

**SOFTWARE DEVELOPMENT AND LICENSE AGREEMENT  
AND  
ADMINISTRATIVE SERVICES AND SUPPORT SERVICES AGREEMENT**

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**SOFTWARE DEVELOPMENT AND LICENSE AGREEMENT  
AND  
ADMINISTRATIVE SERVICES AND SUPPORT SERVICES AGREEMENT**

This Software Development and License Agreement and Administrative Services and Support Services Agreement (this "**Agreement**") is made effective as of the Effective Date written on the signature page, by and between Georgia Department of Community Health (hereinafter referred to as "**DCH**"), and \_\_\_\_\_, a \_\_\_\_\_ corporation ("**Contractor**"). DCH and Contractor may be referred to as a "**Party**" or collectively as the "**Parties**."

**WITNESSETH:**

**WHEREAS**, DCH, is a department of the State of Georgia established under O.C.G.A. Section 31-5A-1 *et.seq.* which serves as the lead planning agency for all health issues in the state for healthcare policy, planning, purchasing and regulation;

**WHEREAS**, DCH operates several health plan programs (the "**DCH Plans**"), including:

- (i) the Medical Assistance (hereinafter referred to as "**Medicaid**") program (Title XIX of the Federal Social Security Act) in Georgia,
- (ii) the PeachCare for Kids (hereinafter referred to as "**PeachCare**") program (Title XXI of the Federal Social Security Act) in Georgia, and
- (iii) the State Health Benefit Plan (hereinafter referred to as "**SHBP**"), authorized under Article 1 of Chapter 18 of Title 45 of the O.C.G.A.; and

**WHEREAS**, the Board of Regents of the University System of Georgia ("**BOR**") has established and is responsible for the administration of a self-insured health benefit plan (the "**BOR Health Plan**") and of a self-insured dental benefit plan (the "**BOR Dental Plan**"), all pursuant to authority granted in O.C.G.A. Section 20-3-31 and Section 20-3-51;

**WHEREAS**, DCH has entered into an agreement with the BOR for the coordination of their healthcare purchasing decisions on behalf of the BOR Health Plan and the BOR Dental Plan, pursuant to authority granted in O.C.G.A. Section 31-5A-4 (e);

**WHEREAS**, BOR provides health benefits and dental benefits for University System of Georgia employees, dependents, and retirees under the BOR Health Plan and the BOR Dental Plan (collectively, the "**BOR Plans**");

**WHEREAS**, DCH has a need to obtain the services of a Contractor to design, implement, and integrate new and existing information systems; to provide claims and customer service administrative support for all of the DCH Plans, including Medicaid, and all BOR Plans; and to manage the subcontractors involved with the DCH Plans and the BOR Plans;

**WHEREAS**, Contractor is experienced in designing and implementing information architectures; providing software and services for health claims administration, dental claims

administration, and customer services; and providing management services for health plan and dental plan operations;

**NOW, THEREFORE**, for and in consideration of the premises, and other good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties do hereby agree as follows:

## 1. GENERAL DEFINITIONS.

1.1 Defined Terms. The following terms shall have the meanings indicated.

“**Acceptance**” – see Section 5.4.4 of this Agreement.

“**Acceptance Date**” – see Section 5.4.4 of this Agreement.

“**Additional Performance Standards**” – see Section 3.11 of this Agreement.

“**Administrative Services**” means the administrative services that Contractor performs, or directs subcontractors to perform, in connection with the claims and customer service administrative support for all of the DCH Plans, including Medicaid, and all of the BOR Plans, all as more fully described in Section 7.1 of this Agreement.

“**Administrative Services Coordinator**” -- see Section 7.2 of this Agreement.

“**Administrative Services Fees**” means the payments described in the Contractor's Proposal and **Appendix L**.

“**Affiliate**” as to any Person, means a second Person that directly or indirectly is under common Control with the first Person, including a Subsidiary or Parent Company of the first Person. With regard to DCH, an Affiliate shall mean any agency, department, or instrumentality of the State of Georgia, including BOR and the Georgia Technology Authority.

“**Agreement**” – see the preamble to this Agreement.

“**A.m. or p.m.**” refers to local time in Atlanta, Georgia.

“**Approve**” or “**Approval**” means that at the time of a Party's preliminary review of another Party's performance or a Deliverable revealed no basis for rejecting the performance or Deliverable; *provided, however*, that Approval does *not* mean that a Party has accepted such performance or Deliverable.

“**Appendix**” means an appendix to the RFP.

“**As-Documented Warranty**” – see Section 11.2.1 of this Agreement.

“**Audit Rights**” – see Section 7.9 of this Agreement.

“**Authorized Inspector**” – see Section 7.9.

“**Authorized Users**” – see Section 6.1 of this Agreement.

“**Authorized User Support**” means information and assistance concerning the Use of the System, which assistance is provided to one or more **Authorized Users**.

"**Authorized User Support Coordinator**" – see Section 8.3.1.

“**BOR**” – see third recital.

“**BOR Dental Plan**” – see third recital.

“**BOR Health Plan**” – see third recital.

"**BOR Plans**" – see fifth recital.

“**Breach**” means (a) a breach by a Party of a covenant or warranty herein, or (b) a misrepresentation made hereunder (see also “**Material**”).

“**Bug**” – see Section 9.1 of this Agreement.

“**Bug Report**” – see Section 9.1 of this Agreement.

“**Business Day**” includes every day except Saturdays, Sundays, and legal holidays pursuant to O.C.G.A. § 1-4-1.

“**Change Order Schedule**” – see Section 3.11 of this Agreement.

“**Change Order Services**” – see Section 3.11 of this Agreement.

“**Claim**” in connection with a defense obligation, encompasses any and all claims, counterclaims, crossclaims, and the like for monetary or injunctive relief in respect of any alleged or proven injury (including bodily injury or death) in or before any court, administrative agency, or other forum having the legal power to adjudicate disputes, and any and all demands not yet matured into one or more of the foregoing.

“**Combination Use**” – see Section 12.2.2 of this Agreement.

"**Component Approval Dates**" -- see Section 3.5.2 of this Agreement.

“**Computer program**” (in lower case) means a set of statements or instructions, to be used directly or indirectly in a computer in order to bring about a certain result. Although a computer program may comprise any or all of source code and executable code, the term means executable code only, unless otherwise clear from the context.

"**Conceived**" – see Section 12.1.1 of this Agreement.

"**Conception**" – see Section 12.1.1 of this Agreement.

"**Contractor**" – see the preamble to this Agreement.

"**Contractor's Proposal**" means the final proposal prepared by Contractor, and agreed to by DCH, as more fully described in the RFP, including Sections 4.4 through 4.10 of the main body of the RFP, and consisting of Contractor's final technical proposal and final cost proposal. A copy of the Contractor's Proposal is attached to this Agreement as **Schedule 1**.

"**Control**" of one Person by another Person means that the controlling Person owns, directly or indirectly, stock or other interest in the controlled entity representing more than fifty percent (50%) of the aggregate stock or other interest entitled to vote for the election of directors or other managing authority or other decisions reserved to a vote by owners of such stock or other interest.

"**Copy**" means a material object, including a phonorecord, in which a work is fixed by any method now known or later developed, and from which the work can be communicated, either directly or with the aid of a machine or device. The term "copy" includes the material object, including a phonorecord, in which a work is first fixed.

"**Cover Remedy**" – see Section 14.7 of this Agreement.

"**Day**" means calendar day, including every day of the year, unless specified to the contrary.

"**DCH**" – see the preamble to this Agreement.

"**DCH Confidential/Proprietary Information**" – see Section 12.6.2 of this Agreement.

"**DCH Data**" – see Section 12.1.4 of this Agreement.

"**DCH Plans**" – see second recital.

"**Defend**", "**Defense**", and similar terms relate to defense against Claims pursuant to Section 13.4.

"**Deliverables**" shall have the meaning set forth in **Appendix H**.

"**Design documentation**" (in lower case) means documentation describing the data flows, data structures, and control logic of a computer program.

"**Development Plan**" – see Section 3.5.1 of this Agreement.

"**Development Services**" means the services that Contractor and any approved subcontractors perform in connection with the design, implementation, and integration of the System, as more fully described in Section 3 and the Appendices referenced therein and shall also include the services necessary to create the infrastructure needed to enable Contractor to provide the Administrative Services, including hiring and training the subcontractor(s) and/or employees to perform the Administrative Services.

**“Development Services Fee”** means the fees paid to Contractor for Development Services, as set forth in the Contractor's Proposal and **Appendix L**.

