with U.S. generally accepted accounting principles (GAAP) for the most recent two accounting years at the time of this Agreement. In addition, the Recipient has an ongoing obligation to provide annual, audited financial statements for future accounting years within one hundred twenty (120) days after the end of the Recipient's accounting year and to provide financial statements for interim accounting periods upon the Government's request. The requirement to provide financial statements shall continue through the accounting year ending after the last payment is made by the Government.
- 24.4. **Tax Record Retention and Production.** Recipient agrees to provide the Government with any and all tax returns, employee or contractor tax documents and any other tax records upon the Government's request, for the Government's inspection and/or audit of the Recipient's use of the funds provided pursuant to this Agreement. Such tax returns, employee or contractor tax documents and other tax records include, but are not limited to, annual tax returns, payroll tax returns, quarterly unemployment tax filings, and other employee or contractor tax related information.
- 24.5. **Cross-Government Sharing of Records.** Recipient specifically agrees to allow the sharing or exchange of any information or documents which relates to this Agreement among the Government and its political subdivisions, as well as the Federal Government.
- 24.6. **Public Access to Audit Materials.** While confidential business information as defined by the State of Delaware Freedom of Information Act shall remain entitled to protection and shall not be disclosed to members of the public by the Government unless required by law or court order, Recipient, and its approved subcontractors and assignees, shall expect that invoices, reports, certifications, and any Government-generated audit report regarding Recipient's performance may be made available to the public.

25. Insurance.

As a part of the contract requirements, the contractor must obtain at its own cost and expense and keep in force and effect during the term of this contract, including all extensions, the minimum coverage limits specified below with a carrier satisfactory to the State. All contractors must carry the following coverage depending on the type of service or product being delivered.

- a. Worker's Compensation and Employer's Liability Insurance in accordance with applicable law.
- b. Commercial General Liability - \$1,000,000 per occurrence/\$3,000,000 per aggregate.
- c. Automotive Liability Insurance covering all automotive units used in the work (including all units leased from and/or provided by the State to Vendor pursuant to this Agreement as well as all units used by Vendor, regardless of the identity of the registered owner, used by Vendor for completing the Work required by this Agreement to include but not limited to transporting Delaware clients or staff), providing coverage on a primary non-contributory basis with limits of not less than:
 1. \$1,000,000 combined single limit each accident, for bodily injury;
 2. \$250,000 for property damage to others;
 3. \$25,000 per person per accident Uninsured/Underinsured Motorists coverage;
 4. \$25,000 per person, \$300,000 per accident Personal Injury Protection (PIP) benefits as provided for in 21 Del. C. §2118; and
 5. Comprehensive coverage for all leased vehicles, which shall cover the replacement cost of the vehicle in the event of collision, damage or other loss.

The successful vendor must carry at least one of the following depending on the scope of work being performed.

- a. Medical/Professional Liability - \$1,000,000 per occurrence/\$3,000,000 per aggregate
- b. Miscellaneous Errors and Omissions - \$1,000,000 per occurrence/\$3,000,000 per aggregate
- c. Product Liability - \$1,000,000 per occurrence/\$3,000,000 aggregate or:
- d. Cyber Liability Insurance. Data such as names, addresses, phone numbers, email addresses, social security numbers, tax return information, bank account information, dates of birth, driver's license numbers and other personally identifiable or other confidential information maintained by Recipient under the Agreement (collectively, "PII") shall be encrypted at rest with validated cryptography standards as specified in National Institute of Standards and Technology FIPS140-2 Security Requirements. If

Recipient cannot offer encryption at rest, Recipient must maintain cyber security liability insurance coverage for any loss resulting from a data breach. The policy, if required, shall remain in place in the amounts set forth below for the term of the Agreement, inclusive of any extension(s), or for as long as the Recipient possesses or controls PII, whichever is longer.

Levels of cyber liability insurance required are based on the number of records with PII anticipated to be possessed or controlled by Recipient in connection with the Agreement. Should the actual number of PII records exceed the anticipated number, it is the Recipient's responsibility to ensure that sufficient coverage is obtained (see table below). In the event that Recipient fails to obtain sufficient coverage, Recipient shall be liable to cover damages and shall indemnify the Government for any damages, cost or expenses beyond the coverage amount.

