

EXHIBIT A - STAR HEALTH UNIFORM TERMS AND CONDITIONS

Contents

Article 1 Definitions 6

Article 2 Introduction 12

 Section 2.01 Inducements 12

 Section 2.02 Construction of the Contract..... 13

 Section 2.03 No implied authority..... 14

 Section 2.04 Legal Authority..... 14

 Section 2.05 Loss of Program Authority..... 14

Article 3 General Terms..... 16

 Section 3.01 Funding 16

 Section 3.02 Delegation of Authority..... 16

 Section 3.03 No waiver of Sovereign Immunity. 16

 Section 3.04 Force majeure..... 16

 Section 3.05 Publicity..... 17

 Section 3.06 Assignment. 17

 Section 3.07 Cooperation with other vendors and prospective vendors. 18

 Section 3.08 Renegotiation and Reprocurement rights. 18

 Section 3.09 RFP errors and omissions..... 19

 Section 3.10 Attorneys’ fees..... 19

 Section 3.11 Preferences under service contracts..... 19

 Section 3.12 Ensuring timely performance. 19

Article 4 – Contract Administration and Management 19

 Section 4.01 Qualifications, retention, and replacement of the MCO employees. 19

 Section 4.02 MCO’s Key Personnel..... 19

 Section 4.03 Executive Director. 22

 Section 4.04 Medical Director. 23

 Section 4.05 Responsibility for MCO personnel and Subcontractors. 24

 Section 4.06 Cooperation with HHSC and state administrative agencies..... 25

Section 4.07 Conduct of MCO personnel. 25

Section 4.08 Subcontractors and Agreements with Third Parties. 26

Section 4.09 HHSC’s ability to contract with Subcontractors. 30

Section 4.10 Prohibition Against Performance Outside the United States. 30

Section 4.11 Employment Verification 33

Article 5 Service Levels and Performance Measurements..... 34

Section 5.01 Performance measurement. 34

Section 5.02 Service Coordination Staffing..... 35

Article 6 Governing Laws and Regulations 35

Section 6.01 MCO responsibility for compliance with laws and regulations..... 35

Section 6.02 Compliance with state and federal anti-discrimination laws..... 36

Section 6.03 Environmental protection laws. 38

Section 6.04 HIPAA..... 39

Section 6.05 Historically Underutilized Business Participation Requirements. 40

Section 6.06 Compliance with Fraud, Waste, and Abuse requirements..... 40

Article 7 Amendments and Modifications 40

Section 7.01 Mutual agreement. 40

Section 7.02 Changes in law or contract. 41

Section 7.03 Modifications as a remedy..... 41

Section 7.04 Modifications upon renewal or extension of Contract..... 41

Section 7.05 Modification of HHSC Uniform Managed Care Manual. 41

Section 7.06 CMS approval of Contracts. 42

Section 7.07 Required compliance with amendment and modification procedures.
..... 42

Article 8 Records, Audit and Disclosure 42

Section 8.01 Maintenance of Books and Records..... 42

Section 8.02 Access to records, books, and documents..... 43

Section 8.03 General access to accounting records..... 44

Section 8.04 Audits and inspections of Services and Deliverables. 45

Section 8.05 SAO Audit 47

Section 8.06 Response/compliance with audit or inspection findings..... 47

Section 8.07 Notification of legal and other proceedings and related events. 48

Section 8.08 Cost of audits, examinations, investigations and risk assessments.48

Article 9 Disclosure and Confidentiality of Information 48

Section 9.01 Confidentiality 48

Section 9.02 Disclosure of HHSC’s Confidential Information. 49

Section 9.03 Member Records 50

Section 9.04 Requests for public information..... 50

Section 9.05 Privileged work product. 51

Section 9.06 Unauthorized acts..... 52

Section 9.07 Legal action..... 52

Section 9.08 Information Security and Privacy Requirements..... 53

Section 9.09 MCO's Incident and Breach Notice, Reporting and Mitigation 56

Section 9.10 Notification to HHSC. 56

Section 9.11 MCO Investigation, Response and Mitigation. 57

Section 9.12 Breach notification to individuals and reporting to authorities..... 58

Article 10 Remedies and Disputes 59

Section 10.01 Understanding and expectations..... 59

Section 10.02 Tailored remedies. 59

Section 10.03 Termination by HHSC. 64

Section 10.04 Termination by MCO..... 68

Section 10.05 Termination by mutual agreement. 69

Section 10.06 Effective date of termination..... 69

Section 10.07 Extension of termination effective date..... 69

Section 10.08 Payment and other provisions at Contract termination. 69

Section 10.09 Modification of Contract in the event of remedies. 70

Section 10.10 Turnover assistance. 70

Section 10.11 Rights upon termination or expiration of Contract. 70

Section 10.12 MCO responsibility for associated costs..... 70

Section 10.13 Dispute resolution. 71

Section 10.14 Liability of MCO. 72

Article 11 Assurances and Certifications 73

Section 11.01 Proposal certifications..... 73

Section 11.02 Conflicts of interest. 73

Section 11.03 Organizational conflicts of interest. 74

Section 11.04 HHSC personnel recruitment prohibition. 75

Section 11.05 Anti-kickback provisions..... 75

Section 11.06 Debt or back taxes owed to State of Texas..... 75

Section 11.07 Certification regarding status of license, certificate, or permit. ... 76

Section 11.08 Outstanding debts and judgments. 76

Article 12 Representations and Warranties..... 76

Section 12.01 Authorization. 76

Section 12.02 Ability to perform..... 76

Section 12. 03 Minimum Net Worth. 77

Section 12. 04 Insurer solvency. 77

Section 12. 05 Workmanship and performance. 78

Section 12. 06 Warranty of Deliverables. 78

Section 12. 07 Compliance with Contract..... 78

Section 12. 08 Technology Access. 78

Section 12. 09 Electronic and Information Resources Accessibility Standards.... 78

Article 13 Intellectual Property 81

Section 13.01 Infringement and misappropriation. 81

Section 13.02 Exceptions..... 81

Section 13.03 Ownership and Licenses..... 82

Article 14 Liability..... 84

Section 14.01 Property damage. 84

Section 14.02 Risk of Loss. 85

Section 14.03 Limitation of HHSC’s Liability. 85

Article 15 Insurance and Bonding..... 85
Section 15.01 Insurance Coverage. 85
Section 15.02 Performance Bond..... 88
Section 15.03 TDI Fidelity Bond. 89

Article 1 Definitions

As used in this Contract, unless the context clearly indicates otherwise, the following terms and conditions have the meanings assigned below:

1915(c) waiver means any Medicaid waiver authorized by Section 1915 of the Social Security Act, 42 U.S.C. 1396n(c), that allows the State to provide certain services to specific populations under the State’s Medicaid program.

Abuse means provider practices that are inconsistent with sound fiscal, business, or medical practices and result in an unnecessary cost to Medicaid Programs or in reimbursement for services that are not Medically Necessary or that fail to meet professionally recognized standards for healthcare. It also includes Member practices that result in unnecessary cost to the Programs.

Accessibility Standards means the Electronic and Information Resources Accessibility Standards and the Web Site Accessibility Standards/Specifications.

Administrative Services means the performance of services or functions, other than the direct delivery of Covered Services, necessary for the management of the delivery of and payment for Covered Services, including Network, utilization, clinical or quality management, service authorization, claims processing, management information systems operation and reporting. This term also includes the infrastructure development for, preparation of, and delivery of, all required Deliverables under the Contract, outside of the Covered Services.

Agency Sensitive Information means information that is not subject to specific legal, regulatory, or other external requirements, but is considered HHSC sensitive and is not readily available to the public. Agency Sensitive Information could be subject to disclosure under the Texas Public Information Act, but disclosure should be controlled due to sensitivity.

Agreement see Contract.

Breach means the unauthorized acquisition, access, use, or disclosure of protected health information as described in 45 C.F.R. § 164.402.

Business Day means any day other than a Saturday, Sunday, or a state or federal holiday on which HHSC’s offices are closed, unless the context clearly indicates otherwise.

Centers for Medicare and Medicaid Services (CMS) means the federal agency responsible for administering Medicare and overseeing state administration of Medicaid.

Confidential Information means any communication or record (whether oral, written, electronically stored or transmitted, or in any other form) provided to or made available to MCO or that MCO may create, receive, maintain, use, disclose or have access to on behalf of HHS that consists of or includes any or all of the following:

- (1) Education records as defined in the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Part 99;
- (2) Federal Tax Information as defined in Internal Revenue Code § 6103 and Internal Revenue Service Publication 1075;
- (3) Personal identifying information (PII) as defined in Tex. Bus. & Com. Code, ch. 521;
- (4) Protected health information (PHI) in any form including without limitation, electronic protected health information as defined in 45 C.F.R. § 160.103 or unsecured protected health information as defined in 45 C.F.R. § 164.402;
- (5) Sensitive personal information (SPI) as defined in Tex. Bus. & Com. Code, ch. 521;
- (6) Social Security Administration data, including, without limitation, Medicaid information means disclosures of information made by the Social Security Administration or the CMS from a federal system of records for administration of federally funded benefit programs under the Social Security Act, 42 U.S.C., ch. 7;
- (7) All privileged work product; and
- (8) All information designated as confidential under the constitution and laws of the State of Texas and of the United States, including the Tex. Health & Safety Code and the Texas Public Information Act, Tex. Gov't Code ch. 552.

Consumer Assessment of Healthcare Providers and Systems (CAHPS)

means the standardized Member survey tool developed by the Agency for Healthcare Research and Quality and included in Member surveys conducted by the External Quality Review Organization to evaluate Member care experiences.

Contract means this formal, written, and legally enforceable contract between the Parties and any amendments.

Contract Period or **Contract Term** means the Initial Contract Period plus all Contract extensions.

Corrective Action Plan means the detailed written plan that may be required by HHSC to correct or resolve a deficiency, event, or breach causing the assessment of a remedy or damage against MCO.

Custom Software means any software or modifications developed by the MCO: for HHSC; in connection with the Contract; and with funds received from HHSC. The term does not include MCO Proprietary Software or Third-Party Software.

Day means a calendar day unless specified otherwise.

Deliverable means a written or recorded work product or data prepared or service, developed, or procured by MCO as part of the services under the Contract for the use or benefit of HHSC or the State of Texas.

Discovery/Discovered has the meaning assigned by 45 C.F.R. § 164.410.

Electronic and Information Resources (EIR) means Information Resources, including Information Resources technologies, and any equipment or interconnected system of equipment that is used in the creation, conversion, duplication, or delivery of data or information. The term includes telephones and other telecommunications products, information kiosks, transaction machines, internet websites, multimedia resources, and office equipment, including copy machines and fax machines.

Electronic and Information Resources Accessibility Standards means the accessibility standards for Electronic and Information Resources contained in 1 Tex. Admin. Code ch. 213.

Exclusive Provider Benefit Plan (EPBP) means a type of healthcare plan offered by an issuer that arranges for, or provides benefits to, covered persons through a Network of exclusive Providers and that limits or excludes benefits for services provided by other Providers, except in cases of emergency or approved referral.

Fraud means an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person. It includes any act that constitutes fraud under applicable federal or State law.

Health and Human Service (HHS) Agency means any Texas health and human service agency subject to HHSC's oversight under Texas Government Code Chapter 531, and any successor agency.

Health and Human Services Commission (HHSC) means the administrative agency within the executive department of the State of Texas established under

Texas Government Code Chapter 531. HHSC is the single state agency charged with administration and oversight of the Texas Medicaid Program, including Medicaid Managed Care.

Healthcare Services means the Acute Care, Behavioral Healthcare, and health-related services that an enrolled population might reasonably require in order to be maintained in good health, including, at a minimum, Emergency Services and inpatient and outpatient services.

HHSC Office of the Inspector General (HHSC OIG) In accordance with Texas Government Code § 531.102, the HHSC OIG is responsible for the prevention, detection, audit, inspection, review, and investigation of Fraud, Waste, and Abuse in the provision and delivery of all health and human services in the State, including services through any state-administered health or human services program that is wholly or partly federally funded or services provided by the Department of Family and Protective Services, and the enforcement of State law relating to the provision of those services.

HIPAA means the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191 (August 21, 1996), as amended or modified.

HITECH Act means the Health Information Technology for Economic and Clinical Health Act, 42 U.S.C. §§ 17931–39.

Historically Underutilized Business (HUB) has the meaning assigned in Tex. Gov't Code ch. 2161.

HSP means a HUB Subcontracting Plan.

Information Resources means the procedures, equipment, and software that are employed, designed, built, operated, and maintained to collect, record, process, store, retrieve, display, and transmit information, and associated personnel including consultants and contractors, as defined in Tex. Gov't Code § 2054.003(7) and as defined in 44 U.S.C. § 3502(6), NIST SP 800-53 rev 4.

Initial Contract Period means six (6) years from the Effective Date of the Contract.

Key Personnel means the critical management and technical positions identified by the MCO in accordance with **Article 4**.

Managed Care Organization (MCO) has the same meaning as the definition under Texas Government Code Section 533.001(4) and is a Party to this Contract.

Material Subcontract means any contract, Subcontract, or agreement between the MCO and another entity that meets any of the following criteria:

1. The other entity is an Affiliate of the MCO;
2. The Subcontract is considered by HHSC to be for a key type of service or function, including:
 - a. Administrative Services (including third party administrator, Network administration, and claims processing);
 - b. Delegated Networks (including BH, dental, pharmacy, and vision);
 - c. Management Services (including management agreements with parent)
 - d. Reinsurance or retrocession agreements;
 - e. DM;
 - f. Pharmacy Benefit Management (PBM) or pharmacy administrative Services;
 - g. Call lines (including nurse and medical consultation); or
 - h. Any other Subcontract that exceeds, or is reasonably expected to exceed, the lesser of: a) \$500,000 per year, or b) one percent of the MCO's annual Revenues under this Contract. Any Subcontracts between the MCO and a single entity that are split into separate agreements by time period, Program, or SA, etc., will be consolidated for the purpose of this definition.

For the purposes of the Contract, Material Subcontracts do not include contracts with any non-Affiliates for any of the following, regardless of the value of the contract: utilities (e.g., water, electricity, telephone, internet, trash), mail/shipping, office space, maintenance, security, or computer hardware.

Material Subcontractor means any entity with a Material Subcontract with the MCO. For purposes of this Agreement, Material Subcontractors do not include Providers in the MCO's Provider Network. Material Subcontractors may include, without limitation, Affiliates, subsidiaries, and affiliated and unaffiliated third parties.

MCO Proprietary Software means:

- (1) software developed by the MCO prior to the Effective Date of the Contract, or
- (2) software, modifications to software, or independent software developed by the MCO after the Effective Date of the Contract that is not developed for HHSC in connection with the Contract with funds received from HHSC.

Medicaid means the medical assistance entitlement program authorized and funded under Title XIX, Social Security Act (42 U.S.C. § 1396 *et seq.*) and administered by HHSC.

Network means all Providers that have a contract with the MCO, or any Subcontractor, for the delivery of Covered Services to the MCO's Members under the Contract.

Product means Information Resources technology that is, or is related to, EIR.

Proposal has the same meaning as the definition in RFP.

Public Information means public information as defined by the Public Information Act, Tex. Gov't Code § 552.002.

Request for Proposals (RFP) means the procurement solicitation instrument issued by HHSC under which this Contract was awarded and all associated exhibits, attachments, forms, and addenda, corrections or modifications, if any.

Risk means the potential for loss as a result of expenses and costs of the MCO exceeding payments made by HHSC under the Contract.

Services mean the tasks, functions, and responsibilities assigned and delegated to the MCO under this Contract.

Social Security Administration (SSA) means the federal agency responsible for administering the Social Security program.

Software means all operating system and applications software used by the MCO to provide the Services under this Contract.

State Fiscal Year (SFY) means a 12-month period beginning on September 1 and ending on August 31 the following year.

Subcontract means any agreement between the MCO and another party to fulfill the requirements of the Contract.

Subcontractor has the same meaning as assigned in 42 C.F.R. § 438.2.

Third-Party Software means software that is: developed for general commercial use; available to the public; or not developed for HHSC. Third-Party Software includes: commercial off-the-shelf software; operating system software; and application software, tools, and utilities.

Uniform Managed Care Manual (UMCM) means the manual that contains policies and procedures required of an MCO participating in Medicaid managed care programs. The **UMCM**, as amended or modified, is incorporated by reference into the Contract.

Waste means practices that a reasonably prudent person would deem careless or that would allow inefficient use of resources, items, or services.

Web Site Accessibility Standards/Specifications means standards contained in 1 Tex. Admin. Code ch. 206.

Article 2 Introduction**Section 2.01 Inducements**

In making the award of this Contract, HHSC relied on the MCO's assurances of the following:

- (1) The MCO is a health maintenance organization, Approved Non-profit Health Corporation, Exclusive Provider Benefit Plan (EPBP), or exclusive provider organization that arranges for the delivery of Healthcare Services, and either:
 - (a) Has received Texas Department of Insurance (TDI) licensure or approval as one of these entities and is fully authorized to conduct business in the Service Area; or
 - (b) Will receive TDI licensure or approval as one of these entities and be fully authorized to conduct business in the Service Area no later than 60 Days after HHSC executes this Contract;
- (2) The MCO and the MCO Administrative Service Subcontractors have the skills, qualifications, expertise, financial resources and experience necessary to provide the Services and Deliverables described in the RFP, MCO's Proposal, and this Contract in an efficient, cost-effective manner, with a high degree of quality and responsiveness, and has performed similar Services for other public or private entities;
- (3) The MCO has thoroughly reviewed, analyzed, and understood the RFP, has timely raised all questions or objections to the RFP, and has had the opportunity to review and fully understand HHSC's current Program and operating environment for the activities that are the subject of the Contract and HHSC's needs and requirements during the Contract term;
- (4) The MCO has had the opportunity to review and understand HHSC's stated objectives in entering into this Contract and, based on this review and understanding, the MCO currently has the capability to perform in accordance with the terms and conditions of this Contract;
- (5) The MCO also has reviewed and understands the Risks associated with the Program as described in the RFP, including the Risk of non-appropriation of funds.

