

# 6 Contract Terms and Conditions

## 6.1 General Contract Terms

This contract is made pursuant to and under the authority of §27-2-10(c), Code of Alabama, 1975.

### 6.1.1 Terms

- “ACA” means the Patient Protection and Affordable Care Act, P.L. 11-148, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152 and any other amendments.
- “Department” is the Alabama Department of Insurance, an agency of the State of Alabama. “Department” is also deemed to include the HIX. The Department designates the HIX as its representative for purposes of facilitating, directing, and monitoring the Vendor’s performance of the Services for the contract.
- “HIX” means the Governor’s Office of the Health Insurance Exchange or any similar successor entity created by Legislation or Executive Order of the Governor. HIX is not a division or unit of the Department but is designated by the Department to act as the Department’s representative for the purposes of this RFP and contract, if any.
- “HIX System” is the Alabama Health Insurance Exchange System, a state-of-the-art automated system that supports HIX in providing all of the functionality described herein.
- “Exchange” is the Alabama Health Insurance Exchange which is the organization and automation necessary to enable individuals or companies to purchase health insurance from a set of state-regulated and standardized health care plans that is eligible for Federal subsidies or small business tax credits. Health insurance exchanges are authorized and funded as part of implementing key elements of the ACA.

### 6.1.2 Entire Agreement

This RFP and the Vendor's response thereto shall be incorporated into a contract by the execution of a formal agreement. No alteration or variation of the terms of ~~these contracts~~this Contract *[note to Department: We have made this correction throughout our draft but have not subsequently marked (have “accepted”) such edits]* shall be valid unless made in writing and duly signed by the parties thereto. Oral understandings of this agreement are not incorporated therein and no alterations or variations of the terms thereof shall be binding on any of the parties unless made in writing between the parties. The contract shall be amended by written agreement duly executed by the parties; every such amendment shall specify the date of its provisions and shall be effective as agreed to by the parties. This Contract and amendments, if any, are subject to approval by the CMS, approval by the Information Services Division of the

Department of Finance, review by the Legislative Contract Review Oversight Committee, and approval by the Governor of the State of Alabama.

Execution of the contract and posting of the performance bond shall authorize the Vendor to undertake performance of the contract and shall entitle Vendor to be reimbursed for costs incurred in such performance, subject to all terms and conditions of the contract.

### 6.1.3 Notice to Parties

Any notice to the Department under the contract shall be sufficient when mailed to the Commissioner of Insurance c/o Legal Division, Post Office Box 303351, Montgomery, AL 36130-3351. Any notice to the Vendor shall be sufficient when mailed to the Vendor at the address given on the return receipt from this RFP or on the contract after signing. All notices shall be given by certified mail, return receipt requested.

### 6.1.4 Headings and Titles

Any headings or titles used to help identify any part of this RFP or any contract upon which it is based are for reference purposes only and shall not be deemed as controlling the interpretation or meaning of any provision of this RFP or any contract upon which it shall be based.

### 6.1.5 Compliance with Federal and State Requirements

The Vendor shall perform all services under these contracts in accordance with applicable Federal and State statutes, regulations and other guidance issued. HIX retains full operational and administrative authority and responsibility over the Alabama Exchange in accordance with the requirements of the Federal and State statutes and regulations.

### 6.1.6 Contract a Public Record; Public Information

Once fully executed, this contract shall become a public record under Alabama state law.

All information received in response to this RFP, including copyrighted material, is deemed public information and become a public record subject to review and copying. The sole exceptions are trade secrets as defined in Ala. Code § 8-27-2(1), sensitive personnel information, and other exceptions under Alabama state law, that have been properly marked, separated, and documented.

### 6.1.7 Beginning Work under Contract

The effective date of this contract is the date on which it has been fully executed by signature of the Governor of Alabama. The Vendor shall not commence work under this contract until such time and agrees that it cannot claim, and shall not be entitled to, payment for the services performed or expenses incurred before the effective date.

### 6.1.8 Cooperation with Other Contractors/Vendors

The State may award other contracts for additional work related to this contract and Vendor shall fully reasonably cooperate with such other contractors and State employees or designated agents, ~~and fit its own work to such other contractor's work~~. Vendor shall not intentionally commit or permit any act which will interfere with the performance of work by any other contractor or by State employees or designated agents.

### 6.1.9 Term of the Contract

This contract shall begin on the date of award and shall terminate upon December 31, 2014, contingent upon the continued availability of federal funding and the exercise of any renewal options. As part of the contract, the Department shall have three one-year renewal options to address tasks such as remaining design, development and implementation (DDI) phases, a one-year period for stabilization following the initial operational capability (IOC) and additional optional maintenance support. Within ninety (90) days prior to the end of the initial contract period, the Department may at its discretion, exercise the extension option and allow the period of performance to be extended at the rate indicated on the price sheet contained in the RFP. The Vendor will provide pricing for each year of the contract, including any extensions. The Vendor agrees that if the Department exercises the renewal options that the Vendor is required to perform the services pursuant to this RFP for the renewal period for the rate indicated on the price sheet of the RFP.

### 6.1.10 Contract Content and Other Priority Documents

This RFP and the Vendor's response shall be incorporated into a contract by the execution of a formal agreement. The contract and amendments, if any, are subject to approval by CMS, approval by the Information Services Division of the Department of Finance, review by the Legislative Contract Review Oversight Committee and approval by the Governor of the State of Alabama.

The Contract shall include the following:

- Executed contract
- RFP, and any addenda or amendments thereto
- Vendor's response to the RFP

The contracts shall be construed in accordance with ~~and in the order of the applicable provisions of:~~

- ~~• Applicable Federal statutes and regulations, including the ACA, subsequent regulations and guidance~~
- ~~• Alabama state law and applicable regulations~~
- The statutory and case law of the State of Alabama, without regard to any choice of laws principles thereof. The order of precedence shall be: 1) Executed contract, 2) Vendor's response to the RFP, 3) addenda or amendments to the RFP, and 4) the RFP.

- ~~HIX's written responses to prospective Vendors' questions~~

### 6.1.11 Contract Amendments

The contract shall be deemed to include all applicable provisions of the ACA and of all State and Federal laws and regulations, in each case to the extent applicable to the Exchange performance of the Services, as they may be amended. In the event of any change in the ACA, laws, or regulations, which materially affect the operation of the Exchange, or the costs of administering such program, either party, after written notice and before performance of any related work, may apply in writing to the other for an equitable adjustment in compensation and other terms of this Contract caused by such material change. In no event shall the contract be amended unless it is in writing and signed by duly authorized representatives of the Vendor and the Department.

### 6.1.12 Changes to the Statement of Work

During the Contract period, if the Vendor considers that any written or oral communication, including any order, direction, instruction, interpretation, or determination, received from the Project Manager or any other authorized Department representative, or any other act or omission of the Department (an "Event") constitutes a change to the scope of the Statement of Work of this RFP but is not plainly identified, labeled, or titled as such, the Vendor shall advise the designated Department contact person in writing within 10 business days of promptly upon the Vendor project manager becoming aware of the Event [note: We are proposing this minor clarification, since we would need awareness of the Event in order to advise of such] and shall request written confirmation of the Event. The notice shall state:

- The nature and pertinent circumstances of the communication, act, or omission regarded as a change in scope of the Statement of Work by the Vendor
- The date of the communication, act, or omission, and the identification of each individual involved in such communication, act, or omission, listing his or her name and function
- The identification of the documents involved
- The substance of any oral communications
- The particular technical requirements or contract requirements regarded as changed
- The direct and foreseeable consequential effect of the communication, act, or omission regarded as a change to the scope of the Statement of Work, including the number of hours required from the staff to accomplish the change and the manner and sequence of performance or delivery of supplies or services, identifying which supplies or services are or shall be affected

The Department shall respond within 10 days of receipt of the Vendor's notice, either:

- To countermand the action or communications regarded as an Event
- To deny that the Event is a change in the scope of the Statement of Work

- To confirm that the Event is a change to the scope of the Statement of Work by issuance of a written notice
- If the information in the Vendor's notice is inadequate to permit a decision to be made, advise the Vendor as to what additional information is required and establish the date by which this information shall be furnished

If the Vendor complies with any such order, direction, interpretation, or determination, written or oral, without providing the notice, in accordance with this section, the Department shall not be liable for any increased price, delay in performance, or contract nonconformance by the Vendor.

If the Vendor does not agree with the decision of the Department designee, the Vendor has 30 days to appeal the decision to the Commissioner of Insurance.

### **6.1.13 Additions to Permanent Staff**

Both the Vendor and the Department must agree upon additions to contract-required staff or key personnel. The reimbursement of the staff cannot exceed the current Vendor rate being paid for equivalent staff.

