

APPENDIX D – SAMPLE PROFESSIONAL SERVICES AGREEMENT

**for
[ENTER CONTRACT NAME]
Contract No. [Enter Contract Number]**

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, Department of Correction (“Delaware” or “DDOC” as appropriate), and _____ (“Provider”).

WHEREAS, Delaware desires to obtain certain services to provide _____; and

WHEREAS, DDOC issued Request for Proposal No. _____ on or about _____, 20__ and selected Provider as the winning bidder; and

WHEREAS, Provider acknowledges, accepts, and will comply with all terms and conditions of said RFP as outlined in the RFP specifications; and

WHEREAS, the Commissioner of the DDOC has legal authority to enter into any and all contracts, 29 *Del. C.* § 8903(5); and

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

WHEREAS, Delaware and Provider 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 promises and mutual agreements herein, Delaware and Provider agree as follows:

1. Services.

- 1.1. Provider shall perform for Delaware the services specified in Appendix-1 to this Agreement, attached hereto and made a part hereof. Provider shall comply with all DDOC policies and other laws and regulations in performing the services.
- 1.2. Delaware may, at any time, in writing, 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 Provider 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 Provider, 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 Provider for any aspect of its performance under this Agreement. Pricing of changes shall be consistent with those established within this Agreement.
- 1.3. Provider will not be required to make changes to its scope of work that result in Provider’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 Agreement shall be from [REDACTED], 20[REDACTED] through [REDACTED], 20[REDACTED]. The Agreement may be renewed for three (3) one (1) year periods through negotiation between the Provider and Delaware.
- 2.2. Delaware will pay Provider for the performance of services in accordance with the payment schedule described in Appendix 1.
- 2.3. Delaware's obligation to pay Provider for the performance of services will not exceed the total amount set forth in Appendix 1. It is expressly understood that the work defined in Appendix 1 to this Agreement must be completed by Provider and it shall be Provider'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 Provider.
- 2.4. 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 on all Purchase Orders (P.O.) and shall complete the same when entering P.O. information in the state's financial reporting system.
- 2.5. The State of Delaware intends to maximize the use of the Purchase Card (P-Card) for payment for goods and services provided under contract. Providers 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.
- 2.6. Provider shall submit 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 Provider 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 may be charged interest on the overdue portion at no more than 1.0% per month. All payments should be sent to the Provider's identified address on record with the State of Delaware's Division of Accounting as identified in the completion of the electronic W-9.
- 2.7. Unless provided otherwise in an Appendix, all expenses incurred in the performance of the services are to be paid by Provider. If an Appendix specifically provides for expense reimbursement, Provider shall be reimbursed only for reasonable expenses incurred by Provider in the performance of the services, including, but not necessarily limited to, travel and lodging expenses, communications charges, and computer time and supplies.

- 2.8. In accordance with the Internal Revenue Service regulations, the State of Delaware is generally exempt from federal excise tax for communications, certain fuels, sales by manufacturers and the tax on heavy trucks, trailers and tractors. Refer to [IRS Publication 510 - Excise Taxes](#) for more detail. Per IRS regulations, all exemption certificates must be specific to the vendor and the type of excise tax. If an exemption certificate is requested by a vendor, the Division of Accounting will work with the agency and vendor to complete the appropriate certificate. Such taxes shall not be included in prices quoted.
- 2.9. Delaware shall subtract from any payment made to Provider all damages, costs and expenses caused by Provider's breach of contract, resulting from or arising out of errors or omissions in Provider's work products, which have not been previously paid to Provider.
- 2.10. Invoices shall be submitted to DDOC via email at:
DOC_AcctsPayable_Mail@delaware.gov

3. Responsibilities of Provider.

- 3.1. Provider shall be responsible for the professional quality, technical accuracy, timely completion, and coordination of all services furnished by Provider, its subcontractors and its and their principals, officers, employees and agents under this Agreement. In performing the specified services, Provider shall follow practices consistent with generally accepted professional and technical standards. Provider shall be responsible for ensuring that all services, products and deliverables furnished pursuant to this Agreement comply with the standards promulgated by the Delaware Department of Technology and Information ("DTI") published at <https://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, Provider shall, at its expense and option either (1) replace it with a conforming equivalent or (2) modify it to conform to DTI standards. Provider shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages to Delaware caused by Provider's failure to ensure compliance with DTI standards.
- 3.2. It shall be the duty of the Provider 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 including DDOC policies. Provider will not produce a work product that violates or infringes on any copyright or patent rights. Provider 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 Provider shall not in any way relieve Provider of responsibility for the professional and technical accuracy and adequacy of its work. Delaware's review, approval, acceptance, or payment for any of Provider'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 Provider shall be and remain liable in accordance with the terms of this Agreement and applicable law for all

damages to Delaware caused by Provider's performance or failure to perform under this Agreement.