**“Direct Expense”** with respect to an activity, means salary and benefit charges for personnel time spent engaging in the activity, plus cost of goods and outside services used in the activity, plus fifteen percent (15%) of all of the foregoing in respect of overhead.

**“Dispute”** – see Section 15.1 of this Agreement.

**“Documentation”** (in lower case) means textual and/or graphic material, perceivable directly by humans and/or with the aid of a device or machine, relating to a computer program. When capitalized, the term Documentation has the same meaning as Licensed Documentation.

**“Effective Date”** – see the end of this Agreement.

**“Escrow Agent”** – see Section 5.5.2 of this Agreement.

**“Escrow Agreement”** – see Section 5.5.2 of this Agreement.

**“Escrow Release Events”** – see Section 5.5.6 of this Agreement.

Executable code (in lower case) means a series of one or more instructions executable after suitable processing by a computer or other programmable machine, without compilation or assembly.

**“Executable Code”** (capitalized) means executable code of the System.

Hereunder, herein, and similar terms refer to this Agreement.

**“HIPAA”** means the Health Insurance Portability and Accountability Act of 1996.

Include and similar terms (e.g., includes, including, included, e.g., for example), when used as part of a phrase including one or more specific items, are used by way of example and not of limitation.

**“Incumbent Data”** – see Section 3.1 of this Agreement.

Indemnity, Indemnify, and similar terms relate to indemnification in accordance with this Agreement (see Section 13.4 of this Agreement).

**“Intellectual Property Rights”** means any and all rights to exclude existing from time to time in a specified jurisdiction under patent law, copyright law, moral rights law, trade-secret law, semiconductor chip protection law, trademark law, unfair competition law, or other similar rights.

**“Internal Use”** means Use of one or more copies of a computer program and associated user documentation in the course of the user's business. Internal Use Rights do not themselves include Service Bureau Use Rights nor any other License Right.

**“Invention”** – see Section 12.1.1 of this Agreement.

**“Invoking Party”** – see Section 15.1.1 of this Agreement.

**“Key Contractor Support Personnel”** – see Section 8 of this Agreement.

**“Knowledge Representation”** means a representation that, to the best of the representing Party's knowledge (based on the knowledge of the individual executing this Agreement on behalf of the representing Party, who need not have conducted any particular inquiry), the specified matter or matters are true (see also **“No-Knowledge Representation”**).

A party making a Knowledge Representation has a duty to apprise the party to whom the representation is made, at the time the representation is made, of any fact that it knows is necessary to prevent the Knowledge Representation from being misleading.

- (i) Except as expressly provided otherwise in this Agreement, a party making a Knowledge Representation has no duty to amend or supplement its representation after the representation is made.
- (ii) A Knowledge Representation may be referred to using a shorthand expression similar to one used herein for a corresponding warranty; for example, a term such as “no-infringement Knowledge Representation” may be used to denote a Knowledge Representation that no infringement exists.

**“Licensable Activity”** means an activity encompassed by one or more Intellectual Property Rights; i.e., an activity that, absent a license, would give rise to liability for infringement (or inducement of infringement or contributory infringement) of the Intellectual Property Right(s).

**“License”** means the license granted by this Agreement, comprising one or more License Rights.

**“License Right”** means a right granted by this Agreement to engage in a Licensable Activity. A License Right may be referred to for convenience by the name of the corresponding Licensable Activity; e.g., "Internal Use Rights" for the right to engage in Internal Use.

**"Licensed-Back"** – see Section 12.1 of this Agreement.

**"Licensed Copy"** means a copy that is either furnished by Contractor or made in accordance with the terms of this Agreement or Contractor's permission.

**“Licensed Documentation”** means documentation relating to a System. Unless otherwise specified herein, Licensed Documentation means User Documentation only and not documentation related to the design of the System.

**“Loss or Expense”** encompasses any losses, damages, costs, and expenses, of every kind, nature, and description, including costs of court and reasonable attorneys’ fees and any disbursements that is or are based upon, arise out of, or otherwise are in respect of a specified matter.

**“Maintenance Release”** means a maintenance release (*i.e.*, a release that incorporates one or more Bug corrections but that does not necessarily include additional capability or functionality for the computer program) for the System. Any copy of a Maintenance Release provided by Contractor will be deemed to be a Licensed Copy, and the Maintenance Release in question will be deemed to be a part of the System.

**“Material”** with respect to a particular matter (e.g., a Breach), means that the matter is shown to affect adversely the rights and benefits of the other Party under this Agreement or the ability of the other Party to perform its obligations hereunder; in either case to such a degree that a reasonable person in the management of his or her own affairs would be more likely than not to decline to enter into this Agreement in view of the matter in question.

**"Medicaid"** – see second recital.

**“No-Knowledge Representation”** means a Knowledge Representation that a specified condition does not exist. Unless otherwise provided in this Agreement, a No-Knowledge Representation does not include any representation or warranty that any particular investigation has been performed by the representing Party in connection with the specified matter(s).

**“No Surreptitious Code Warranty”** – see Section 11.4.1 of this Agreement.

**"Noninfringement Warranty"** – see Section 12.2.1 of this Agreement.

**“O.C.G.A.”** means Official Code of Georgia Annotated.

**“Owner”** as to software, means a Person that can grant licenses to engage in Licensable Activities utilizing the software.

**“Parent Company”** as to any Person, means a second Person that controls the first Person.

**“Party”** means a party to this Agreement unless otherwise clear from the context.

**"PeachCare"** – see second recital.

**“Person”** means a natural person, a corporation (for profit or not-for-profit), an association, a partnership (general or limited), a joint venture, a trust, a government or political department, subdivision, or agency, or any other entity.

**“Personnel”** with respect to a Person (e.g., Contractor Personnel, DCH Personnel, BOR Personnel), means an officer, director, partner, employee, or other representative of that Person.

**“Physical Media Warranty”** – see Section 11.3.1 of this Agreement.

**“Plan Participant”** means a member (as defined in Appendices D, E, F, and G) who is covered under the terms of one of the Plans.

**“Plans”** means the BOR Plans and the DCH Plans.

**“Project Director”** – see Section 3.4 of this Agreement.

**"Refund Remedy"** – see Section 14.6 of this Agreement.

**"Relating to the System"** – see Section 12.1.1 of this Agreement.

**“RFP”** – means the State of Georgia, Georgia Technology Authority, Request for Proposal Number GTA-000011, for The Georgia Department of Community Health and the Board of Regents of the University System of Georgia, together with all appendices and amendments thereto.

**“Self-Help Code”** – see Section 11.4.2 of this Agreement.

**“Service Bureau Use”** means the Use of software to process input data that is supplied by one or more Persons other than the User (e.g., other than a licensee) and to generate output data (in the form of reports, charts, graphs or other pictorial representations, or the like) that is sold or licensed to such Person or Persons.

**“Services”** means the Development Services, the Administrative Services, and the Support Services.

**"SHBP"** – see second recital.

Software includes computer programs and associated documentation.

Source code (in lower case) means a series of instructions or statements in an English-like high-level computer language such as FORTRAN, C, PASCAL, or LISP, or in a relatively low-level language such as the assembly language for a particular processor. Source code is normally readily readable by humans trained in the particular computer language in question. It is normally transformed by an interpreter or compiler into machine-readable executable code for actual use on a computer.

**“Source Code”** (capitalized) means the source code of the System.

**“Source Code Escrow Package”** – see Section 5.5.1 of this Agreement.

**“Subsidiary”** as to any Person, means a second Person that is controlled by the first Person.

**“Substantial Compliance”** (also Substantially Comply) means compliance with the essential elements of an obligation so that the obligee is afforded all of the essential benefits reasonably expected to result from compliance with the obligation owed to the obligee, taking into account the likelihood that the obligor will cure any failure to fully comply, after considering all of the circumstances, including the reasonable assurance of the obligor.

**"Support Services"** – see Section 8 of this Agreement.

**"Support Services Fees"** – see Section 8.5 of this Agreement.

“**System**” means the computer programs and documentation described in Section 3.2.1 of this Agreement and developed pursuant to Contractor's performance of the Development Services.

"**Term**" – see Section 14.1 of this Agreement.

“**Testing Period**” – see Section 5.4 of this Agreement.

“**Unauthorized Code**” – see Section 11.4.3 of this Agreement.

Upgrade version (in lower case) means a version of a computer program that incorporates additional capability or functionality and that, as a practical matter, is not distributed to licensees without charge.

“**Upgrade Version**” (capitalized) means an upgrade version of the System. Any copy of an Upgrade Version provided by Contractor will be deemed to be a Licensed Copy.