Accordingly, on the basis of the terms of this Contract, HHSC engages the MCO to perform the Services and provide the Deliverables described in this Contract.

Section 2.02 Construction of the Contract.

(1) Scope of introductory article.

The provisions of any introductory article or heading to the Contract are intended to be a general introduction and are not intended to expand the scope of the Parties' obligations under the Contract or to alter the plain meaning of the terms of the Contract.

(2) References to the "State."

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

(3) Severability.

If any provision of this Contract is for any reason held to be unenforceable, the rest of it remains fully enforceable.

(4) Survival of terms.

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

- (a) The Parties have expressly agreed will survive any termination or expiration; or
- (b) Arose prior to the effective date of termination and remain to be performed or by their nature would be intended to be applicable following any termination or expiration.

(5) Headings.

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

(6) Global drafting conventions.

- (a) The terms "include," "includes," and "including" are terms of inclusion and enlargement, and where used in this Contract, should be read as if followed by the phrase "without limitation."

- (b) Any references to “sections,” “appendices,” “exhibits,” or “attachments” are references to sections, appendices, exhibits or attachments to this Contract.
- (c) Any references to laws, rules, regulations, and manuals in this Contract are references to these documents as amended, modified, or supplemented from time to time during the term of this Contract.

Section 2.03 No implied authority.

The authority delegated to the MCO by HHSC is limited to the terms of this Contract. HHSC is the State agency designated by the Texas Legislature to administer the Program, and no other State agency grants the MCO any authority related to this Program unless directed through HHSC. The MCO may not rely upon implied authority, and specifically, is not delegated authority under this Contract to:

- (1) Make public policy;
- (2) Promulgate, amend, or disregard administrative regulations or program policy decisions made by State and federal agencies responsible for administration of HHSC Programs; or
- (3) Unilaterally communicate or negotiate with any State or federal agency or the Texas Legislature on behalf of HHSC regarding the HHSC Programs.

The MCO is required to cooperate to the fullest extent possible to assist HHSC in communications and negotiations with State and federal governments and agencies concerning matters relating to the scope of the Contract and the MCO Program, as directed by HHSC.

Section 2.04 Legal Authority.

- (1) HHSC is authorized to enter into this Contract under Tex. Gov’t Code chs. 531 and 533, Tex. Gov’t Code § 2155.144, and Tex. Fam. Code § 266. The MCO is authorized to enter into this Contract under the authorization of its governing board or controlling owner or officer.
- (2) Any person signing and executing this Contract on behalf of the Parties, or representing signatory authority on behalf of the Parties, [warrant](#) and guarantee that he or she is authorized to execute this Contract and to validly and legally bind the Parties to all of its terms, performances, and provisions.

Section 2.05 Loss of Program Authority.

Should any part of the Scope of Work under this Contract relate to a State program that is no longer authorized by law (e.g., which has been vacated by a court of law, or for which CMS has withdrawn federal authority, or which is the subject of a

legislative repeal), the MCO must do no work on that part after the effective date of the loss of program authority.

HHSC must adjust Capitation Rates, or non-risk payments as applicable, to remove costs that are specific to any program or activity that is no longer authorized by law. If the MCO works on a program or activity no longer authorized by law after the date the legal authority for the work ends, the MCO will not be paid for that work. If HHSC paid the MCO in advance to work on a no-longer-authorized program or activity and under the terms of this Contract the work was to be performed after the date the legal authority ended, the payment for that work should be returned to HHSC. However, if the MCO worked on a program or activity prior to the date legal authority ended for that program or activity, and HHSC included the cost of performing that work in its payments to the MCO, the MCO may keep the payment for that work even if the payment was made after the date the program or activity lost legal authority.

Article 3 General Terms

Section 3.01 Funding

This Contract is conditioned on the continued availability of lawful appropriations . The MCO will have no right of action against HHSC in the event that HHSC is unable to perform its obligations under this Contract as a result of the suspension, termination, or withdrawal of funding to HHSC, the failure to fund HHSC, or lack of sufficient funding of HHSC for any activities or functions contained within the scope of this Contract. If funds become unavailable, the provisions of **Article 10** (Remedies and Disputes) will apply. HHSC will use all reasonable efforts to ensure that funds are available and will negotiate with the MCO to resolve any of the MCO's claims for payment that represent accepted services or Deliverables that are pending at the time funds become unavailable. HHSC will use best efforts to provide reasonable written advance notice to the MCO upon learning that funding for this Contract may be unavailable.

Section 3.02 Delegation of Authority

Whenever, by any provision of this Contract, any right, power, or duty is imposed or conferred on HHSC, the Executive Commissioner has the imposed or conferred right, power, or duty unless any right, power, or duty is specifically delegated to the duly appointed agents or employees of HHSC. If the Executive Commissioner delegates any authority, a written copy may be provided to the MCO on request.

Section 3.03 No waiver of Sovereign Immunity.

The Parties agree that no provision of this Contract is in any way intended to constitute a waiver by HHSC or the State of Texas of any immunities from suit or from liability that HHSC or the State of Texas may have.

Section 3.04 Force majeure.

Neither Party will be liable for any failure or delay in performing its obligations under the Contract if the failure or delay is due to any cause beyond the reasonable control of a Party, including unusually severe weather, strikes, natural disasters, fire, civil disturbance, epidemic, war, court order, or acts of God. The existence of these causes of delay or failure will extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. Each Party must inform the other in writing with proof of receipt within five Business Days of the existence of a force majeure event or otherwise waive this right as a defense.

Section 3.05 Publicity.

- (1) The MCO may use the name of HHSC, the State of Texas, any HHS Agency, and the name of the Program in any media release, public announcement, or public disclosure relating to the Contract or its subject matter only if, at least seven Days prior to distributing the material, the MCO submits the information to HHSC for review and comment and HHSC then approves the use in writing. The MCO may not use the submitted information without prior approval from HHSC. HHSC reserves the right to object to and require changes to the publication if, at HHSC's sole discretion, it determines that the publication does not accurately reflect the terms of the Contract or the MCO's performance under the Contract.
- (2) The MCO will provide HHSC with one electronic copy of any information described in **Section 3.05(1)** prior to public release. The MCO will provide additional copies, including hard copies, at HHSC's request.
- (3) The requirements of **Section 3.05(1)** do not apply to:
 - (a) Proposals or reports submitted to HHSC, an administrative agency of the State of Texas, or a governmental agency or unit of another State or the federal government;
 - (b) Information concerning the Contract's terms, subject matter, and estimated value:
 - (i) In any report to a governmental body to which the MCO is required by law to report the information, or
 - (ii) That the MCO is otherwise required by law to disclose; and
 - (c) Member Materials (the MCO must comply with the provisions in **Chapter 4 of Exhibit B** regarding the review and approval of Member Materials).

Section 3.06 Assignment.

- (1) Assignment by the MCO.

The MCO must not assign all or any portion of its obligations or rights under the Contract, or interests in the Contract without prior written consent of HHSC. Any written request for assignment must be accompanied by written acceptance by the party to whom the assignment is made. Except where otherwise agreed in writing by HHSC, assignment will not release the MCO from its obligations under the Contract.

(2) Assignment by HHSC.

The MCO understands and agrees HHSC may in one or more transactions assign, pledge, or transfer the Contract. This assignment will only be made to another State agency or a non-state agency that is contracted to perform agency support.

(3) Assumption.

Each Party to whom an assignment is made (an "Assignee") must assume all of the assigned interests in and responsibilities under the Contract and any documents executed with respect to the Contract, including its obligation for all or any portion of the purchase payments, in whole or in part.

Section 3.07 Cooperation with other vendors and prospective vendors.

HHSC may award contracts or supplemental contracts for work related to the Contract or any portion of the work. The MCO will reasonably cooperate with these other vendors and will not commit or permit any act that may interfere with the performance of work by any other vendor.

Section 3.08 Renegotiation and Reprocurement rights.

(1) Renegotiation of Contract terms.

Notwithstanding anything in the Contract to the contrary, HHSC may at any time during the term of the Contract exercise the option to notify the MCO that HHSC has elected to renegotiate certain terms of the Contract. Upon the MCO's receipt of any notice mentioned in this section, the MCO and HHSC will undertake negotiations of the subject terms of the Contract, and may execute an amendment to the Contract in accordance with **Article 7** (Amendments and Modifications) of this document.

(2) Reprocurement of the services or procurement of additional services.

Notwithstanding anything in the Contract to the contrary, whether or not HHSC has accepted or rejected the MCO's services or Deliverables provided during any period of the Contract, HHSC may at any time issue requests for proposals or offers to other potential contractors for performance of any portion of the SOW covered by the Contract or SOW similar or comparable to the SOW performed by the MCO under the Contract.

(3) Termination rights upon reprocurement.

If HHSC elects to procure the services or Deliverables or any portion of the services or Deliverables from another vendor in accordance with this section, HHSC will have the termination rights noted in **Article 12** (Remedies and Disputes).

Section 3.09 RFP errors and omissions.

The MCO will not take advantage of any errors or omissions in the RFP or the resulting Contract. The MCO must promptly notify HHSC of any errors or omissions that are discovered.

Section 3.10 Attorneys' fees.

In the event of any litigation, appeal, or other legal action to enforce any provision of the Contract, the MCO agrees to pay all reasonable expenses of HHSC for that action, including attorneys' fees and costs, if HHSC is the prevailing Party.

Section 3.11 Preferences under service contracts.

The MCO is required in performing the Contract to purchase products and materials produced in the State of Texas when they are available at a price and time comparable to products and materials produced outside the State.

Section 3.12 Ensuring timely performance.

The Parties acknowledge the need to ensure uninterrupted and continuous performance of the SOW under the Contract, therefore, HHSC may terminate this Contract or apply any other remedy as noted in **Article 10** (Remedies and Disputes) if the MCO performance is not timely.

Article 4 – Contract Administration and Management

Section 4.01 Qualifications, retention, and replacement of the MCO employees.

The MCO agrees to maintain the organizational and administrative capacity and capabilities to carry out all duties and responsibilities under this Contract. The personnel the MCO assigns to perform the duties and responsibilities under this Contract will be properly trained and qualified for the functions they will perform. Notwithstanding transfer or turnover of personnel, the MCO remains obligated to perform all duties and responsibilities under this Contract without degradation and in accordance with the terms of this Contract.

Section 4.02 MCO's Key Personnel.

(1) Designation of Key Personnel.

The MCO must designate key management and technical personnel who will be assigned to the Contract. For the purposes of this requirement, Key Personnel are those with management responsibility or principal technical responsibility for the following functional areas included within the scope of the Contract:

- (a) Member Services;
- (b) MIS;
- (c) Health Passport management;
- (d) Claims processing,
- (e) Claims education;
- (f) Provider Network development and management;
- (g) Benefit administration and PA;
- (h) Utilization Review;
- (i) Service Coordination;
- (j) Quality Improvement;
- (k) BH Services;
- (l) Dental services;
- (m) Vision services;
- (n) Pharmacy benefits manager services;
- (o) STAR Health Liaison;
- (p) Financial functions;
- (q) Reporting;
- (r) Security official as required in 45 C.F.R. § 164.308(a)(2) and privacy official as required in 45 C.F.R. § 164.530(a)(2);
- (s) Executive director as defined in **Section 4.03**;
- (t) Medical director as defined in **Section 4.04**;
- (u) STAR Health Liaison director as defined in **Exhibit H, STAR Health SOW**, and

(v) Special Investigative Unit (SIU).

(2) Support and replacement of Key Personnel.

The MCO must maintain, throughout the Contract Term, the ability to supply its Key Personnel with the required resources necessary to meet Contract requirements and comply with applicable law. The MCO must ensure project continuity by timely replacement of Key Personnel, if necessary, with a sufficient number of persons having the requisite skills, experience, and other qualifications. Regardless of specific personnel changes, the MCO must maintain the overall level of expertise, experience, and skill reflected in the Key Personnel job descriptions and qualifications included in the MCO's Proposal.

(3) Notification of replacement of Key Personnel.

The MCO must notify HHSC in writing within 15 Business Days of any change in Key Personnel. Hiring or replacement of Key Personnel must conform to all Contract requirements. If HHSC determines that a satisfactory working relationship cannot be established between certain Key Personnel and HHSC, it will notify the MCO in writing. Upon receipt of HHSC's notice, HHSC and the MCO will attempt to resolve HHSC's concerns on a mutually agreeable basis.

(4) Dedicated Staff

The MCO agrees to maintain staff dedicated exclusively to serving the STAR Health Program in the following areas:

(a) Regional staff:

- (i) BH and physical health Service Coordinators;
- (ii) STAR Health Liaisons;
- (iii) STAR Health staff;
- (iv) Member Advocates;
- (v) Member and Nurse Hotline staff;
- (vi) BH Hotline staff;
- (vii) Complaints and Appeals staff;
- (viii) Health Passport staff; and
- (ix) Regional Internal Trainers.

(b) Training for dedicated staff

Staff identified in **Section 4.02(1)** (MCOs Key Personnel) must receive foster care-specific training during employee orientation, and as needed thereafter. Training curriculum must include the following components, at a minimum:

- (i) differences and similarities between managing the care for a child in foster care and managing the care for the other Medicaid populations;
- (ii) vital timelines in the evaluation and delivery of services to Members;
- (iii) the roles and responsibilities of the MCO staff in interfacing with DFPS Staff, Single Source Continuum Contractor (SSCC) staff, and the court system;
- (iv) Community-Based Care and the roles and responsibilities of the SSCC in each specific catchment area; and
- (v) symptoms and treatment of childhood medical and BH conditions commonly seen in the foster care population, such as the effect of abuse and neglect on the developing brain, fetal alcohol syndrome, and shaken baby syndrome.

Section 4.03 Executive Director.

- (1) The MCO must employ a qualified individual to serve as the executive director for the STAR Health Program. The executive director must be employed full-time by the MCO, be primarily dedicated to the Program, and must hold a senior executive or management position in the MCO's organization, except that the MCO may propose an alternate structure for the executive director position, subject to HHSC's prior review and written approval.
- (2) The executive director must be authorized and empowered to represent the MCO regarding all matters pertaining to the Contract prior to such representation. The executive director must act as liaison between the MCO and HHSC and will have responsibilities that include the following:
 - (a) ensuring the MCO's compliance with the terms of the Contract, including securing and coordinating resources necessary for compliance;

- (b) receiving and responding to all inquiries and requests made by HHSC related to the Contract, in the time frames and formats specified by HHSC. Where practicable, HHSC will consult with the MCO to establish time frames and formats reasonably acceptable to the Parties;
- (c) attending and participating in regular HHSC and the MCO executive director meetings or conference calls;
- (d) making best efforts to promptly resolve any issues identified either by the MCO or HHSC that may arise and are related to the Contract;
- (e) meeting with HHSC representatives on a periodic or as needed basis to review the MCO's performance and resolve issues, and
- (f) meeting with HHSC at the time and place requested by HHSC, if HHSC determines that the MCO is not in compliance with the requirements of the Contract.

Section 4.04 Medical Director.

- (1) The MCO must have a qualified individual to serve as the medical director for its HHSC MCO Program(s). The medical director must be currently licensed in Texas by the Texas Medical Board as an M.D. or D.O. with no restrictions or other licensure limitations. The medical director must comply with the requirements of 28 Tex. Admin. Code § 11.1606 and all applicable federal and State statutes and regulations.
- (2) The medical director, or his or her designee, must be available by telephone 24 hours a Day, seven Days a week, for Utilization Review decisions. The medical director, and his or her designee, must either possess expertise with BH Services, or have ready access to that expertise to ensure timely and appropriate medical decisions for Members, including after regular business hours.
- (3) The medical director, or his or her designee, must be authorized and empowered to represent the MCO regarding clinical issues, Utilization Review, and quality of care inquiries. The medical director, or his or her physician designee, must exercise independent medical judgment in all decisions relating to medical necessity. The MCO must ensure that its decisions relating to medical necessity are not adversely influenced by fiscal management decisions. HHSC may conduct reviews of decisions relating to medical necessity upon reasonable notice.

- (4) For purposes of this section, the medical director's designee must be a physician that meets the qualifications for a medical director, as described in **Section 4.04(1)** through **(3)** (Medical director).
- (5) The requirements of this section do not apply to PA determinations for outpatient pharmacy services made by a Texas licensed pharmacist.

Section 4.05 Responsibility for MCO personnel and Subcontractors.

- (1) The MCO's employees and Subcontractors are not employees of HHSC or the State of Texas; but are considered the MCO's employees or its Subcontractor's employees, as applicable, for all purposes under the Contract.
- (2) Except as provided in this Contract, neither the MCO nor any of the MCO's employees or Subcontractors may act as agents or representatives of HHSC or the State of Texas.
- (3) The MCO agrees that anyone employed by the MCO to fulfill the terms of the Contract is an employee of the MCO and remains under the MCO's sole direction and control. The MCO assumes sole and full responsibility for its acts and the acts of its employees and Subcontractors.
- (4) THE MCO agrees that any claim on behalf of any person arising out of employment or alleged employment by the MCO, including claims of discrimination against the MCO, its officers, or its agents is the sole responsibility of the MCO and not the responsibility of HHSC. The MCO will indemnify the State and hold it harmless from any and all claims asserted against the State arising out of employment or alleged employment by the MCO. The MCO understands that any person who alleges a claim arising out of employment or alleged employment by the MCO will not be entitled to any compensation, rights, or benefits from HHSC, including tenure rights, medical and hospital care, sick and annual or vacation leave, severance pay, or retirement benefits.
- (5) The MCO agrees to be responsible for the following in respect to its employees:
 - (a) Damages incurred by the MCO's employees within the scope of their duties under the Contract; and
 - (b) Determination of the hours to be worked and the duties to be performed by the MCO's employees.