- 3.4. All of the services specified by this Agreement shall be performed by the Provider or by Provider's employees or agents under the personal supervision of the Provider. Prior to performing any work under this Agreement, Provider and Provider's employees and agents shall submit to any criminal history or other background checks that may be requested by Delaware and shall comply with all DDOC policies. DDOC may refuse access to any Delaware facility or to any sensitive information possessed or controlled by Delaware for any person not conforming to DDOC policy or whose criminal history or background check results are not acceptable to DDOC, in its sole and absolute discretion.
- 3.5. In accordance with the Federal Prison Rape Elimination Act of 2003 and [DDOC Policy 8.60](#), the Provider agrees to report allegations of sexual misconduct promptly, fully cooperate with investigation inquiries and participate in training as directed by the DDOC, within thirty (30) days of entering into contract. Provider and Provider staff's (including volunteers and subcontractors) agree to abide by DDOC Policy 8.60. The Provider acknowledges that all allegations of staff sexual misconduct and/or harassment will be investigated and, if substantiated, will result in discipline up to and including termination. All substantiated cases will be referred to the Delaware Department of Justice for prosecution. Failure to report such misconduct, delays in reporting, or material omissions shall be grounds for termination. If DDOC Policy is modified, the Provider will be notified and shall comply.
- 3.6. In accordance with DDOC Policy 16.1, the Provider may be required to complete Contractual Staff Orientation.
- 3.7. Delaware may terminate this Agreement for default if at any time it learns that Provider's criminal history or background check results are not acceptable to DDOC, in its sole and absolute discretion. Upon receipt of written notice from Delaware that an employee or agent of Provider is unsuitable to Delaware for good cause, including, without limitation, violation of DDOC policies, or a criminal history or background check that yield results that are not acceptable to DDOC, in its sole and absolute discretion, Provider shall remove such employee from the performance of services and substitute in his/her place a suitable employee or agent.
- 3.8. 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, Provider 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 Provider 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 Provider is unsuitable to Delaware for good cause, Provider shall remove such employee from the performance of services and substitute in his/her place a suitable employee.

- 3.9. Provider shall furnish to Delaware's designated representative copies of all correspondence to regulatory agencies for review prior to mailing such correspondence.
- 3.10. Provider 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.
- 3.11. Provider 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.
- 3.12. Provider will not use Delaware's name, either express or implied, in any of its advertising or sales materials without Delaware's express written consent.
- 3.13. The rights and remedies of Delaware provided for in this Agreement are in addition to any other rights and remedies provided by law.

4. State Responsibilities.

- 4.1. In connection with Provider's provision of the services, Delaware shall perform those tasks and fulfill those responsibilities specified in Appendix 1.
- 4.2. Delaware agrees that its officers and employees will cooperate with Provider in the performance of services under this Agreement and will be available for consultation with Provider at such reasonable times with advance notice as to not conflict with their other responsibilities.
- 4.3. The services performed by Provider 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 Provider by written notice before the effective date of each such delegation.
- 4.4. The review comments of Delaware's designated representatives may be reported in writing as needed to Provider. It is understood that Delaware's representatives' review comments do not relieve Provider from the responsibility for the professional and technical accuracy of all work delivered under this Agreement.
- 4.5. Provider 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.
- 4.6. Delaware agrees not to use Provider's name, either express or implied, in any of its advertising or sales materials. Provider reserves the right to reuse the nonproprietary data and the analysis of industry-related information in its continuing analysis of the industries covered.

5. Work Product.

- 5.1. All materials, information, documents, and reports, whether finished, unfinished, or draft, developed, prepared, completed, or acquired by Provider 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. Provider 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.
- 5.2. Provider 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 Provider retains title, whether individually by Provider 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.
- 5.3. In no event shall Provider 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, Provider 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.
- 5.4. Notwithstanding anything to the contrary contained herein or in any attachment hereto, any and all intellectual property or other proprietary data owned by Provider prior to the effective date of this Agreement ("Preexisting Information") shall remain the exclusive property of Provider 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.

6. 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.

7. Warranty.

- 7.1. Provider warrants that its services will be performed in a good and workmanlike manner. Provider agrees to re-perform any work not in compliance with this warranty brought to its attention within a reasonable time after that work is performed.

7.2. Third-party products within the scope of this Agreement are warranted solely under the terms and conditions of the licenses or other agreements by which such products are governed. With respect to all third-party products and services purchased by Provider for Delaware in connection with the provision of the services, Provider shall pass through or assign to Delaware the rights Provider obtains from the manufacturers and/or providers of such products and services (including warranty and indemnification rights), all to the extent that such rights are assignable.