### **6.1.14 Force Majeure**

Neither party to this Contract shall be responsible for delays or failures in performance resulting from acts beyond the control of such party. Such acts shall include, but not be limited to, acts of God, strikes, riots, lockouts, and acts of war, epidemics, fire, earthquakes, or other disasters natural or man-made.

### **6.1.15 Not a Debt of the State**

It is agreed that the terms and commitments contained herein shall not be constituted as a debt of the State of Alabama in violation of Art. XI, § 213, Ala. Const. 1901 (Recomp.). It is further agreed that if any provision of this Contract shall contravene any statute or Constitutional provision or amendment, either now in effect or which may, during the course of this Contract, be enacted, then that conflicting provision in the Contract shall be deemed null and void. The Vendor's sole remedy for the settlement of any and all disputes arising under the terms of this Contract shall be limited to the filing of a claim with the Board of Adjustment for the State of Alabama as provided in Ala. Code §§ 41-9-60 et seq.

### **6.1.16 Use of Federal Cost Principles**

For any terms of this Contract which allow reimbursement for the cost of procuring goods, materials, supplies, equipment, or services, such procurement shall be made on a competitive basis (including the use of competitive bidding procedures) where practicable, and reimbursement for such cost under this Contract shall be in accordance with federal cost principles. If such reimbursement is to be made with funds derived wholly or partially from Federal sources, such reimbursement shall be subject to Vendor's compliance with applicable

Federal procurement requirements, Office of Management and Budget (OMB) Circular A-87, and the determination of costs shall be governed by Federal cost principles.

### 6.1.17 Non-assignment

Vendor may not assign its interest in or obligations under this contract without the express written consent of the Department, which consent will be granted or withheld in the sole discretion of the Department. The Department reserves the right to assign its rights and obligations under the contract to the HIX should it become a legal entity by legislation or executive order of the Governor.

### 6.1.18 Subcontracts

The Vendor may subcontract for any services necessary to the completion and maintenance of this Contract and to the performance of its duties under this contract with advance written approval by the Department of both the subcontracted function and the subcontractor.

~~Subcontractors include those whose services shall be purchased or software licensed by the Vendor, and any business partnerships between the Vendor and others.~~ Subcontractors shall demonstrate the capability to perform the function to be subcontracted at a level equal or superior to that of the Vendor. All subcontracts shall be in writing, with the subcontractor functions and duties clearly identified, and shall require the subcontractor to comply with all applicable provisions of this RFP. The Vendor shall at all times remain responsible for the performance by any subcontractors approved by the Department. The Vendor's performance bond and Vendor's responsibility for damages shall apply whether performance or nonperformance was by the Vendor or one of its subcontractors. The Department shall not release the Vendor from any claims or defaults of this contract, which are predicated upon any action or inaction or default by any subcontractor of the Vendor, even if such subcontractor was approved by HIX as provided above. The Vendor shall give the Department notice in writing by certified or registered mail of any action or suit filed against it by any subcontractor. The Vendor shall give the Department immediate written notice of any claim made against the Vendor by any subcontractor or Vendor, which in the opinion of the Vendor, may result in litigation related in any way to this contract with the State of Alabama.

Payments to any subcontractor for the performance of this contract, including, without limitation, expenses or disbursements incurred by the subcontractor, is strictly between Vendor and subcontractor, and subcontractor shall have no claim as against the Department for any payments for work performed and expenses or disbursement incurred by Subcontractor relative to this contract. ~~If requested by the Department, Vendor will provide the Department with appropriate documentation that all amounts due to subcontractor have been paid by Vendor.~~

~~In the event of a proposal submitted jointly by more than one organization, one organization must be designated as the prime Vendor and must have responsibility for the project management and not less than 60 percent of the work to be performed (as measured by price). All other participants shall be designated as subcontractors.~~ [note to Department: Removed]

because this is instructions for the RFP rather than a contract term. The State encourages Vendors to consider the use of minority and small business firms as subcontractors.

### 6.1.19 Ownership

The State of Alabama shall have all rights of ownership in software, any modifications thereof, and all associated documentation, designed, or developed, or enhanced by the Vendor for the HIX System in the performance of its duties under this agreement, except for any Vendor Technology contained therein (collectively, the "Deliverables"), upon full payment to Vendor for the applicable Deliverable. Vendor hereby grants to the State of Alabama a non-exclusive, fully paid-up license to use the Vendor Technology contained in a Deliverable in connection with use of such Deliverables, upon full payment to Vendor for the applicable Deliverable. "Vendor Technology" means works of authorship, materials, information and other intellectual property created by Vendor or its subcontractors prior to or independently of the performance of the Services or as a tool for their use in performing the Services, plus any modifications or enhancements thereto and derivative works based thereon. The Vendor shall obtain for the Department any necessary licenses for all commercial or proprietary software of its subcontractors not owned by the Vendor that are necessary for the performance granting of rights to the duties State of Alabama to such Deliverables and obligations Vendor Technology as expressed in this Contract, except as otherwise identified as to be acquired by the Department in Vendor's response to the RFP. Federal funds through a cooperative agreement to support the establishment of a state-operated health insurance exchange are the source of funding for this contract. Under 45 CFR 92.34 and the terms of the cooperative agreement, HHS retains a royalty-free, nonexclusive, irrevocable license to reproduce, publish or otherwise use, for Federal Government purposes, the copyright in any work developed under the grant, or a subgrant or subcontract, and in any rights to a copyright purchased with grant support. HHS shall be provided with a working electronic copy of the software (including object source and code) with the right to distribute it to others for Federal purposes consistent with and throughout the execution of the Cooperative Agreement.

### 6.1.20 Firm and Fixed Price

Refer to Section 4.9 Proposal Prices.

### 6.1.21 Relationship of Parties

The relationship created by the contract is strictly that of independent contractor and not a relationship of employer/employee, principal/agent, partnership or joint venture. Under no circumstances shall the Vendor or any subcontractor be entitled to receive the benefits guaranteed to State employees under the Merit System Act.

### 6.1.22 Conservation of Resources

To the extent practicable and economically feasible, the Vendor shall utilize products and services that conserve natural resources and protect the environment and are energy efficient.

## 6.2 Termination

This Contract may be terminated by the Department for any and all of the following reasons:

- In the event of the insolvency of or declaration of bankruptcy by the Vendor
- For any default by the Vendor
- In the event sufficient appropriated, obligated funds from either State or Federal sources are withheld, reduced or are otherwise unavailable for use in whole or in part in connection with this contract, whether as a result of Congressional or state legislative action or otherwise
- For the convenience of the Department

Each of these is described in the following subsections.

### 6.2.1 Termination for Bankruptcy

The filing of a petition for voluntary or involuntary bankruptcy or a company or corporate reorganization pursuant to the Bankruptcy Act shall, at the option of the Department, constitute grounds for termination default by the Vendor effective the date of such filing for voluntary filing and as of the date that is 60 days after such filing, if not previously dismissed, for involuntary filing. The Vendor shall inform the Department in writing of any such action(s) immediately upon occurrence.

### 6.2.2 Termination for Default

The Department or Vendor may, by written notice, terminate performance under the Contract, in whole or in part, for failure of the Vendor other party to perform any of the material Contract provisions (the "defaulting party"). In the event the Vendor party materially defaults in the performance of any of the Vendor's defaulting party's material duties and obligations, written notice shall be given to the Vendor defaulting party specifying the default. A copy of the written notice shall be sent to the Surety for the Vendor's Performance Bond, in the case of Vendor as defaulting party.

The Vendor defaulting party shall have ten (10) calendar business days, or such additional time as agreed to in writing by the Department the other party, after the mailing of such notice to cure any default. In the event the Vendor defaulting party does not cure a default within ten (10) calendar business days, or such additional time allowed by the Department other party, the Department other party at its option may notify the Vendor defaulting party in writing that performance under the contract is terminated and proceed to seek appropriate relief from the Vendor defaulting party and, in the case of Vendor as the defaulting party, Surety. If it is determined, after notice of termination for default, that the Vendor's defaulting party's failure was due to causes beyond the control of and not due to without error or negligence of the Vendor defaulting party, or that the defaulting party did not thus fail to perform, the termination shall be deemed a termination for convenience under Section 6.2.4.



### 6.2.3 Termination for Unavailability of Funds

The source of payment for this contract is federal funds awarded through a cooperative agreement to support establishment of a state-operated health insurance exchange. This contract shall be cancelled or the scope of services modified by the Department by written notice provided thirty (30) days before the cancellation or modification effective date, within such lesser time as may be required by the circumstances, in the event Federal funds designated for this contract are withheld or reduced or are otherwise unavailable for use in whole or in part in connection with this contract, whether as a result of congressional or state legislative action or otherwise. In the event of termination or modification due to lack of funds, the Department shall not be liable to Vendor for any claimed loss or damage resulting from or relating to the termination or modification, provided, however, that Vendor shall be paid for services performed before the termination or modification date.