“**Use**” of the System means the performance of one or more of the following: (i) copying any of the software comprising the System into memory that is accessible by the User (main memory, extended memory, expanded memory, or virtual memory); (ii) obtaining the benefit of some or all of the functionality of the System; or (iii) causing the System to execute one or more of the computer programs that comprise the System.

"**User Documentation**" means the materials that Contractor has designed to be used by the Authorized Users in connection with Using the System, which materials may be available on-line (as part of the System) or in hard-copy format.

"**Verifier**" -- see Section 5.5.4 of this Agreement.

"**Warranty Period**" – see Section 11.1 of this Agreement.

"**Work of Authorship**" – see Section 12.1.1 of this Agreement.

“Written direction” or “In writing” means communications via U.S. Mail, courier service, hand delivery.

“**Year 2000 Capabilities**” – see Section 11.5.2 of this Agreement.

## 1.2 Rules of Interpretation.

1.2.1 The male, female, and neutral genders will be interpreted to mean any other gender as indicated by the context.

1.2.2 The singular includes the plural and vice versa as indicated by the context.

1.2.3 Any term defined elsewhere in this Agreement shall have the meaning set forth in that definition wherever the term is used herein, except as otherwise provided or as the context indicates otherwise.

**2. THIRD PARTY BENEFICIARY / RELATIONSHIP OF PARTIES.** Contractor shall provide the Services in accordance with the guidelines set forth in this Section 2 and elsewhere in this Agreement.

2.1 Third-Party Beneficiary. Although DCH is the contracting party to this Agreement, Contractor acknowledges and agrees that BOR is a third-party beneficiary. By executing this Agreement in the space provided at the end of this Agreement, BOR appoints DCH as its attorney-in-fact with regard to all matters related to this Agreement, including undertaking the steps included in the dispute resolution procedure set forth in Section 15 of this Agreement. Contractor may rely on the existence of said attorney-in-fact relationship and may consider instruction and notice from DCH as being binding on BOR. BOR and DCH each represent for the benefit of Contractor that the aforementioned attorney-in-fact relationship is addressed in a separate document executed on behalf of each of them and is binding on each of them as set forth therein.

2.2 Selection, Qualification, Approval, and Performance of Employees and Subcontractors

2.2.1 All individuals assigned by Contractor to participate in the performance of the Services shall be employees of Contractor and, if required, shall have been approved by DCH, in accordance with Section 4.7.2 of the main body of the RFP. Contractor shall not engage any subcontractor in connection with the performance of the Services without the prior written consent of DCH, which consent shall not be unreasonably withheld. By executing this Agreement, DCH shall be deemed to have consented to the subcontractors (if any) listed in Contractor's Proposal, but shall not be deemed to have consented to any replacements thereof or additions thereto.

2.2.2 Contractor represents and warrants to DCH that each of Contractor's employees, and its subcontractors' employees, who are engaged in the performance of the Services shall be adequately experienced and trained before the employee is assigned to perform the Services. If any payment under this Agreement is based in whole or in part on time charges, then Contractor shall not replace any one of the employees performing the Services with another employee until the replacement employee has received such training from Contractor and Contractor's employee designated for replacement (including any special training in the performance of the Services) as may be necessary to ensure the continuous and satisfactory performance of the Services in the absence of the replaced employee. Contractor acknowledges and agrees that the only payments under this Agreement that are based in whole or in part on time charges, are those described in Section 3 of the main body of the RFP, related to the performance of services outside the scope of this Agreement, which would have to be addressed in a written Change Order Schedule. Further, Contractor shall not charge DCH, and DCH shall have no obligation to pay Contractor for, any time spent by such employees or replacement employees in providing or receiving training or special training with regard to the performance of the Services.

2.2.3 If DCH, in its sole and absolute discretion, determines that the Services are not being performed satisfactorily, or that any security standards, guidelines, or procedures are not being followed and communicates that determination to Contractor, then Contractor shall take such steps as are necessary and appropriate to remedy the situation, including

replacing employees of Contractor or subcontractors who are engaged in the performance of the Services.

2.2.4 No subcontracts that Contractor enters into with respect to the performance under this Agreement shall in any way relieve Contractor of any responsibility for the performance required of Contractor pursuant to this Agreement.

2.2.5 Contractor shall give notice, pursuant to Section 17.7 of this Agreement, in writing by registered mail or certified mail of any action or suit filed by any subcontractor, and prompt notice of any claim made against Contractor by any subcontractor or vendor that may result in litigation related in any way to this Agreement.

2.3 Independence and Authority of the Parties.

2.3.1 Neither Contractor's employees nor its subcontractors' employees shall be or shall be deemed to be employees of DCH for any purpose whatsoever. In conformance with, and without limitation on, any application of the foregoing statement, Contractor and its subcontractors shall be responsible for payment of all unemployment, social security and other payroll taxes on their respective employees who are engaged in the performance of the Services.

2.3.2 Neither Contractor, its subcontractors, nor any of their employees are authorized to act or appear to act as representatives of DCH, whether in performing the Services, or otherwise. If the performance of the Services shall include the use by Contractor or its subcontractors of DCH's facilities, equipment, or other resources, such use is permitted only to the extent necessary for the performance of the Services and not for any other purpose.

2.3.3 This Agreement shall not be construed as a partnership or joint venture between the Contractor or any subcontractor and DCH.

2.3.4 Although this Agreement contains covenants with respect to Confidential/Proprietary Information, the Parties disclaim any other intent to create a confidential or fiduciary relationship between them.

2.4 Security Matters.

2.4.1 For the purpose of a security check, Contractor shall, prior to assigning any employee or subcontractor's employee to participate in the performance of any Services, direct any such employee or subcontractor's employee to furnish Contractor with information required by the Employee Security Check, attached hereto as **Exhibit A**.

2.4.2 Contractor will not permit any of its employees or its subcontractors' employees (including substitute or replacement employees) to perform the Services unless and until Contractor has completed Contractor's security check.

2.4.3 Contractor shall have the continuing obligation to direct its employees and its subcontractors' employees to provide DCH with any additional information of the type required by **Exhibit A**.

2.4.4 For security reasons, Contractor shall neither assign nor permit any of its employees or its subcontractors' employees to perform the Services at the premises of DCH or an Affiliate at any time during which there is not at least one professional employee of DCH or such Affiliate present in the immediate area where the Services are being performed.

2.4.5 After Contractor's complete performance of Services under this Agreement or the termination of this Agreement, or at DCH's request, Contractor shall provide or return to DCH any and all keys, identification cards, equipment, manuals, reports, tapes, disks, negatives, data, or other documentation provided by DCH or any of its Affiliates to Contractor or created by Contractor in connection with the performance of the Services under this Agreement.

### **3. CONTRACTOR'S DEVELOPMENT OF THE SYSTEM.**

3.1 *Data Conversion.* Contractor shall create extract programs that will convert the data concerning the Plans, as specified in **Schedule 3.1**, from the systems that, prior to the Effective Date, have been administered by various incumbent claims administrators, using various systems (the "**Incumbent Data**"). Contractor shall develop and execute testing procedures that will ensure that Contractor properly converts the Incumbent Data and loads it into the System. Such data conversion services are part of the Development Services, and Contractor acknowledges and agrees that the total cost of providing such services is included in the Development Services Fee. All extraction, conversion, and testing procedures are subject to inspection, review, and acceptance by DCH. At a minimum, Contractor will convert the following data from the Incumbent Data and load it into the System:

- (i) Eligibility coverage and eligibility history;
- (ii) Member contributions;
- (iii) Provider demographic and contract data;
- (iv) Fee schedules;
- (v) Pre-authorization and pre-certification (PAC) records; and
- (vi) Health services and pharmacy claims history.

#### 3.2 *Development Services.*

3.2.1 Contractor shall develop for DCH a software system (the "**System**") described in Sections 3.3.1 and 3.7 of the main body of the RFP, the Performance Standards and Goals set forth in **Appendix I**, and the Functional Requirements Matrices set forth in **Appendix J**.

3.2.2 Contractor understands that during the term of this Agreement Contractor is expected to enhance continuously the functionality of the System, so that the System continues to embody the latest technologies and developments that are relevant to the operation of the System and its functionality. Contractor agrees to provide DCH with revisions, updates, version upgrades, modifications, enhancements, and changes, as necessary to keep the System in conformity with the then-current industry standards, including changes to the standard operating system used by DCH, and Contractor will not charge DCH additional fees for the development and implementation of such revisions, updates, version upgrades, modifications, enhancements, and changes.