- (6) The MCO agrees and will inform its employees and Subcontractor(s) that there is no right of subrogation, contribution, or indemnification against HHSC for any duty owed to them by the MCO under this Contract or any judgment rendered against the MCO. HHSC's liability to the MCO's employees, agents, and Subcontractors, if any, will be governed by the Texas Tort Claims Act, as amended or modified (Tex. Civ. Pract. & Rem. Code § 101.001 *et seq.*).
- (7) The MCO understands that HHSC does not assume liability for the actions of, or judgments rendered against, the MCO, its employees, agents, or Subcontractors. The MCO agrees that it has no right to indemnification or contribution from HHSC for any of these judgments rendered against the MCO or its Subcontractors.

Section 4.06 Cooperation with HHSC and state administrative agencies.

- (1) Cooperation with other MCOs.

The MCO agrees to reasonably cooperate with and work with the MCOs administering other Medicaid and CHIP programs, Subcontractors, and third-party representatives as requested by HHSC. To the extent permitted by HHSC's financial and personnel resources, HHSC agrees to reasonably cooperate with the MCO and to use its best efforts to ensure that other HHSC contractors reasonably cooperate with the MCO.

- (2) Cooperation with State and federal administrative agencies.

The MCO must ensure that the MCO's personnel will cooperate with HHSC or other State or federal administrative agency personnel at no charge to HHSC for purposes relating to the administration of HHSC Programs including the following purposes:

- (a) The investigation and prosecution of Fraud, Waste, and Abuse (FWA) in the HHSC Programs;
- (b) Audit, inspection, or other investigative purposes; and
- (c) Testimony in judicial or quasi-judicial proceedings relating to the services or Deliverables under this Contract or other delivery of information to HHSC or other agencies' investigators or legal staff.

Section 4.07 Conduct of MCO personnel.

- (1) The MCO's personnel and Subcontractors must:

- (a) Comply with applicable State and federal rules and regulations and HHSC's requests regarding personal and professional conduct; and
 - (b) Otherwise conduct themselves in a businesslike and professional manner.
- (2) If HHSC determines that a particular employee or Subcontractor is not conducting himself or herself in accordance with this Contract, HHSC may provide the MCO with notice and documentation concerning this conduct. If the MCO receives this notice, the MCO must promptly investigate the matter and take appropriate action that may include:
 - (a) Removing the employee from the project;
 - (b) Providing HHSC with written notice of the removal; and
 - (c) Replacing the employee with a similarly qualified individual acceptable to HHSC.
- (3) Nothing in the Contract will prevent the MCO, at the request of HHSC, from replacing any personnel who are not adequately performing their assigned responsibilities or who, in the opinion of HHSC's project manager, after consultation with the MCO, are unable to work effectively with HHSC's or DFPS' staff. In this event, the MCO will provide replacement personnel with equal or greater skills and qualifications as soon as reasonably practicable. Replacement of Key Personnel will be subject to HHSC review. The Parties will work together in any replacement, so the overall project schedule is not disrupted.
- (4) The MCO agrees that anyone employed by the MCO to fulfill the terms of the Contract remains under the MCO's sole direction and control.
- (5) The MCO must have policies regarding disciplinary action for all employees who have failed to comply with federal or State laws and the MCO's standards of conduct, policies and procedures, and Contract requirements. The MCO must have policies regarding disciplinary action for all employees who have engaged in illegal or unethical conduct.

Section 4.08 Subcontractors and Agreements with Third Parties.

- (1) The MCO remains fully responsible for the obligations, services, and functions performed by its Subcontractors to the same extent as if these obligations, services, and functions were performed by the MCO's employees, and for purposes of this Contract, any work is deemed work performed by the MCO. The MCO must ensure its contracts with Subcontractors comply with all of

the requirements of 42 C.F.R. § 438.230. HHSC reserves the right to require the replacement of any Subcontractor that HHSC finds unacceptable and unable to meet the requirements of the Contract. HHSC may also object to the selection of any Subcontractor.

(2) The MCO must:

- (a) Actively monitor the quality of care and services, as well as the quality of reporting data, provided under a Subcontract;
- (b) Provide HHSC with a copy of TDI filings of delegation agreements;
- (c) Unless otherwise provided in this Contract, provide HHSC with written notice no later than:
 - (i) Three (3) Business Days after receiving notice from a Material Subcontractor of its intent to terminate a Subcontract;
 - (ii) 180 Days prior to the termination date of a Material Subcontract for MIS systems operation or reporting;
 - (iii) 90 Days prior to the termination date of a Material Subcontract for non-MIS Administrative Services; and
 - (iv) 30 Days prior to the termination date of any other Material Subcontract.

HHSC may grant a written exception to these notice requirements if, in HHSC's reasonable determination, the MCO has shown good cause for a shorter notice period.

- (d) The MCO must demonstrate that a Material Subcontractor assuming delegated functions satisfies all requirements of a pre-delegation audit before the applicable functions can be delegated. The MCO must conduct the audit, which must include: a standard audit tool approved by HHSC, site visit, file review, if applicable, staff interviews, and scoring to ensure compliance is achieved.

(3) During the Contract Term, Readiness Reviews by HHSC or its designated agent may occur if:

- (a) A new Material Subcontractor is employed by the MCO;
- (b) An existing Material Subcontractor provides services in a new Service Area;

- (c) An existing Material Subcontractor provides services for a new MCO program;
- (d) An existing Material Subcontractor changes locations, or changes its MIS and/or operational functions;
- (e) An existing Material Subcontractor changes one or more of its MIS subsystems, claims processing, or operational functions; or
- (f) A Readiness Review is requested by HHSC.

The MCO must submit information required by HHSC for each proposed Material Subcontractor as indicated in **Section 4.11** for additional information regarding the MCO reviews during the Contract Term.

- (4) The MCO must not disclose Confidential Information of HHSC, the State of Texas, or the federal government to a Subcontractor unless that Subcontractor has agreed in writing to protect the confidentiality of the Confidential Information in the manner required of the MCO under this Contract.
- (5) The MCO must identify any Subcontractor that is a subsidiary or entity formed after the Effective Date of the Contract, whether or not an Affiliate of the MCO, and the MCO must substantiate the proposed Subcontractor's ability to perform the subcontracted services and certify to HHSC that no loss of service will occur as a result of the performance of such Subcontractor. The MCO will assume responsibility for all contractual responsibilities whether or not the MCO performs them. Further, HHSC considers the MCO to be the sole point of contact with regard to contractual matters, including payment.
- (6) Except as provided in this section, all Subcontracts must be in writing and must provide HHSC the right to examine any Subcontract and all Subcontractor records relating to the Contract and any Subcontract. This requirement does not apply to agreements with non-Affiliate utility or mail service providers.

If the MCO intends to report compensation or any other payments paid to any third party (including an Affiliate) as an Allowable Expense under this Contract and the amounts paid to the third party exceed \$200,000.00, or are reasonably anticipated to exceed \$200,000.00, in a State Fiscal Year (SFY) (or in any contiguous twelve-month period), then the MCO's agreement with the third party must be in writing. The agreement must provide HHSC the right to examine the agreement and all records relating to the agreement.

For any third-party agreements not in writing valued under \$200,000 per SFY that are reported as Allowable Expenses, the MCO still must maintain standard financial records and data sufficient to verify the accuracy of those expenses in accordance with the requirements of **Article 9**. Any agreements that are, or could be interpreted to be, with a single party, must be in writing if the combined total is more than \$200,000. This would include payments to individuals or entities that are related to each other.

- (7) A Subcontract or any other agreement in which the MCO receives rebates, recoupments, discounts, payments, incentives, fees, free goods, bundling arrangements, retrocession payments (as described in **Chapter 6 of Exhibit B**, or any other consideration from a Subcontractor or any other third party (including without limitation Affiliates) as related to this Contract must be in writing and the MCO must allow HHSC and the Office of the Attorney General to examine the Subcontract or agreement and all related records.
- (8) All Subcontracts or agreements described in **subsections (6) and (7)** must show the dollar amount or the value of any consideration that the MCO pays to or receives from the Subcontractor or any other third party.
- (9) The MCO must submit a copy of each Material Subcontract and any agreement covered under **subsection (7)** executed prior to the Effective Date of the Contract to HHSC no later than 30 Days after the Effective Date of the Contract. For Material Subcontracts or **Section 4.07(7)** agreements executed or amended after the Effective Date of the Contract, the MCO must submit a copy to HHSC no later than five Business Days after execution.
- (10) The MCO must ensure its Provider Contracts include the requirement that Subcontractors comply with the same requirements that the MCO must comply with in **Article 6** (Governing Law and Regulations) of this document, including **Chapter 8.1 of Exhibit B**, "Provider Contract Checklist."
- (11) HHSC reserves the right to reject any Subcontract or require changes to any provisions that do not comply with the requirements or duties and responsibilities of this Contract or create significant barriers for HHSC in monitoring compliance with this Contract.
- (12) The MCO must comply with the requirements of 42 U.S.C. § 1396a(a)(80).
- (13) Provider payment must comply with 42 U.S.C. § 1396b-1.

- (14) The MCO and its Subcontractors must provide all information required under **Section 4.08** to HHSC, or to the Office of the Attorney General, if requested, at no cost.

Section 4.09 HHSC’s ability to contract with Subcontractors.

The MCO may not limit or restrict, through a covenant not to compete, employment contract or other contractual arrangement, HHSC’s ability to contract with Subcontractors or former employees of the MCO.

Section 4.10 Prohibition Against Performance Outside the United States.

- (1) Findings.

- (a) HHSC finds the following:

- (i) HHSC is responsible for administering several public programs that require the collection and maintenance of information relating to persons who apply for and receive services from HHSC programs. This information consists of, among other things, personal financial and medical information and information designated Confidential Information under State and federal law and this Agreement. Some of this information may, within the limits of the law and this Agreement, be shared from time to time with the MCO or a Subcontractor for purposes of performing the services or providing the Deliverables under this Agreement.

HHSC is legally responsible for maintaining the confidentiality and integrity of information relating to applicants and recipients of HHSC services and ensuring that any person or entity that receives this information—including the MCO and any Subcontractor—is similarly bound by these obligations.

- (ii) HHSC also is responsible for the development and implementation of computer software and hardware to support HHSC programs. These items are paid for, in whole or in part, with State and federal funds. The federal agencies that fund these items maintain a limited interest in the developed or acquired software and hardware.
- (iv) Some of the software used or developed by HHSC may also be subject to statutory restrictions on the export of technology to

foreign nations, including the Export Administration Regulations, 15 C.F.R. Parts 730-774.

- (b) In view of these obligations, and to ensure accountability, integrity, and the security of the information maintained by or for HHSC and the work performed on behalf of HHSC, HHSC determines that it is necessary and appropriate to require that:
 - (i) All work performed under this Agreement must be performed exclusively within the United States; and
 - (ii) All information obtained by the MCO or a Subcontractor under this Agreement must be stored and maintained within the United States.
- (c) Accordingly, except as authorized by HHSC in writing, MCO or a Subcontractor are forbidden from performing any work or maintaining any information relating to or obtained under this Contract to occur outside the United States.

(2) Meaning of “within the United States” and “outside the United States.”

- (a) As used in this **Section 4.10**, the term “within the United States” means any location inside the territorial boundaries comprising the United States of America, including any of the 48 contiguous states, the states of Alaska and Hawaii, and the District of Columbia.
- (b) Conversely, the phrase “outside the United States” means any location that is not within the territorial boundaries comprising the United States of America, including any of the 48 contiguous states, the states of Alaska and Hawaii, and the District of Columbia.

(3) Maintenance of Confidential Information.

- (a) The MCO and all Subcontractors, vendors, agents, and service Providers of or for the MCO must not allow any Confidential Information that the MCO receives from or on behalf of HHSC to be moved outside the United States by any means (physical or electronic) at any time, for any period of time, for any reason.
- (b) The MCO and all Subcontractors, vendors, agents, and service Providers of or for the MCO must not permit any person to have remote

access to HHSC information, systems, or Deliverables from a location outside of the United States.

(4) Performance of work under Agreement.

- (a) Unless otherwise approved in advance by HHSC in writing, and subject to the exceptions specified in paragraph (4) of this **Section 4.10**, the MCO and all Subcontractors, vendors, agents, and service Providers of or for the MCO must perform all services under the Agreement, including all tasks, functions, and responsibilities assigned and delegated to the MCO under this Agreement, within the United States.
 - (i) This obligation includes all services, including information technology services, processing, transmission, storage, archiving, data center services, disaster recovery sites and services, customer support), medical, dental, laboratory, and clinical services.
 - (ii) All Custom Software prepared for performance of this Agreement, and all modifications of custom, third party, or vendor proprietary software, must be performed within the United States.
- (b) Unless otherwise approved in advance by HHSC in writing, and subject to the exceptions specified in paragraph (4) of this **Section 4.10**, the MCO and all Subcontractors, vendors, agents, and service Providers of or for the MCO must not permit any person to perform work under this Agreement from a location outside the United States.

(5) Exceptions.

- (a) COTS Software. The foregoing requirements will not preclude the acquisition or use of commercial off-the-shelf software that is developed outside the United States or hardware that is generically configured outside the United States.
- (b) Foreign-made Products and Supplies. The foregoing requirements will not preclude the MCO from acquiring, using, or reimbursing products or supplies that are manufactured outside the United States, provided such products or supplies are commercially available within the United States for acquisition or reimbursement by HHSC.
- (c) HHSC Prior Approval. The foregoing requirements will not preclude the MCO from performing work outside the United States that HHSC has

approved in writing and that HHSC has confirmed will not involve the sharing of Confidential Information outside the United States.

(6) Disclosure.

The MCO must disclose all Services and Deliverables under or related to this Agreement that the MCO intends to perform or has performed outside the United States, whether directly or via Subcontractors, vendors, agents, or service Providers.

(7) Remedy.

- (a) The MCO's violation of this **Section 4.10** will constitute a material breach in accordance with **Article 10**. The MCO will be liable to HHSC for all monetary damages, in the form of actual, consequential, direct, indirect, special, or liquidated damages in accordance with this Agreement.
- (b) HHSC may also terminate this Contract if the MCO violates this **Section 4.10** constituting a material breach. HHSC will give the MCO notice of at least one Day before the effective date of the termination.

Section 4.11 Employment Verification

- (1) The MCOs must confirm the eligibility of all persons employed by the MCO to perform duties within Texas and all persons, including Subcontractors, assigned by the MCO to perform work pursuant to the Contract.
- (2) The MCO may not knowingly have a relationship with the following:
 - (a) An individual or entity that is debarred, suspended, or otherwise excluded from participating in procurement activities under the Federal Acquisition Regulation or from participating in non-procurement activities under regulations issued under Executive Order No. 12549 or under guidelines implementing Executive Order No. 12549.
 - (b) An individual or entity who is an affiliate, as defined in the Federal Acquisition Regulation at 48 C.F.R. § 2.101, of a person described in (b)(1) of this section.
- (3) A relationship as described in this section is as follows:
 - (a) A director, officer, or partner of the MCO.

- (b) A Subcontractor of the MCO as governed by 42 C.F. R. § 438.230.
 - (c) A person with ownership of five percent or more of the MCO.
 - (d) A person with an employment, consulting or other arrangement with the MCO for the provision of items and services that relate to the MCO's obligations under its Contract with the State.
- (4) The MCO must confirm the identity and determine the exclusion status of any Subcontractor of the MCO, (as governed by 42 C.F.R § 438.230), as well as any person with an ownership or control interest, or who is an agent or managing employee of the MCO as defined in **Subsection (2)** of this section upon Contract execution and through checks of federal databases that include the:
- (a) U.S. Department of Health and Human Services, Office of Inspector General's List of Excluded Individuals and Entities (LEIE);
 - (b) System for Awards Management (SAM) [the successor to the Excluded Parties List System (EPLS)];
 - (c) Social Security Administration's Death Master File (SSA-DMF); and the
 - (d) National Plan & Provider Enumeration System.
- (5) The MCO must consult the databases upon contracting and no less frequently than monthly thereafter. If the MCO finds a party that is excluded, it must promptly notify the entity and take action consistent with 42 C.F.R. § 438.610(c).
- (6) The MCO must maintain records demonstrating compliance with this section in accordance with **Section 8.01** below.

Article 5 Service Levels and Performance Measurements

Section 5.01 Performance measurement.

Satisfactory performance of this Contract will be measured by:

- (1) Adherence to this Contract, including all representations and warranties;
- (2) Delivery of the Services and Deliverables described in the RFP;
- (3) Results of audits performed by HHSC or its representatives in accordance with **Article 8** (Records, Audit and Disclosure);
- (4) Timeliness, completeness, and accuracy of required reports; and
- (5) Achievement of performance measures developed by the MCO and HHSC and as modified from time to time by written agreement during the term of this Contract.

Section 5.02 Service Coordination Staffing.

- 1) During the first 12-month period following the Operational Start Date, HHSC and the MCO will meet at least quarterly to review the adequacy of the MCO's staffing of the Service Coordination functions. After the first 12 months, the Parties will negotiate the frequency of these staffing reviews; however, the reviews must occur at least annually.
- (2) As a result of the staffing reviews described in **Section 5.02(1)**, the Parties may mutually agree to increase, decrease, reallocate, or reassign the MCO staff. In addition, should a review reveal that the MCO's performance is not satisfactory, as measured by **Section 5.01**, HHSC may require the MCO to make reasonable adjustments in staffing, including increasing, reallocating, or reassigning the MCO staff.

Article 6 Governing Laws and Regulations**Section 6.01 MCO responsibility for compliance with laws and regulations**

- (1) The MCO must comply, to the satisfaction of HHSC, with all Contract provisions, all provisions of State and federal laws, rules, regulations, policies, guidelines, as well as federal waivers, State policy guidance memos, and any court-ordered consent decrees, settlement agreements, or other court orders that govern the performance of the Contract.
- (2) The Parties acknowledge that the federal or State laws, rules, regulations, policies, or guidelines, and court-ordered consent decrees, settlement agreements, or other court orders that affect the performance of the Contract may change from time to time or be added, judicially interpreted, or amended by competent authority. The MCO acknowledges that the MCO programs will be subject to continuous change during the term of the Contract and, except as provided in **Section 7.02** (Changes in law or Contract) of this document, the MCO has provided for or will provide for adequate resources, at no additional charge to HHSC, to reasonably accommodate these changes. The Parties further acknowledge that the MCO was selected, in part, because of its expertise, experience, and knowledge concerning applicable federal or State laws, regulations, policies, or guidelines that affect the performance of the Contract. In keeping with HHSC's reliance on this knowledge and expertise, the MCO is responsible for identifying the impact of changes in applicable federal or State legislative enactments and regulations that affect

the performance of the Contractor the State's use of the Services and Deliverables. The MCO must timely notify HHSC of these changes and must work with HHSC to identify the impact of these changes on how the State uses the Services and Deliverables.