### 6.2.4 Termination for Convenience

The Department may terminate performance of work under the Contract ~~in whole or in part~~ [note: Chopping up the project unilaterally would be detrimental to its success; if it is desired that parts be terminated, the parties should agree on that as a change and on any other modifications that may be needed per such change] whenever, for any reason, the Department, in its sole discretion determines that such termination is in the best interest of the State. In the event that the Department elects to terminate the contract pursuant to this provision, it shall so notify the Vendor at least thirty (30) days in advance, [note: This allows for a professional and effective ramp-down/transfer of the services] by certified or registered mail, return receipt requested. The termination shall be effective as of the date specified in the notice. In such event, the Vendor will be entitled only to payment for all work ~~satisfactorily~~ completed and for reasonable, documented costs incurred in good faith for work in progress. The Vendor will not be entitled to payment for ~~unperforme~~ completed work, or for anticipated profit, unabsorbed over- head, or any other costs.

### 6.2.5 Termination for Conflicts

Vendor may terminate this Contract or performance of any part of the Services, upon written notice to the Department, if Vendor determines that performance of any part of the Services would be in conflict with law, or independence or professional rules. [note: This is driven by our relationship to an audit firm– should the State choose to use the firm as an auditor, certain kinds of services could not be performed legally and without impairing the audit]

## 6.3 The Vendor's Duties Upon Expiration/Termination

### 6.3.1 Procedure for Termination

Prior to the conclusion of this Contract, the Vendor shall provide, at no extra charge, full support and assistance in turning over the complete and current deliverables to the Department or its

agent. Specific objectives are to provide for an orderly, complete, and controlled transition to a successor Vendor and to minimize any disruption of processing and services provided.

The Vendor must:

- Stop work under this Contract on the date and to the extent specified in the notice of termination
- Place no further orders or subcontracts for materials or services, except as may be necessary for completion of such portion of work under this Contracts as is not terminated
- Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination
- ~~Assign to the Department, in the manner and to the extent directed by the Department, all of the rights, title, and interest of the Vendor under the orders or subcontracts so terminated, in which case the Department shall have the right, in its discretion, to settle, pay, or deny any or all claims arising out of the termination of such orders and subcontracts~~
- With the prior approval or ratification of the Department, settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, the cost of which would be reimbursable in whole or in part, in accordance with the provisions of this Contract. Failure to obtain prior approval shall result in loss of the Department re- imbursement.
- ~~Complete performance of such part of the work as shall not have been terminated by the~~
- Take such action as shall be necessary, or as the Department shall direct, for the protection and preservation of any and all property or information related to this Contract which is in the possession of the Vendor and in which the Department has or shall acquire an interest

### 6.3.2 Termination Claims

After receipt of a notice of termination, Vendor must submit to the Project Manager and the Department any termination claim in the form and with the certification prescribed by the Project Manager and the Department. In no event shall such claim be submitted later than sixty (60) days from the effective date of termination. Upon failure of the Vendor to submit its termination claim within the time allowed, the Project Manager and the Commissioner of Insurance may, subject to any review required by the State procedures in effect as of the date of execution of the contract, determine, on the basis of information available, the amount, if any, due to the Vendor by reason of the termination and shall thereupon cause to be paid to the Vendor the amount so determined.

Upon receipt of notice of termination, Vendor must have no entitlement to receive any amount for lost revenues or anticipated profits or for expenditures associated with this or in any other contract. Vendor shall be paid only by the following upon termination:

- At the contract price(s) for completed deliverables and services delivered to and thereafter accept-ed by the Department

- At a price mutually agreed upon by the Vendor and the Department or otherwise on a pro rata basis for partially completed deliverables (which are provided as-is, without warranty of any kind)
- All amounts withheld from payment pursuant to Section 6.8 below (the withholding as referenced therein) not yet paid as of such termination, even the system has not yet been delivered or accepted.

In the event of the failure of the Vendor and the Department to agree in whole or in part as to the amounts with respect to costs to be paid to the Vendor in connection with the ~~total or partial~~ termination of work pursuant to this article, the ~~Department amount~~ shall be determined on the basis of ~~in-~~formation available the amount, ~~if any, due to the Vendor by reason of termination~~ and the Department shall pay to the Vendor the amount so determined.

## 6.4 Employment

### 6.4.1 Nondiscrimination Compliance

The Vendor shall comply with Title VII of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Executive Order No. 11246, as amended by Executive Order No. 11375, both issued by the President of the United States, the Americans with Disabilities Act of 1990, and with all applicable Federal and State laws, rules and regulations implementing the foregoing statutes with respect to nondiscrimination in employment. The Vendor shall not discriminate against any employee or applicant for employment because of a physical or mental disability in regard to any position for which the employee or applicant is qualified. The Vendor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled individuals without discrimination based on their physical or mental disability in all employment practices.

### 6.4.2 Immigration

Vendor shall comply with the requirements of the Immigration Reform and Control Act of 1986 regarding employment verification and retention of verification forms for any individuals hired on or after November 6, 1986, who will perform any labor or services under this contract. Vendor further agrees to provide affidavit(s) and furnish documentation that Vendor has enrolled in the E-Verify program operated by the U.S. Department of Homeland Security as required by Section 9 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (Ala. Act 2011-535) and any amendments, and to otherwise comply with the applicable requirements of said act during the term of this contract. Vendor shall be responsible for all subcontractor compliance with said act and shall provide documentation of said compliance to the Department.

### 6.4.3 Small Businesses, Minority-Owned Firms, and Women's Business Enterprises Utilization

In accordance with the provisions of 45 CFR Part 74 and Office of Management and Budget (OMB) Circular A-102, affirmative steps shall be taken to assure that small businesses, minority-owned firms and women's business enterprises are utilized when possible as sources of supplies, equipment, construction, and services.

### 6.4.4 Worker's Compensation

At all times during the contract, the Vendor shall at its sole costs and expense maintain in force worker's compensation insurance for those employees of Vendor performing work under this contract who are subject to workers compensation laws as required by such laws. In the event any work is subcontracted, the Vendor must require any subcontractor similarly to provide worker's compensation insurance for all the latter's employees working as a part of this contract. Upon the Department request, Vendor shall provide a certificate of insurance evidencing such insurance is in effect.

### 6.4.5 Other Insurance

Vendor shall provide coverage with limits of liability not less than those stated below.

**6.4.5.1 Commercial General Liability – Occurrence Form.** Policy shall include bodily injury, property damage, personal injury and ~~broader form~~ contractual liability coverage. Each Occurrence: \$1,000,000; General Aggregate: \$2,000,000; Products - Completed Operations Aggregate: \$2,000,000; Personal and Advertising Injury: \$1,000,000; ~~Blanket~~ Contractual Liability - Written and Oral: \$1,000,000; and Fire Legal Liability: \$50,000. The policy shall ~~be endorsed to~~ include the following additional insured ~~s~~ language: "The State of Alabama, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees ~~shall be named~~ as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Vendor." Policy shall contain a waiver of subrogation against the State of Alabama, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Vendor except in instances of liability caused by the State of Alabama, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees except where prohibited by law.

**6.4.5.2 Automobile Liability.** Bodily Injury and Property Damage for any owned, hired, and/or non-owned vehicles used in the performance of this Contract. Combined Single Limit (CSL): \$1,000,000. The policy shall be endorsed to include the following additional insured ~~s~~ language: "The State of Alabama, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be ~~included~~ named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Vendor, involving automobiles owned, leased, hired or borrowed by the Vendor."

**6.4.5.3 Umbrella/Excess Liability.** Umbrella/Excess liability in the minimum amount of \$10,000,000 (\$51,000,000 for Subcontractors) excess of Commercial General Liability, Automobile Liability and Employers' Liability. The policy shall ~~be endorsed to~~ include the following additional insureds ~~language~~: "The State of Alabama, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees shall be named as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Vendor." Policy shall contain a waiver of subrogation against the State of Alabama, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees for losses arising from work performed by or on behalf of the Vendor except where prohibited by law.

**6.4.5.4 Professional Liability (Errors and Omissions Liability).** Each Claim Minimum Limit: \$5,000,000; Annual Aggregate Minimum Limit: \$5,000,000 (\$1,000,000/\$2,000,000 Aggregate for subcontractors). In the event that the professional liability insurance required by this Contract is written on a claims-made basis, Vendor warrants that any retroactive date under the policy shall precede the effective date of this Contract; and that either continuous coverage will be maintained or an extended discovery period will be exercised for a period of two (2) years beginning at the time work under this contract is completed if available at commercially reasonable cost. The policy shall cover errors or omissions and shall not include an exclusion for professional misconduct or lack of ordinary skill for those positions defined in the Scope of Work of this contract.