3.3 Delivery Schedule. Contractor shall complete the phases of the System in accordance with the following schedule, which is set forth in Section 1.6 of the main body of the RFP and **Appendix A**:

<u>Phase</u>	<u>Date</u>
Phase I – Medicaid / PeachCare for Kids	October 1, 2002
Phase II	
Part A – SHBP	July 1, 2003
Part B – BORHP	January 1, 2004

Each of the two Phases, and the Parts of Phase II, consists of several stages, as set forth in **Appendix H**. Contractor acknowledges and agrees that time is of the essence in meeting the above delivery dates.

3.4 Project Directors. The following individuals are hereby appointed as "**Project Directors**" for the respective Parties

Contractor: \_\_\_\_\_

DCH: Wade Miller, Systems Director  
 Department of Community Health  
 State of Georgia  
 2 Peachtree Street, N.W.  
 38<sup>th</sup> Floor  
 Atlanta, Georgia 30303-3159

Phone: 404-656-2375  
 Email: wmillers@dch.state.ga.us

Either Party may replace a Project Director by notice to the other Party, in accordance with Section 17.7 of this Agreement; *provided, however*, that DCH must consent to any such change proposed by Contractor, in DCH's sole and absolute discretion. The Project Directors shall be the sole point of contact for coordinating matters related to the provision of the Development Services, as provided in Sections 1.1.2.2, 1.1.3.1, and 3.2 of the main body of the RFP. Contractor's Project Director is the

Person referred to in Section 4.7.2 of the main body of the RFP as the "overall account manager" and, as such, shall be responsible for the duties set forth in such section.

### 3.5 Preparation of Development Plan

3.5.1 Contractor to Prepare Development Plan. Contractor shall prepare and deliver a detailed design and implementation plan (the "**Development Plan**"), setting forth in detail the Development Services as described in this Section 3 of this Agreement, in accordance with the timetable set forth in the Contractor's Proposal and the RFP, but in no event later than ten (10) Business Days following the Effective Date.

3.5.2 Anticipated Contents of Development Plan. The Parties contemplate that the Development Plan will address the requirements set forth in **Appendix H** and will include some or all of the following items (because of DCH's right to approve the Development Plan, however, the outline of suggested contents of the Development Plan set forth below is not binding):

- (i) a complete set of proposed report formats including sample reports, screen displays, and procedural steps to be taken by Authorized Users in Using the System. The intent of this provision is to permit DCH to review the Authorized User interface with the System prior to approving or disapproving the Development Plan;
- (ii) a detailed list of specific Deliverables that Contractor will deliver to DCH, along with a timetable for delivery of each;
- (iii) a suggested timetable for the conversion of the Incumbent Data and DCH's testing of such converted data;
- (iv) a detailed list of specific obligations to be performed by each Party as part of the Development Services, along with a timetable of deadlines for each such performance obligation, including completion of the following components of the System by the dates indicated (the "**Component Approval Dates**"), with respect to which Contractor acknowledges and agrees that time is of the essence:
  - (1) Membership Enrollment Management System (as defined in Section 2.2.2 of the main body of the RFP and in **Appendix S**) by **July 1, 2002**;
  - (2) Medicaid / PeachCare for Kids (as defined in Section 2.2.1 of the main body of the RFP) by **October 1, 2002**;
  - (3) State Health Benefit Plan (as defined in Section 2.2.2 of the main body of the RFP) by **July 1, 2003**;
  - (4) BOR Plan by **January 1, 2004**; and

- (5) Consolidation of all components of the System by **January 1, 2004**;
- (v) dates for commencement of DCH's testing of each of the foregoing components, which dates shall be at least 120 days prior to the respective Component Approval Date;
- (vi) a set of acceptance criteria and/or guidelines for DCH's guidance during the Testing Period discussed in Section 5.4 of this Agreement.
- (vii) a proposed timetable for training;
- (viii) a date for commencement of DCH's Testing Period; and
- (ix) a set of acceptance criteria and/or guidelines for DCH's guidance during the Testing Period discussed in Section 5.4 of this Agreement.

3.5.3 DCH Review of the Development Plan. DCH shall have ten (10) Business Days following its receipt of the Development Plan in which to review and Approve or reject the Development Plan in its sole and absolute discretion. If DCH rejects the Development Plan, then the Parties will negotiate in good faith for ten (10) Business Days to create a mutually acceptable Development Plan; *provided, however*, that if the Parties are unable to arrive at a mutually acceptable Development Plan within such period, then DCH may, in its sole and absolute discretion, terminate this Agreement. If DCH terminates this Agreement, then DCH may, in its sole and absolute discretion, avail itself of either the Refund Remedy or the Cover Remedy.

3.6 Accomplishment of Development Services. The Parties shall carry out their respective obligations (if any) set forth in the Development Plan as approved by DCH in accordance with the timetable set forth therein and in accordance with this Agreement.

3.6.1 Use of Third-Party Materials. Contractor's use of any third-party materials in the Development Services will be without additional charge to, or obligation on the part of, DCH. Except as may be expressly agreed in writing by DCH, Contractor will make no use of any third-party materials in the Development Services where such use could limit DCH's License Rights.

3.6.2 Infringement of Third-Party Rights. Contractor will immediately notify DCH if it becomes aware that any part of the Development Services may infringe any Intellectual Property Right of any third party.

3.6.3 Originality Records. Contractor will maintain detailed records to document the originality of the System (and DCH may inspect such records, subject to the confidentiality obligations of Section 12.3 of this Agreement, from time to time at the place where such records are stored in the ordinary course of business by Contractor upon at least one Business Day's notice to Contractor) including at least the following:

- (i) at least weekly archival copies of in-progress source code;

- (ii) up-to-date lists of the names of all Contractor Personnel and other Persons who participate in the Development Services; and
- (iii) a complete list of all third-party materials (e.g., compiler libraries) used in developing the System, together with complete copies of the license agreements authorizing Contractor to use such materials

3.6.4 Periodic Progress Reports / Meetings. No less often than weekly, Contractor shall deliver to DCH's Project Director a written report summarizing the progress of the Development Services. Each such report shall identify any significant unresolved problems in the Development Services along with Contractor's then-current plans for resolving each problem and estimated dates of such resolution. Contractor's Project Director shall be available for meetings at least weekly with the DCH Project Director, or his designee, and staff, as required by Section 4.7.2 of the main body of the RFP.

3.6.5 Problem Reports. Each Party shall notify the other Party's Project Director promptly upon becoming aware of any potentially significant delay in the Development Services. The Parties' intention is that all doubt will always be resolved in favor of such notification.

3.6.6 Response to Queries. Each Party shall promptly respond to all inquiries made by the other Party's Project Director (other than inquiries shown to be unreasonable under the circumstances) with respect to any matter that could delay the Development Services.

3.7 Failure to Carry out Development Plan Obligation. Any failure of Contractor to carry out an obligation assigned to it in the Development Plan will be deemed to be a Breach of this Agreement, and DCH may, in its sole and absolute discretion, avail itself of either the Refund Remedy or the Cover Remedy.

3.8 Extensions of Time for Development Services.

3.8.1 Extension of Development Deadlines with Liquidated Damages. Contractor may extend any or all of its performance deadlines in the Development Plan for an aggregate of up to thirty (30) days by (i) giving notice thereof to DCH prior to each deadline in question, and (ii) paying DCH on a weekly basis liquidated damages of Ten Thousand Dollars (\$10,000.00) per day for each day of the extension, with any accrued but unpaid liquidated damages being due to DCH on Wednesdays. Any such extension shall automatically extend any subsequent deadlines in the Development Plan by the same length of time without additional charge to Contractor; **provided, however,** that notwithstanding any other provision of this Agreement, Contractor must complete the components listed in Section 3.5.2 of this Agreement, and DCH must approve them, by the Component Approval Dates. The Component Approval Dates may not be extended, and Contractor's failure to satisfy such deadlines by the Component Approval Dates shall constitute a Breach, and DCH may, in its sole and absolute discretion, avail itself of either the Refund Remedy or the Cover Remedy.

3.8.2 No Other Extensions of Development Deadlines. Except as set forth in Section 3.8.1 of this Agreement, Contractor will not be entitled to extension of any of its

performance deadlines in the Development Plan for any reason without the written consent of DCH, which DCH may withhold for any reason or no reason, in its sole and absolute discretion.

3.9 Payments to Contractor for Development Services.

3.9.1 Fees for Development Services. DCH shall pay Contractor for the Development Services in accordance with the provisions of the Contractor's Proposal, the Development Plan, and **Appendix H**.

3.9.2 Payments for Substantial Compliance. In its sole and absolute discretion, DCH may decide to pay Contractor for Development Services that only Substantially Comply with the requirements of this Agreement.