- (3) The MCO is responsible for compliance with changes in federal and State law that occur during the course of the Contract term. If there are any conflicts between rules promulgated by CMS, including the C.F.R., and this Contract, then the federal rule takes precedence over the Contract and the MCO must comply with the C.F.R unless CMS has waived applicability of the C.F.R. provision to Texas Medicaid via a waiver.
- (4) The MCO is responsible for any fines, penalties, or disallowances imposed on the State or the MCO arising from any noncompliance with the laws and regulations relating to the delivery of the services or Deliverables by the MCO, its Subcontractors, or agents.
- (5) The MCO is responsible for ensuring each of its employees, agents, or Subcontractors who provide services under the Contract is properly licensed, certified, or has proper permits to perform any activity related to the services or Deliverables.
- (6) The MCO warrants that the Services and Deliverables will comply with all applicable federal, State, and county laws, regulations, codes, ordinances, guidelines, and policies. The MCO will, in accordance with the requirements stated in section 10.14(2) of this Exhibit, defend and indemnify HHSC from and against any losses, liability, claims, damages, penalties, costs, fees, or expenses arising from or in connection with the MCO's failure to comply with or violation of any law, regulation, code, ordinance, or policy.

Section 6.02 Compliance with state and federal anti-discrimination laws.

- (1) The MCO agrees to comply with state and federal anti-discrimination laws, including without limitation:
 - (a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d *et seq.*);
 - (b) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794);
 - (c) Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.*);
 - (d) Age Discrimination Act of 1975 (42 U.S.C. §§ 6101-6107);
 - (e) Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1688 regarding education programs and activities;

- (f) Food and Nutrition Act of 2008 (7 U.S.C. §§ 2011 *et. seq.*); and
- (g) HHSC’s administrative rules, as set forth in the Texas Administrative Code, to the extent applicable to this Agreement.

The MCO agrees to comply with all amendments to the above-referenced laws and all requirements imposed by any corresponding regulations. These laws provide in part that no persons in the United States may, on the grounds of race, color, national origin, sex, age, Disability, political beliefs, or religion, be excluded from participation in or denied any aid, care, service or other benefits provided by federal or State funding, or otherwise be subjected to discrimination.

- (2) The MCO agrees to comply with Title VI of the Civil Rights Act of 1964, and its implementing regulations at 45 C.F.R. Part 80 or 7 C.F.R. Part 15, prohibiting a contractor from adopting and implementing policies and procedures that exclude or have the effect of excluding or limiting the participation of clients in its Programs, benefits, or activities on the basis of national origin. Applicable State and federal civil rights laws require contractors to provide alternative methods for ensuring access to services for applicants and recipients who cannot express themselves fluently in English. The MCO agrees to ensure that its policies do not have the effect of excluding or limiting the participation of persons in its Programs, benefits, and activities on the basis of national origin. The MCO also agrees to take reasonable steps to provide services and information, both orally and in writing, in appropriate languages other than English, in order to ensure that persons with limited English proficiency are effectively informed and can have meaningful access to Programs, benefits, and activities.
- (3) The MCO agrees to comply with the Patient Protection and Affordable Care Act (PPACA) § 1557.
- (4) The MCO agrees to comply with Executive Order 13279 and its implementing regulations at 45 C.F.R. Part 87 or 7 C.F.R. Part 16. These provide in part that any organization that participates in programs funded by direct financial assistance from the United States Department of Agriculture or the United States Department of Health and Human Services will not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.
- (5) Upon request, the MCO will provide HHSC with copies of all of the MCO’s civil rights policies and procedures.

- (6) The MCO must notify HHSC’s Civil Rights Office of any civil rights complaints received relating to its performance under this Agreement. This notice must be delivered no more than 10 Days after receipt of a complaint. For this section’s purposes, notice must be directed to:

HHSC Civil Rights Office
701 W. 51st Street, Mail Code W206
Austin, Texas 78751
Phone Toll Free: (888) 388-6332
Phone: (512) 438-4313
TTY Toll Free: (877) 432-7232
Fax: (512) 438-5885.

Section 6.03 Environmental protection laws.

The MCO must comply with the applicable provisions of federal environmental protection laws as described in this section:

- (1) Pro-Children Act of 1994.

The MCO must comply with the Pro-Children Act of 1994 (20 U.S.C. §§ 6081 *et seq.*), as applicable, regarding the provision of a smoke-free workplace and promoting the non-use of all tobacco products.

- (2) National Environmental Policy Act of 1969.

The MCO must comply with any applicable provisions relating to the institution of environmental quality control measures contained in the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 *et seq.*) and Executive Order 11514 (“Protection and Enhancement of Environmental Quality”).

- (3) Clean Air Act and Water Pollution Control Act regulations.

The MCO must comply with any applicable provisions relating to required notification of facilities violating the requirements of Executive Order 11738 (“Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans”).

- (4) State Clean Air Implementation Plan.

The MCO must comply with any applicable provisions requiring conformity of federal actions to State (Clean Air) Implementation Plans under § 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§ 740 *et seq.*).

(5) Safe Drinking Water Act of 1974.

The MCO must comply with applicable provisions relating to the protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (21 U.S.C. § 349; 42 U.S.C. §§ 300f to 300j-9).

Section 6.04 HIPAA.

- (1) The MCO must comply with applicable provisions of HIPAA. This includes the requirement that the MCO's MIS system comply with applicable certificate of coverage and data specification and reporting requirements promulgated under HIPAA. The MCO must comply with HIPAA EDI requirements.
- (2) Additionally, the MCO must comply with HIPAA notification requirements, including those set forth in the Health Information Technology for Economic and Clinical Health Act (HITECH Act) at 42 U.S.C. §§ 17931, *et.seq.* If, in HHSC's determination, the MCO has not provided notice in the manner or format prescribed by HIPAA or the HITECH Act, then HHSC may require the MCO to provide proper notice.
- (3) The MCO must notify HHSC in writing of all Breaches or potential Breaches of unsecured protected health information, as that term is defined by the HITECH Act. As noted in **Article 1**, "Definitions," Confidential Information includes HIPAA-defined protected health information. Therefore, any Breach of that information is also subject to the requirements, including notice requirements, in **Article 9**, "Disclosure & Confidentiality of Information."
- (4) The MCO must use or disclose protected health information as authorized and in response to another HIPAA-covered entity's inquiry about a Member for authorized purposes of treatment, payment, healthcare operations, or as required by law under HIPAA.
- (5) The MCO must comply with rights of individual access by a Member or a Member's Legally Authorized Representative to Member's protected health information. The MCO may permit limited disclosures of protected health information as permissible under HIPAA for a family member, other relative, or close personal friends of the Member or anyone identified in the Member's protected health information directly relevant to the Member's involvement with the Member's healthcare or payment related to the Member's healthcare. The MCO should refer to 45 C.F.R. § 164.510(b) and related regulatory guidance for additional information.

Section 6.05 Historically Underutilized Business Participation Requirements.**(1) HUB Requirements.**

- (a) The MCO must submit an HSP for HHSC's approval during the Transition Phase and maintain the HSP thereafter.
- (b) The MCO must report to HHSC's contract manager and HUB Office monthly, in the format required by **Chapter 5 of Exhibit B**, its use of HUB subcontractors to fulfill the subcontracting opportunities identified in the HSP.
- (c) The MCO must obtain prior written approval from the HHSC HUB Office before making any changes to the HSP. The proposed changes must comply with HHSC's good faith effort requirements relating to the development and submission of HSPs.
 - (i) The MCO must submit a revised HSP to the HHSC HUB Office when it: changes the dollar amount of, terminates, or modifies an existing Subcontract for the MCO Administrative Services; or enters into a new Subcontract for the MCO Administrative Services. All proposed changes to the HSP must comply with the requirements of this Agreement.
- (d) HHSC will determine if the value of Subcontracts to HUBs meet or exceed the HUB subcontracting provisions specified in the MCO's HSP. If HHSC determines that the MCO's subcontracting activity does not demonstrate a good faith effort, the MCO may be subject to provisions in the Vendor Performance and Debarment program (34 Tex. Admin. Code § 21.115), and subject to remedies for breach.

Section 6.06 Compliance with Fraud, Waste, and Abuse requirements.

The MCO, the MCO's personnel, and all Subcontractors must comply with all FWA requirements found in [HHS Circular C-027](#). The MCO must comply with Circular C-027 requirements in addition to other FWA provisions in the Contract and in State and federal law.

Article 7 Amendments and Modifications**Section 7.01 Mutual agreement.**

This Contract may be amended at any time by mutual agreement of the Parties. The amendment must be in writing and signed by individuals with authority to bind the Parties.

Section 7.02 Changes in law or contract.

If federal or State laws, rules, regulations, policies, or guidelines are adopted, promulgated, judicially interpreted or changed, or if Contracts are entered or changed, and the effect of which alters the ability of either Party to fulfill its obligations under this Contract, the Parties will promptly negotiate appropriate modifications or alterations to the Contract and any schedule(s) or attachment(s) made a part of this Contract. Any modifications or alterations must be made through written amendment signed by individuals with authority to bind the parties, must equitably adjust the terms of this Contract, and must be limited to those provisions of this Contract affected by the change.

Section 7.03 Modifications as a remedy.

This Contract may be modified under the terms of **Article 10** (Remedies and Disputes).

Section 7.04 Modifications upon renewal or extension of Contract.

- (1) If HHSC seeks modifications to the Contract as a condition of any Contract extension, HHSC's notice to the MCO will specify those modifications to the SOW, the Contract pricing terms, or other Contract terms.
- (2) The MCO must respond to HHSC's proposed modification within the time frame specified by HHSC, generally within 30 Days of receipt. Upon receipt of the MCO's response to the proposed modifications, HHSC may enter into negotiations with the MCO to arrive at mutually agreeable Contract amendments. In the event that HHSC determines that the Parties will be unable to reach agreement on mutually satisfactory Contract modifications, then HHSC will provide written notice to the MCO of its intent not to extend the Contract beyond the Contract Term then in effect.

Section 7.05 Modification of HHSC Uniform Managed Care Manual.

- (1) HHSC will provide the MCO with at least 30 Days' advance written notice before implementing a substantive and material change in **Exhibit B** (a change that materially and substantively alters the MCO's ability to fulfill its obligations under the Contract). **Exhibit B**, and all subsequent versions of the chapters that make up **Exhibit B**, are incorporated by reference into this Contract. HHSC will provide the MCO with a reasonable amount of time to comment on substantive and material changes, generally at least 10 Business Days. HHSC is not required to provide advance written notice of changes that

are not material and substantive in nature, such as corrections of clerical errors or policy clarifications (including policy guidance memos).

- (2) The Parties agree to work to resolve disagreements concerning material and substantive changes to **Exhibit B**. If the Parties are unable to resolve issues relating to material and substantive changes, then either Party may terminate the agreement in accordance with **Article 10** (Remedies and Disputes).
- (3) Changes will be effective on the date specified in HHSC's written notice, which will not be earlier than the MCO's response deadline, and the changes will be incorporated into **Exhibit B**. If the MCO has raised an objection to a material and substantive change to **Exhibit B** and submitted a notice of termination in accordance with **Section 10.04(iv)**, HHSC will not enforce the policy change during the period of time between the receipt of the notice and the date of Contract termination.

Section 7.06 CMS approval of Contracts.

The implementation of amendments, modifications, and changes to the Contract is subject to the approval of the Centers for Medicare and Medicaid Services (CMS).

Section 7.07 Required compliance with amendment and modification procedures.

No different or additional services, work, or products will be authorized or performed except as authorized by this Article. No waiver of any term, covenant, or condition of this Contract will be valid unless executed in compliance with this Article. The MCO will not be entitled to payment for any services, work, or products that are not authorized by a properly executed Contract amendment or modification.

Article 8 Records, Audit and Disclosure

Section 8.01 Maintenance of Books and Records.

The State, CMS, the OIG, the Comptroller, the Office of the Texas Attorney General and their designees have the right to audit records or documents, related to this Contract of the MCO or Subcontractors for ten years from the final date of the Contract period or from the date of any audit, whichever is later.

The MCO agrees to maintain, and require its Subcontractors to maintain, records, books, documents, and information (collectively "records") that are adequate to document that services are provided and payments are made in accordance with the requirements of this Contract, including **Exhibit B UMCM Chapter 18** and applicable federal and State requirements. The records must be retained by the MCO and its

Subcontractors for a period of ten years after the Contract Expiration Date or until the resolution of all litigation, claims, financial management reviews, or audits pertaining to this Contract, whichever is longer.

The MCO and the Subcontractors must retain, as applicable, enrollee grievance and appeal records under 42 C.F.R. § 438.416, base data in 42 C.F.R. § 438.5(c), MLR reports under 42 C.F.R. § 438.8(k), and the data, information, and documentation specified under 42 C.F.R. § 438.604, § 438.606, § 438.608, and § 438.610 for a period no less than ten years from the expiration date of this Contract or from the date of the completion of any audit, whichever is later.

Additionally, the MCO agrees to, and to require its Subcontractors to, immediately retain all records in accordance with any litigation hold that is provided to them by HHSC and actively participate in the discovery process or request for information or documents from HHSC if required to do so, at no additional charge to HHSC. Litigation holds may require the MCO or its Subcontractors to keep the records longer than other records retention schedules. The MCO will be required to retain all records subject to the litigation hold until notified by HHSC when the litigation hold ends and then other approved records retention schedule(s) may resume. If the MCO or its Subcontractors fail to retain the pertinent records after receiving a litigation hold from HHSC, the MCO agrees to pay to HHSC all damages, costs, and expenses incurred by HHSC arising from such failure to retain.

Section 8.02 Access to records, books, and documents.

- (1) Upon reasonable notice, the MCO must provide, and cause its Subcontractors to provide, at no cost to the officials and entities identified in this section prompt, reasonable, and adequate access to any records, books, documents, and papers that are related to the scope of this Contract.
- (2) The MCO and its Subcontractors must provide the access described in this section upon HHSC's request. This request may include the following purposes:
 - (a) examination;
 - (b) audit;
 - (c) investigation;
 - (d) inspection;
 - (e) contract administration; or
 - (f) the making of copies, excerpts, or transcripts.

- (3) The access required must be provided to the following officials or entities:
- (a) The United States Department of Health and Human Services, HHS-OIG, or either's designee;
 - (b) The Comptroller General of the United States or its designee;
 - (c) The MCO program personnel from HHSC or its designee;
 - (d) The Health and Human Services Commission Office of Inspector General;
 - (e) The Texas Attorney General's Office or its designee;
 - (f) Any independent verification and validation contractor or Quality Assurance contractor acting on behalf of HHSC;
 - (g) The State Auditor's Office (SAO) of Texas or its designee;
 - (h) A State or federal law enforcement agency;
 - (i) A special or general investigating committee of the Texas Legislature or its designee; and
 - (j) Any other State or federal entity identified by HHSC, or any other entity engaged by HHSC.
- (4) The MCO agrees to provide the access described in this section wherever the MCO maintains any books, records, and supporting documentation. The MCO further agrees to provide access in reasonable comfort and to provide any furnishings, equipment, and other conveniences deemed reasonably necessary to fulfill the purposes described in this section. The MCO will require its Subcontractors to provide comparable access and accommodations.
- (5) Upon request, the MCO must provide copies of the information described in this section free of charge to HHSC and the entities described in **Subsection (3)**.
- (6) In accordance with Tex. Gov't Code § 533.012(e), any information submitted to HHSC or the Texas Attorney General's Office under Tex. Gov't Code § 533.012(a)(1) is confidential and is not subject to disclosure under the Texas Public Information Act.

Section 8.03 General access to accounting records

- (1) The MCO must provide authorized representatives of the State government, including the entities described in Section 8.02(3), and federal government

full access to all financial and accounting records related to performance of the Contract.

(2) The MCO must:

- (a) Cooperate with the State and federal governments in their evaluation, inspection, investigation, audit, or review of accounting records and any necessary supporting information.
- (b) Permit authorized representatives of the State and federal governments full access, during normal business hours, to the accounting records that the State and federal governments reasonably determine are relevant to the Contract or audit. This access is guaranteed at all times during the performance and retention period of the Contract and will include both announced and unannounced inspections, on-site audits, and the review, analysis, and reproduction of reports produced by the MCO. Except in the case of unannounced inspections or audits, the State or federal government will provide reasonable advance written notice of the inspections or audits, as determined by the State or federal government.
- (c) At the MCO's expense, make copies of any accounting records or supporting documentation relevant to the MCO available to HHSC or its agents within 10 Business Days of receiving a written request from HHSC for specified records or information. If the MCO does not produce the documentation as requested, the MCO agrees to reimburse HHSC for all costs, including transportation, lodging, and subsistence for all State and federal representatives, or their agents, to carry out their inspection, audit, review, analysis, and reproduction functions at the location(s) of the accounting records or supporting documentation.
- (d) Pay any and all additional costs incurred by the State or federal government that are the result of the MCO's failure to provide the requested accounting records or financial information within 10 Business Days of receiving a written request from the State or federal government.

Section 8.04 Audits and inspections of Services and Deliverables.

- (1) Upon reasonable notice from HHSC, the MCO will provide, and will cause its Subcontractors to provide, auditors and inspectors that HHSC may designate from time to time, with access to:

- (a) service locations, facilities, or installations;
- (b) records; and
- (c) Software and equipment.