~~If the Vendor is providing hosting or other network support, they must provide the following insurance coverage:~~

~~**Technology/Network Errors and Omissions Insurance.**~~

~~Each Claim \$5,000,000~~

~~Annual Aggregate \$5,000,000~~

~~Coverage to include:~~

- ~~• Hostile action or a threat of hostile action with the intent to affect, alter, copy, corrupt, destroy, disrupt, damage, or provide unauthorized access/unauthorized use of a computer system including exposing or publicizing confidential electronic data or causing electronic data to be inaccessible;~~
- ~~• Computer viruses, Trojan horses, worms and any other type of malicious or damaging code;~~
- ~~• Dishonest, fraudulent, malicious, or criminal use of a computer system by a person, whether identified or not, and whether acting alone or in collusion with other persons, to affect, alter, copy corrupt, delete, disrupt, or destroy a computer system or obtain financial benefit for any party or to steal or take electronic data;~~
- ~~• Denial of service for which the insured is responsible that results in the degradation of or loss of access to internet or network activities or normal use of a computer system;~~

- ~~Loss of service for which the insured is responsible that results in the inability of a third party, who is authorized to do so, to gain access to a computer system and conduct normal internet or network activities;~~
- ~~Access to a computer system or computer system resources by an unauthorized person or an authorized person in an unauthorized manner;~~
- ~~Loss or disclosure of confidential information no matter how it occurs;~~
- ~~Systems analysis;~~
- ~~Software Design;~~
- ~~Systems programming;~~
- ~~Data processing;~~
- ~~Systems integration;~~
- ~~Outsourcing including outsourcing development and design;~~
- ~~Systems design, consulting, development and modification;~~
- ~~Training services relating to computer software or hardware;~~
- ~~Management, repair and maintenance of computer products, networks and systems;~~
- ~~Marketing, selling, servicing, distributing, installing and maintaining computer hardware or software; and~~
- ~~In the event that the professional liability insurance required by this contract is written on a claims-made basis, Vendor warrants that any retroactive date under the policy shall precede the effective date of this contract; and that either continuous coverage will be maintained or an extended-discovery period will be exercised for a period of two (2) years beginning at the time work under this contract is completed. The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the Scope of Work of this contract.~~

**6.4.5.5 Fidelity Bond or Crime Insurance.** Fidelity Bond or Crime Insurance in the minimum amount of \$2,000,000. The bond or policy shall include coverage for third party fidelity. The bond or policy shall include coverage for theft and mysterious disappearance. The bond or policy shall contain no requirement for arrest and conviction. The bond or policy shall cover loss outside the premises of the Named Insured.

**6.4.5.6 Property Coverage.** Property Coverage to insure property under the care custody and control of the Vendor for this contract for full replacement value on an all risk basis.

~~**6.4.5.7 Builders Risk.** Builders Risk to insure all equipment and installations under this contract for 100% of value of the installation.~~

~~**6.4.5.8 Additional Insurance Requirements.** The policies shall include, or be endorsed to include, the following provisions: The State of Alabama, its departments, agencies, boards, commissions, universities and its officers, officials, agents, and employees wherever additional insured status is required such additional insured shall be covered to the full limits of liability~~

~~purchased by the Vendor, even if those limits of liability are in excess of those required by this contract.~~ The Vendor's insurance coverage shall be primary insurance with respect to all other available sources as respects Vendor's activities hereunder. Coverage provided by the Vendor shall not be limited to the liability assumed under the indemnification provisions of this contract.

**6.4.5.9 Notice of Cancellation.** Each insurance policy ~~required by the insurance provisions of this contract shall provide the required coverage and~~ shall not be suspended, voided, canceled, or reduced in coverage or in limits below the amounts set forth herein except after thirty (30) days prior written notice has been given to the State of Alabama by Vendor. Such notice shall be sent directly to the Department and shall be sent by certified mail, return receipt requested.

**6.4.5.10 Acceptability of Insurers.** Insurance is to be placed with admitted or approved non-admitted insurers in the state of Alabama with an "A.M. Best" rating of not less than A- VII. The State of Alabama in no way warrants that the above-required minimum insurer rating is sufficient to protect the Vendor from potential insurer insolvency.

**6.4.5.11 Verification of Coverage.** Vendor shall furnish the State of Alabama with certificates of insurance (ACORD form or equivalent) as required by this contract. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf or by an authorized representative of the insurer. All certificates ~~and endorsements~~ are to be received and approved by the Department before work commences. Each insurance policy required by this contract must be in effect at or prior to commencement of work under this contract and remain in effect for the duration of the project subject to annual renewals. Failure to maintain the insurance policies as required by this contract, or to provide evidence of renewal, is a material breach of contract. All certificates required by this contract shall be sent directly to the Department. The State of Alabama project/contract number and project description shall be noted on the certificate of insurance. ~~The Department reserves the right to require complete, certified copies of all insurance policies required by this contract.~~ Certificates of Insurance shall not be sent to the State of Alabama's Risk Management Section.

**6.4.5.12 Subcontractors.** Vendors' certificate(s) shall include all subcontractors as insureds under its policies or Vendor shall furnish to the State of Alabama separate certificates ~~and endorsements~~ for each subcontractor. All coverages for subcontractors shall be subject to the minimum requirements identified above, except for the provisions pertaining to umbrella coverage and fidelity bond or crime insurance.

**6.4.5.13 Approval.** Any modification or variation from the insurance requirements in this contract shall be made by the State of Alabama Risk Management Section, whose decision shall be final. Such action will not require a formal contract amendment, but may be made by administrative action.

**6.4.5.14 Exceptions.** If the Vendor or sub-contractor(s) is/are a State of Alabama agency, board, commission, or university, none of the above shall apply.

## 6.4.6 Employment of State Staff

To ensure compliance with the Alabama Code of Ethics, Ala. Code §36-25-1, et seq. the Vendor shall not knowingly engage and assign to the services hereunder on a full-time, part-time, or other basis during the period of this Contract, any professional or technical personnel who is or has been in the employ of the State of Alabama during the previous 24 months, without first acquiring an Ethics Opinion from the Alabama Ethics Commission. The web site for the Ethics Commission is: <http://ethics.alabama.gov/default2.aspx>

## 6.4.7 Additional Terms and Conditions For Vendor's Personnel

The Vendor warrants and represents that all persons including independent Vendors and Vendors assigned by it to the performance of this contract shall be agents of the Vendor and shall be fully qualified to perform the work required herein. The Vendor must include a similar provision in any contract with any subcontractor selected to perform work there under.

The Department shall have the absolute right to approve or disapprove Vendor's staff assigned to this contract, to approve or disapprove any proposed ~~changes in~~ individuals for replacement of staff, and to require the removal or reassignment of any Vendor employee or subcontractor employee found unacceptable by the Department. The Vendor may terminate any of its personnel assigned to the project for a violation of law or company policy or any other reason without the Department prior approval. Upon written request, Vendor must provide the Department with a resume of any member of its staff or its subcontractor's staff assigned to or proposed to be assigned to any aspect of the performance of this contract.

~~Personnel commitments made in Vendor's proposal!~~ The following personnel shall not be changed except as here-in above provided, or due to a resignation of any named individual, or other separation from service, illness, or personal circumstances: . Vendor staffing will include the named individuals at the levels of effort ~~proposed in the Vendor's proposal~~ set forth in this Contract. Replacement of any personnel will be with personnel of equal ability and qualifications as determined by the Department. No diversion of staffing of such individuals to other assignments will be made by the Vendor without prior written consent of the Department ~~except~~ as provided herein.

The Vendor must provide staff to perform all tasks specified as the Vendor's responsibilities in this RFP. The staff level must be maintained at the level stated in the proposal or as authorized in writing by the Department for the duration of the contract.

Failure of the Vendor to provide staffing at the contracted and Department approved level may result in ~~liquidated~~ damages.

The Vendor will commit all personnel specified ~~in its proposal to~~ above in this section of this ~~C~~ contract unless the Department exercises its option to have such a staff person removed or as otherwise permitted hereunder. The Department will be provided ~~unrestricted~~ reasonable access



to appropriate Vendor project management personnel for discussion of problems or concerns-  
regarding Vendor staff.

## 6.4.8 Federal Involvement Practices Requirements

The Vendor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, marital status, political affiliation, or disability. The Vendor will take affirmative action to employ and treat employees during employment without discrimination due to their race, color, religion, sex, national origin, age, marital status, political affiliation, or disability. Such action will include, but will not be limited to, the following:

- Employment
- Upgrade
- Promotion
- Demotion
- Transfer
- Recruitment
- Advertisement for Recruitment
- Layoff
- Termination
- Rates of pay or other compensation
- Selection for training (including apprenticeship)

The Vendor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth these provisions.

