

HAWAII HEALTH SERVICES CORPORATION

Information Technology Special Terms and Conditions for Software and Services

1) Definitions: As used herein;

“Acceptance” shall mean that the Software has passed its Acceptance Testing and shall be formalized in a written notice from HHSC to CONTRACTOR; or, if there is no Acceptance Testing, Acceptance shall occur upon the first productive use of the system by HHSC.

“Acceptance Date” shall mean the date upon which HHSC accepts the Software as provided in the contract; or, if there is no Acceptance Testing, Acceptance Date shall mean the date upon the first productive use of the system by HHSC.
Products.

“Acceptance Testing” shall mean the process for ascertaining that the Software meets the standards set forth in the contract prior to Acceptance by the HHSC.

“Business Days and Hours” shall mean Monday through Friday, 6:00 a.m. to 6:00 p.m., Hawaii Standard Time. HI state holidays may be non-standard work days for HHSC and therefore subject to overtime.

“Confidential Information” shall mean information that may be exempt from disclosure to the public or other unauthorized persons under state or federal statutes or regulations and/or any data that may be expressly identified by Federal, State, certifying agency or entity. Confidential Information includes, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card information, driver’s license numbers, medical data, law enforcement records, medical record identifiers, HHSC source code or object code, or HHSC security data, as well as any data deemed to be “protected health information” (PHI) under HIPAA regulations.

“Contract” shall mean this document, all schedules and exhibits, and all amendments hereto.

“CONTRACTOR” shall mean CONTRACTOR, its employees and agents. CONTRACTOR also includes any firm, provider, organization, individual, or other entity performing the business activities under this Contract. It shall also include any Subcontractor retained by CONTRACTOR as permitted under the terms of this Contract.

“CONTRACTOR Account Manager” shall mean a representative of CONTRACTOR who is assigned as the primary contact person whom the HHSC Technical Representative or Project Manager shall work with for the duration of this Contract and as further defined in the contract.

“Deliverables” shall mean all project materials, including goods, software, data, and documentation created during the performance or provision of services hereunder. Deliverables include “Work Product” and means any expression of Licensor’s findings, analyses, conclusions, opinions, recommendations, ideas, techniques, know-how, designs, programs, enhancements, and other technical information; but not source and object code or software. All Software source and object code is the property of Licensor and is licensed nonexclusively to the HHSC, at no additional license fee, pursuant to the terms of the software license contained herein, and in the Supplemental Terms and Conditions for Software and Services or the License Agreement if incorporated in the Solicitation Documents.

“Delivery Date” shall mean the date by which the Products ordered hereunder must be delivered.

“Effective Date” shall mean the first date this Contract is in full force and effect. It may be a specific date agreed to by the parties; or, if not so specified, the date of the last signature of a party to this Contract.

“Help Desk” shall mean a service provided by CONTRACTOR for the support of CONTRACTOR’s Products. HHSC shall report warranty or maintenance problems to CONTRACTOR’s Help Desk for initial troubleshooting and possible resolution of the problems or for the initiation of repair or replacement services.

“Installation Date” shall mean the date by which all Software ordered hereunder shall be in place, in good working order and ready for Acceptance Testing.

“HHSC” shall mean the Hawaii Health Systems Corporation, [HHSC], any of its regions, hospitals, facilities, affiliates or any of the officers or other officials lawfully representing HHSC.

“HHSC Technical Representative or Project Manager” shall mean the person designated by HHSC who is assigned as the primary contact person whom CONTRACTOR’s Account Manager shall work with for the duration of this Contract and as further defined in the contract.

“License” shall mean the rights granted to HHSC to use the Software that is the subject of this Contract.

“Price” shall mean charges, costs, rates, and/or fees charged for the Products and Services under this Contract and shall be paid in United States dollars.

“Product(s)” shall mean any CONTRACTOR-supplied equipment, Software, and documentation.

“Proprietary Information” shall mean information owned by CONTRACTOR to which CONTRACTOR claims a protectable interest under law. Proprietary Information includes, but is not limited to, information protected by copyright, patent, trademark, or trade secret laws.

“Solicitation” shall mean the solicitation document(s) used to establish this Contract, including all its amendments, modifications and exhibits.

“Response” shall mean CONTRACTOR’s Response to HHSC’s solicitation.

“Services” shall mean those Services provided under this Contract and related to the Software License(s) being purchased that are appropriate to the scope of this Contract and includes such things as installation Services, maintenance, training, etc.

“Software” shall mean the object code version of computer programs licensed pursuant to this Contract. Software also means the source code version, where provided by CONTRACTOR. Embedded code, firmware, internal code, microcode, and any other term referring to software residing in the equipment that is necessary for the proper operation of the equipment is not included in this definition of Software. Software includes all prior, current, and future versions of the Software and all maintenance updates and error corrections.

“Specifications” shall mean the technical and other specifications set forth in the HHSC statement of Work (SOW), solicitation, any additional specifications set forth in CONTRACTOR’s Response, and the specifications set forth in CONTRACTOR’s Product documentation, whether or not CONTRACTOR produces such documentation before or after this Contract’s Effective Date.