8. Indemnification; Limitation of Liability.

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

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

- a. Delaware's misuse or modification of the Deliverable, or
- b. Delaware's failure to use corrections or enhancements made available by Provider, or
- c. Delaware's use of the Deliverable in combination with any product or information not owned or developed by Provider, or
- 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 Provider's opinion is likely to be, held to be infringing, Provider shall at its expense and option either:
 - i. Procure the right for Delaware to continue using it, or
 - ii. Replace it with a non-infringing equivalent, or
 - iii. Modify it to make it non-infringing.

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

9. Employees.

- 9.1. Except as provided herein with respect to removal of employees for good cause, and subject to the DDOC's sole and absolute right to maintain safety and security and otherwise manage the operations of its facilities, Provider has and shall retain the right to exercise full control over the employment, direction, compensation and discharge of all persons employed by Provider 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.
- 9.2. 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.
- 9.3. Possession of a Security Clearance, as issued by the Delaware Department of Correction, may be required of any employee of Provider who will be assigned to this project.

10. Independent Contractor.

- 10.1. It is understood that in the performance of the services herein provided for, Provider 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. Provider 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.
- 10.2. Provider acknowledges that Provider and any subcontractors, agents or employees employed by Provider 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.
- 10.3. Provider shall be responsible for providing liability insurance for its personnel.
- 10.4. As an independent contractor, Provider 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.

11. Dispute Resolution.

- 11.1. 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.
- 11.2. If the matter is not resolved by negotiation, as outlined above, or, alternatively, the parties elect 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 a mediator selected by the parties. If the matter is not resolved through mediation, it may be submitted for arbitration or litigation. The Agency 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 State of Delaware law, and jurisdiction and venue shall be in the State of Delaware. Each party shall bear its own costs of mediation, arbitration, or litigation, including attorneys' fees.

12. Remedies.

Except as otherwise provided in this Agreement, including but not limited to Section 11 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.

13. Suspension.

- 13.1. Delaware may suspend performance by Provider under this Agreement for such period of time as Delaware, at its sole discretion, may prescribe by providing written notice to Provider at least 30 working days prior to the date on which Delaware wishes to suspend. Upon such suspension, Delaware shall pay Provider its compensation, based on the percentage of the project completed and earned until the effective date of suspension, less all previous payments. Provider shall not perform further work under this Agreement after the effective date of suspension until receipt of written notice from Delaware to resume performance.
- 13.2. In the event Delaware suspends performance by Provider for any cause other than the error or omission of the Provider, for an aggregate period in excess of 30 days, Provider shall be entitled to an equitable adjustment of the compensation payable to Provider under this Agreement to reimburse Provider for additional costs occasioned as a result of such suspension of performance by Delaware based on appropriated funds and approval by Delaware.

14. Termination.

- 14.1. 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 60 calendar days written notice of intent to terminate, and
 - b. An opportunity for consultation with the terminating party prior to termination.
- 14.2. This Agreement may be terminated in whole or in part by Delaware for its convenience, but only after Provider is given:
 - a. Not less than 60 calendar days written notice of intent to terminate, and
 - b. An opportunity for consultation with Delaware prior to termination.
- 14.3. If termination for default is affected by Delaware, Delaware will pay Provider 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 Provider at the time of termination may be adjusted to the extent of any additional costs occasioned to Delaware by reason of Provider'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 Provider shall cease conducting business, Delaware shall have the right to make an unsolicited offer of employment to any employees of Provider assigned to the performance of the Agreement, notwithstanding the provisions of Section 9.2.
- 14.4. If after termination for failure of Provider to fulfill contractual obligations, it is determined that Provider has not so failed, the termination shall be deemed to have been affected for the convenience of Delaware.
- 14.5. The rights and remedies of Delaware and Provider provided in this section are in addition to any other rights and remedies provided by law or under this Agreement.
- 14.6. Gratuities.
 - a. Delaware may, by written notice to Provider, 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 Provider or any agent or representative of Provider 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 Provider it could pursue in the event of a breach of this Agreement by Provider.
- c. The rights and remedies of Delaware provided herein shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

15. 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.