The Vendor will in all solicitations or advertisements for employees, placed by or on behalf of the Vendor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, age, marital status, political affiliation, or disability except where it relates to a bona fide occupational qualification.

## 6.5 Guarantees, Warranties, and Certifications

### 6.5.1 Taxes

Vendor shall account for and remit all taxes relating to its performance under this Cecontract, including but not limited to, state, federal, foreign or local taxes, including income tax, withholding tax, Social Security tax, pension contributions, and any other form of payroll or other taxes, for all Vendor employees. Vendor is solely responsible for any benefit plans Vendor may provide for its employees.

## 6.5.2 Licenses

Vendor shall maintain in current status all federal, state, and local licenses and permits required for the operation of a business conducted by Vendor.

## 6.5.3 Lobbying

No funds paid to the Vendor shall be used for the purpose of influencing or attempting to influence an officer or employee of any federal or state agency, a member of the United States Congress or State legislature in connection with the awarding of any state or federal contract, the making of any state or federal grant, the making of any state or federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any state or federal contract, grant, loan, or cooperative agreement, in violation of applicable law or regulation. Vendor shall disclose if any funds other than those paid to Vendor by the Department have been used or will be used to influence the persons and entities above and will assist in making such disclosures to the U.S. Department of Health and Human Services.

## 6.5.4 No Guaranteed Quantities/Non-exclusive Contract

The Department does not guarantee Vendor any minimum or maximum quantity of services or goods to be provided under this contract.

Any contract resulting from the RFP shall be awarded with the understanding and agreement that it is for the sole convenience of the State of Alabama. The Department reserves the right to obtain like goods or services from another source when necessary.

## 6.5.5 Security and Release of Information

The Vendor shall take all reasonable precautions to ensure the safety and security of all information, data, procedures, methods, and funds involved in the performance under this Contract, and shall require the same from all employees so involved. In compliance with 42 CFR §431.300 et seq., the Vendor shall conform to the requirements of Federal and State regulations regarding confidentiality of information about eligible beneficiaries. The Vendor shall not release any data or other information relating to the HIX System to any third party without prior written consent of HIX. This provision covers both general summary data as well as detailed, specific data. The Vendor shall not be entitled to use of HIX data in its other business dealings without prior written consent of HIX. All requests for program data shall be referred to the HIX Executive Director for response.

The Vendor must treat all information, including that relating to beneficiaries and providers, which is obtained by the Vendor through his/her performance under the contract as confidential information, and shall not use any information so obtained in any manner except as necessary for the proper discharge of its obligations and securement of its rights herein, or as otherwise provided for herein. The Department, the Attorney General, Federal officials as authorized by

Federal law or regulations, or the authorized representatives of these parties shall have access to all confidential information in accordance with the requirements of State and Federal laws and regulations. Any other party will be granted access to confidential information only after complying with requirements of State and Federal laws and regulations pertaining to such access. The Department shall have absolute authority to determine if any other party has properly obtained the right to have access to this confidential information.

The foregoing restrictions on disclosure and release shall not apply the extent such information (A) shall have otherwise become publicly available (including, without limitation, any information filed with any governmental agency and available to the public) other than as the result of a disclosure in breach hereof, (B) becomes available to Vendor on a nonconfidential basis from a source other than the Department which Vendor believes is not prohibited from disclosing such information by obligation to the Department, (C) is known by Vendor prior to its receipt from the Department party without any obligation of confidentiality with respect thereto, or (D) is developed by Vendor independently of any disclosures made by the Department to Vendor of such information. In carrying out its obligations under this Section, Vendor shall use at least the same degree of care as it employs in maintaining in confidence its own trade secrets and proprietary or confidential information, but in no event less than a reasonable degree of care.

### 6.5.6 Federal Nondisclosure Requirements

Each officer or employee of any person to whom Social Security information is or may be disclosed shall be notified in writing by such person that Social Security information disclosed to such officer or employee can be only used for authorized purposes and to that extent and any other unauthorized use herein constitutes a felony punishable upon conviction by a fine of as much as five thousand dollars (\$5,000.00) or imprisonment for as long as five years, or both, together with the cost of prosecution. Such person shall also notify each such officer or employee that any such unauthorized further disclosure of Social Security information may also result in an award of civil damages against the officer or employee in an amount not less than one thousand dollars (\$1,000.00) with respect to each instance of unauthorized disclosure. These penalties are prescribed by IRC Sections 7213 and 7431 and set forth at 26 CFR 301.6103(n).

Additionally, it is incumbent upon the Vendor to inform its officers and employees of penalties for improper disclosure implied by the Privacy Act of 1974, 5 USC 552a. Specifically, 5 USC 552a (1) (1), which is made applicable to the Vendors by 5 USC 552a (m) (1), provides that any officer or employee of the Vendor who, by virtue of his/her employment or official position, has possession of or access to Agency-Department records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established there under, and who knowing that disclosure of the specific material is prohibited, willfully discloses that material in any manner to any person or agency not entitled to receive it, shall be guilty of a mis-demeanor and fined not more than five thousand dollars (\$5,000.00).

### 6.5.7 Health Insurance Portability and Accountability Act of 1996 Requirements

All parties shall comply with the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and any implementing regulations as adopted.

### 6.5.8 Share of Contract

No official or employee of the State of Alabama shall be permitted any share of this Contract or any benefit that may arise there from.

### 6.5.9 Provision of Gratuities

Neither the Vendor nor any person, firm, or corporation employed by the Vendor in the performance of this Contract shall offer or give, directly or indirectly, to any employee or agent of the State, any gift, money or anything of value, or any promise, obligation or contract for future reward or compensation at any time during the term of this Contract.

### 6.5.10 Conflict of Interest

The Vendor covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services ~~hinder the contract hereunder such that Vendor would be unable to perform its obligations hereunder or such that such performance would be illegal.~~ *[note: This is a clarification needed as it was previously quite vague]* The Vendor further covenants that in the performance of this Contract no person having any such known interests shall be employed by the Vendor.

### 6.5.11 Debarment

The Vendor certifies that neither it nor to the best of its knowledge, its principals, officers, directors, owners, or subcontractors, ~~partners~~ are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in federal programs or programs supported in whole or in part by federal funds.

### 6.5.12 Performance Bond

In order to assure full performance of all obligations imposed on a Vendor contracting with the State of Alabama, the Vendor will be required to provide a performance bond in the amount of fifteen (15) percent of the total contract value as a guarantee for the delivery and acceptance of the services in accordance with the specifications and requirements of this RFP and contract. The performance bond must be submitted by the Vendor at least ten (10) calendar days prior to the start of the contract date. The form of security guarantee shall be one of the following:

- Cashier's check (personal or company checks are not acceptable);
- Other type of bank certified check;

- Money order;
- Surety bond issued by a company authorized to do business in the State of Alabama.

The bond shall be in force from that date through the term of operations contract and ninety (90) calendar days beyond and shall be condition on faithful performance of all contractual obligations. ~~Failure of the Vendor to perform satisfactorily~~Breach by the Vendor in any material respect of any material provision of this Contract, which breach has not been cured by Vendor after receipt of notice thereof pursuant to Section 6.2.2 above -shall cause the performance bond to become due and payable to the State of Alabama. The Commissioner of Insurance shall be custodian of the performance bond which shall be made payable to the Commissioner of Insurance. Said bond shall be extended in the event the Department exercises its option to extend the operational contract. ~~In the event the Vendor fails to deliver or perform to the satisfaction of the Department, the Department reserves the right to proceed against the performance bond and to terminate any contracts without any resulting liability to the State.~~

### 6.5.13 Indemnification

~~Vendor shall indemnify and hold the Department harmless from all claims, losses, expenses, fees (including attorney's fees and litigation costs), costs and judgments that may be asserted against the Department resulting from any acts or omissions of the Vendor, the Vendor's employees, the Vendor's subcontractors and the Vendor's agents.~~

~~Without limiting the foregoing paragraph, Vendor shall indemnify and hold the Department harmless from all claims, losses, expenses, fees (including attorney's fees and litigation costs), costs and judgments that may be asserted against the Department for the infringement of any patents, trademark, copyright, proprietary right, or right of privacy arising from the Vendor's or State's use of any equipment, materials, or information prepared or developed in conjunction with performance of the contract. The Vendor shall, in any such suit, satisfy any final judgment for infringement. Any Federal sanction or damages, other than those specified herein, imposed upon the State due to the Vendor's failure to perform its responsibilities under the contract shall be paid by the Vendor.~~