“Standard of Performance” shall mean the criteria that must be met before Software Acceptance, as set forth in the contract. The Standard of Performance also applies to all additional, replacement or substitute Software and Software that is modified by or with the written approval of CONTRACTOR after having been accepted.

“Statement of Work (SOW)” shall be a requirement for any IT contract. SOW should include agreement to a particular project management approach and specify/require reporting on budget/timeline, etc. Component parts of a SOW should include following examples:

- Scope of work
- Conversion plan
- Down-time procedures
- Description of training approach to be used (i.e. train the trainer, use of in-house trainers, purchase training, etc)

“Subcontractor” shall mean one not in the employment of CONTRACTOR, who is performing all or part of the business activities under this Contract under a separate contract with CONTRACTOR. The term “Subcontractor” means Subcontractor(s) of any tier.

“Work Product” shall mean data and products produced under this Contract including but not limited to, regardless of medium/media used, discoveries, formulae, ideas, improvements, inventions, methods, models, processes, techniques, findings, conclusions, recommendations, reports, designs, plans, diagrams, drawings, Software, databases, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions, to the extent provided by law.

2) Standards: Manufactured items and/or fabricated assemblies comprising Deliverables shall meet all requirements of the Occupational Safety and Health Act (OSHA), and state and federal requirements relating to clean air and water pollution, if applicable. CONTRACTOR will provide and maintain a quality assurance system or program that includes any Deliverables and will tender to the HHSC only those Deliverables that have been inspected and found to conform to the requirements of this Contract. All manufactured items and/or fabricated assemblies comprising Deliverables are subject to operation, certification or inspection, and accessibility requirements as required:

- by HHSC or federal Regulation,
- Where applicable, software must be certified in accordance with Office of the National Coordinator of Health Information Technology (ONC) regulations regarding provider demonstration of “meaningful use” of health information technology to qualify for economic incentives
- acceptance with appropriate standards of operations or uses of said Deliverables as may be shown by identification markings or other means of the appropriate certifying standards organization.
 - a) **Site Preparation:** CONTRACTORs shall provide HHSC complete site requirement specifications for the Deliverables, if any. These specifications shall ensure that the Deliverables to be installed shall operate properly and efficiently within the site environment, including Deliverables hosted at a remote site. The CONTRACTOR shall advise the HHSC of any site requirements, including remote hosting, for any Deliverables required by the HHSC’s

specifications. Any alterations or modification in site preparation which are directly attributable to incomplete or erroneous specifications provided by the CONTRACTOR and which would involve additional expenses to the HHSC, shall be made at the expense of the CONTRACTOR.

b) **Goods Return:** Deliverables and any other goods or materials furnished by the CONTRACTOR to fulfill technical requirements shall be in good working order and be maintained in good working order by CONTRACTOR for the duration of the Contract; unless otherwise provided in a separate maintenance agreement or in the Solicitation Documents. Deliverables failing to meet the HHSC's technical requirements shall be considered non-conforming goods and subject to return to the CONTRACTOR for replacement at the HHSC's option, and at the CONTRACTOR's expense. The HHSC is responsible for the return costs related to the termination of a Contract, including deinstallation, and freight to destinations within the United States; except in the case of default by the CONTRACTOR or delivery of non-conforming goods by CONTRACTOR. Shipping or freight charges, if any, paid by the HHSC for non-conforming goods will be reimbursed to the HHSC by CONTRACTOR.

c) **Specifications:** The apparent silence of the specifications as to any detail, or the apparent omission of detailed description concerning any point, shall be regarded as meaning that only the best commercial practice is to prevail and only material and workmanship of the first quality may be used. Upon any notice of noncompliance provided by the HHSC, CONTRACTOR shall supply proof of compliance with the specifications. CONTRACTOR must provide written notice of its intent to deliver alternate or substitute products, goods or Deliverables. Alternate or substitute products, goods or Deliverables may be accepted or rejected in the sole discretion of the HHSC; and any such alternates or substitutes must be accompanied by CONTRACTOR's certification and evidence satisfactory to the HHSC that the function, characteristics, performance and endurance will be equal or superior to the original Deliverables specified.

3) Personnel: CONTRACTOR shall not substitute key personnel assigned to the performance of this Contract without a minimum of 30-days notice prior written approval by the HHSC Contract Administrator. Any desired substitution shall be noticed to the HHSC's Contract Administrator accompanied by the names and references of CONTRACTOR's recommended substitute personnel. The HHSC will approve or disapprove the requested substitution in a timely manner. The HHSC may, in its sole discretion, terminate the services of any person providing services under this Contract. Upon such termination, the HHSC may request acceptable substitute personnel or terminate the contract services provided by such personnel.