Level	Number of PII records	Level of cyber liability insurance required (occurrence = data breach)
1	1-10,000	\$2,000,000 per occurrence
2	10,001 – 50,000	\$3,000,000 per occurrence
3	50,001 – 100,000	\$4,000,000 per occurrence
4	100,001 – 500,000	\$15,000,000 per occurrence
5	500,001 – 1,000,000	\$30,000,000 per occurrence
6	1,000,001 – 10,000,000	\$100,000,000 per occurrence

The insurance policy covering Cyber Liability shall include but not be limited to, coverage for liabilities relating to Recipient's or any independent contractor's or subcontractor's premises, operations, products, completed operations, or conduct relating to the Agreement. At a minimum, the policy must include third-party coverage for credit monitoring, notification costs to data breach victims, and regulatory penalties and fines. Recipient shall be responsible for any deductible or self-insured retention contained in the insurance policy. The coverage under the policy shall be primary, and not excess, to any other insurance carried by the Recipient.

Should any of the above described policies be cancelled before expiration date thereof, notice will be delivered in accordance with the policy provisions.

Before any work is done pursuant to this Agreement, the Certificate of Insurance and/or copies of the insurance policies, referencing the contract number stated herein, shall be filed with the State. The certificate holder is as follows:

State of Delaware
 Government Support Services
 Contract No: ENTER CONTRACT NUMBER
 100 Enterprise Place, Suite 4
 Dover, DE 19904-8202

Nothing contained herein shall restrict or limit the Vendor's right to procure insurance coverage in amounts higher than those required by this Agreement. To the extent that the Vendor procures insurance coverage in amounts higher than the amounts required by this Agreement, all said additionally procured coverages will be applicable to any loss or claim and shall replace the insurance obligations contained herein.

To the extent that Vendor has complied with the terms of this Agreement and has procured insurance coverage for all vehicles Leased and/or operated by Vendor as part of this Agreement, the State of Delaware's self-insured insurance program shall not provide any coverage whether coverage is sought as primary, co-primary, excess or umbrella insurer or coverage for any loss of any nature.

In no event shall the State of Delaware be named as an additional insured on any policy required under this agreement.

The vendor shall provide a Certificate of Insurance (COI) as proof that the vendor has the required insurance. The COI shall be provided to agency contact prior to any work being completed by the awarded vendor(s).

The State of Delaware shall not be named as an additional insured.

Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.

26. Performance Requirements

The selected Vendor will warrant that it possesses, or has arranged through subcontractors, all capital and other equipment, labor, materials, and licenses necessary to carry out and complete the work hereunder in compliance with any and all Federal and State laws, and County and local ordinances, regulations and codes.

27. Performance Bond

There is no Performance Bond requirement.

28. Assignment of Antitrust Claims.

As consideration for the award and execution of this contract by the State, the Vendor hereby grants, conveys, sells, assigns, and transfers to the State of Delaware all of its right, title and interest in and to all known or unknown causes of action it presently has or may now or hereafter acquire under the antitrust laws of the United States and the State of Delaware, regarding the specific goods or services purchased or acquired for the State pursuant to this contract. Upon either the State's or the Vendor notice of the filing of or reasonable likelihood of filing of an action under the antitrust laws of the United States or the State of Delaware, the State and Vendor shall meet and confer about coordination of representation in such action.

29. Applicable Law.

29.1. The laws of the State of Delaware shall apply, except where Federal Law has precedence. The successful vendor consents to jurisdiction and venue in the State of Delaware.

29.2. In submitting a proposal, Vendors certify that they comply with all federal, state and local laws applicable to its activities and obligations including:

29.2.1. the laws of the State of Delaware;

29.2.2. the applicable portion of the Federal Civil Rights Act of 1964;

- 29.2.3. the Equal Employment Opportunity Act and the regulations issued there under by the federal government;
 - 29.2.4. a condition that the proposal submitted was independently arrived at, without collusion, under penalty of perjury; and
 - 29.2.5. that programs, services, and activities provided to the general public under resulting contract conform with the Americans with Disabilities Act of 1990, and the regulations issued there under by the federal government.
- 29.3. If any vendor fails to comply with (28.2.1) through (28.2.5) of this paragraph, the State of Delaware reserves the right to disregard the proposal, terminate the contract, or consider the vendor in default.
- 29.4. The selected vendor shall keep itself fully informed of and shall observe and comply with all applicable existing Federal and State laws, and County and local ordinances, regulations and codes, and those laws, ordinances, regulations, and codes adopted during its performance of the work.

30. Certifications Required

- 30.1. All of Recipient's invoices and reports shall contain the following certification:
- 30.1.1. Recipient acknowledges that each of its requests for payment under this Agreement constitutes an express true and correct certification that the goods or services for which payment is sought comply with all statutory, regulatory, and contractual requirements related to this Agreement (including the "CARES Act"), and that the Recipient is not holding, billing, or otherwise requesting, any funds which the Government is entitled to possess. Recipient recognizes and agrees that the Government seeks to enter into this Agreement, on an expedited basis and, as such, is explicitly relying on the truth and accuracy (including the lack of any material omissions) of each representation, warranty, certification, and other statement made by Recipient in connection with its entering into this Agreement, including any boilerplate in this Agreement, or related documents, as an express condition of the Government's Agreement to provide payment pursuant to this Agreement.