~~This entire indemnification section applies whether or not: 1) the activities involve third parties or employees, subcontractors or agents of the Vendor or Department, or 2) a claim results in a monetary obligation that exceeds any contractual commitment.~~

~~This entire indemnification section~~[note: the proposed edits to this section clarify the scope of the indemnities and process. The scope needs to be clarified to be appropriate- we should defend any claim brought against the Department – the Department would not want us to step into all kinds of claims. The indemnities we have proposed align with the kinds of injuries for which we should be at the forefront of defense.] ~~The Vendor agrees to indemnify, defend, and hold harmless the State, the Department, and their officers, agents, and employees (hereinafter collectively referred to as "indemnitees"), for all claims, losses, or suits solely for bodily injury or death or damage to real or tangible personal property to the extent directly caused by the~~

Vendor's negligence or willful misconduct while engaged in the performance of the services under this Contract. The Vendor, at its own expense, shall also defend any claim or suit which may be brought against the State for the infringement of any patents, copyrights, intellectual property rights arising from the Vendor's Deliverables in conjunction with performance of this Contract. The Vendor shall, in any such suit, satisfy any final judgment for infringement. Such indemnification obligation shall not apply if such infringement arises from, or could have been avoided except for (i) the indemnified party's modification of such Deliverable or use thereof in a manner not contemplated by this Contract; (ii) the failure of the indemnified party to use any corrections or modifications made available by Vendor, (iii) information, materials, instructions, or specifications provided by or on behalf of the Department, or (iv) the use of such Deliverable in combination with any product or data not provided by Vendor. If the Department's use of any such Deliverable, or any portion thereof, is or is likely to be enjoined by order of a court of competent jurisdiction as such an infringement or unauthorized use, Vendor, at its option and expense, shall have the right to (x) procure for the Department the continued use of such Deliverable, (y) replace such Deliverable with a non-infringing Deliverable, or (z) modify such Deliverable so it becomes non-infringing; provided that, if (y) or (z) is the option chosen by Vendor, the replacement or modified Deliverable is capable of performing substantially the same function. The foregoing provisions of this paragraph constitute the sole and exclusive remedy of the indemnified parties, and the sole and exclusive obligation of Vendor, relating to a claim that any of the Deliverables infringes any patent, copyright or other intellectual property right of a third party.

As a condition to the foregoing indemnity obligations, the Department shall provide Vendor with prompt notice of any claim for which indemnification shall be sought hereunder and shall provide reasonable assistance to the Vendor in its defense of such claims. This indemnification extends to the successors and assigns of the Vendor, and this indemnification and release survives the termination of this contract and the dissolution or, to the extent allowed by law, the bankruptcy of the Vendor.

~~¶The Vendor must, at its expense, be entitled to and shall have the eventduty to control the Department is named as a defendant in, or made the subject of, a suit or other form of action, the Department has the sole discretion exercisable at any time while the suit or matter is pending to either (1) tender defense of the Department to Vendor, in which case, Vendor shall engage any suit against the indemnitees, with counsel to represent the Department at Vendor's cost and expense, or (2) separately engage counsel for the Department, in which case the cost and expense for such legal representation shall be paid by Vendor upon the Department's demand of its own choosing. No settlement or compromise of any claim, loss, or damage asserted against the Department indemnitees shall be binding upon the Department indemnitees unless expressly approved by the Department indemnitees, except for the payment of monies or release of all claims.~~

## 6.5.14 Compliance with Environmental Standards

The Vendor agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act, 42 U.S.C. 7401 et seq. and the Federal Water Pollution Control Act, as amended 33 U.S.C. 1251 et seq., Executive Order 11738, and other Environmental Protection Agency (EPA) regulations.

## 6.5.15 Waiver

No covenant, condition, duty, obligation, or undertaking contained in or made a part of this Contract shall be waived except by written agreement of the parties expressly acknowledging this waiver as a modification of the Contract.

## 6.5.16 Warranties Against Broker's Fees

The Vendor warrants that no person or selling agency has been employed or retained to solicit or secure the contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee except bona fide employees. For breach of this warranty, the Department shall have the right to terminate the Contract without liability to the Department.

## 6.5.17 Novation

In the event of a change in the corporate or company ownership of the Vendor, the Department may, subject to approval by HHS and a determination by the Department that the successor can meet the needs of the Department, recognize the successor's interest in the transfer of the contract. The new corporate or company entity shall agree to the terms of the original contract and any amendments thereto. During the interim between legal recognition of the new entity and the Department's execution of the novation agreement, a valid contract shall continue to exist between the Department and the original Vendor. When the Department, in its sole discretion determines sufficient assets necessary for the performance of these contracts have been transferred from the original Vendor, the Department shall approve the novation agreement.

## 6.6 Disputes and Litigation

### 6.6.1 Attorney's Fees

In the event that the State shall prevail in any legal action arising out of the performance or non-performance of this Contract, the Vendor ~~may~~ **must be deemed obligated to** pay, in addition to any damages **awarded**, all expenses of such action including reasonable attorney's fees and costs. This requirement applies regardless of whether the Department is represented by staff counsel or outside counsel. Fees and costs of defense shall be deemed to include administrative proceedings of all kinds, as well as all actions at law or equity.

## 6.6.2 Disputes

Except in those cases where the proposal response exceeds the requirements of the RFP, any conflict between the proposal response of the Vendor and the RFP shall be controlled by the provisions of the RFP.

Vendor acknowledges that, as a department of State government, the Department is immune from being made a defendant in any court of law or equity by operation of Art. I, § 14, Ala. Const. 1901 (Official Recompilation), which immunity is not waivable.

For any and all disputes arising under the terms of this contract, the Vendor and the Department agree to first utilize appropriate forms of non-binding alternative dispute resolution, including, but not limited to, mediation.

The Vendor's sole remedy for the settlement of any and all disputes arising under the terms of this contract concerning compensation claimed to be due and payable to the Vendor, or any aspect of the performance of duties by the Vendor shall be limited to the filing of a claim with the Board of Adjustment for the State of Alabama.

## 6.6.3 Litigation

Any litigation brought by the Department or the Vendor regarding any provision of the Contract shall be brought in either the Circuit Court of Montgomery County, Alabama, or the United States District Court for the Middle District of Alabama, Northern Division, according to the jurisdictions of these courts. This provision is not intended to, nor shall it operate to, enlarge the jurisdiction of either of said courts, but is merely an agreement and stipulation as to venue.

## 6.7 Records

### 6.7.1 Records Retention and Storage

The Vendor will maintain all ~~books, documents, payroll papers,~~ financial records, ~~statistical records,~~ and accounting records and other evidence pertaining to amounts invoiced to the Department under this contract for inspection by any authorized representative of the state or the federal government and make them available upon reasonable advance written request at reasonable times during the period of the contract and for three years after the date of the final payment by the Department to the Vendor under this contract. If any litigation, claim, or audit is commenced before the expiration of the three year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved.

### 6.7.2 Inspection of Records

The Vendor agrees that representatives of the Comptroller General, HHS, the General Accounting Office, the State of Alabama Department of Examiners of Public Accounts, The Department, and their authorized representatives shall have the right during business hours to



inspect and copy ~~the Vendor's books and such~~ records pertaining to contract performance and costs thereof. The Vendor shall cooperate fully with requests from any of the agencies listed above and shall furnish free of charge copies of all requested records. The Vendor may require that a receipt be given for any original record removed from the Vendor's premises.

The Vendor agrees to make available at its central business office at all reasonable times during the period set forth below any of ~~thesuch~~ records of the contracted work for inspection or audit by any authorized representative of the Department or their duly authorized representative.

A file and report retention schedule shall be developed by the Vendor and approved by the Department. The Vendor shall maintain the schedule and the Department will approve all changes.

### 6.7.3 System Documentation

The awarded Vendor shall establish and utilize documentation update procedures, including status report meetings with HIX, to endeavor to ensure that the HIX System documentation remains current at all times. The Vendor shall maintain the master copy of all HIX System documentation and shall furnish the Department with one complete copy by start of operations, and one copy of each update. The Vendor shall provide the Project Manager with a complete copy of all Deliverables system documentation (e.g., all detailed system designs, data element dictionary, systems manuals, user manuals, provider manuals, etc.) prior to going live. [note: The foregoing insertions of "Deliverables" are to clarify that we would do so for our work product – e.g. third party software vendors would best manage their own documentation] The Vendor shall incorporate any agreed-upon requirement change into all necessary documentation within five days of promptly upon implementation. [note: The parties would be better to served to address such project management items in the work plans to allow for flexibility]

### 6.8 Method of Payment and Invoicing

The Department shall provide payment to the Vendor in accordance with the Vendor's proposal sheet and the Pricing Schedules in Forms F through M in Appendix K of this RFP.