4) Software License (for internal embedded software, firmware and unless otherwise provided in the HHSC's solicitation document, or in an attachment hereto):

a) Deliverables comprising goods, equipment or products (hardware) may contain software for internal operation, or as embedded software or firmware that is generally not sold or licensed as a severable software product. Software may be provided on separate media, such as CD-ROM, or may be included within the hardware at or prior to delivery. Such software is proprietary, copyrighted, and may also contain valuable trade secrets and may be protected by patents. CONTRACTOR grants the HHSC a license to use the Code (or any replacement provided) on, or in conjunction with, only the Deliverables purchased, or with any system identified in the solicitation documents. This includes using the Code to interface system data with other systems, in accordance with the scope of work defined in the solicitation. The HHSC shall have a worldwide, nonexclusive, non-sublicensable license to use such software and/or documentation for its internal use by anyone performing duties on behalf of HHSC to fulfill their work obligations. The HHSC may make and install copies of the software to support the authorized level of use. Provided, however that if the hardware is inoperable, the software may be copied for temporary use on other hardware. The HHSC shall promptly affix to any such copy the same proprietary and copyright notices affixed to the original. The HHSC may make one copy of the software for archival, back-up or disaster recovery purposes. The HHSC reserves the right to subcontract the operation of the software to a qualified third-party "business associate", which will be bound by all obligations specified herein. HHSC shall have the right to access the Code in a remote hosted environment. The license set forth in this Paragraph shall terminate immediately upon the HHSC's discontinuance of the use of the equipment on which the software is installed. The software may be transferred to another party only with the transfer of the hardware. If the hardware is transferred, the HHSC shall i) destroy all software copies made by the HHSC, ii) deliver the original or any replacement copies of the software to the transferee, and iii) notify the transferee that title and ownership of the software and the applicable patent, trademark, copyright, and other intellectual property rights shall remain with CONTRACTOR, or CONTRACTOR's

licensors. The HHSC shall not disassemble, decompile, reverse engineer, modify, or prepare derivative works of the embedded software, unless permitted under the solicitation documents.

b) For any additional software or subscription services not directly offered by CONTRACTOR, the CONTRACTOR shall specify what additional “sublicensed software” is required, any associated costs and how HHSC will be able to access support and maintenance for this sublicensed software, should it be necessary.

5) Deliverables: Deliverables are the property of the HHSC and must be kept confidential or returned to the HHSC, or destroyed as required by the HHSC. Proprietary CONTRACTOR materials licensed to the HHSC shall be identified to the HHSC by CONTRACTOR prior to use or provision of services hereunder and shall remain the property of the CONTRACTOR. Embedded software or firmware shall not be a severable Deliverable. The HHSC’s solicitation document may supplement or substitute this definition and the requirements set forth in this Paragraph.

6) Late Delivery, Back Order: CONTRACTOR shall advise the HHSC Technical Representative or Project Manager immediately upon determining that any Deliverable will not, or may not, be delivered at the time or place specified. Together with such notice, CONTRACTOR shall state the projected delivery time and date. In the event the delay projected by CONTRACTOR is unsatisfactory, the HHSC shall so advise CONTRACTOR and may proceed to procure substitute Deliverables or services.

7) Date and Time Warranty: The CONTRACTOR warrants that any Deliverable, whether hardware, firmware, middleware, custom or commercial software, or internal components, subroutines, and interface therein which performs any date and/or time data recognition function, calculation, or sequencing, will provide accurate date/time data and leap year calculations. This warranty shall survive termination or expiration of the Contract.

8) No Surreptitious Code Warranty:

a) CONTRACTOR warrants to HHSC that no licensed copy of the Software provided to HHSC contains or will contain any Self-Help Code nor any Unauthorized Code as defined below. CONTRACTOR further warrants that CONTRACTOR will not introduce, via modem or otherwise, any code or mechanism that electronically notifies CONTRACTOR of any fact or event, or any key, node, lock, time-out, or other function, implemented by any type of means or under any circumstances, that may restrict HHSC’s use of or access to any program, data, or equipment based on any type of limiting criteria, including frequency or duration of use for any copy of the Software provided to HHSC under this Contract. The warranty is referred to in this Contract as the “No Surreptitious Code Warranty.”

b) As used in this Contract, “Self-Help Code” means any back door, time bomb, drop dead device, or other software routine designed to disable a computer program automatically with the passage of time or under the positive control of a person other than a licensee of the Software. Self-Help Code does not include software routines in a computer program, if any, designed to permit an owner of the computer program (or other person acting by authority of the owner) to obtain access to a licensee’s computer system(s) (e.g., remote access via modem) solely for purposes of maintenance or technical support.

c) As used in this Contract, “Unauthorized Code” means any virus, Trojan horse, worm or other software routines or equipment components designed to permit unauthorized access, to disable, erase, or otherwise harm Software, equipment, or data; or to perform any other such actions. The term Unauthorized Code does not include Self-Help Code.

d) CONTRACTOR will defend HHSC against any claim, and indemnify HHSC against any loss or expense arising out of any breach of the No Surreptitious Code Warranty. No limitation of liability, whether contractual or statutory, shall apply to a breach of this warranty.