3.10 DCH Component Testing and Approval of Deliverables.

3.10.1 Contractor shall complete each component of the System described in the Development Plan in time to permit DCH to have one hundred twenty (120) days in which to test the component prior to the Component Approval Date related to such component.

3.10.2 DCH's Approval of any Deliverables will be made solely in a writing signed by DCH's Project Director.

3.10.3 If DCH does not disapprove a Deliverable, as to which it has Approval rights within the time period set out in this Agreement for such Approval, then it will be deemed to have Approved the Deliverable, unless DCH, in its sole and absolute discretion, decides to extend the time for such approval and so notifies Contractor in accordance with Section 17.7 of this Agreement; **provided, however**, that no such extension shall have the effect of extending the Component Approval Dates.

3.10.4 If DCH disapproves any Deliverable, then unless otherwise agreed by the Parties in writing, DCH may, in its sole and absolute discretion do one or more of the following:

- (i) Extend the time for delivery of same; **provided, however**, that no such extension shall have the effect of extending the Component Approval Dates;
- (ii) Allow Contractor to propose an alternative Deliverable;
- (iii) Hire a different contractor to complete the performance of same, the cost of which will be borne by Contractor; or
- (iv) Terminate this Agreement or the portion pertaining to the Development Services, or the portion pertaining to the Deliverable.

3.10.5 If DCH chooses to terminate the Agreement or the portion pertaining to a Deliverable, then DCH may, in its sole and absolute discretion, avail itself of either the Refund Remedy or the Cover Remedy.

3.11 Change Order Services. From time to time DCH may request Contractor to provide additional system development services, create customized enhancements to the System, or provide other consulting services that are not specifically addressed in this Agreement (“**Change Order Services**”). Contractor shall provide Change Order Services in accordance with the terms and conditions set forth in this Agreement and pursuant to a Change Order Schedule that is substantially in the form of **Exhibit B**, attached hereto (“**Change Order Schedule**”). Such Change Order Schedule or Schedules shall be deemed to be part of this Agreement and unless otherwise provided therein shall be governed by the terms and conditions of this Agreement. If DCH is obligated to pay Contractor for time spent by Contractor Personnel and/or to pay or reimburse Contractor for expenses incurred in connection with the Change Order Services, then Contractor will maintain detailed records to support its invoices or other charges to DCH. DCH will have Audit Rights in accordance with Section 7.9 of this Agreement with respect to all such records. To the extent the Change Order Services enhance the performance of the System, such enhancements shall be referred in this Agreement as "**Additional Performance Standards**."

#### **4. CREATION OF THE LICENSE FOR THE SYSTEM.**

##### 4.1 License Grant.

4.1.1 License Rights Granted. Subject to the terms and conditions of this Agreement, Contractor hereby grants to DCH and its Affiliates, and DCH hereby accepts on behalf of itself and its Affiliates, a license of all Intellectual Property Rights owned or otherwise assertable by Contractor to Use the System (the “**License**”).

4.1.2 Scope of License. The License is non-exclusive and extends as far as necessary to support the Plans.

4.1.3 No Other Rights Granted. Other than the License Rights enumerated in this Agreement, the License includes no other grant to DCH of any right to engage in any Licensable Activity, nor any ownership right, title, or interest, nor any security interest or other interest, in any Intellectual Property Rights relating to the System or in any Copy of any part of the System.

4.2 Term of License. The term of the License shall be perpetual.

4.3 License Fee. DCH will not pay Contractor a separate license fee. Said amount is included in the Development Services Fee.

#### **5. LICENSE START-UP ACTIVITIES.**

5.1 Delivery of Licensed Materials. In accordance with the schedule set forth in the Development Plan, Contractor will deliver, on-line as part of the System, any Licensed Materials that are to be used by Authorized Users. In addition, Contractor will deliver hard copies of such Licensed Materials to any Authorized User who requests same, the aggregate total of which shall not exceed 10,000. Contractor will pay all handling charges associated with such delivery of the Licensed Materials, although DCH will pay the cost of postage.

5.2 Contractor Testing of System.

5.2.1 Contractor shall test the System using hardware provided, or contemplated for acquisition, by DCH in accordance with this Section 5.2. No later than thirty (30) days after the Effective Date, DCH shall notify Contractor of the specific computer hardware configuration with which DCH desires to Use the System, in such detail as Contractor may reasonably request. Within thirty (30) days after such notice, Contractor shall notify DCH whether the System can be Used with such hardware and configuration.

5.2.3 If Contractor notifies DCH in writing that it has determined that the System can be Used with the hardware configuration in question, then the As-Documented Warranty will be deemed to include a warranty that the System can be Used as so warranted with such hardware configuration.

5.2.4 If Contractor notifies DCH in writing that it has determined that the System cannot be Used with the proposed hardware configuration, then DCH may at its option:

- (i) Attempt to select another hardware configuration for testing by Contractor pursuant to this Section 5.2;
- (ii) Continue the License of the System without a warranty or Knowledge Representation concerning the System's ability to be Used on the selected hardware configuration; or
- (iii) Terminate the License in accordance with the procedures of Section 14 of this Agreement, after which neither Contractor nor DCH need render any additional performance under this Agreement other than of post-termination obligations as set forth herein.

5.3 Training of Authorized Users. Contractor shall provide training to Authorized Users in accordance with the Development Plan. Neither DCH nor the trainees will be entitled to any salary, overtime, or other compensation from Contractor for their participation in the training.

5.4 Testing Period / Acceptance. During the “**Testing Period**” defined in this Section 5.4, DCH shall conduct such tests as it deems appropriate to determine that the System is capable of effective operation in accordance with the terms of this Agreement, under reasonably anticipated operating conditions.

5.4.1 Commencement of Testing Period. The Testing Period shall commence five (5) business days after Contractor’s completion of the System and delivery of the Licensed Materials. Subject to Section 3.8 of this Agreement, concerning possible extensions, the Testing Period shall end upon DCH's Acceptance of the System (see Section 5.4.4 of this Agreement) or upon termination of this Agreement for Breach for Contractor's failure to satisfy the requirements of the schedule set forth in the Development Plan and the Contractor's Proposal.

5.4.2 Extensions of the Testing Period. The Testing Period may be extended beyond the date set forth in the schedule contained in the Development Plan, in accordance with the following procedures:

- (i) If DCH determines, in its sole and absolute discretion at any time prior to the end of the Testing Period, that the System appears to be deficient or unsuitable for DCH's use for any reason, then DCH may, in its discretion, promptly notify Contractor in accordance with Section 9.1 of this Agreement relating to Bug Reports, specifying in the notice the respects in which the System is deemed to be deficient or unsuitable.
- (ii) If DCH gives such notice to Contractor during the period beginning five (5) Business Days prior to expiration of the Testing Period, then the expiration of the Testing Period will be postponed for five (5) Business Days to permit Contractor to evaluate the reported deficiency or unsuitability, unless otherwise specified in DCH's notice.

5.4.3 Correction of Bugs During Testing Period. Contractor's attempts to correct Bugs will be governed generally by Section 9.1 of this Agreement. If the Parties agree to extend the Testing Period to permit Contractor to make such attempts, then the Testing Period will be extended by the lesser of: (i) the amount of time actually taken by Contractor to correct the System plus the amount of time actually taken by DCH to retest the corrected version, or (ii) any maximum extension agreed by DCH and Contractor.

5.4.4 Acceptance or Rejection of System. DCH (i) may accept the System subject to Contractor's warranties and obligations under this Agreement (“**Acceptance**”), or (ii) in its sole and absolute discretion may reject the System for any reason, in either case by notice to Contractor, in accordance with Section 17.7 of this Agreement, at any time during the Testing Period. The date, if any, on which DCH accepts the System is referred to as the “**Acceptance Date.**” Contractor acknowledges and agrees that DCH's Approval of a portion of the System does not constitute Acceptance or even partial Acceptance. Acceptance will occur only after DCH Approves *all* components of the System, including operation of all components as a consolidated system. DCH will be deemed to have rejected the System if it does not Accept the System by notice to Contractor prior to the end of the Testing Period.

## 5.5 Source Code Escrow.

5.5.1 Source Code Escrow Package Definition. The term “**Source Code Escrow Package**” means the following:

- (i) a complete copy in machine-readable form of the Source Code and Executable Code of the System(s);
- (ii) a complete copy of any existing documentation related to the design of the System and User Documentation; and
- (iii) complete instructions for compiling and linking every part of the Source Code into Executable Code, for purposes of enabling verification of the

completeness of the Source Code as provided below, which instructions shall include precise identification of all compilers, library packages, and linkers used to generate Executable Code.