Reasonable notice may include time-limited or immediate requests for information

- (2) The access described in this section will be for the purpose of examining, auditing, or investigating:
 - (a) The MCO's capacity to bear the Risk of potential financial losses;
 - (b) the Services and Deliverables provided;
 - (c) a determination of the amounts payable under this Contract;
 - (d) a determination of the allowability of costs reported under this Contract;
 - (e) detection of FWA;
 - (f) an examination of Subcontract terms or transactions;
 - (g) an assessment of financial results under this Contract; or
 - (h) will be for other purposes HHSC determines it needs to perform its regulatory function or to enforce the provisions of this Contract.
- (3) The MCO must provide, as part of the SOW, any assistance that the auditors, State representatives, and inspectors may require to complete their audits or inspections.
- (4) If, as a result of an audit or review of payments made to the MCO, HHSC discovered a payment error or overcharge, HHSC will notify the MCO of that error or overcharge. HHSC will be entitled to recover those funds as an offset to future payments to the MCO, or to collect the funds directly from the MCO. The MCO must return funds owed to HHSC within 30 Days after receiving notice of the error or overcharge, or interest will accrue on the amount due. HHSC will calculate interest at 12 percent per annum, compounded daily. In the event that an audit reveals that errors in reporting by the MCO have resulted in errors in payments to the MCO or errors in the calculation of the Experience Rebate, the MCO will indemnify HHSC for any losses resulting from these errors, including the cost of audit and any attorneys' fees incurred by the State to collect the overpayment. If the interest rate stipulated in this section is found by a court of competent jurisdiction to be outside the legal and enforceable range, then the rate in

this section will be adjusted to the maximum allowable rate the court of competent jurisdiction finds legal and enforceable.

Section 8.05 SAO Audit

The MCO understands that acceptance of funds under this Contract acts as acceptance of the authority of the State Auditor's Office (SAO), or any successor agency, to conduct an audit or investigation in connection with those funds. The MCO further agrees to cooperate fully with the SAO or its successor in the conduct of the audit or investigation, including providing all records requested at no cost. The MCO will ensure that this clause concerning the authority to audit funds received indirectly by Subcontractors through the MCO and the requirement to cooperate is included in any Subcontract it awards, and in any third-party agreements described in **Section 4.08**.

Section 8.06 Response/compliance with audit or inspection findings.

- (1) The MCO must ensure it or any Subcontractor corrects any finding of noncompliance with any law, regulation, audit requirement, cost principles, or generally accepted accounting principle relating to the Services and Deliverables or any other deficiency contained in any audit, review, or inspection conducted under this Article. This action will include the MCO (or any Subcontractor) coming into compliance and the MCO'S delivery to HHSC, for HHSC'S approval, a Corrective Action Plan (CAP) that addresses deficiencies identified in any audit(s), review(s), or inspection(s) within 30 Days of the close of the audit(s), review(s), or inspection(s).
- (2) The MCO must bear the expense of compliance with any finding of noncompliance under this Article that is:
 - (a) Required by State or federal law, regulation, rule or other audit requirement relating to the MCO's business;
 - (b) Performed by the MCO as part of the Services or Deliverables; or
 - (c) Necessary due to the MCO's noncompliance with any law, regulation, rule, or audit requirement imposed on the MCO.
- (3) The MCO must provide to HHSC, upon request, a copy of those portions of the MCO's and its Subcontractors' internal audit reports relating to the Services and Deliverables provided to HHSC under the Contract.

Section 8.07 Notification of legal and other proceedings and related events.

The MCO must notify HHSC of all proceedings, actions, and events as specified in **Chapter 5 of Exhibit B**.

Section 8.08 Cost of audits, examinations, investigations and risk assessments.

In the course of exercising its responsibilities for oversight of managed care organizations HHSC may employ outside contractors to perform these functions. The MCO must bear all costs of such assignments. HHSC will utilize good business practices to select and manage high quality, cost effective contractors. HHSC retains sole responsibility and authority for: establishing the scope of these assignments and for negotiating appropriate fees. HHSC will retain all billing details for its own use and will not release those to the MCOs.

Article 9 Disclosure and Confidentiality of Information**Section 9.01 Confidentiality**

- (1) The MCO and all Subcontractors, consultants, or agents must treat all information that is obtained through performance of the services under the Contract, including information relating to applicants or recipients of HHSC programs as Confidential Information to the extent that confidential treatment is provided under law and regulations.
- (2) The MCO is responsible for understanding the degree to which information obtained through performance of this Contract is confidential under State and federal law, regulations, or administrative rules, whether such information is identified by HHSC as confidential or not confidential.
- (3) The MCO and all Subcontractors, consultants, or agents under the Contract may not use any information obtained through performance of this Contract in any manner except as is necessary for the proper discharge of obligations and securing of rights under the Contract.
- (4) The MCO must have a system in effect to protect all records and all other documents deemed confidential under this Contract maintained in connection with the activities funded under the Contract. Any disclosure or transfer of Confidential Information by the MCO, including information required by HHSC, will be in accordance with applicable law. If the MCO receives a request for information deemed confidential under this Contract, the MCO will immediately notify HHSC in writing of such request and will make reasonable efforts to protect the information from public disclosure.

- (5) In addition to the requirements expressly stated in this Section, the MCO must comply with any policy, rule, or requirement of HHSC that relates to the safeguarding or disclosure of information relating to Members, the MCO'S operations, or the MCO'S performance of the Contract.
- (6) In the event of the expiration of the Contract or termination of the Contract for any reason, all Confidential Information disclosed to and all copies of any Confidential Information made by the MCO must be returned to HHSC or, at HHSC'S option, erased or destroyed. The MCO must provide HHSC certificates evidencing this erasure or destruction.
- (7) The obligations in this section do not restrict any disclosure by the MCO under any applicable law or by order of any court or government agency. However, HHSC must be notified in writing promptly, as dictated by the circumstances or law, but not later than 24 hours in any circumstance of a request or order that would result in disclosure of HHSC'S Confidential Information.
- (8) With the exception of confidential Member information, information provided under this Agreement by one Party (the "Furnishing Party") to another Party (the "Receiving Party") will not be considered Confidential Information if the data was:
 - (a) Already known to the Receiving Party without restrictions at the time of its disclosure by the Furnishing Party;
 - (b) Independently developed by the Receiving Party without reference to the Furnishing Party'S Confidential Information;
 - (c) Rightfully obtained by the Receiving Party without restriction from a third party after its disclosure to a third party by the Furnishing Party;
 - (d) Publicly available other than through the fault or negligence of the Receiving Party; or
 - (e) Lawfully released without restriction to anyone.

Section 9.02 Disclosure of HHSC'S Confidential Information.

- (1) The MCO will report to HHSC and notify HHSC in writing of any and all unauthorized disclosures or uses of HHSC'S Confidential Information of which it or its Subcontractor(s), consultant(s), or agent(s) is aware or has knowledge in accordance with **Section 9.09**. The MCO acknowledges that any

publication or disclosure of HHSC's Confidential Information to others may cause immediate and irreparable harm to HHSC and may constitute a violation of State or federal laws. If the MCO, its Subcontractor(s), consultant(s), or agent(s) should publish or disclose such Confidential Information to others without authorization, HHSC will immediately be entitled to injunctive relief or any other remedies to which it is entitled under law or equity. HHSC will have the right to recover from the MCO all damages, penalties, fines and liabilities caused by or arising from the MCO's, its Subcontractors', consultants', or agents' failure to protect HHSC's Confidential Information. The MCO will defend with counsel approved by HHSC, indemnify and hold harmless HHSC from all damages, costs, liabilities, and expenses (including without limitation attorneys' fees and costs) caused by or arising from the MCO's or its Subcontractors', consultants', or agents' failure to protect HHSC's Confidential Information. HHSC will not unreasonably withhold approval of counsel selected by the MCO but approval of counsel is subject to Tex. Gov't. Code § 402.0212.

- (2) The MCO will require its Subcontractor(s), consultant(s), and agent(s) to comply with the terms of this provision.

Section 9.03 Member Records

- (1) The MCO must comply with the requirements of State and federal laws, including the HIPAA requirements set forth in **Section 6.04** (HIPAA), regarding the transfer of Member Records.
- (2) If at any time during the Contract Term this Contract is terminated, HHSC may require the transfer of Member Records, upon written notice to the MCO, to another entity, as consistent with federal and State laws and applicable releases.
- (3) The term "Member Record" for this section means only those administrative, enrollment, case management, and other records maintained by the MCO and is not intended to include Member records maintained by Providers.

Section 9.04 Requests for public information.

- (1) HHSC agrees that it will promptly notify the MCO of a request for disclosure of information filed in accordance with the Texas Public Information Act, Tex. Gov't Code ch. 552 that consists of the MCO'S Confidential Information, including information or data to which the MCO has a proprietary or commercial interest. HHSC will deliver a copy of the request for public information to the MCO.

- (2) With respect to any information that is the subject of a request for disclosure, the MCO is required to demonstrate to the Office of the Texas Attorney General the specific reasons why the requested information is confidential or otherwise excepted from required public disclosure under law. The MCO will provide HHSC with copies of all of these communications.
- (3) The MCO must make information defined as public information not otherwise excepted from disclosure under the Texas Public Information Act, Tex. Gov't Code ch. 552, available to HHSC in a format accessible by the public and at no additional charge to HHSC.
- (4) To the extent authorized under the Texas Public Information Act, HHSC agrees to safeguard from disclosure information received from the MCO that the MCO believes to be Confidential Information. The MCO must clearly mark such information as Confidential Information or provide written notice to HHSC that it considers the information confidential.

Section 9.05 Privileged work product.

- (1) The MCO acknowledges that HHSC asserts that privileged work product may be prepared in anticipation of litigation and that the MCO is performing the services with respect to privileged work product as an agent of HHSC. All matters related to this performance of services are protected from disclosure by the Texas Rules of Civil Procedure, Texas Rules of Evidence, Federal Rules of Civil Procedure, or Federal Rules of Evidence.
- (2) HHSC will notify the MCO of any privileged work product to which the MCO has or may have access. After the MCO is notified or otherwise becomes aware that these documents, data, databases, or communications are privileged work product, only the MCO personnel, for whom access is necessary for the purposes of providing the services, may have access to privileged work product.
- (3) If the MCO receives notice of any subpoena, judicial, or other proceeding seeking to obtain access to HHSC's privileged work product, the MCO will:
 - (a) Immediately notify HHSC in writing; and
 - (b) Use all reasonable efforts to resist providing access.
- (4) If the MCO resists disclosure of HHSC's privileged work product in accordance with this section, HHSC will, to the extent authorized under Civil

Practices and Remedies Code or other applicable State law, have the right to:

- (a) represent the MCO in the resistance; or
 - (b) to retain counsel to represent the MCO.
- (5) If a court of competent jurisdiction orders the MCO to produce documents, disclose data, breach the confidentiality obligations imposed in the Contract, or otherwise breach the Contract with respect to maintaining the confidentiality, proprietary nature, and secrecy of privileged work product, the MCO will not be liable for a Contract breach when ordered to do so by the court.

Section 9.06 Unauthorized acts.

Each Party agrees to:

- (1) Notify the other Party promptly of any unauthorized possession, use, or knowledge, or attempted possession, use, or knowledge, by any person or entity that may become known to the Party, of any HHSC Confidential Information or any information identified by the MCO as confidential or proprietary;
- (2) Promptly furnish to the other Party full details of the unauthorized possession, use, or knowledge, or attempted possession, use, or knowledge, and use reasonable efforts to assist the other Party in investigating or preventing the reoccurrence of any unauthorized possession, use, or knowledge, or attempted possession, use, or knowledge, of Confidential Information;
- (3) Cooperate with the other Party in any litigation and investigation determined to be necessary against third Parties to protect that Party's proprietary rights; and
- (4) Promptly prevent a reoccurrence of any unauthorized possession, use, or knowledge, or attempted possession, use, or knowledge, of the information.

Section 9.07 Legal action.

The MCO may not commence any legal action or proceeding in respect to any unauthorized possession, use, or knowledge, or attempted possession, use, or knowledge by any person or entity of HHSC's Confidential Information without HHSC's consent. Also, the MCO must notify HHSC of any legal action or proceeding

in respect to any unauthorized possession, use, or knowledge, or attempted possession, use, or knowledge by any person or entity of information identified by the MCO as confidential or proprietary that is related to the fulfillment of any duties under this Contract but is not considered Confidential Information as defined by this Contract.

Section 9.08 Information Security and Privacy Requirements

(1) Compliance.

The MCO agrees to comply with all applicable State and federal security and privacy requirements, governing the creation, collection, access, use, storage, maintenance, disclosure, safeguarding and destruction of Texas HHS data including Agency Sensitive Information and Confidential Information.

(2) Protection.

The MCO will implement, maintain, document, and use appropriate administrative, technical and physical security measures to protect all Texas HHS Information Resources and data, including Agency Sensitive Information and Confidential Information.

(3) Reviews.

The MCO must comply with security and privacy controls compliance assessments, updates, and monitoring by Texas HHS as required by State and federal law or by Texas HHS's discretion. The security and privacy controls will be based on the National Institute of Standards and Technology (NIST) Special Publication 800-53 from the applicable State and federal requirements. The Texas HHS process is described in the Information Security Risk Assessment and Monitoring Procedures (IS-RAMP) that is published on the Texas HHS internet website.

(4) Workforce.

The MCO must ensure that their workforce, including Subcontractors, who are granted specified Texas HHS authorized access to internal Texas HHS Information Resources, comply with the Texas HHS Acceptable Use Policy (AUP) and sign the Acceptable Use Agreement (AUA) prior to access, in accordance with 1 Tex. Admin. Code ch. 202.22.

(5) Information Security and Privacy Officials.

The MCO must designate an information security official and a privacy official who will be responsible for managing its security and privacy programs and Texas HHS requirements. The MCO will provide Texas HHS the names, phone numbers and email addresses of these officials. The information security official and privacy official roles may be performed by the same individual.

(6) Program.

The MCO must establish an information security and privacy program and maintain information security and privacy policies and standards that are updated at least annually with respect to the management or handling of Texas HHS Information Resources or data. The program will:

- (a) Comply with all applicable legal and regulatory requirements for Texas HHS data protection;
- (b) Comply with Texas HHS Information Security Office's published or provided policies, standards, and controls available at Doing Business with HHS;
- (c) Ensure the integrity, availability, and confidentiality by implementing technical, administrative and physical safeguards for Texas HHS Agency Sensitive Information and Confidential Information;
- (d) Protect against any anticipated threats or hazards to the security or integrity of such information;
- (e) Protect and monitor against unauthorized access to or use of such information that could result in harm to the person that is the subject of such information both logically and physically;
- (f) Routinely review, monitor, and remove unnecessary accounts that have access to Texas HHS Agency Sensitive Information or Confidential Information;
- (g) Coordinate with Texas HHS to determine the Texas HHS data types accessed, transmitted, stored, or maintained by the system and identify applicable State, federal and regulatory requirements;
- (h) Encrypt the Texas HHS Agency Sensitive Information and Confidential Information on end-user devices, on portable devices, in transit over public networks, and while stored in the cloud;

- (i) Ensure FIPS 140-2 validated encryption will be used for federal protected data and access to Texas HHS Confidential Information and Agency Sensitive Information will be controlled and monitored;
- (j) Prohibit the use of free cloud services with Texas HHS Agency Sensitive Information or Confidential Information;
- (k) Ensure that, prior to offshoring or using cloud services, the contractor must obtain the express prior written permission from the Texas HHS agency and comply with the Texas HHS agency conditions for safeguarding offshore Texas HHS information;
- (l) Provide the workforce security and privacy training, conduct appropriate background checks, ensure individual accountability, and implement appropriate sanctions for non-compliance;
- (m) Establish a secure method of assigning and selecting passwords, or use of unique identifier technologies, such as biometrics or token devices;
- (n) Keep current on security update/patch releases and maintain up-to-date anti-virus/malware protection;
- (o) Ensure security will be integrated into all phases including planning, development, and implementation and will include security testing and remediation of security vulnerabilities prior to production especially for online websites, applications and mobile applications;
- (p) Establish standards and methods to securely return, destroy or dispose of Texas HHS Agency Sensitive Information or Confidential Information;
- (q) Provide documentation of information security and privacy policies/standards to Texas HHS Information Security if requested;
- (r) Develop and implement methods that ensure security for all components, including:
 - (i) Environmental security;
 - (ii) Physical site security;
 - (iii) Computer hardware security;
 - (iv) Computer software security;

- (v) Application security;
- (vi) Data access and storage;
- (vii) Client/user security;
- (viii) Secure processes and procedures;
- (ix) Telecommunications and network security; and
- (x) General support systems (GSS) security.

Section 9.09 MCO's Incident and Breach Notice, Reporting and Mitigation

The MCO's obligation begins at Discovery of any unauthorized disclosure of Confidential Information or any privacy or security incident that may compromise Confidential Information (collectively "Incident") and continues until all effects of the Incident are resolved to HHSC's satisfaction, hereafter referred to as the "Incident Response Period".

For each Incident, the MCO must perform a Risk analysis in accordance with HIPAA requirements to determine the probability of compromise of the Confidential Information.

Section 9.10 Notification to HHSC.

- (1) The MCO must notify HHSC within the timeframes set forth in **Section (3)** below unless HHSC has agreed in writing to an alternate timeframe for notification.
- (2) The MCO must coordinate with and require that its Subcontractors and Providers take the necessary steps to assure that the MCO can comply with all of the following Incident notice requirements.
- (3) Incident Notice:
 - (a) Initial Notice.

Within 24 hours of Discovery of an Incident that the MCO or the MCO's Risk analysis has determined has more than a low probability of compromise, the MCO must preliminarily report on the occurrence of an Incident to the HHSC Privacy Officer via email at: privacy@HHSC.state.tx.us using the Potential Privacy/Security Incident Form which is available on the HHSC website. This initial notice must, at a minimum, contain (1) all information reasonably available to the

MCO about the Incident, (2) confirmation that the MCO has met any applicable federal Breach notification requirements and (3) a single point of contact for the MCOs for HHSC communications both during and outside of business hours during the Incident Response Period.