9) Patent, Copyright, and Trade Secret Protection:

a) CONTRACTOR has created, acquired or otherwise has rights in, and may, in connection with the performance of services for the HHSC, employ, provide, create, acquire or otherwise obtain rights in various concepts, ideas, methods, methodologies, procedures, processes, know-how, techniques, models, templates and general purpose consulting and software tools, utilities and routines (collectively, the “CONTRACTOR Technology”). To the extent that any CONTRACTOR Technology is contained in any of the Deliverables including any derivative works, the CONTRACTOR hereby grants the HHSC a royalty-free, fully paid, worldwide, perpetual, non-exclusive license to use such CONTRACTOR Technology in connection with the Deliverables for the HHSC’s purposes.

b) CONTRACTOR shall not acquire any right, title and interest in and to the copyrights for goods, any and all software, technical information, specifications, drawings, records, documentation, data or derivative works thereof, or other work products provided by the HHSC to CONTRACTOR. The HHSC hereby grants CONTRACTOR a royalty-free, fully paid, worldwide, perpetual, non-exclusive license for CONTRACTOR's internal use to non-confidential Deliverables first originated and prepared by the CONTRACTOR for delivery to the HHSC

c) The CONTRACTOR, at its own expense, shall defend any action brought against the HHSC to the extent that such action is based upon a claim that the services or Deliverables supplied by the CONTRACTOR, or the operation of such Deliverables pursuant to a current version of CONTRACTOR-supplied software, infringes a United States patent, or copyright or violates a trade secret. The CONTRACTOR shall pay those costs and damages finally awarded against the HHSC in any such action. Such defense and payment shall be conditioned on the following:

d) That the CONTRACTOR shall be notified within a reasonable time in writing by the HHSC of any such claim; and,

e) That the CONTRACTOR shall have the sole control of the defense of any action on such claim and all negotiations for its settlement or compromise, provided, however, that the HHSC shall have the option to participate in such action at its own expense.

f) Should any services or software supplied by CONTRACTOR, or the operation thereof become, or in the CONTRACTOR's opinion are likely to become, the subject of a claim of infringement of a United States patent, copyright, or a trade secret, the HHSC shall permit the CONTRACTOR, at its option and expense, either to procure for the HHSC the right to continue using the goods/hardware or software, or to replace or modify the same to become noninfringing and continue to meet procurement specifications in all material respects. If neither of these options can reasonably be taken, or if the use of such goods/hardware or software by the HHSC shall be prevented by injunction, the CONTRACTOR agrees to take back such goods/hardware or software, and refund any sums the HHSC has paid CONTRACTOR less any reasonable amount for use or damage and make every reasonable effort to assist the HHSC in procuring substitute Deliverables. If, in the sole opinion of the HHSC, the return of such infringing Deliverables makes the retention of other items of Deliverables acquired from the CONTRACTOR under this Contract impractical, the HHSC shall then have the option of terminating the Contract, or applicable portions thereof, without penalty or termination charge. The CONTRACTOR agrees to take back such Deliverables and refund any sums the HHSC has paid CONTRACTOR less any reasonable amount for use or damage.

g) CONTRACTOR will not be required to defend or indemnify the HHSC if any claim by a third party against the HHSC for infringement or misappropriation (i) results from the HHSC's alteration of any CONTRACTOR-branded product or Deliverable, or (ii) results from the continued use of the good(s) or Services and Deliverables after receiving notice they infringe a trade secret of a third party.

h) Nothing stated herein, however, shall affect CONTRACTOR's ownership in or rights to its preexisting intellectual property and proprietary rights.

10) Limitation of Liability: The parties agree that neither CONTRACTOR nor HHSC shall be liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages except a claim related to bodily injury or death, or a claim or demand based on a Date Warranty or No Surreptitious Code Warranty issue or patent, copyright, or other intellectual property right infringement, in which case liability shall be as set forth elsewhere in this Contract. This section does not modify any sections regarding liquidated damages or any other conditions as are elsewhere agreed to herein between the parties.

11) Supplement: The additional terms and conditions set forth herein shall supplement the HHSC General Terms and Conditions for Goods and Services. In the event of a conflict between this Supplement and the General Terms and Conditions, or any other document, the order of precedence shall be as determined in the Agreement. If not otherwise determined, the order of priority shall be: 1) this Supplement; 2) HHSC Agreement, Statements of Work (SOW) and General Terms and Conditions for Goods and Services; 3) CONTRACTOR'S agreed upon terms and licensing agreement, if any; 4) HHSC's solicitation documents; 5) CONTRACTOR's proposal.

12) Restrictions: HHSC's use of the CONTRACTOR's Software is restricted as follows:

a) The license granted herein is granted to the HHSC Entities as defined above. If the License Grant and License Fees are based upon the number of Users, the number of Users may be increased at any time, subject to the restrictions on the maximum number of Users specified in the solicitation documents. Under no circumstance will a qualified User be denied

access to the Software, even if that user represents an increase over the maximum number of users authorized. CONTRACTOR will specify in its Response how it counts Users and what the procedure is for allowing larger number of Users on the Software than specified in the original contract.

b) No right is granted hereunder to HHSC contractors to use the Software except as incidental to work being performed by the contractor on HHSC's behalf.

c) The HHSC may not copy, distribute, reproduce, use, lease, rent or allow access to the Software except as explicitly permitted under this Agreement, and HHSC will not modify, adapt, translate, prepare derivative works (unless allowed by the solicitation documents or SOW,) decompile, reverse engineer, disassemble or otherwise attempt to derive source code from the Software or any internal data files generated by the Software.

d) HHSC shall not remove, obscure or alter CONTRACTOR's copyright notice, trademarks, or other proprietary rights notices affixed to or contained within the Software.