16. Assignment; Subcontracts.

- 16.1. Any attempt by Provider to assign or otherwise transfer any interest in this Agreement without the prior written consent of Delaware shall be void. Such consent shall not be unreasonably withheld.
- 16.2. Services specified by this Agreement shall not be subcontracted by Provider, without prior written approval of Delaware.
- 16.3. Approval by Delaware of Provider's request to subcontract or acceptance of or payment for subcontracted work by Delaware shall not in any way relieve Provider of responsibility for the professional and technical accuracy and adequacy of the work. All subcontractors shall adhere to all applicable provisions of this Agreement.
- 16.4. Provider shall be and remain liable for all damages to Delaware caused by negligent performance or non-performance of work under this Agreement by Provider, its subcontractor or its sub-subcontractor.
- 16.5. The compensation due shall not be affected by Delaware's approval of the Provider's request to subcontract.

17. Force Majeure; Applicability.

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

- 17.1. Acts of God, labor disturbances, accidents, failure of a governmental entity to issue a permit or approval required for performance when the Provider 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, or material shortages, or

- 17.2. Diseases, plagues, quarantine, epidemics, pandemics, or
- 17.3. Federal, state, or local work or travel restrictions to control, mitigate, or reduce transmission of diseases, plagues, epidemics, pandemics, or
- 17.4. Delaware'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.

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

18. Non-Appropriation of Funds.

- 18.1. 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.
- 18.2. 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.

19. State of Delaware Business License.

Provider and all subcontractors represent that they are properly licensed and authorized to transact business in the State of Delaware.

20. Complete Agreement.

- 20.1. This Agreement shall constitute the entire agreement between Delaware and Provider 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.
- 20.2. 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.

- 20.3. Provider may not order any product requiring a purchase order prior to Delaware's issuance of such order. The 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.

21. **Miscellaneous Provisions.**

- 21.1. In performance of this Agreement, Provider shall comply with all applicable federal, state and local laws, ordinances, codes and regulations. Provider shall solely bear the costs of permits and other relevant costs required in the performance of this Agreement.
- 21.2. This Agreement may only be modified 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.
- 21.3. 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.
- 21.4. Provider 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. Provider further covenants, to its knowledge and ability, that in the performance of said services no person having any such interest shall be employed.
- 21.5. Provider acknowledges that Delaware has an obligation to ensure that public funds are not used to subsidize private discrimination. Provider recognizes that if it refuses 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 Provider in breach of the Agreement, terminate the Agreement, and designate Provider as non-responsible.
- 21.6. Provider 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 Agreement 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.
- 21.7. 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.
- 21.8. Provider shall maintain all public records, as defined by 29 *Del. C.* § 502(8), 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 Provider's performance and records pertaining to this Agreement at the Provider business office during normal business hours.

- 21.9. 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.
- 21.10. Provider's employees carrying out any work related to this Agreement within a State facility shall have those employees comply with any health mandate or policy issued by the State related to a pandemic or other State of Emergency issued by any State authority during the term of this Agreement, including those that apply directly to State employees.

22. Insurance.

As a part of the Agreement requirements, the Provider must obtain at its own cost and expense and keep in force and effect during the term of this Agreement, including all extensions, the minimum coverage limits specified below with a carrier satisfactory to the State. All Providers 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 - \$1,000,000.00 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 Provider pursuant to this Agreement as well as all units used by Provider, regardless of the identity of the registered owner, used by Provider 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:
 - I. \$1,000,000 combined single limit each accident, for bodily injury;
 - II. \$250,000 for property damage to others;
 - III. \$25,000 per person per accident Uninsured/Underinsured Motorists coverage;
 - IV. \$25,000 per person, \$300,000 per accident Personal Injury Protection (PIP) benefits as provided for in 21 Del. C. § 2118; and
 - V. 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 Provider 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

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 DDOC. The certificate holder is as follows:

Delaware Department of Correction
Contract No: _____
CBO Purchasing
245 McKee Road
Dover, DE 19904

Nothing contained herein shall restrict or limit the Provider's right to procure insurance coverage in amounts higher than those required by this Agreement. To the extent that the Provider 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 Provider has complied with the terms of this Agreement and has procured insurance coverage for all vehicles Leased and/or operated by Provider 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.

23. Performance Requirements

The Provider 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.

24. Performance Bond.

There is no Performance Bond requirement.

25. Assignment of Antitrust Claims.

As consideration for the award and execution of this Agreement by the State, the Provider hereby grants, conveys, sells, assigns, and transfers to the State of Delaware all 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 Agreement. Upon either the State's or the Provider's 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 Provider shall meet and confer about coordination of representation in such action.

26. Governing Law.

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, except where Federal Law has precedence. Provider consents to jurisdiction and venue in the State of Delaware.

27. 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:

Manager, Support Services
Department of Correction
245 McKee Road
Dover, DE 19904

PROVIDER:

(Signature Page to follow)

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

For the Provider:

For the Department:

Name Date
Title
Company

Commissioner Date

Bureau Chief Date

Bureau Chief Date

Manager, Support Services Date