(b) Formal Notice.

No later than three Business Days after Discovery of an Incident that the MCO's Risk analysis has determined has more than a low probability of compromise, or when the MCO should have reasonably Discovered such Incident, the MCO must provide written formal notification to HHSC using the Potential Privacy/Security Incident Form which is available on the HHSC website. The formal notification must include all available information about the Incident, and the MCO's investigation of the Incident.

(c) Annual Notice

For an Incident that the MCO or the MCO's Risk analysis has determined has a low probability of compromise or only involves unauthorized disclosure of a single individual's Confidential Information to a single unauthorized recipient, the MCO must provide written notice to HHSC of such Incident no later than 60 Days after the end of the calendar year in which the Incident occurred.

No later than 60 Days after the end of each calendar year, the MCO's must provide the HHS Privacy Office with a comprehensive list of all incidents involving HHSC Confidential Information that were reported to the US Office for Civil Rights in accordance with the obligations under HIPAA.

Section 9.11 MCO Investigation, Response and Mitigation.

The MCO must fully investigate and mitigate, to the extent practicable and as soon as possible or as indicated below, any Incident. At a minimum, the MCO will:

- (1) Immediately commence a full and complete investigation;
- (2) Cooperate fully with HHSC in its response to the Incident;
- (3) Complete or participate in an initial Risk analysis;
- (4) Provide a final Risk analysis;

- (5) Submit proposed corrective actions to HHSC for review and approval;
- (6) Commit necessary and appropriate staff and resources to expeditiously respond;
- (7) Report to HHSC as required by HHSC and all applicable federal and State laws for Incident response purposes and for purposes of HHSC's compliance with report and notification requirements, to the satisfaction of HHSC;
- (8) Fully cooperate with HHSC to respond to inquiries and/or proceedings by federal and State authorities about the Incident;
- (9) Fully cooperate with HHSC's efforts to seek appropriate injunctive relief or to otherwise prevent or curtail such Incidents;
- (10) Recover, or assure destruction of, any Confidential Information impermissibly disclosed during or as a result of the Incident; and
- (11) Provide HHSC with a final report on the Incident explaining the Incident's resolution.

Section 9.12 Breach notification to individuals and reporting to authorities.

- (1) The MCO must provide Breach notification, in accordance with 45 C.F.R. §§ 164.400-414.
- (2) The MCO must assure that the time, manner and content of any Breach notification required by this section meets all federal and State regulatory requirements. Breach notice letters must be in the MCO's name and on the MCO's letterhead and must contain contact information to obtain additional information, including the name and title of the MCO's representative, an email address and a toll-free telephone number.
- (3) The MCO must provide HHSC with copies of all distributed communications related to the Breach notification at the same time the MCO distributes the communications.

The MCO must demonstrate to the satisfaction of HHSC that any Breach notification required by applicable law was timely made. If there are delays outside of the MCO's control, the MCO must provide written documentation to HHSC of the reasons for the delay.

Article 10 Remedies and Disputes**Section 10.01 Understanding and expectations.**

The remedies described in this section are directed to the MCO's timely and responsive performance of the Services and production of Deliverables, and the creation of a flexible and responsive relationship between the Parties. The MCO is expected to meet or exceed all HHSC objectives and standards, as set forth in the Contract. All areas of responsibility and all Contract requirements will be subject to performance evaluation by HHSC. Performance reviews may be conducted at the discretion of HHSC at any time and may relate to any responsibility and/or requirement. Any and all responsibilities and/or requirements not fulfilled may be subject to remedies set forth in the Contract.

Section 10.02 Tailored remedies.

(1) Understanding of the Parties.

The MCO agrees and understands that HHSC may pursue tailored contractual remedies for noncompliance with the Contract. At any time and at its discretion, HHSC may impose or pursue one or more remedies for each item of noncompliance and will determine remedies on a case-by-case basis. HHSC's pursuit or non-pursuit of a tailored remedy does not constitute a waiver of any other remedy that HHSC may have at law or equity.

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

- (a) HHSC will notify the MCO in writing of specific areas of the MCO performance that fail to meet performance expectations, standards, or schedules set forth in the Contract, but that, in the determination of HHSC, do not result in a material deficiency or delay in the implementation or operation of the Services or Deliverables.
- (b) The MCO will, within five Business Days (or another date approved by HHSC) of receipt of written notice of a non-material deficiency, provide the HHSC Project Manager a written response that:
 - (i) Explains the reasons for the deficiency, the MCO's plan to address or cure the deficiency, and the date and time by which the deficiency will be cured; or
 - (ii) If the MCO disagrees with HHSC's findings, its reasons for disagreeing with HHSC's findings.

- (b) The MCO's proposed cure of a non-material deficiency is subject to the approval of HHSC. The MCO's repeated commission of non-material deficiencies or repeated failure to resolve any such deficiencies may be regarded by HHSC as a material deficiency and entitle HHSC to pursue any other remedy provided in the Contract or any other appropriate remedy HHSC may have at law or equity.

(3) Corrective Action Plan (CAP).

- (a) At its option, HHSC may require the MCO to submit to HHSC a written plan (the "Corrective Action Plan") to correct or resolve a material breach of the Contract, as determined by HHSC.
- (b) The CAP must provide:
 - (i) A detailed explanation of the reasons for the cited deficiency;
 - (ii) The MCO's assessment or diagnosis of the cause; and
 - (iii) A specific proposal to cure or resolve the deficiency.
- (c) The CAP must be submitted by the deadline set forth in HHSC's request for a CAP. The CAP is subject to approval by HHSC, which will not unreasonably be withheld.
- (d) HHSC will notify the MCO in writing of HHSC's final disposition of HHSC's concerns. If HHSC accepts the MCO's proposed CAP, HHSC may:
 - (i) Condition such approval on completion of tasks in the order or priority that HHSC may reasonably prescribe;
 - (ii) Disapprove portions of the MCO's proposed CAP; or
 - (iii) Require additional or different corrective action(s).

Notwithstanding the submission and acceptance of a CAP, the MCO remains responsible for achieving all written performance criteria.

- (e) HHSC's acceptance of a CAP under this section will not:
 - (i) Excuse the MCO's prior substandard performance;
 - (ii) Relieve the MCO of its duty to comply with performance standards; or

- (iii) Prohibit HHSC from assessing additional tailored remedies or pursuing other appropriate remedies for continued substandard performance.

(4) Administrative remedies.

- (a) At its discretion, HHSC may impose one or more of the following remedies for each item of material noncompliance and will determine the scope and severity of the remedy on a case-by-case basis:
 - (i) Assess liquidated damages in accordance with **Exhibit C**.
 - (ii) Conduct accelerated monitoring of the MCO. Accelerated monitoring includes more frequent or more extensive monitoring by HHSC or its agent;
 - (iii) Require additional, more detailed, financial and/or programmatic reports to be submitted by the MCO;
 - (iv) Decline to renew or extend the Contract;
 - (v) Appoint temporary management under the circumstances described in 42 C.F.R. § 438.706;
 - (vi) Initiate disenrollment of a Member or Members;
 - (vii) Suspend enrollment of Members;
 - (viii) Withhold or recoup payment to the MCO;
 - (ix) Require forfeiture of all or part of the MCO's bond; or
 - (x) Terminate the Contract in accordance with **Section 10.03**, ("Termination by HHSC").
- (b) For purposes of the Contract, an item of material noncompliance means a specific action of the MCO that:
 - (i) Violates a material provision of the Contract;
 - (ii) Fails to meet an agreed measure of performance; or

- (iii) Represents a failure of the MCO to be reasonably responsive to a reasonable request of HHSC relating to the Services for information, assistance, or support within the timeframe specified by HHSC.
 - (c) HHSC will provide notice to the MCO of the imposition of an administrative remedy in accordance with this section, with the exception of accelerated monitoring, which may be unannounced. HHSC may require the MCO to file a written response in accordance with this section.
 - (d) The Parties agree that a State or Federal statute, rule, regulation, or Federal guideline will prevail over the provisions of this section unless the statute, rule, regulation, or guidelines can be read together with this section to give effect to both.
- (5) Damages.
- (a) HHSC will be entitled to actual and consequential damages resulting from the MCO's failure to comply with any of the terms of the Contract. In some cases, the actual damage to HHSC or State of Texas as a result of the MCO's failure to meet any aspect of the responsibilities of the Contract and/or to meet specific performance standards set forth in the Contract are difficult or impossible to determine with precise accuracy. Therefore, liquidated damages will be assessed in writing against and paid by the MCO in accordance with and for failure to meet any aspect of the responsibilities of the Contract and/or to meet the specific performance standards identified by HHSC in **Exhibit C**. Liquidated damages will be assessed if HHSC determines such failure is the fault of the MCO, including the MCO's Subcontractors and/or consultants, and is not materially caused or contributed to by HHSC or its agents. If at any time, HHSC determines the MCO has not met any aspect of the responsibilities of the Contract and/or the specific performance standards due to mitigating circumstances, HHSC reserves the right to waive all or part of the liquidated damages. All such waivers must be in writing, contain the reasons for the waiver, and be signed by the appropriate executive of HHSC.
 - (b) The liquidated damages prescribed in this section are not intended to be in the nature of a penalty, and the MCO acknowledges that the liquidated damages are reasonable estimates of HHSC's projected financial loss and damage resulting from the MCO's nonperformance, including financial loss as a result of project delays. Accordingly, in the

event the MCO fails to perform in accordance with the Contract, HHSC may assess liquidated damages as provided in this section.

- (c) If the MCO fails to perform any of the services described in the Contract, HHSC may assess liquidated damages for each occurrence of a liquidated damages event, to the extent consistent with HHSC's tailored approach to remedies and Texas law.
- (d) HHSC may elect to collect liquidated damages:
 - (i) Through direct assessment and demand for payment delivered to the MCO; or
 - (ii) By deduction of amounts assessed as liquidated damages as set-off against payments then due to the MCO or that become due at any time after assessment of the liquidated damages. HHSC will make deductions until the full amount payable by the MCO is received by HHSC.

(6) Equitable Remedies.

- (a) The MCO acknowledges that, if the MCO breaches (or attempts or threatens to breach) its material obligation under the Contract, HHSC may be irreparably harmed. In such a circumstance, HHSC may proceed directly to court to pursue remedies.
- (b) If a court of competent jurisdiction finds that the MCO breached, or attempted or threatened to breach, any such obligations, the MCO agrees that without any additional findings of irreparable injury or other conditions to injunctive relief, it will not oppose the entry of an appropriate order compelling performance by the MCO and restraining it from any further breaches or attempted or threatened breaches.

(7) Suspension of Contract.

- (a) HHSC may suspend performance of all or any part of the Contract if:
 - (i) HHSC determines that the MCO has committed a material breach of the Contract;
 - (ii) HHSC has reason to believe that the MCO has committed, assisted in the commission of Fraud, Waste, or Abuse; malfeasance; misfeasance; or nonfeasance by any party concerning the Contract;
 - (iii) HHSC determines that the MCO knew, or should have known, of Fraud, Waste, or Abuse; malfeasance; or nonfeasance by any

- party concerning the Contract, and the MCO failed to take appropriate action; or
- (iv) HHSC determines that suspension of the Contract in whole or in part is in the best interests of the State of Texas or the HHSC programs.
- (b) HHSC will notify the MCO in writing of its intention to suspend the Contract in whole or in part. Such a notice will:
- (i) Be delivered in writing to the MCO;
 - (ii) Include a concise description of the facts or matter leading to HHSC's decision; and
 - (iii) Unless HHSC is suspending the Contract for convenience, request a CAP from the MCO or describe actions that the MCO must take to avoid the contemplated suspension of the Contract

Section 10.03 Termination by HHSC.

Prior to completion of the Contract Period, all or a part of the Contract may be terminated for any of the following reasons:

- (1) Termination in the best interest of HHSC.

HHSC may terminate the Contract without cause at any time when, in its sole discretion, HHSC determines that termination is in the best interests of the State of Texas. HHSC will provide reasonable advance written notice of the termination, as it deems appropriate under the circumstances. HHSC may terminate the Contract without prior notice if there is an emergency situation or exigent circumstances. The termination will be effective on the date specified in HHSC's notice of termination.

- (2) Termination related to MCS's financial status.

Except as otherwise provided by the U.S. Bankruptcy Code, or any successor law, HHSC may terminate the Contract, in whole or in part, upon the following conditions:

- (a) Makes an assignment for the benefit of its creditors or appointment of receiver;
- (b) Admits in writing its inability to pay its debts generally as they become due; or
- (c) Consents to the appointment of a receiver, trustee, or liquidator of the MCO of all or any part of its property.
- (d) HHSC determines that MCO is insolvent or will become insolvent during the term of the Contract.

(3) Failure to adhere to laws, rules, ordinances, or orders.

HHSC may terminate the Contract if a court of competent jurisdiction finds the MCO failed to adhere to any laws, ordinances, rules, regulations, or orders of any public authority having jurisdiction and such violation prevents or substantially impairs performance of the MCO's duties under the Contract. HHSC will provide at least 30 Days' advance written notice such of termination.

(4) Breach of confidentiality.

HHSC may terminate the Contract at any time if the MCO breaches confidentiality laws with respect to the Services and Deliverables provided under the Contract.

(5) Failure to maintain adequate personnel or resources.

HHSC may terminate the Contract if, after providing notice and an opportunity to correct, HHSC determines that the MCO has failed to supply personnel or resources and such failure results in the MCO's potential inability to fulfill its duties under the Contract. HHSC will provide at least 30 Days' advance written notice of such termination.

(6) Termination for gifts and gratuities.

- (a) HHSC may terminate the Contract at any time following the determination by a competent judicial or quasi-judicial authority and the MCO's exhaustion of all legal remedies that the MCO, its employees, agents or representatives have either offered or given anything of value to an officer or employee of HHSC or the State of Texas in violation of State or Federal law.
- (b) The MCO must include a similar provision in each of its Subcontracts and shall enforce this provision against a Subcontractor who has offered or given anything of value to an officer or employee of HHSC or the State of Texas , whether or not the offer or gift was in the MCO's behalf.
- (c) Termination of a Subcontract by the MCO pursuant to this provision will not be a cause for termination of the Contract unless:
 - (i) The MCO fails to replace such terminated Subcontractor within a reasonable time; and
 - (ii) Such failure constitutes cause, as described in this **Section 10.03(2)**.
- (d) For purposes of this section, a "thing of value" means any item of tangible or intangible property that has a monetary value of more than \$50.00 and includes, but is not limited to, cash, food, lodging, entertainment, and charitable contributions. The term does not

include contributions to holders of public office or candidates for public office that are paid and reported in accordance with State and/or Federal law.

(7) Termination for non-appropriation of funds.

Notwithstanding any other provision of the Contract, if funds for the continued fulfillment of the Contract by HHSC are at any time not forthcoming or are insufficient, through failure of any entity to appropriate funds or otherwise, then HHSC will have the right to terminate the Contract at no additional cost and with no penalty whatsoever by giving prior written notice documenting the lack of funding. HHSC will provide at least 30 Days' advance written notice of such termination. HHSC will use reasonable efforts to ensure appropriated funds are available.

(8) Judgment and execution.

- (a) HHSC may terminate the Contract at any time if a judgment or fine for the payment of money in excess of \$500,000.00 that is not covered by insurance, is rendered by any court or governmental body against the MCO, and the MCO does not:
 - (i) Discharge the judgment or fine or provide for its discharge in accordance with the terms of the judgment;
 - (ii) Procure a stay of execution of the judgment within 30 Days from the date of entry thereof; or
 - (iii) Perfect an appeal of such judgment and cause the execution of such judgment to be stayed during the appeal, providing such financial reserves as may be required under generally accepted accounting principles.
- (b) If a writ or warrant of attachment or any similar process is issued by any court against all or any material portion of the property of the MCO, and such writ or warrant of attachment or any similar process is not released or bonded within 30 Days after its entry, HHSC may terminate the Contract in accordance with this Section.

(9) Termination for MCO'S material breach of the Contract.

HHSC will have the right to terminate the Contract in whole or in part if HHSC determines, at its sole discretion, that the MCO has materially breached the Contract. HHSC will provide at least 30 Days' advance written notice of such termination.

(10) Termination for Criminal Conviction

HHSC will have the right to terminate the Contract in whole or in part, or require the replacement of a Material Subcontractor, if the MCO or any Key Personnel of the MCO

or a Material Subcontractor is convicted of a criminal offense in a State or federal court:

- (a) Related to the delivery of an item or service;
 - (b) Related to the neglect or abuse of Members in connection with the delivery of an item or service;
 - (c) Consisting of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, or
 - (d) Resulting in a penalty or fine in the amount of \$500,000 or more in a State or federal administrative proceeding.
- (11) Termination for failure to comply with the requirements of Subchapter J, Chapter 552, Government Code.

The requirements of Subchapter J, Chapter 552, Government Code, may apply to this Contract and the MCO agrees that the Contract can be terminated if the MCO knowingly or intentionally fails to comply with a requirement of that subchapter.

(12) Pre-termination Process

The following process will apply when HHSC terminates the Contract for any reason set forth in **Section 10.03(2)**, "Termination related to MCO's financial status" through **Section 10.03(11)**, Termination for failure to comply with the requirements of Subchapter J, Chapter 552, Government Code, other than **Section 10.03(7)**, "Termination for non-appropriation of funds":

In accordance with 42 C.F.R. §438.710, before terminating the Contract, HHSC will provide the MCO with 30 Days advance written notice of its intent to terminate. The pre-termination notice will include the following information: the reason for the proposed termination; the proposed effective date of the termination; and the time and place of the pre-termination hearing. During the hearing, the MCO may present written information explaining why HHSC should not terminate the Contract. After the pre-termination hearing, the State Medicaid Director will provide the MCO with a written notice of HHSC's final decision affirming or reversing the proposed termination of the Contract and the effective date of termination if applicable.

HHSC's final decision to terminate the Contract is binding and is not subject to review by the State Office of Administrative Hearings under Chapter 2260, Texas Government Code.