Payment shall be made monthly for the Department-approved Vendor staff hours worked and tasks/deliverables/requirements received and approved (as specified in Price Schedule II).

The Vendor shall submit one invoice to the Project Manager and one invoice to Tisha Johnson, Department Accountant, on a monthly basis for approved services and deliverables rendered to the Department in the previous month. Properly submitted invoices shall be paid within [ \_\_\_\_\_ ] days of receipt. [note: It did not state a payment period. May one be stated? E.g. is one dictated by law?] Each monthly invoice shall have a cover letter/memo addressed to the Project Manager printed on the Vendor's company letterhead. Attached to the Vendor's letter/memo shall be the Vendor's invoice. The invoice shall contain summary level descriptions of each invoiced line item. All Vendor staff signed timesheets for the billing period must be

attached to the invoice. The Vendor's staff resource and the Vendor's Project Lead must sign each Vendor staff's timesheet. Items appearing on the monthly Vendor's invoice must be line items identified as part of this contract, invoiced according to the Vendor's fixed quoted price for deliverables and a computed summary level cost for the Vendor's staff hours worked based upon the Vendor's quoted Rate Per Hour for each staff member multiplied by the actual hours worked. The total accumulated hours for each **Vendor staff resource must not exceed the total hours quoted for each staff resource by the Vendor in their proposal response.** One full copy of the invoice documentation (cover letter, invoice, and timesheets) shall also be provided to the Project Manager.

During the life of the Contract for this RFP, payment of 90 percent of the amount proposal per task/deliverable/requirement will be paid to the Vendor following HIX's approval of tasks/deliverables/requirements for services rendered with the exceptions noted below. The Department will retain an amount equal to 10 percent of each task/deliverable/requirement cost (withholding) which will be paid to the Vendor ~~at the successful completion of all tasks. The Awarded Vendor's upon acceptance of the system (as defined below).~~ [note: This more clearly defines the holdback term to both parties' benefit] Vendor's monthly invoices must show the 10 percent withholding amount for task/deliverables/requirements deducted from the total amount of the invoice. The 10 percent withholding is payable upon HIX's acceptance of the final software implementation Deliverable ("the system-"). **The total amount billed under this RFP by the Vendor, including the 10 percent withholding, shall and cannot exceed the total fixed price agreed to under this Contract.**

## 6.9 Damages

### 6.9.1 Liquidated Damages

[note: We believe that this set of terms merits a detailed discussion between the parties. The parties need to agree upon the specific terms for the triggers for any liquidated damages, the amounts, and a reasonable cap on such liquidated damages. Also, liquidated damages should, when assessed, be the sole remedy for the applicable failure, and should only be applicable when the given trigger occurs due solely to Vendor's acts or omissions and not due to any act or omission by the Department or any third party or any failed contract assumption.]

Vendor understands that the U.S. Department of Health and Human Services has placed strict time constraints on the Department in implementing this project. The firm, critical deadlines that currently exist are set out within in the following sections:

- Table 1: Project Timetable
- Section 5.2.2.11, response Tab 6, SDLC Approach and Methodology
- Section 5.2.2.13, response Tab 8, Project Plan
- Staffing requirements as outlined Section 3.5.2, Staffing

Vendor understands that meeting deadlines are crucial, and that failing to meet these deadlines will cause the State substantial monetary and non-monetary damages. It is agreed by the Department and the Vendor that, in the event of a failure to meet the contract requirements, damage shall be sustained by the Department, and that it is and shall be impractical and extremely difficult to ascertain and determine the actual damages which the Department shall sustain in the event of, and by reason of, such failure. Due to the unknown nature of the acts necessary to be undertaken in the event a deadline is not met, the exact cost of such a contingency is impossible to calculate with mathematical exactness. The Department estimates that any such delay will result in daily damages that will exceed \$10,000.00 As a result, Vendor agrees that liquidated damages of \$10,000.00 shall be deducted from Vendor's compensation for each and every day that the work contemplated in the sections outlined below continues uncompleted beyond those dates:

- Table 1: Project Timetable
- Section 5.2.2.11, response Tab 6, SDLC Approach and Methodology
- Section 5.2.2.13, response Tab 8, Project Plan
- Staffing requirements as outlined in Section 3.5.2, Staffing

Vendor understands that the Department has outlined requirements of performance expectations and service level agreements in Appendix I. Liquidated damages shall also be assessed at the rates in Appendix I for such performance expectations and service level agreements.

The imposition of liquidated damages is not in lieu of any other remedy available to the Department. The Department shall withhold from the Vendor reimbursements amounts necessary to satisfy any damages imposed.

A decision by the Department not to exercise this damage clause in a particular instance shall not be construed as a waiver of the Department's right to pursue future assessment of that performance requirement and associated damages. The Department may, at its sole discretion, return all or a portion of any liquidated damages collected, as an incentive to the Vendor for prompt and lasting correction of performance problems.

### 6.9.2 Payment of Damages

Amounts owed the Department due to liquidated damages shall be deducted by the Department from any money payable to the Vendor pursuant to this Contract. These amounts shall be deducted from any actual damages claimed by the Department in the event of litigation for non-compliance and default and shall be included in the calculation of Vendor's maximum liability pursuant to Section 6.12 below.

### **6.9.3 Right of Offset**

~~The Department shall be entitled to offset against any amounts due the Vendor any expenses or costs incurred by the Department concerning the Vendor's nonconforming performance or failure to perform the contract, including expenses, costs and damages described in this contract.~~

### **6.9.34 Right to Assurance**

If the Department, in good faith, has reason to believe that the Vendor does not intend to perform or continue performing this contract, the Department may demand in writing that the Vendor give a written assurance of intent to perform. The demand shall be sent to the Vendor by certified mail, return receipt requested. ~~Failure by the Vendor to provide written assurance within the number of days specified in the demand may, solely at the Department's option, be the basis for terminating the contract.~~

## **6.10 Delivery**

### **6.10.1 Acceptance**

~~Materials and d~~ Deliverables under this contract shall not be deemed accepted by Vendor upon delivery. ~~The Department shall notify Vendor whether such deliverable and/or material have been accepted pursuant to~~ This Section hereby supersedes and replaces Sections 2.3.2 and 2.3.3 of the RFP.

All Deliverables prepared by Vendor shall have the written acceptance of the Department's project director or his or her written designee that such Deliverables comply in all material respects with the requirements of this Contract or a previously accepted Deliverable (the "Specifications"), which acceptance shall not be unreasonably withheld.

The Department shall complete its review of a Deliverable in not more than the number of business days that is specified in the agreed-upon project work plan for the Department review of such Deliverable. If not specifically identified in the project plan, then the number of business days for any Department review of a Deliverable shall be no more than ten (10) business days. The Department shall provide Vendor (i) with acceptance of the Deliverable or (ii) with a written statement, as provided below, of the deficiencies preventing acceptance. Such business days shall be counted from and include the first business day following the delivery of the Deliverable to the Department.

The Department's review and acceptance of Deliverables shall be solely for the purpose of determining compliance in all material respects with the Specifications and not for any other purpose, including, without limitation, format or style of the Deliverables or the incorporation at that time of additional ideas or functionality. Acceptance shall be granted if the Deliverable conforms in all material respects to the applicable Specifications. In the event of The Department's rejection of a Deliverable, the Department shall provide a complete and written statement which identifies in reasonable detail, with references to the applicable Specifications,

all deficiencies. Deliverables requiring only minor or cosmetic corrections and not requiring extensive re-review by the Department and for which corrections have been promised by Vendor within specified times will be deemed accepted.

Vendor shall have thirty (30) business days to complete all such corrective actions or changes in order for such Deliverable to conform in all material respects with the Specifications. The count of such business days shall begin on the first business day following Vendor's receipt of the written statement of required corrective actions or changes as set forth in subparagraph (b) of this Paragraph.

The Department shall have ten (10) business days to complete a review of the corrective actions or changes made to the Deliverable in response to The Department's written statement of deficiencies as set forth in subparagraph (b) of this Paragraph and notify Vendor in writing of acceptance or rejection. The count of such days shall begin on the first business day after The Department receives the corrected or changed Deliverable from Vendor. The Department's review and acceptance of such corrected or changed Deliverable shall be solely for the purpose of determining that corrections have been made to bring the Deliverables into compliance in all material respects with the Specifications and not for any other purpose, including, without limitation, for format, style or the incorporation of additional ideas or functionality.

The Department and Vendor may mutually agree to extend the period of time allotted for any review, correction or change under this Paragraph. Any such extension of time shall extend the schedule for subsequent Deliverables by a corresponding amount.