5.5.2 Delivery of Source Code Into Escrow. Contractor shall deliver a Source Code Escrow Package to the escrow agent named in the Development Plan (the “**Escrow Agent**”), provided that Contractor, DCH, and the Escrow Agent shall first enter into a supplementary escrow agreement in substantially the form attached hereto as **Exhibit C** (“**Escrow Agreement**”). Contractor and DCH shall use their best efforts to enter into such an Escrow Agreement as soon as possible after the effective date of this Agreement.

5.5.3 Delivery of New Source Code Into Escrow. If, from time to time during the Term, Contractor changes the computer programs that comprise the System, then Contractor shall within ten (10) Business Days thereafter deposit a Source Code Escrow Package for such change with the Escrow Agent and give DCH notice of such delivery.

5.5.4 Verification of Source Code Escrow Package. DCH, at its option and expense, may request that the completeness and accuracy of any Source Code Escrow Package be verified.

- (i) DCH may request such verification once per year of the Term or once per Source Code Escrow Package, whichever event occurs more frequently.
- (ii) Escrow Agent will conduct such verification or, upon at least ten (10) Business Days’ prior notice to Contractor, another party (the “**Verifier**”) reasonably acceptable to Contractor (after full disclosure to Contractor of information reasonably requested by Contractor about the Verifier) may conduct such verification.
- (iii) Prior to conducting the verification, the Verifier shall first execute a form of confidentiality agreement substantially embodying the provisions of Section 12.3 of this Agreement and precluding the Verifier from disclosing any information about the Source Code Escrow Package to DCH other than whether the Source Code Escrow Package was found to be complete and accurate.
- (iv) Unless otherwise agreed at the time by Contractor and DCH, verification will be performed on-site at Contractor's premises, utilizing Contractor's equipment and software, at a time reasonably acceptable to Contractor. Contractor shall make technical and support personnel available as reasonably necessary for the verification.
- (v) Contractor may in its discretion designate a representative to accompany the Source Code Escrow Package at all times, and to be present at the verification. The Verifier will be DCH's sole representative at the verification.

- (vi) The responsibility for the completeness and accuracy of the verification will be solely that of the Verifier. Neither the Escrow Agent nor Contractor shall have any responsibility or liability to DCH for any incompleteness or inaccuracy of any verification.

5.5.5 Escrow Fees. All fees and expenses charged by the Escrow Agent will be borne by Contractor. Contractor shall reimburse DCH for any such fees, expenses, or other charges billed to DCH by the Escrow Agent, except as may be otherwise expressly agreed in writing by DCH.

5.5.6 Release Events for Source Code Escrow Package. The Source Code Escrow Package may be released from escrow to DCH, temporarily or permanently, solely upon the occurrence during the Term of one or more of the following “**Escrow Release Events**” defined below:

- (i) permanently, if Contractor becomes insolvent or admits insolvency or admits a general inability to pay its debts as they become due;
- (ii) permanently, if Contractor files a petition for protection under the Bankruptcy Code of the United States, or an involuntary petition in bankruptcy is filed against Contractor and is not dismissed within sixty (60) days thereafter; or
- (iii) temporarily, if Contractor proves unable or otherwise fails to cure a Breach of the As-Documented Warranty or the warranties set forth in Section 11.5 of this Agreement, for the duration of any reasonable attempt by DCH to cure any such Breach.

5.5.7 Release Event Procedures. If DCH desires to obtain the Source Code Escrow Package from the Escrow Agent upon the occurrence of a Release Event, then:

- (i) DCH shall comply with the procedures set forth in the Escrow Agreement to document the occurrence of the Release Event;
- (ii) DCH shall maintain all materials and information comprising the Source Code Escrow Package in strict confidence in accordance with Section 12 of this Agreement and shall use and/or disclose such materials and information only in accordance with this Agreement;
- (iii) If the release is a temporary one, then DCH shall promptly return all released materials to Contractor when the circumstances leading to the release are no longer in effect; and
- (iv) DCH shall promptly respond, fully and completely, to any and all requests for information from Contractor concerning DCH's use or contemplated use of the Source Code Escrow Package and the names, employment histories, and affiliations of the individual(s) having access to the Source Code Escrow Package.

## 6. OPERATING PROVISIONS FOR LICENSED ACTIVITIES.

6.1 *Internal Use.* The System will be accessed and used solely by Persons authorized to have access to information related to the Plans, including Plan Participants, healthcare providers who provide services to Plan Participants pursuant to the terms of the Plans, and their respective agents (“**Authorized Users**”).

### 6.2 *Connectivity.*

6.2.1 Contractor shall be responsible at its sole expense for maintaining all connectivity between Contractor's computer hardware and the Internet and LANs of DCH and its Affiliates, including Contractor's telephone access lines, and telephone and communications equipment. Contractor shall be solely responsible for the selection, installation, configuration, testing, operation, maintenance, support and use of such items. Contractor shall maintain such equipment as is necessary to meet the Minimum Response Time commitments set forth in **Appendix I**.

6.2.2 Each Authorized User is responsible for providing, at said Authorized User's sole expense, all Internet access, telephone access lines, and telephone and communications equipment (e.g., modems or other access devices) used by said Authorized User. Each Authorized User shall be solely responsible for the selection, installation, configuration, testing, operation, maintenance, support and use of the foregoing items.

## 7. CLAIMS ADMINISTRATION SERVICES.

7.1 *General Duties.* Contractor shall be responsible for providing the “**Administrative Services**,” which consist of the claims administration, management, and information systems services in connection with the Plans, as more fully described in the main body of the RFP and the Contractor's Proposal; *provided, however*, that Contractor shall have no final discretionary authority or control with regard to the management of the Plans or over the assets of any Plan and shall not to be deemed a fiduciary of any of the Plans. Contractor shall administer the Plans in accordance with their respective terms, as provided and interpreted by DCH and its Affiliates. At a minimum, the Administrative Services shall include the following functions:

- (i) load and maintain group and account data, benefit plans, provider data, fee schedule data,
- (ii) perform data entry related to eligibility and claims,
- (iii) coordinate benefits,
- (iv) promptly accept and respond to contacts from members and providers regarding matters pertaining to the Plans, including eligibility, coverages, exclusions, and claims,
- (v) operate a mail room for receipt correspondence related to the Plans,
- (vi) adjudicate and pay claims,

- (vii) generate electronic fund transfer payments, EOBs, I.D. cards, member and provider correspondence, and if necessary, paper checks,
- (viii) make payment of any other disbursements authorized from time to time by the fiduciaries of a Plan,
- (ix) performs fraud and abuse detection and screening.
- (x) perform such additional incidental services with respect to the claims administration of the Plans as may be agreed to in writing by the parties from time to time during the term of this Agreement,
- (xi) render a statement for Administrative Services Fees and reimbursable expenses of Contractor as provided for in this Agreement and **Appendix L**,
- (xii) provide the fiduciaries of a Plan with printed reports in form and content agreed upon by and between Contractor and the fiduciaries of the Plan,
- (xiii) provide the fiduciaries of a Plan and other contractors designated by DCH with access to the System, in a manner that permits said parties to query the database of the System and to produce reports at their respective facilities,
- (xiv) support the reconciliation of the bank accounts of the Plans; *provided, however*, that the Plans shall be responsible for all bank charges incurred in connection with the reconciliation services.

7.2 Administrative Services Coordinators. Contractor shall appoint an overall account manager (the "**Contractor Administrative Services Coordinator**"); BOR shall appoint a representative for matters related to Contractor's provision of Administrative Services in connection with the BOR Plans (the "**BOR Administrative Services Coordinator**"); and DCH shall appoint a representative for matters related to Contractor's provision of Administrative Services in connection with all Plans other than the BOR Plans (the "**DCH Administrative Services Coordinator**") (collectively, the "**Administrative Services Coordinators**"). The following individuals are appointed to such positions:

Contractor: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

BOR: William Wallace  
 Associate Vice Chancellor of Human Resources  
 Board of Regents of the University System of Georgia  
 \_\_\_\_\_  
 \_\_\_\_\_

DCH: Elvina Calland  
Director of Contracts Administration  
Georgia Department of Community Health  
2 Peachtree Street, N.W.  
40<sup>th</sup> Floor  
Atlanta, Georgia 30303

Either Party or BOR may replace their respective Administrative Services Coordinator by notice to the others.

7.3 Administration of Claims under the Plans.

7.3.1 Contractor shall process and pay claims in accordance with the provisions of the applicable Plans and the procedures and policies adopted by the Plans. Contractor will only pay for claims that are covered benefits under a Plan, unless specifically authorized in writing by the Administrative Services Coordinator of such Plan.