13) CONTRACTOR's Retained Rights: Subject only to the rights granted to HHSC hereunder, CONTRACTOR retains all right, title and interest in and to the Software and all copies of the Software, including without limitation all modifications, enhancements, upgrades and new versions with respect to any of the foregoing, all patent rights, copyrights and trade secret rights embodying any of the foregoing, and all know-how, concepts, inventions and ideas related to the foregoing. HHSC shall provide CONTRACTOR with access to HHSC's facilities, at reasonable times and upon reasonable notice, to verify HHSC's compliance with the terms of this Agreement.

14) Support or Maintenance Services: This paragraph recites the scope of maintenance services due under the license granted, if not superseded by a separate licensing and maintenance agreement or as may be in the solicitation documents. Subject to payment of a Support Service or Maintenance Fee stated in the solicitation documents for the first year and all subsequent years, if requested by the HHSC, CONTRACTOR agrees to provide the following support services ("Support Services") for the current version and one previous version of the Software commencing upon delivery of the Software:

a) Error Correction: If the error conditions reported by the HHSC are not corrected in a timely manner, as determined by HHSC, the HHSC may request a replacement copy of the licensed Software from CONTRACTOR. In such event, and if practicable, CONTRACTOR shall then deliver a replacement copy, together with corrections and updates, of the licensed Software within 24 hours of the HHSC's request at no added expense to the HHSC. CONTRACTOR shall notify the HHSC of any material errors or defects in the Deliverables known, or made known to CONTRACTOR from any source during the Contract term that could cause the production of inaccurate, or otherwise materially incorrect, results. CONTRACTOR shall initiate actions as may be commercially necessary or proper to effect corrections of any such errors or defects, at no cost to the HHSC.

b) Other Agreement: This Paragraph may be superseded by agreement provided that support and maintenance services shall be fully described in a separate agreement annexed hereto and incorporated herein

c) Temporary Extension of License: If any licensed Software or CPU/computing system on which the Software is installed fails to operate or malfunctions, the term of the license granted shall be temporarily extended to another CPU selected by the HHSC and continue until the earlier of:

- i) Return of the inoperative CPU to full operation, or
- ii) Termination of the license.

d) Encryption Code: CONTRACTOR shall provide any temporary encryption code or authorization necessary or proper for operation of the licensed Software under the foregoing temporary license. The HHSC will provide notice by expedient means, whether by telephone, e-mail or facsimile of any failure under this paragraph. On receipt of such notice, CONTRACTOR shall issue any temporary encryption code or authorization to the HHSC within 24 hours; unless otherwise agreed.

e) Updates. CONTRACTOR shall provide to the HHSC, at no additional charge, all new releases and bug fixes (collectively referred to as "Updates") for any Software Deliverable developed or published by CONTRACTOR and made generally available to its other customers at no additional charge. All such Updates shall be a part of the Program and Documentation and, as such, be governed by the provisions of this Agreement.

f) Telephone Assistance. CONTRACTOR shall provide the HHSC with telephone access to technical support

engineers for assistance in the proper installation and use of the Software, and to report and resolve Software problems, 24 hours a day, seven days a week. CONTRACTOR shall respond to the telephone requests for Program maintenance service, within four (4) hours, for calls made at any time. Requests deemed “urgent” by the HHSC will be responded to by CONTRACTOR immediately, with agreed-upon escalation paths utilized to facilitated rapid resolution. Access to such assistance shall be unlimited, unless explicitly stated otherwise in a contract between CONTRACTOR and the HHSC.

g) Environment. CONTRACTOR shall support all applications in a “virtualized” environment and be able to support all applications in a remote-hosted environment of HHSC’s choosing. HHSC will have the right to subcontract operation of CONTRACTOR applications.

15) Termination of Support or Maintenance: If the HHSC fails to pay Support or Maintenance Services for the Software or choose not to pay for Support or Maintenance Services, the HHSC may continue to use the Software pursuant to the license granted hereunder, but will not be entitled to receive routine Support Services for such Software., effective 90 days after the date the payment is due. If the HHSC does not subscribe or purchase Support or Maintenance Services effective with the date of this Agreement, Support or Maintenance Services may be subsequently subscribed or purchased at any time during the term of this Agreement by payment of Support Service or Maintenance Fees at CONTRACTOR’s then current prices. During the term of this Agreement, the HHSC may also purchase additional implementation, consulting, and training services from CONTRACTOR at CONTRACTOR’s then current prices.