Notwithstanding the provisions of this Section above, acceptance of a Deliverable shall be deemed given by the Department if the Department has not delivered to Vendor a notice of deficiencies in writing for such Deliverable prior to the expiration of any period for The Department review thereof as set forth in this Paragraph, or if the Department uses the Deliverable in production. Notwithstanding the foregoing provisions of this Section, acceptance of corrective actions or changes with respect to a Deliverable shall be deemed given by the Department if the Department has not rejected in writing, in accordance with this Section, such corrective actions or changes with respect to such Deliverables prior to the expiration of any period for the Department review thereof as set forth in this Section.

To the extent that any Deliverables have been accepted by the Department at any stage of Vendor's performance hereunder, Vendor shall be entitled to rely on such acceptance for purposes of all subsequent stages of Vendor's performance hereunder. Upon the Department's acceptance of each Deliverable, The Department agrees that, in the event of a contradiction between the Engagement Letter and the accepted Deliverable, the contradiction shall be resolved by the accepted Deliverable controlling.

### **6.10.2 Inspection/Testing**

The Vendor agrees to permit ~~access to its facilities and subcontractor facilities;~~ the Department to inspect performance of the Services on the Department's premises at reasonable times for inspection of the ~~deliverables-services~~ under this contract. The Department shall have the right

to test at its own cost the deliverables to be supplied under this contract in accordance with Section 6.10.1 above. ~~Testing shall not constitute final acceptance of the deliverables. If the Department determines non-compliance of the deliverables, the Vendor shall be responsible for the payment of all costs incurred by the State for testing and inspection.~~

### **6.10.3 Liens**

~~The Vendor warrants that the materials and/or deliverables supplied under this contract are free of liens.~~

### **6.10.4 Fitness**

~~The Vendor warrants that any deliverable supplied to the Department shall fully conform to all requirements of the contract and all representations of the Vendor, and shall be fit for all purposes and uses required by the contract.~~

### **6.10.5 3 Delivery/Risk of Loss**

Unless stated otherwise in this contract, all prices shall be F.O.B. Destination and shall include all delivery and unloading at destination. The Vendor shall bear all loss of conforming materials and/or deliverables covered under this contract until received by authorized personnel at the Department. Mere receipt does not constitute acceptance. ~~The risk of loss for nonconforming materials shall remain with the Vendor regardless of receipt.~~

### **6.10.46 Nonconforming Tender**

~~Materials and/or deliverables supplied under this contract shall fully comply with the contract. The delivery of materials or a portion of materials in an installment that do not fully comply constitutes a breach of contract.~~ On delivery of nonconforming ~~materials and/or deliverables~~ not remedied pursuant to Sections 2.3.2 and 2.3.3, the Department may terminate the contract for default under the applicable termination clauses in the contract, exercise any of its rights and remedies or pursue any other right or remedy available to it.

### **6.10.57 Warranty of Services**

The Vendor warrants that all services provided under this contract will be performed in accordance with industry-standards and in a professional and workmanlike mannere~~conform to the requirements stated herein~~ for the duration of the contract. The Department's acceptance of services-Deliverables provided by the Vendor shall not relieve the Vendor from its obligations under this warranty. In addition to its other remedies, the Project Manager may, at the Vendor's expense, require prompt correction of any services failing to meet Vendor's warranty herein upon written notice. Services corrected by Vendor shall be subject to all of the provisions of this contract in the manner and to the same extent as the services originally furnished.

## 6.10.68 Exclusions

Except ~~as otherwise set forth~~ for the warranties expressly provided in this Section 6.10 of this Contract, there are no other warranties, express or implied, including without limitation, warranties of merchantability or fitness for a particular purpose.

## 6.11 Other Requirements

### 6.11.1 The Vendor's Liaison

The Vendor's Account Manager shall serve as liaison and shall be available and responsible, as the need arises, for consultation and assistance with the Department personnel; he/she shall attend, upon request, Department meetings, meetings and hearings of legislative committees and interested governmental bodies, agencies, and officers; and he/she shall provide timely and informed responses to operational and administrative problems whenever arising in administration of the HIX System. Whenever the Account Manager is not available, the Vendor shall provide a designated alternate that is fully capable of meeting the requirements of this section.

### 6.11.2 HIX System Project Manager

The Department's Project Manager shall be responsible for coordination of implementation activities with the Vendor. Said Project Manager, his/her designee(s), and Department HIX implementation personnel shall have reasonable access to the Vendor's project personnel, facilities, and records for evaluating the quality, appropriateness, and timeliness of deliverables. The Project Manager shall have authority on a reasonable basis to call meetings with the Vendor's Account Manager or designee and project personnel, as required, and to assign appropriate technical personnel of HIX to work with designated staff of the Vendor.

### 6.11.3 Financial Disclosure Statement

The successful Vendor shall be required to complete a financial disclosure statement with the executed contract.

### 6.11.4 Inspection of Work Performed

The Department or its authorized representative shall have the right to ~~enter into the premises of the Vendor and all subcontractors, or such other places where duties under the contract are being performed, to~~ inspect, monitor or otherwise [ ] *[note: Word seems to be missing here]* the work being performed on the Department's premises. All inspections and evaluations shall be performed in such a manner as will not unduly delay work.

### 6.11.5 Survival

The terms, provisions, representatives, and warranties contained in the contract shall survive the development and submission of all required deliverables and the payment of the purchase price thereof.

### 6.11.6 Amendments in Writing

After the award of the contract, no amendment to this contract shall be effective unless it is in writing and signed by duly authorized representatives of the Vendor and the Department.

### 6.11.7 Severability

If any provision of the contract (including terms incorporated by reference) is declared or found to be illegal, unenforceable, or void, then both the Department and the Vendor must be relieved of all obligations arising under such provision; if the remainder of the contract is capable of performance, it shall not, at the sole option of the Department, be affected by such declaration or finding and shall be fully performed.

### 6.11.8 Choice of Law

The construction, interpretation, and enforcement of this contract shall be governed by the substantive contract law of the State of Alabama without regard to its conflict of law provisions. In the event any provision of this contract is unenforceable as a matter of law, the remaining provisions will remain in full force and effect.

### 6.11.9 Effective Date

Vendor acknowledges and understands that this contract is not effective until it has received all requisite State and Federal government approvals and Vendor shall not begin performing work under this contract until notified to do so by the Department. Vendor is entitled to no compensation for work performed prior to the effective date of this contract.

### 6.11.10 Authority

Each party has full power and authority to enter into and perform this contract, and the person signing this agreement has been properly authorized and empowered to enter into this contract. Each party further acknowledges that it has read this contract, understands it, and agrees to be bound by it.

## **6.12 Limitation on Damages.**

The Department agrees that Vendor, its subcontractors and their respective personnel shall not be liable to the Department for any claims, liabilities, or expenses relating to this engagement ("Claims") for an aggregate amount in excess of the fees paid by the Department to Vendor pursuant to this engagement, except to the extent finally judicially determined to have resulted



primarily from the recklessness, bad faith or intentional misconduct of Vendor or its subcontractors. In no event shall Vendor, its subcontractors or their respective personnel be liable for any loss of use, data, goodwill, revenues or profits (whether or not deemed to constitute a direct Claim), or any consequential, special, indirect, incidental, punitive or exemplary loss, damage, or expense, relating to this engagement. In circumstances where all or any portion of the provisions of this Section is finally judicially determined to be unavailable, the aggregate liability of Vendor, its subcontractors and their respective personnel for any Claim shall not exceed an amount which is proportional to the relative fault that their conduct bears to all other conduct giving rise to such Claim.

### **6.13 Department Responsibilities**

The Department shall cooperate with Vendor hereunder, including, without limitation, (i) providing Vendor with reasonable facilities and timely access to data, information and personnel of the Department; (ii) providing experienced and qualified personnel having appropriate skills to perform their assigned tasks and duties in a competent and timely fashion; (iii) providing a stable, fully functional system infrastructure environment which will support the Services and allow Vendor and Client to work productively; and (iv) promptly notifying Vendor of any issues, concerns or disputes with respect to the Services. The Department shall be responsible for the performance of its personnel and agents and for the accuracy and completeness of data and information provided to Vendor for purposes of the performance of the Services. The Department acknowledges and agrees that Vendor's performance is dependent upon the timely and effective satisfaction of the Department's responsibilities hereunder and timely decisions and approvals of the Department in connection with the Services. Vendor shall be entitled to rely on all decisions and approvals of the Department. The Department shall be solely responsible for, among other things: (i) making all management decisions and performing all management functions; (ii) designating a competent management member to oversee the Services; (iii) evaluating the adequacy and results of the Services; (iv) accepting responsibility for the results of the Services; and (v) establishing and maintaining internal controls, including, without limitation, monitoring ongoing activities.