7.3.2 Contractor may request and/or be given specific directions from the Administrative Services Coordinator of a Plan with regard to the processing of a claim and will comply with the written direction received.

7.3.3 Contractor will provide the Administrative Services Coordinator of a Plan and/or third parties, as directed by the Administrative Services Coordinator of a Plan, with information and documents within Contractor's control that are needed to facilitate the full and fair review of a claim on appeal. In addition, Contractor will send and receive data to and from the Administrative Services Coordinator of a Plan and to designated third parties to the extent such data are necessary to support the delivery of health care services, including claims adjudication and payment, medical management, pharmacy benefit plan administration, customer service, regulatory compliance, and reporting.

7.4 Plan Participant Relations.

7.4.1 Contractor will have primary responsibility for direct communications with members and will work with the Administrative Services Coordinators in the development of such materials, including responses to requests for information from members as to the benefits available to them under the Plans, the proper method of submitting claims for benefits, and to otherwise consult in writing or by telephone with such persons when necessary. No written communication piece will be distributed to Plan members without the prior written authorization of the Administrative Services Coordinator of that Plan. All member communications received by DCH or the BOR Administrative Services Coordinator or the DCH Administrative Services Coordinator shall be delivered promptly to Contractor by DCH.

7.4.2 Contractor shall provide for each Plan Participant plastic I.D. cards and other materials and documents (including EOBs, remittance advices, letters and copies of IRS Form 1099) as may be necessary for the operation of the Plans or to satisfy the requirements of federal, state, or local law as might, from time to time, be determined or prepared by an

Administrative Services Coordinator. Such materials will be developed and obtained at the sole cost and expense of Contractor as part of the Administrative Services Fee.

7.5 Management of Subcontractors. Contractor shall be responsible for managing the performance of any subcontractor that is involved with providing Administrative Services. Contractor will provide technical assistance and direction to such subcontractors to help them meet their own performance standards and to promote the efficiency and effectiveness of the administration of the Plans; **provided, however,** that Contractor shall have no responsibility for managing the performance of DCH's pharmacy benefit manager or for managing the performance of DCH's Decision Support / Executive Information System vendor.

7.6 Overpayments. Contractor will make a diligent attempt to recover any payment or overpayment made to an ineligible person or entity, or to adjust any overpayment or underpayment made to an eligible person or entity in the event it is determined that more or less than the correct amount has been paid by Contractor to such ineligible or eligible person or entity. Contractor also agrees to pursue from providers overpayments attributable to other causes (e.g., fraud or the submission of incorrect information by a beneficiary, etc.). Contractor, however, shall be financially responsible for reimbursing: (i) overpaid or other improperly paid amounts to DCH that are not collected within six (6) months after the time of overpayment, or (ii) any costs and expenses associated with DCH's use of any third party to seek to recover any such amounts. Contractor agrees to report to DCH on a monthly basis its payment errors and collection efforts and to cooperate with any third party DCH may elect to use in collecting receivables.

7.7 Transition to a New Administrator.

7.7.1 Upon the giving or receipt of any notice of termination of all or any part this Agreement, or upon expiration of the Term, Contractor will fully cooperate with DCH in facilitating its transition to another administrator or to self-administration by providing all non-proprietary information and data in the possession of Contractor or its subcontractors on a timely basis on standard, machine-sensible media, as may be reasonably requested by DCH. Following actual termination of all or any part of this Agreement, Contractor will continue to reasonably cooperate with DCH in the transition, in exchange for the charges described in Appendix L, and in accordance with Contractor's Proposal provisions concerning runout and turnover, including the payment of run out claims for a period to be determined by DCH, but not to exceed twelve (12) months following the termination of this Agreement.

7.7.2 Within fifteen (15) days after receipt of a written request from DCH, if such a written request is made, Contractor must turn over to DCH copies of all information obtained from the providers and any other information obtained as a result of performing the tasks of this Agreement in whatever formats the information exists.

7.8 Maintenance of Necessary Licenses.

7.8.1 Contractor and its subcontractors will obtain and maintain any licenses or regulatory approvals necessary for them to perform claims administration services under this Agreement and will comply with any laws applicable to entities engaged in the business of providing the types of services contemplated by this Agreement, including relevant

provisions of Title XIX and XXI of the Social Security Act, as amended, and those laws and regulations applicable to federal contractors with respect to equal employment opportunity.

7.8.2 Contractor will be responsible for monitoring of, and compliance with, the laws governing the processing of claims, as well as the Medicare, Department of Labor, and other rules, regulations, requirements, and guidelines applicable to Contractor's processing of claims under this Agreement, to the extent such laws and rules affect the third party administration industry in general.

7.9 Inspection of Work / Audit Rights. Contractor agrees that the DCH Administrative Services Coordinator, the State Auditor of Georgia, the U.S. Department of Health and Human Services, the General Accounting Office, the Comptroller General of the United States, or their authorized representatives (an "**Authorized Inspector**") may inspect the Contractor (and Contractor shall ensure that such right is also available with regard to subcontractors), as described in this Section 7.9. The Authorized Inspectors may enter the premises of Contractor or any subcontractor or such other places where such parties are performing duties under this Agreement to inspect, monitor, or otherwise evaluate the performance of the Services. All such inspections and evaluations of Services shall be conducted with prior notice and during normal business hours and shall be performed in such a manner as will not unduly delay the performance of the Services or other work being performed by such parties. Contractor shall maintain reasonable books of account in support of charges hereunder. Contractor shall keep such records open for inspection by an Authorized Inspector upon thirty (30) Days' written notice to Contractor. In addition, DCH may cause an audit of such records to be made, no more than once each year, by an Authorized Inspector, an independent firm of accountants, or such other individuals as may be reasonably acceptable to Contractor. Such rights to inspect and audit such books shall be known as the "**Audit Rights.**"

7.10 State Contractor Compliance Personnel. Contractor shall make space available for the monitoring staff of the State Office of Contractor Compliance, in accordance with the provisions of Section 1.1.4.4. of the main body of the RFP.

**8. ON-GOING CONTRACTOR SUPPORT.** During the Term, Contractor shall provide the support services set forth in the Contractor's Proposal, including the services set forth in this Section 8 (the "**Support Services**"). Contractor's principal representative who shall be the liaison with DCH in connection with Contractor's provision of Support Services shall be known as the "**Key Contractor Support Personnel.**"

8.1 Telephone Support by Contractor.

8.1.1 Beginning upon the date on which the Licensed Materials are delivered to DCH and continuing during the Term, Contractor will make Authorized User Support available by telephone (toll-free in the United States) to Authorized Users at substantially all times from 8:00 a.m. until 5:00 p.m. each Business Day.

8.1.2 During the Term, Contractor will make available to DCH a pager telephone number and will ensure that one of the Key Contractor Support Personnel carries the pager at any time during which the Key Contractor Support Personnel are not available for telephone support in accordance with Section 8.1.1 of this Agreement.

8.2 Maintenance / Upgrades.

8.2.1 Maintenance Releases. During the Term, at no charge to DCH, Contractor shall make Maintenance Release(s) available and shall take steps necessary to keep the System in good working order, to continue the warranties set forth in Section 11 of this Agreement, and to correct Bugs.

8.2.2 Upgrade Versions. During the Term, at no charge to DCH, Contractor shall: (i) make Upgrade Versions of the System, if any, available to DCH, (ii) take all actions necessary to ensure that the System reflects current and anticipated federal and state regulatory requirements (e.g. HIPAA), as well as technical and computer operating system changes, and (iii) provide DCH all revisions and enhancements to the System that Contractor makes generally available to its users.

8.3 Authorized User Support Coordination.

8.3.1 DCH shall designate points of contact for coordinating System changes and Authorized User Support (the “**Authorized User Support Coordinators**”), one of whom shall be designated as DCH's principal representative on matters related to Support Services.

8.3.2 DCH shall take appropriate steps to educate Authorized Users about the need to contact a DCH Authorized User Support Coordinator when support is needed. DCH shall appropriately publicize the name, telephone number, and/or FAX number and/or electronic mail address if applicable, of the Authorized User Support Coordinators.

8.3.3 Contractor will ordinarily attempt to respond promptly and courteously to an Authorized User Support request from any Authorized User, but it shall always have the right to require the caller to work through a designated Authorized User Support Coordinator instead of directly with Contractor.

8.3.4 The following Persons shall be the Key Contractor Support Personnel:

\_\_\_\_\_.