The pre-termination process described herein will not limit or otherwise reduce the MCO's rights and the Parties' responsibilities under **Section 10.13**, "Dispute Resolution."

Section 10.04 Termination by MCO.

(1) Failure to pay.

The MCO may terminate the Contract if HHSC fails to pay the MCO undisputed charges when due as required under the Contract. Retaining premium, recoupment, sanctions, or penalties that are allowed under the Contract or that result from the MCO's failure to perform or the MCO's default under the terms of the Contract is not cause for termination. Termination for failure to pay does not release HHSC from the obligation to pay undisputed charges for services provided prior to the termination date.

If HHSC fails to pay undisputed charges when due, then the MCO may submit a notice of intent to terminate for failure to pay in accordance with the requirements of **Section 10.04(5)** (Notice of intent to terminate or to allow the Contract to expire). If HHSC pays all undisputed amounts then due within 30 Days after receiving the notice of intent to terminate, the MCO cannot proceed with termination of the Contract under this Article.

(2) Change to HHSC Uniform Managed Care Manual.

The MCO may terminate this agreement if the Parties are unable to resolve a dispute concerning a material and substantive change to **Exhibit B** (a change that materially and substantively alters the MCO's ability to fulfill its obligations under the Contract). The MCO must submit a notice of intent to terminate due to a material and substantive change in **Exhibit B** no later than 30 Days after the effective date of the policy change. HHSC will not enforce the policy change during the period of time between the receipt of the notice of intent to terminate and the effective date of termination.

(3) Change to Capitation Rate.

If HHSC proposes an initial Capitation Rate or a modification to the Capitation Rate that is unacceptable to the MCO, the MCO may terminate the Contract. The MCO must submit a written notice of intent to terminate due to a change in the Capitation Rate no later than 30 Days after HHSC's notice of the proposed change. HHSC will not enforce the rate change during the period of time between the receipt of the notice of intent to terminate and the effective date of termination.

(4) Expiration of Contract.

If the MCO rejects, or intends to reject, an amendment extending the term of the Contract, the MCO is subject to the requirements of **Section 10.04(5)**.

(5) Notice of intent to terminate or to allow the Contract to expire.

If the MCO intends to terminate the Contract pursuant to this Section, or allow the Contract to expire, the MCO must give HHSC at least 90 Days written notice of intent to terminate, or intent to allow the Contract to expire. The termination date will be calculated as the last Day of the month following 90 Days from the date the notice of intent is received by HHSC.

In the event the MCO fails to comply with this notice requirement, the Contract shall be extended under the same terms, conditions, and rates, for the period of time necessary to satisfy this notice requirement.

Section 10.05 Termination by mutual agreement.

The Contract may be terminated by mutual written agreement of the Parties.

Section 10.06 Effective date of termination.

Except as provided in Section 10.05 or as otherwise provided in the Contract, termination will be effective as of the date specified in the notice of termination. The Turnover obligations of the MCO will continue to apply after the effective date of the Contract termination.

Section 10.07 Extension of termination effective date.

The Parties may extend the effective date of termination one or more times by mutual written agreement.

Section 10.08 Payment and other provisions at Contract termination.

- (1) In the event of termination pursuant to this Article, HHSC will pay the Capitation Payment for Services and Deliverables rendered through the effective date of termination. All pertinent provisions of the Contract will form the basis of settlement.
- (2) The MCO must provide HHSC all reasonable access to records, facilities, and documentation as is required to efficiently and expeditiously close out the Services and Deliverables provided under the Contract and transition the Services to a new MCO.

- (3) The MCO must prepare a Turnover Plan, which is acceptable to and approved by HHSC. The Turnover Plan will be implemented during the time period between receipt of notice and the termination date.

Section 10.09 Modification of Contract in the event of remedies.

HHSC may propose a modification of the Contract in response to the imposition of a remedy under this Article. Any modifications under this section must be reasonable, limited to the matters causing the exercise of a remedy, in writing, and executed in accordance with **Article 7** (Amendments and Modifications). The MCO must negotiate such proposed modifications in good faith.

Section 10.10 Turnover assistance.

Upon receipt of notice of termination of the Contract by HHSC or by the MCO, or notice of intent to allow the contract to expire by the MCO, the MCO will provide any turnover assistance reasonably necessary to enable HHSC or its designee to effectively close out the Contract and move the work, Services and Deliverables under this Contract to another vendor or to perform the work, Services and Deliverables.

During the Turnover Phase, the MCO must continue performing under the Contract, including rendering all contracted Services, until such time HHSC determines that the MCO has completed all requirements in accordance with the Turnover Plan.

Section 10.11 Rights upon termination or expiration of Contract.

In the event that the Contract is terminated for any reason, or upon its expiration, HHSC will, at HHSC's discretion, retain ownership of any and all associated work products, Deliverables, or documentation in whatever form that they exist.

Section 10.12 MCO responsibility for associated costs.

If HHSC terminates the Contract for Cause, the MCO will be responsible to HHSC for all reasonable costs incurred by HHSC, the State of Texas, or any of its administrative agencies to replace the MCO. These costs include, but are not limited to, the costs of procuring a substitute vendor, HHSC's costs to replace the MCO through the Turnover Phase, and the cost of any claim or litigation that is reasonably attributable to the MCO's failure to perform any service in accordance with the terms of the Contract.

Section 10.13 Dispute resolution.

(1) General agreement of the Parties.

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

(2) Duty to negotiate.

Any dispute that in the judgment of any Party to the Contract may materially or substantially affect the performance of any Party will be reduced to writing and delivered to the other Party. The Parties must then negotiate and use efforts to resolve such dispute and the Parties shall not resort to any formal proceedings unless they have determined that a negotiated resolution is not possible. The resolution of any dispute disposed of by Contract between the Parties shall be reduced to writing and delivered to all Parties within 10 Business Days.

(3) Claims for breach of Contract.

- (a) General requirement. The MCO's claim for breach of the Contract will be resolved in accordance with the dispute resolution process established by HHSC in accordance with Tex. Gov't Code, Chapter 2260.
- (b) Negotiation of claims. The Parties expressly agree that any claim by the MCO for breach of Contract, that the Parties cannot resolve in the ordinary course of business or through the use of informal means, will be submitted to the negotiation process provided in Tex. Gov't Code, Chapter 2260, Subchapter B.
 - (i) To initiate the process, the MCO must submit written notice to HHSC that specifically states that the MCO invokes the provisions of Tex. Gov't Code, Chapter 2260, Subchapter B. The notice must comply with the requirements of 1 Tex. Admin. Code, Chapter 392391, Subchapter BF, and the requirements of Chapter 2260 of the Texas Government Code.
 - (ii) The Parties expressly agree that the MCO's compliance with Tex. Gov't Code, Chapter 2260, Subchapter B, will be a condition precedent to the filing of a contested case proceeding under Tex. Gov't Code, Chapter 2260, Subchapter C.

- (c) Contested case proceedings. The contested case process provided in Tex. Gov't Code, Chapter 2260, Subchapter C, will be the MCO's sole and exclusive process for seeking a remedy for any and all alleged breaches of contract by HHSC if the Parties are unable to resolve their disputes under **Subsection (3)(b)** of this section.

The Parties expressly agree that the MCO's strict compliance with the contested case process provided in Tex. Gov't Code, Chapter 2260, Subchapter C, will be a condition precedent to seeking consent to sue from the Texas Legislature under Chapter 107, Civil Practices & Remedies Code. Neither the execution of the Contract by HHSC nor any other conduct of any representative of HHSC relating to the Contract will be considered a waiver of HHSC's sovereign immunity to suit.

- (d) HHSC's rules. The submission, processing, and resolution of the MCO's breach of contract claim is governed by the rules adopted by HHSC pursuant to Chapter 2260, Texas Government Code, found at Title 1, Chapter 392, Subchapter B of Texas Administrative Code.
- (e) MCO's duty to perform. Neither the occurrence of an event constituting an alleged breach of contract nor the pending status of any claim for breach of contract is grounds for the suspension of performance, in whole or in part, by the MCO of any duty or obligation with respect to the performance of the Contract. Any changes to the Contract as a result of a dispute resolution will be implemented in accordance with **Article 7** (Amendments and Modifications).

Section 10.14 Liability of MCO.

- (1) The MCO bears all Risk of loss or damage to HHSC or the State due to:
 - (a) Defects in services or Deliverables;
 - (b) Unfitness or obsolescence of Services or Deliverables; or
 - (c) The negligence or intentional misconduct of the MCO or its employees, agents, Subcontractors, or representatives.
- (2) **THE MCO SHALL DEFEND, INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS AND HHSC, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES ARISING OUT OF, OR RESULTING FROM ANY ACTS OR OMISSIONS OF THE MCO OR ITS AGENTS, EMPLOYEES,**

SUBCONTRACTORS, ORDER FULFILLERS, OR SUPPLIERS OF SUBCONTRACTORS IN THE EXECUTION OR PERFORMANCE OF THE CONTRACT AND ANY PURCHASE ORDERS ISSUED UNDER THE CONTRACT. THE DEFENSE SHALL BE COORDINATED BY THE MCO WITH THE OFFICE OF THE TEXAS ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND THE MCO MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE TEXAS ATTORNEY GENERAL. THE MCO AND HHSC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

- (3) The MCO will not be liable to HHSC for any loss, damages, or liabilities attributable to or arising from the failure of HHSC or any State agency to perform a service or activity in connection with the Contract.

Article 11 Assurances and Certifications

Section 11.01 Proposal certifications.

The MCO acknowledges its continuing obligation to comply with the requirements of the certifications contained in its Proposal and the Contract and will immediately notify HHSC of any changes in circumstances affecting these certifications. A false statement regarding the MCO's status or false statement as to the representations related to this section will be treated as a material breach of this Contract and may be grounds for termination at the option of HHSC.

Section 11.02 Conflicts of interest.

- (1) Representation.

The MCO agrees to comply with applicable State and federal laws, including 41 U.S.C. § 423, rules, and regulations regarding conflicts of interest in the performance of its duties under this Contract. The MCO warrants that it has no interest and will not acquire any direct or indirect interest that would conflict in any manner or degree with its performance under this Contract.

- (2) General duty regarding conflicts of interest.

The MCO will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain. The MCO will operate with complete independence and objectivity without actual, potential, or apparent

conflict of interest with respect to the activities conducted under this Contract with the State of Texas.

Section 11.03 Organizational conflicts of interest.

For the purposes of this section an organizational conflict of interest is a set of facts or circumstances, a relationship, or other situation under which an MCO, or a Subcontractor has past, present, or currently planned personal or financial activities or interests that either directly or indirectly:

- (a) Impairs or diminishes the MCO's, or Subcontractor's ability to render impartial or objective assistance or advice to HHSC; or
- (b) Provides the MCO or Subcontractor an unfair competitive advantage in future HHSC procurements (excluding the award of this Contract).

(1) Warranty.

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

(2) Continuing duty to disclose.

- (a) The MCO agrees that, if after the Effective Date, the MCO discovered or was made aware of an organizational conflict of interest, the MCO will immediately and fully disclose such interest in writing to the HHSC project manager. In addition, the MCO must promptly disclose any relationship that might be perceived or represented as a conflict after its discovery by the MCO or by HHSC as a potential conflict. HHSC reserves the right to make a final determination regarding the existence of conflicts of interest, and the MCO agrees to abide by HHSC's decision.
- (b) The disclosure will include a description of the action(s) that the MCO has taken or proposes to take to avoid or mitigate such conflicts.

(3) Remedy.

If HHSC determines that an organizational conflict of interest exists, HHSC may, at its discretion, terminate the Contract under the terms found in **Section 10.03**. If HHSC determines that the MCO was aware of an organizational conflict of interest before the award of this Contract and did not disclose the conflict to HHSC, the nondisclosure will be considered a material breach of the Contract. Furthermore, the breach may be submitted to the Office of the Attorney General, Texas Ethics Commission, or appropriate State or federal law enforcement officials for further action.

(4) Flow-down obligation.

The MCO must include the provisions of this section in all Subcontracts for work to be performed similar to the service provided by the MCO, and the terms “Contract,” “MCO,” and “project manager” modified appropriately to preserve HHSC’s rights.

Section 11.04 HHSC personnel recruitment prohibition.

The MCO has not retained or promised to retain any person or company or utilized or promised to utilize a consultant that participated in HHSC’s development of specific criteria of the RFP or who participated in the selection of the MCO for this Contract.

Unless authorized in writing by HHSC, the MCO will not recruit or employ any HHSC professional or technical personnel who have worked on projects relating to the subject matter of this Contract, or who have had any influence on decisions affecting the subject matter of this Contract, for two years following the completion of this Contract.

Section 11.05 Anti-kickback provisions.

The MCO certifies that it will comply with the Anti-Kickback Act of 1986 (41 U.S.C. § 51–58), 42 U.S.C. § 1320a-7b(b), and Federal Acquisition Regulation Subpart 52.203-7, to the extent applicable.

Section 11.06 Debt or back taxes owed to State of Texas.

In accordance with Tex. Gov’t Code § 403.055, the MCO agrees that any payments due to the MCO under the Contract will be first applied toward any debt or back taxes the MCO owes the State of Texas. The MCO further agrees that payments will be so applied until those debts and back taxes are paid in full.

Section 11.07 Certification regarding status of license, certificate, or permit.

Article IX, Section 163 of the General Appropriations Act for the 1998/1999 State fiscal biennium prohibits an agency that receives an appropriation under either Article II or V of the General Appropriations Act from awarding a contract with the owner, operator, or administrator of a facility that has had a license, certificate, or permit revoked by another Article II or V agency. The MCO certifies it is not ineligible for an award under this provision.

Section 11.08 Outstanding debts and judgments.

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

Article 12 Representations and Warranties**Section 12.01 Authorization.**

- (1) The execution, delivery, and performance of this Contract has been duly authorized by the MCO and no additional approval, authorization, or consent of any governmental or regulatory agency is required in order for the MCO to enter into this Contract and perform its obligations under this Contract.
- (2) The MCO has obtained all licenses, certifications, permits, and authorizations necessary to perform the services under this Contract and currently is in good standing with all regulatory agencies that regulate any or all aspects of the MCO's performance of this Contract. The MCO will maintain all required certifications, licenses, permits, and authorizations during the term of this Contract.

Section 12.02 Ability to perform.

The MCO warrants that it has the financial resources to fund the capital expenditures required under the Contract without advances by HHSC or assignment of any payments by HHSC to a financing source.

Section 12. 03 Minimum Net Worth.

The MCO has, and will maintain throughout the life of this Contract, minimum net worth to the greater of (a) \$1,500,000; (b) an amount equal to the sum of \$25 times the number of all enrollees including Members; or (c) an amount that complies with standards adopted by TDI. Minimum net worth means the excess total admitted assets over total liabilities, excluding liability for subordinated debt issued in compliance with Tex. Ins. Code ch. 843.

Section 12. 04 Solvency.

- (1) The MCO must be and remain in full compliance with all applicable State and federal solvency requirements, including those set forth in 42 C.F.R. § 438.116, for basic-service health maintenance organizations, including all reserve requirements, net worth standards, debt-to-equity ratios, or other debt limitations. Provision against the Risk of insolvency must be made by establishing adequate reserves, insurance or other guarantees in full compliance with all financial requirements of TDI. In the event the MCO fails to maintain such compliance, HHSC, without limiting any other rights it may have by law or under the Contract, may terminate the Contract.
- (2) If the MCO becomes aware of any impending changes to its financial or business structure that could adversely impact its compliance with the requirements of the Contract or its ability to pay its debts as they come due, the MCO must notify HHSC immediately in writing.
- (3) The MCO must have a plan and take appropriate measures to ensure adequate provision against the Risk of insolvency as required by TDI. Such provision must be adequate to provide for the following in the event of insolvency:
 - (a) continuation of Covered Services, until the time of Discharge, to Members who are confined on the date of insolvency in a Hospital or other inpatient facility;
 - (b) payments to unaffiliated healthcare providers and affiliated healthcare Providers whose Contracts do not contain Member “hold harmless” clauses acceptable to the TDI;
 - (c) continuation of Covered Services for the duration of the Contract Period for which a capitation has been paid for a Member;

- (d) provision against the Risk of insolvency must be made by establishing adequate reserves, insurance or other guarantees in full compliance with all financial requirements of TDI and the Contract.

Should TDI determine that there is an immediate Risk of insolvency or the MCO is unable to provide Covered Services to its Members, HHSC, without limiting any other rights it may have by law, or under the Contract, may terminate the Contract.

Section 12. 05 Workmanship and performance.

- (1) All Services and Deliverables provided under this Contract will be provided in a manner consistent with the standards of quality and integrity as outlined in the Contract.
- (2) All Services and Deliverables must meet or exceed the required levels of performance specified in or under this Contract.
- (3) The MCO will perform the Services and provide the Deliverables in a workmanlike manner, in accordance with best practices and high professional standards used in well-managed operations performing services similar to the services described in this Contract.

Section 12. 06 Warranty of Deliverables.

The MCO warrants that Deliverables developed and delivered under this Contract will meet in all material respects the specifications described in the Contract during the period following its acceptance by HHSC, throughout the term of the Contract, including any terms subsequently negotiated by the MCO and HHSC. The MCO will promptly repair or replace any Deliverables not in compliance with this warranty at no charge to HHSC.

Section 12. 07 Compliance with Contract.

The MCO will not take any action substantially or materially inconsistent with any of the terms set forth in this Contract without the express written approval of HHSC.

Section 12. 08 Technology Access.

All technological solutions offered by the MCO must comply with the requirements of Tex. Gov't Code § 531.0162. This includes providing technological solutions that meet federal accessibility standards for persons with Disabilities, as applicable.

Section 12. 09 Electronic and Information Resources Accessibility Standards.

- (1) Applicability.

The following Electronic and Information Resources (EIR) requirements apply to the Contract because the MCO performs services that include EIR that: (i) HHSC employees are required or permitted to access; or (ii) members of the public are required or permitted to access. This section does not apply to incidental uses of EIR in the performance of a Contract, unless the Parties agree that the EIR will become property of the State of Texas or will be used by HHSC's clients or recipients after completion of the Contract. Nothing in this section is intended to prescribe the use of particular designs or technologies or to prevent the use of alternative technologies, provided they result in substantially equivalent or greater access to and use of a Product.