16) Program Retirement: CONTRACTOR retains the right to retire a version of the Program and stop providing Maintenance, Updates or Services, upon providing 18 months advance written notice to the HHSC of its intent to do so, unless otherwise stated in the solicitation documents. The decision to stop maintaining a version of the Program is the sole business discretion of CONTRACTOR and shall not be deemed a breach of contract. If CONTRACTOR retires the version of the Program provided to the HHSC and if the HHSC has paid all applicable annual Maintenance Fees subsequent to executing this Agreement, the HHSC shall be entitled to receive, at no additional charge, a newer version of the Program that supports substantially the same functionality as the licensed version of the Program. CONTRACTOR shall provide implementation services for a newer version at either no charge or a nominal charge. Newer versions of the Program containing substantially increased functionality will be made available to the HHSC for an additional reasonable fee.

17) Applies if marked (✓): **Services Provided by CONTRACTOR:** CONTRACTOR shall provide the HHSC with implementation services as specified in a Statement of Work (“SOW”) executed by the parties. This Agreement in combination with each SOW individually comprises a separate and independent contractual obligation from any other SOW. A breach by CONTRACTOR under one SOW will not be considered a breach under any other SOW. The services intended hereunder are related to the HHSC’s implementation and/or use of one or more Software Deliverables licensed hereunder or in a separate software license agreement between the parties (“License Agreement”).

18) Payment Terms: The total License Fee and the Support Service or Maintenance Fee (provided the HHSC subscribes or purchases such services) for the first year shall be invoiced upon delivery of the Software. The Support Service or Maintenance Fee for subsequent Agreement years, if any, will be invoiced annually 60 days prior to the anniversary date beginning each subsequent year. Increases in CONTRACTOR’s Agreement price for Support Services or Maintenance for each year following the first Agreement year shall be the lesser of 1) the annual percentage increase in the ECI Index for White Collar Workers or 2) three percent (3%). Payment terms for software are Net 60 days after receipt of correct invoice or acceptance of software, whichever is later. Payment terms for services are due and payable the month following the month for which charges accrue, or in accordance with the Agreement payment schedule. In the case of multiple HHSC regional participation in the Agreement as stated in the SOW, CONTRACTOR agrees to bill individual regions of the HHSC separately and each region is responsible for payments due from the respective region, only.

19) Acceptance Criteria: In the event acceptance of Deliverables is not described in additional Contract documents, the HHSC shall have the obligation to notify CONTRACTOR, in writing ten calendar days following installation of any Deliverable described in the Contract if it is not acceptable. The notice shall specify in reasonable detail the reason(s) a deliverable is unacceptable. Acceptance by the HHSC shall not be unreasonably withheld; but may be conditioned or delayed as required for installation and/or testing of Deliverables. Final acceptance is expressly conditioned upon

completion of all applicable inspection and testing procedures. Should the Deliverables fail to meet any specifications or acceptance criteria the HHSC may exercise any and all rights hereunder, including such rights provided by the Uniform Commercial Code as adopted in Hawaii Deliverables discovered to be defective or failing to conform to the specifications may be rejected upon initial inspection or at any later time if the defects contained in the Deliverables or non-compliance with the specifications was not reasonably ascertainable upon initial inspection. If the CONTRACTOR fails to promptly cure the defect or replace the Deliverables, the HHSC reserves the right to cancel the Purchase Order, contract with a different CONTRACTOR, and to invoice the original CONTRACTOR for any differential in price over the original Contract price. When Deliverables are rejected, the CONTRACTOR must remove the rejected Deliverables from the premises of the HHSC within seven calendar days of notification, unless otherwise agreed by the HHSC. Rejected items may be regarded as abandoned if not removed by CONTRACTOR as provided herein.

20) Acceptance: Acceptance testing is required for all CONTRACTOR supplied software unless provided otherwise in the solicitation documents or a Statement of Work. The HHSC may define such processes and procedures as may be necessary or proper, in its opinion and discretion, to ensure compliance with the HHSC's specifications and CONTRACTOR's technical representations. Acceptance of software or services may be controlled by amendment hereto, or additional terms as agreed by the parties. In the event acceptance of software or services is not described in additional Agreement documents, the HHSC shall have the obligation to notify CONTRACTOR, in writing and within a reasonable time following installation of any software deliverable described in the Agreement if it is not acceptable. The notice shall specify in reasonable detail the reason(s) a deliverable is unacceptable. Acceptance by the HHSC shall not be unreasonably withheld; but may be conditioned or delayed as required for installation and/or testing of software.

21) Warranty Terms: Notwithstanding anything in this Agreement or Exhibit hereto to the contrary, CONTRACTOR shall assign warranties for any Deliverable supplied by a third party to the HHSC.

a) CONTRACTOR warrants that any Software or Deliverable will operate substantially in conformity with prevailing specifications as defined by the current standard documentation (except for minor defects or errors which are not material to the HHSC) for as long as the HHSC is using the Software ("Warranty Period"), unless otherwise specified in the Solicitation Documents. If the Software does not perform in accordance with such specifications during the Warranty Period, CONTRACTOR will use reasonable efforts to correct any deficiencies in the Software so that it will perform in accordance with or substantially in accordance with such specifications. CONTRACTOR warrants that any updates provided will be documented in accordance with agreed-upon access (electronic or paper) for the HHSC and will not negatively impact any functionality specified by the HHSC in its scope of work. Any deviation from this will be remedied by CONTRACTOR at its own expense in a timely manner as determined by HHSC,.