31. Misrepresentation Illegal

In connection with this Agreement, Recipient agrees not to engage in any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission whether or not any person has in fact been misled, deceived or damaged thereby (collectively, the 'misrepresentation'), and agrees that any such misrepresentation shall be treated as an unlawful practice under § 2513 of Title 6 of the Delaware Code. Material misrepresentation(s) will be assessed on the basis of individual transactions and/or combined transactions at the Government's discretion.

32. Price Gouging Illegal

Recipient agrees not to engage in price gouging as herein defined and understands and agrees that any price gouging shall be treated as an unlawful practice under § 2513 of Title 6 of the Delaware Code and a violation of Subchapter II of Chapter 25 of Title 6. 'Price gouging' shall have the meaning set forth in paragraph 9 of Governor John C. Carney's Declaration of a State of Emergency dated March 12, 2020, as clarified by paragraph 3 of

Governor Carneys 9th Modification of the Declaration of a State of Emergency dated April 1, 2020.

33. Non- Compliance is a Material Breach of Contract

Recipient acknowledges that any failure to comply with the terms and conditions included by virtue of a Mandatory Term & Condition listed herein shall constitute a material breach of Agreement.

34. Non-Compliance Tolls Government Payment Obligation

Any payment obligation by the Government for services rendered or materials provided during a period of time in which a Recipient's report was not timely delivered, or during which a defective report was delivered, shall be tolled until Recipient has fully complied with all of its outstanding and overdue reporting obligations

35. Non-Waiver

The delay or failure by the Government to exercise or enforce any of its rights under a contract, Agreement, or other transaction shall not constitute or be deemed a waiver of the Government's right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right.

36. No Third Party Beneficiary Rights

This Agreement, is not intended to and shall not be construed to give any Third Party any interest or rights (including, without limitation, any third party beneficiary rights) with respect to or in connection with any Agreement or provision contained herein or contemplated hereby, even if indirectly benefited by it.

37. Jurisdiction and Venue

Recipient irrevocably consents and submits to the exclusive jurisdiction of the State courts of the State of Delaware located in New Castle County, Delaware and the United States District Court for the District of Delaware and waives any objection based on venue or forum non conveniens with respect to any action instituted therein arising under this Agreement, or any of the other Agreement(s) or in any way connected with or related or incidental to the dealings of the parties hereto in respect of this Agreement or the transactions related hereto or thereto, in each case whether now existing or hereafter arising, and whether in contract, tort, equity or otherwise, and agree that any dispute with respect to any such matters shall be heard only in the courts and geographic locations described above.

38. Governing Law

This Agreement, and all claims or causes of action (whether in contract, tort or statute) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement (including any claim or cause of action based upon, arising out of or related to any representation or warranty made in or in connection with this Agreement, or as an inducement to enter into same), shall be governed by, and enforced in

accordance with, the internal laws of the Government, including its statutes of limitations without regard to its rules of conflict of laws.

39. Limitation of Liability

- 39.1. Except for specifically identified fees and expenses that may be due and owing under the Agreement, and notwithstanding anything to the contrary in this Agreement, neither Government nor any officers, members, employees or attorneys of the foregoing, shall have any liability to Recipient or any other party for fees (including attorneys' fees), expenses, suits, actions, claims or damages, whether direct or indirect, compensatory or punitive, actual or consequential, in or for actions, claims, causes of action or rights, including indemnification rights, arising out of or related in any way to this Agreement.
- 39.2. Notwithstanding anything to the contrary herein, no provision of this Agreement shall constitute a waiver or limitation of any right held by the Government or United States of America that may exist under applicable statutory or common law
- 39.3. Notwithstanding anything to the contrary herein, to the extent available under applicable law, Government and their respective officers, members, employees and attorneys, expressly reserve all rights, claims, arguments, defenses and immunities, including, without limitation, claims or defenses based on sovereign immunity, qualified immunity and other statutory or common law rights, claims, defenses or immunities; provided, however, that Recipient shall have the right to seek to enforce this Agreement in the courts of this State.

40. Notices.

Any and all notices required by the provisions of this Agreement shall be in writing and shall be mailed, certified or registered mail, return receipt requested. All notices shall be sent to the following addresses:

DELAWARE:
Government Support Services
100 Enterprise Place, Suite 4
Dover, DE 19904

VENDOR:
(Vendor contact address)

IN WITNESS THEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date and year first above written.

STATE OF DELAWARE
Government Support Services

Witness

Name

Title

Date

VENDOR

Witness

Name

Title