(2) Accessibility Requirements.

Under Tex. Gov't Code ch. 2054, subch. M, and implementing rules of the Texas Department of Information Resources, HHSC must procure Products that comply with the Accessibility Standards when those Products are available in the commercial marketplace or when those Products are developed in response to a procurement solicitation. Accordingly, the MCO must provide Electronic and Information Resources and associated Product documentation and technical support that comply with the Accessibility Standards.

(3) Evaluation, Testing, and Monitoring.

- (a) HHSC may review, test, evaluate and monitor the MCO's Products and associated documentation and technical support for compliance with the Accessibility Standards. Review, testing, evaluation and monitoring may be conducted before and after the award of a contract. Testing and monitoring may include user acceptance testing. Neither (i) the review, testing (including acceptance testing), evaluation or monitoring of any Product, nor (ii) the absence of review, testing, evaluation or monitoring, will result in a waiver of the State's right to contest the MCO's assertion of compliance with the Accessibility Standards.
- (b) The MCO agrees to cooperate fully and provide HHSC and its representatives timely access to Products, records, and other items and information needed to conduct such review, evaluation, testing, and monitoring.

(4) Representations and Warranties.

- (a) The MCO represents and warrants that:

- (i) as of the Effective Date of the Contract, the Products and associated documentation and technical support comply with the Accessibility Standards as they exist at the time of entering the Contract, unless and to the extent the Parties otherwise expressly agree in writing; and
 - (ii) if the Products will be in the custody of the State or an HHS Agency's client or recipient after the Contract expiration or termination, the Products will continue to comply with Accessibility Standards after the expiration or termination of the Contract Term, unless HHSC or its clients or recipients, as applicable, use the Products in a manner that renders it noncompliant.
 - (b) In the event the MCO should have known, becomes aware, or is notified that the Product and associated documentation and technical support do not comply with the Accessibility Standards, the MCO represents and warrants that it will, in a timely manner and at no cost to HHSC, perform all necessary steps to satisfy the Accessibility Standards, including remediation, replacement, and upgrading of the Product, or providing a suitable substitute.
 - (c) The MCO acknowledges and agrees that these representations and warranties are essential inducements on which HHSC relies in awarding this Contract.
 - (d) The MCO's representations and warranties under this subsection will survive the termination or expiration of the Contract and will remain in full force and effect throughout the useful life of the Product.
- (5) Remedies for breach of EIR Accessibility Standards.
- (a) Under Tex. Gov't Code § 2054.465, neither the MCO nor any other person has cause of action against HHSC for a claim of a failure to comply with Tex. Gov't Code ch. 2054, subch. M, and rules of the Department of Information Resources.
 - (b) In the event of a breach of the MCO's representations and warranties, the MCO will be liable for direct, consequential, indirect, special, and/or liquidated damages, attorney fees and costs, and any other remedies to which HHSC may be entitled under this Contract and other applicable law. This remedy is cumulative of any other

remedies to which HHSC may be entitled under this Contract and other applicable law.

Article 13 Intellectual Property

Section 13.01 Infringement and misappropriation.

- (1) The MCO warrants that all Deliverables provided by the MCO will not infringe or misappropriate any right of, and will be free of any claim of, any third person or entity based on copyright, patent, trade secret, or other intellectual property rights.
- (2) The MCO will, at its expense, defend with counsel approved by HHSC, indemnify, and hold harmless HHSC, its employees, officers, directors, contractors, and agents from and against any losses, liabilities, damages, penalties, costs, fees, including reasonable attorneys' fees and expenses, from any claim or action against HHSC that is based on a claim of breach of the warranty according to this section. HHSC will promptly notify the MCO in writing of the claim, provide the MCO a copy of all information received by HHSC with respect to the claim, and cooperate with the MCO in defending or settling the claim. HHSC will not unreasonably withhold, delay, or condition approval of counsel selected by the MCO, but approval of counsel is subject to Tex. Gov't. Code § 402.0212.
- (3) In case the Deliverables, or any one or part of them, is held to constitute an infringement or misappropriation in an action, or the use is enjoined or restricted or if a proceeding appears to the MCO to be likely to be brought, the MCO will, at its own expense, either:
 - (a) Procure for HHSC the right to continue using the Deliverables; or
 - (b) Modify or replace the Deliverables to comply with the Specifications and to not violate any intellectual property rights.

If neither of the alternatives set forth in (a) or (b) above are available to the MCO on commercially reasonable terms, the MCO may require that HHSC return the allegedly infringing Deliverable(s) in which case the MCO will refund all amounts paid for all the Deliverables.

Section 13.02 Exceptions.

The MCO is not responsible for any claimed breaches of the warranties set forth in **Section 13.01** to the extent caused by:

- (1) Modifications made to the item in question by anyone other than the MCO or its Subcontractors, or modifications made by HHSC or its contractors working at the MCO's direction or in accordance with the specifications; or
- (2) The combination, operation, or use of the item with other items if the MCO did not supply or approve for use with the item; or
- (3) HHSC's failure to use any new or corrected versions of the item made available by the MCO.

Section 13.03 Ownership and Licenses

- (1) Deliverables.

The Parties agree that any Deliverable, including without limitation the Custom Software, will be the exclusive property of HHSC.

- (2) Ownership rights.

- (a) HHSC will own all right, title, and interest in and to its Confidential Information, STAR Health Program Hardware, and the Deliverables provided by the MCO, including the Custom Software and associated documentation. For purposes of this section, the Deliverables will not include MCO Proprietary Software or Third-Party Software. MCO will take all necessary actions and transfer ownership of the Deliverables to HHSC, including the Custom Software and associated documentation prior to Contract termination.
- (b) MCO will furnish these Deliverables, upon request of HHSC, in accordance with applicable State law. All Deliverables, in whole and in part, will be deemed works made for hire of HHSC for all purposes of copyright law, and copyright will belong solely to HHSC. To the extent that any Deliverable does not qualify as a work for hire under applicable law, and to the extent that the Deliverable includes materials subject to copyright, patent, trade secret, or other proprietary right protection, MCO agrees to assign, and hereby assigns, all right, title, and interest in and to Deliverables, including all copyrights, inventions, patents, trade secrets, and other proprietary rights (including renewals) to HHSC.
- (c) MCO will, at the expense of HHSC, assist HHSC or its nominees to obtain copyrights, trademarks, or patents for all of these Deliverables in the United States and any other countries. MCO agrees to execute

all papers and to give all facts known to it necessary to secure United States or foreign country copyrights and patents, and to transfer or cause to transfer to HHSC all the right, title, and interest in and to these Deliverables. MCO also agrees not to assert any moral rights under applicable copyright law with regard to these Deliverables.

(3) License Rights

HHSC will have a royalty-free and non-exclusive license to access the MCO Proprietary Software and associated documentation during the term of the Contract. HHSC will also have ownership and unlimited rights to use, disclose, duplicate, or publish all information and data developed, derived, documented, or furnished by MCO under or resulting from the Contract. The data will include all results, technical information, and materials developed for or obtained by HHSC from MCO in the performance of the services under this Contract, including all reports, surveys, plans, charts, recordings (video or sound), pictures, drawings, analyses, graphic representations, computer printouts, notes and memoranda, and documents whether finished or unfinished, which result from or are prepared in connection with the services performed as a result of the Contract.

(4) Proprietary Notices

MCO will reproduce and include HHSC's copyright and other proprietary notices and product identifications provided by MCO on the copies, in whole or in part, or on any form of the Deliverables.

(5) State and Federal Governments

In accordance with 45 C.F.R. § 95.617, all appropriate State and federal agencies will have a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, translate, or otherwise use, and to authorize others to use, for federal government purposes, all materials, the Custom Software and modifications of it, and associated documentation designed, developed, or installed with federal financial participation under the Contract, including those materials covered by copyright and all software source and object code, instructions, files, and documentation.

Section 13.04 Indemnification (IP).

MCO SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS HHSC AND THE STATE OF TEXAS FROM AND AGAINST ANY AND ALL CLAIMS, VIOLATIONS, MISAPPROPRIATIONS OR INFRINGEMENT OF ANY PATENT, TRADEMARK,

COPYRIGHT, TRADE SECRET OR OTHER INTELLECTUAL PROPERTY RIGHTS AND/OR OTHER INTANGIBLE PROPERTY, PUBLICITY OR PRIVACY RIGHTS, AND/OR IN CONNECTION WITH OR ARISING FROM: (1) THE PERFORMANCE OR ACTIONS OF MCO PURSUANT TO THIS CONTRACT; (2) ANY DELIVERABLE, WORK PRODUCT, CONFIGURED SERVICE OR OTHER SERVICE PROVIDED HEREUNDER; AND/OR (3) HHSC'S AND/OR MCO'S USE OF OR ACQUISITION OF ANY REQUESTED SERVICES OR OTHER ITEMS PROVIDED TO HHSC BY MCO OR OTHERWISE TO WHICH HHSC HAS ACCESS AS A RESULT OF MCO'S PERFORMANCE UNDER THE CONTRACT. MCO AND HHSC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. MCO SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE, INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY MCO WITH THE OFFICE OF THE TEXAS ATTORNEY GENERAL(OAG) WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND MCO MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM OAG. IN ADDITION, MCO WILL REIMBURSE HHSC AND THE STATE OF TEXAS FOR ANY CLAIMS, DAMAGES, COSTS, EXPENSES OR OTHER AMOUNTS, INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES AND COURT COSTS, ARISING FROM ANY SUCH CLAIM. IF HHSC DETERMINES THAT A CONFLICT EXISTS BETWEEN ITS INTERESTS AND THOSE OF MCO OR IF HHSC IS REQUIRED BY APPLICABLE LAW TO SELECT SEPARATE COUNSEL, HHSC WILL BE PERMITTED TO SELECT SEPARATE COUNSEL AND MCO WILL PAY ALL REASONABLE COSTS OF HHSC'S COUNSEL.

Article 14 Liability

Section 14.01 Property damage.

- (1) MCO will protect HHSC's real and personal property from damage arising from MCO's, its agent's, employees' and Subcontractors' performance of the Contract, and MCO will be responsible for any loss, destruction, or damage to HHSC's property that results from or is caused by MCO's, its agents', employees' or Subcontractors' acts or omissions. Upon the loss of, destruction of, or damage to any property of HHSC, MCO will notify the HHSC project manager and, subject to direction from the Project Manager or her or his designee, will take all reasonable steps to protect that property from further damage.
- (2) MCO agrees to observe and encourage its employees and agents to observe safety measures and proper operating procedures at HHSC sites at all times.

- (3) MCO will distribute a written statement to all of its employees, Subcontractors and agents that directs the employee, Subcontractor or agent to promptly report to HHSC or to MCO any special defect or unsafe condition encountered while on HHSC premises. MCO will promptly report to HHSC any special defect or an unsafe condition it encounters or otherwise learns about.

Section 14.02 Risk of Loss.

During the period Deliverables are in transit and in possession of MCO, its carriers, or HHSC prior to being accepted by HHSC, MCO will bear the Risk of loss or damage, unless the loss or damage is caused by the negligence or intentional misconduct of HHSC. After HHSC accepts a Deliverable, HHSC will bear the Risk of loss or damage to the Deliverable, except loss or damage attributable to the negligence or intentional misconduct of MCO's agents, employees, or Subcontractors.

Section 14.03 Limitation of HHSC's Liability.

HHSC WILL NOT BE LIABLE FOR ANY INCIDENTAL, INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES, OR ATTORNEYS' FEES UNDER CONTRACT, TORT, INCLUDING NEGLIGENCE, OR OTHER LEGAL THEORY. THIS WILL APPLY REGARDLESS OF THE CAUSE OF ACTION AND EVEN IF HHSC HAS BEEN ADVISED OF THE POSSIBILITY OF THESE DAMAGES.

HHSC'S LIABILITY TO MCO UNDER THE CONTRACT WILL NOT EXCEED THE TOTAL CHARGES TO BE PAID BY HHSC TO MCO UNDER THE CONTRACT, INCLUDING CHANGE ORDER PRICES AGREED TO BY THE PARTIES OR OTHERWISE ADJUDICATED.

MCO's remedies are governed by the provisions in **Article 10** (Remedies and Disputes).

Article 15 Insurance and Bonding

Section 15.01 Insurance Coverage.

- (1) Statutory and General Coverage

MCO will maintain, at the MCO's expense, the following insurance coverage:

- (a) Business Automobile Liability Insurance for all owned, non-owned, and hired vehicles for bodily injury and property damage;

- (b) Comprehensive General Liability Insurance of at least \$1 million per occurrence and \$5 million in the aggregate (including Bodily Injury coverage of \$100,000.00 per each occurrence and Property Damage Coverage of \$25,000.00 per occurrence); and
- (c) If MCO's current Comprehensive General Liability insurance coverage does not meet the above stated requirements, MCO will obtain Umbrella liability insurance to compensate for the difference in the coverage amounts. If Umbrella Liability Insurance is provided, it must follow the form of the primary coverage.

(2) Professional Liability Coverage.

- (a) MCO must maintain, or cause its Providers to maintain, Professional Liability Insurance for each Provider of \$100,000.00 per occurrence and \$300,000.00 in the aggregate, or the limits required by the Hospital at which the Provider has admitting privileges.
- (b) MCO must maintain an Excess Professional Liability (Errors and Omissions) Insurance Policy for the greater of \$3 million or an amount (rounded to the nearest \$100,000.00) that represents the number of Members enrolled in the MCO in the first month of the applicable SFY multiplied by \$150.00, not to exceed \$10 million.

(3) General Requirements for All Insurance Coverage

- (a) Except as provided in this subsection, all exceptions to the Contract's insurance requirements must be approved in writing by HHSC. HHSC's written approval is not required in the following situations:
 - (i) An MCO or a Provider is not required to obtain the insurance coverage described in **Section 15.01** if the MCO or Provider qualifies as a State governmental unit or municipality under the Texas Tort Claims Act, and is required to comply with, and subject to the provisions of, the Texas Tort Claims Act.
 - (ii) An MCO may waive the Professional Liability Insurance requirement described in **Section 15.01(2)(a)** for a Provider of community-based LTSS. An MCO may not waive this requirement if the Provider provides other Covered Services in addition to community-based LTSS, or if a Texas licensing entity requires the Provider to carry Professional Liability coverage. An MCO that waives the Professional Liability Insurance

requirement for a Provider under this provision is not required to obtain coverage on behalf of the Provider.

- (iii) An MCO may waive the Professional Liability Insurance requirement described in **Section 15.01(2)(a)** for Providers of durable medical equipment. An MCO that waives the Professional Liability Insurance requirement for a Provider pursuant to this provision is not required to obtain such coverage on behalf of the Provider.
- (b) The MCO or the Provider is responsible for any deductibles stated in the insurance policies.
- (c) Insurance coverage must be issued by insurance companies authorized to conduct business in the State of Texas.
- (d) With the exception of Professional Liability Insurance maintained by Providers, all insurance coverage must name HHSC as an additional insured. In addition, the Professional Liability Insurance maintained by Providers and Business Automobile Liability Insurance must name HHSC as a loss payee.
- (e) Insurance coverage kept by the MCO must be maintained in full force at all times during the Term of the Contract, and until HHSC's final acceptance of all Services and Deliverables. Failure to maintain insurance coverage will constitute a material breach of this Contract.
- (f) With the exception of Professional Liability Insurance maintained by Providers, the insurance policies described in this section must have extended reporting periods of two years. When policies are renewed or replaced, the policy retroactive date must coincide with, or precede, the Contract Effective Date.
- (g) With the exception of Professional Liability Insurance maintained by Providers, the insurance policies described in this section must provide that prior written notice be given to HHSC at least 30 Days before coverage is reduced below minimum HHSC contractual requirements, canceled, or non-renewed. The MCO must submit a new coverage binder to HHSC to ensure no break in coverage.
- (h) The Parties understand and agree that any insurance coverages and limits furnished by the MCO will in no way limit the MCO's liabilities

and responsibilities specified within the Contract documents or by applicable law.

- (i) The MCO understands and agrees that any insurance maintained by HHSC will apply in excess of and not contribute to insurance provided by the MCO under the Contract.
- (j) If the MCO, or its Providers, desire additional coverage, higher limits of liability, or other modifications for its own protection, the MCO or its Providers will be responsible for the acquisition and cost of such additional protection. This additional protection will not be an Allowable Expense under this Contract.
- (k) MCO will require all insurers to waive their rights of subrogation against HHSC for claims arising from or relating to this Contract.

(4) Proof of Insurance Coverage

- (a) Except as provided in **Section 15.01 (4)(b)**, the MCO must furnish the HHSC Project Manager original Certificates of Insurance evidencing the required insurance coverage on or before the Effective Date of the Contract. If insurance coverage is renewed during the Term of the Contract, the MCO must furnish to HHSC renewal certificates of insurance, or such similar evidence, within five Business Days of renewal. The failure of HHSC to obtain this evidence from the MCO will not be deemed to be a waiver by HHSC and the MCO will remain under continuing obligation to maintain and provide proof of insurance coverage.
- (b) The MCO is not required to furnish to HHSC proof of Professional Liability Insurance maintained by Providers on or before the Effective Date of the Contract; but must provide that information upon HHSC's request during the Term of the Contract.

Section 15.02 Performance Bond.

- (1) HHSC reserves the right to require the MCO to procure a performance bond at any point during the term of the Contract, including renewals and extensions. Performance bonds must be issued by a surety licensed by TDI and specify cash payment as the sole remedy. (2) Prior performance bonds received for a specific SFY will be released upon completion of the audit of the 334-Day FSR for the corresponding SFY.

Section 15.03 TDI Fidelity Bond.

The MCO will secure and maintain throughout the life of the Contract a fidelity bond in compliance with Tex. Ins. Code ch. 843. The MCO must promptly provide HHSC with copies of the bond and any amendments or renewals.