b) CONTRACTOR warrants to the best of its knowledge that:

- i) The licensed Software and associated materials do not infringe any intellectual property rights of any third party;
- ii) There are no actual or threatened actions arising from, or alleged under, any intellectual property rights of any third party;
- iii) The licensed Software and associated materials do not contain any surreptitious programming codes, viruses, Trojan Horses, "back doors" or other means to facilitate or allow unauthorized access to the HHSC's information systems.
- iv.) The licensed Software and associated materials do not contain any timer, counter, lock or similar device (other than security features specifically approved by Customer in the Specifications) that inhibits or in any way limits the Software's ability to operate.

c) UNLESS MODIFIED BY AMENDMENT OR THE SOLICITATION DOCUMENTS, THE WARRANTIES IN THIS PARAGRAPH ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, OR WHETHER ARISING BY COURSE OF DEALING OR PERFORMANCE, CUSTOM, USAGE IN THE TRADE OR PROFESSION OR OTHERWISE, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AND NO OTHER REPRESENTATIONS OR WARRANTIES HAVE FORMED THE BASIS OF THE BARGAIN HEREUNDER.

22) Applies if marked (√): **Escrow of Code:** CONTRACTOR has established an Escrow Agreement (“Escrow Agreement”) with a third party escrow agent acceptable to the HHSC, as required in the solicitation documents. Within thirty days from the Effective Date of the Agreement, CONTRACTOR will add the HHSC as a beneficiary to such Escrow Agreement of any/all supporting software to be utilized by HHSC. In the event (i) this Agreement is terminated due to insolvency or the filing of involuntary bankruptcy proceedings pursuant to Chapter 7 of the U.S. Bankruptcy Code and (ii) CONTRACTOR no longer offers support or maintenance services for the Software (both (i) and (ii) constituting the release condition (“Release Condition”) under the Escrow Agreement), the Software code deposited in accordance with the Escrow Agreement (the “Deposit Materials”) shall be delivered to the HHSC and the HHSC shall be granted a license to use the Deposit Materials solely to repair, maintain and support the Software licensed to HHSC pursuant to this Agreement. The license to the Deposit Materials under this Section shall terminate upon the termination or cure of the Release Condition.

23) Confidentiality: CONTRACTOR shall employ security measures and standards, including encryption technologies, as may be necessary or proper, and as mutually agreed by the HHSC and CONTRACTOR during performance of this Agreement. CONTRACTOR and its agents, if any, shall not have access to any information except as required to perform CONTRACTOR’s obligations under this Agreement.

24) Information Systems Policies: CONTRACTOR shall use commercially reasonable efforts to abide by any of HHSC’s Corporate IT policies relating to the Scope of Work of the contract including, but not limited to, information systems access, use, storage, and disposal. HHSC acknowledges that abiding by such policy may cause delays in support that are not the responsibility of the CONTRACTOR. If HHSC wishes to modify any of the policies and such modification(s) would in any way be material to CONTRACTOR’S obligations under the contract, then HHSC will notify CONTRACTOR of such proposed change(s).

25) HHSC Property and Intangibles Rights: The parties acknowledge and agree that the HHSC shall own all right, title and interest in and to the copyright in any and all software, technical information, specifications, drawings, records, documentation, data and other work products first originated and prepared by the CONTRACTOR for delivery to the HHSC (the “Deliverables”). CONTRACTOR will seek permission 30 days in advance for the use of any HHSC corporate / region / facility logo. Material that is delivered under this Agreement, but that does not originate therefrom (“Preexisting Material”), shall be transferred to HHSC with a nonexclusive, royalty-free, irrevocable license to publish, translate, reproduce, deliver, perform, display, and dispose of such Preexisting Material, for internal business purposes, and to authorize others to do so except that such license shall be limited to the extent to which CONTRACTOR has a right to grant such a license. CONTRACTOR shall exert all reasonable effort to advise HHSC at the time of delivery of Preexisting Material furnished under this Agreement, of all known or potential infringements of publicity, privacy or of intellectual property contained therein and of any portion of such document which was not produced in the performance of this Agreement. CONTRACTOR agrees to obtain, at its own expense, express written consent of the copyright holder for the inclusion of Preexisting Material. HHSC shall receive prompt written notice of each notice or claim of copyright infringement or infringement of other intellectual property right worldwide received by CONTRACTOR with respect to any Preexisting Material delivered under this Agreement. HHSC shall have the right to modify or remove any restrictive markings placed upon the Preexisting Material by CONTRACTOR. CONTRACTOR shall seek permission 30 days in advance before HHSC is used a reference site for contractor’s products/services or in any publicity contractor does. CONTRACTOR shall not acquire any right, title and interest in and to the copyrights for goods, any and all software, technical information, specifications, drawings, records, documentation, data or derivative works thereof, or other work products provided by the HHSC to CONTRACTOR. The HHSC hereby grants CONTRACTOR a royalty-free, fully paid, worldwide, perpetual, non-exclusive license to non-confidential Deliverables first originated and prepared by the CONTRACTOR for delivery to the HHSC.

26) License Rights: All licenses granted to either party include the right to make, have made, use, have used, import, offer to sell, sell, lease or otherwise transfer any apparatus, or practice and have practiced any method and shall include the right to grant, directly or indirectly, revocable or irrevocable sublicenses to affiliates of such party; and nothing contained in this Agreement shall be deemed to grant any license under any other patents or patent applications arising out of any other inventions of either party.

27) Default: If the prescribed acceptance testing stated in the Solicitation Documents is not completed successfully, the HHSC may request substitute Software, cancel the portion of the Agreement that relates to the unaccepted Software, or continue the acceptance testing with or without the assistance of CONTRACTOR. These options shall remain in effect until such time as the testing is successful or the expiration of any time specified for completion of the testing. If the testing is not completed after exercise of any of the HHSC's options, the HHSC may cancel any portion of the Agreement related to the failed Software and take action to procure substitute software. If the failed software (or the substituted software) is an integral and critical part of the proper completion of the work for which the Deliverables identified in the solicitation documents or Statement of work were acquired, the HHSC may terminate the entire Agreement pursuant to the Default terms in the General Terms and Conditions.

28) Limitation of Liability for Software Deliverables:

a) Where equipment is under the HHSC's exclusive management and control, CONTRACTOR shall not be liable for any damages caused by the HHSC's failure to fulfill any HHSC responsibilities including, without limitation, those relating to assuring the proper use, management and supervision of the equipment and programs, audit controls, operating methods, office procedures or for establishing all property checkpoints necessary for the HHSC's intended use of the machines.

b) The CONTRACTOR's liability for damages to the HHSC for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, shall not exceed two times the value of the Agreement, but in no event shall the liability for damages be less than the total value of the Agreement.

c) WITH THE EXCEPTIONS OF INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT ACTIONS, THE HHSC'S CONSTITUTIONAL RIGHTS AS A SOVERIGN, AND PENALTIES IMPOSED UPON THE HHSC BY ANY FEDERAL ENTITY OR EXPENDITURES OF PUBLIC FUNDS REQUIRED OR RESULTING FROM AN OPERATIONAL FAILURE OF THE DELIVERABLE(S) OR SERVICES PROVIDED HEREUNDER, BUT NOTWITHSTANDING ANY OTHER TERM TO THE CONTRARY CONTAINED IN THIS AGREEMENT, NEITHER PARTY NOR THEIR RESPECTIVE AFFILIATES SHALL, UNDER ANY CIRCUMSTANCES, BE LIABLE TO THE OTHER PARTY OR ITS AFFILIATES (I) FOR ANY CLAIM BASED UPON ANY THIRD PARTY CLAIM, (II) FOR ANY CONSEQUENTIAL, INCIDENTAL OR INDIRECT DAMAGES OF ANY NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST SAVINGS OR OTHER ECONOMIC CONSEQUENTIAL DAMAGES, WHETHER RESULTING FROM DELAYS, LOSS OF DATA, INTERRUPTION OF SERVICE OR OTHERWISE, EVEN IF A PARTY OR ITS AFFILIATES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR (III) FOR ANY PUNITIVE OR EXEMPLARY DAMAGES OF ANY NATURE WHATSOEVER.

29) CONTRACTOR Obligations: For each SOW, CONTRACTOR will designate one (1) CONTRACTOR point of contact who shall be responsible for responding to the HHSC's questions and issues relating to the Services.

30) Qualified Personnel: Each party shall provide sufficient, qualified, knowledgeable personnel capable of:

(i) performing obligations set forth in this Agreement and each SOW; (ii) making timely decisions necessary to move the Services forward; (iii) participating in the project and assisting CONTRACTOR in rendering the Services; and (iv) facilitating development, testing and implementation of CONTRACTOR software, if applicable. CONTRACTOR warrants that qualified personnel will perform the services in a professional manner. As used in this Paragraph, "professional manner" means that the personnel performing the services will be of a skill and competence consistent with prevailing norms of company providers in the information technology industry.

31) HHSC Obligations: CONTRACTOR shall not be responsible for any alleged breach of the foregoing Paragraph 28) that is attributable to (i) misuse or modification of CONTRACTOR's Software by or on behalf of the HHSC, (ii) the HHSC's failure to use corrections or enhancements made available by CONTRACTOR, (iii) the quality or integrity of data from other automated or manual systems with which the CONTRACTOR's Software interfaces, (iv) errors in or changes to third party software or hardware implemented by the HHSC or a third party that is not a subcontractor of CONTRACTOR or that is not supported by the Deliverables, or (vi) the operation or use of the CONTRACTOR's Software not in accordance with the operating procedures developed for the CONTRACTOR's Software or otherwise in a manner not contemplated by this Agreement.

32) Transportation: Transportation of software shall be FOB Destination unless delivered by internet or file transfer as agreed by the HHSC, or otherwise specified in the solicitation documents.