- (i) Contractor may replace one or more Key Contractor Support Personnel of equivalent qualifications by giving notice to DCH. Any time spent by such a replacement in becoming familiar with DCH or the subject matter of this Agreement will be at no expense to DCH.
- (ii) Contractor may reduce the total number of Key Contractor Support Personnel only with the prior written consent of DCH.
- (iii) The Key Contractor Support Personnel shall not at any time be deemed to be employees of DCH.

#### 8.4 Backup / Disaster Recovery

8.4.1 Contractor shall maintain all necessary safeguards against the destruction, loss, and improper alteration of the System Data, including the requirements set forth in Section 4.9.4 of the main body of the RFP and the following:

- (i) Protection from disaster through several multiple levels of hardware and software redundancy that will allow Contractor to recover from unexpected failures without interruptions in service.
- (ii) Reliability and high availability features to ensure delivery of full 24x7 continuous operation and the integrity and reliability of the System Data, including: automatic recovery, on-line backup, roll-forward, failover, and replication (to provide shared access to the System Data from geographically distributed applications, thereby resulting in improved performance and resistance to site failures).
- (iii) Multiple servers to load balance and provide continued access to the System in the event a server fails.
- (iv) Redundancy and fault tolerance of the data repository through disk arrays on the database servers, which servers will be configured in clusters with redundant processors that take over in the event of CPU/memory failures.
- (v) Application monitoring software that will ensure that, if a process on the server fails, it is restarted automatically and with little perceptible delay to the Authorized User.
- (vi) System backup tapes (daily for data and weekly for applications) and store such tapes off-site at secure and fireproof locations that are subject to DCH's review and approval.
- (vii) Un-interruptible power supply systems and programs, including battery power that protects the network and systems from spikes or drops in incoming power, generators that can provide alternate power for 24 hours in the event of a regional power outage, regularly scheduled tests of Contractor's ability to switch to battery or generator power.
- (viii) Annual recovery tests to ensure Contractor's disaster preparedness, the results of which Contractor will report to DCH immediately upon their conclusion.

8.4.2 In the event of a loss of any System Data, Contractor shall use necessary means to regenerate the lost System Data, at Contractor's expense, as soon as practicable within five (5) Days from the date Contractor is notified of the loss.

- (i) Contractor will provide an alternate business recovery site.

- (ii) In the event of a disaster that might cause the System to become unavailable or cause an interruption in the delivery of the Administrative Services, Contractor will immediately notify DCH of the situation. Contractor will take steps to ensure uninterrupted delivery of the Administrative Services and will send backup media to its alternate site and load the System Data on configured systems at that site, in order to recover the basic functionality of the System within 24 hours and complete functionality of the System within 48 hours from the occurrence of the disaster.

8.4.3 Contractor further warrants that, throughout the Term, Contractor will maintain the business recovery procedures set forth in this Section 8.4.

8.5 *Support Services Fee.* During the Term, DCH shall pay Contractor for providing the Support Services (the "**Support Services Fee**") as set forth in the Contractor's Proposal and **Appendix L**.

## **9. ERROR CORRECTION PROCEDURES.**

9.1 *Bug Reports.* At any time during the Term, DCH may provide Contractor with a report ("**Bug Report**") of any actual or potential defect ("**Bug**") in the System, by notice or by other reasonable means.

### 9.2 *Correction Attempts for Material Bugs.*

9.2.1 During the Term, each Bug Report will include, and DCH will continue to provide, all information reasonably requested by Contractor from time to time to assist Contractor in identifying and correcting the Bug.

9.2.2 During the Term, upon request by DCH, to be accompanied by reasonable backup documents, Contractor will credit or reimburse DCH for any amount by which DCH's Direct Expenses related to the Bug during the Term exceed Ten Thousand Dollars (\$10,000.00) per calendar year in the aggregate.

9.2.3 Contractor's obligations under this Section 9 are effective during the Term, but not at any other time.

9.2.4 Contractor shall carry out its obligations under this Section 9 at no charge to DCH, except as otherwise expressly set forth in this Agreement.

9.2.5 Contractor shall proceed as set forth in this Section 9 if all of the following are true; Contractor may, but need not, so proceed if one or more of the following are untrue:

- (i) DCH states in a Bug Report (or in a follow-up report) that a Bug in the System is a Material one and identifies in reasonable detail the basis for such statement, and

- (ii) Contractor is able to reproduce the Bug in the applicable operating environment and verify that the Bug is in fact in the System and not elsewhere, and
- (iii) DCH is using the then-current version of the System or other version of the System then supported by Contractor.

9.2.6 Within five (5) Business Days of receiving such Bug Report, Contractor shall either:

- (i) provide DCH with a correction or workaround sufficient to alleviate any Material adverse effect of the Bug on the utility of the System, or
- (ii) provide DCH with a written response describing Contractor's then-existing diagnosis of the Bug and generally outlining Contractor's then-existing plan and timetable for correcting or working around the Bug.

9.2.7 After Contractor's initial report to DCH as provided above, Contractor will report its progress in correcting or working around such Bug to DCH no less often than weekly.

9.2.8 Contractor may terminate its corrective efforts under this Section 9 only if Contractor corrects the Bug or finds a way to work around the Bug, such that, in the reasonable judgement of DCH, the functionality of the System is not compromised.

9.2.9 If Contractor is unable to correct the Bug or find a way to work around the Bug, DCH may attempt to correct such Bug at its own risk, including making modifications to the Source Code, if and to the extent DCH has or obtains access to the Source Code under the circumstances in accordance with this Agreement; ***provided, however,*** that this clause does not in itself entitle DCH to have or obtain access to the Source Code. If DCH succeeds in correcting such Bug, then:

- (i) If DCH corrects such Bug after Contractor proved unable or otherwise failed to correct such Bug within thirty (30) days (or such longer time period as agreed to by DCH in its sole and absolute discretion) after Contractor's receipt of the corresponding Bug Report, then DCH may offset reasonable Direct Expenses associated with such successful correction against unpaid amounts owed or becoming owed to Contractor by DCH under this Agreement to the extent that such Bug is shown to have been in the System;
- (ii) The corrected version of the System will be deemed to be part of the System for all purposes; and
- (iii) Contractor may obtain from DCH an irrevocable, non-exclusive, worldwide, royalty-free rights with respect to such correction (*i.e.*, the right to engage in any Licensable Activity whatsoever with regard to such correction) for such compensation as may be agreed to by DCH.

9.3 Availability of Contractor Personnel for Error Correction.

9.3.1 No more than three (3) times per year, Contractor may give DCH at least five (5) Business Days' notice that one or more of the Key Contractor's Support Personnel will be on vacation for the number of days specified in the notice (not to exceed ten (10) Business Days per period), in which case the time for Contractor to provide its initial response will be five (5) Business Days. Contractor will dedicate at least forty (40) staff-hours per week to its efforts to correct or work around such Bug.

9.3.2 If DCH so requests, Contractor will require that appropriate Contractor Personnel travel to DCH's facilities for reasonable periods of time sufficient for Contractor to carry out its corrective maintenance responsibilities under this Section 9 (except that such travel need not exceed five (5) Business Days per month without Contractor's consent).

**10. CONTRACTOR REPRESENTATIONS, WARRANTIES, AND COVENANTS.** Contractor hereby represents and warrants to and for the benefit of DCH, and covenants with DCH, as follows:

10.1 Due Organization. Contractor is a corporation duly organized, validly existing, and in good standing under the laws of the State of \_\_\_\_\_. Contractor has all requisite corporate power and authority to own, operate, and lease its property. Contractor is duly qualified to do business and is in good standing in the State of Georgia.

10.2 Power and Authority. Contractor has full power and authority to execute and deliver this Agreement and to perform its obligations under this Agreement. This Agreement and the obligations contemplated hereby have been duly and validly authorized by all necessary action on the part of Contractor, and this Agreement constitutes a legal, valid, and binding obligation of Contractor, enforceable in accordance with its terms. The Person executing this Agreement on behalf of Contractor has actual authority to bind Contractor to this Agreement.

10.3 No Violation. Contractor will enter into no agreement the execution and/or performance of which would violate or interfere with this Agreement. Neither Contractor's execution and delivery of this Agreement, nor Contractor's performance of the obligations set forth in this Agreement, will, with or without the giving of notice or the passage of time, or both:

- (i) conflict with, result in a default or loss of rights (or give rise to any right of termination, cancellation, or acceleration) under, or result in the creation of any Lien pursuant to:
  - (1) any provision of the Articles of Incorporation or Bylaws of Contractor;
  - (2) any material note, bond, indenture, mortgage, deed of trust, contract, agreement, lease, or other instrument or obligation to which Contractor is a party or by which Contractor may be bound or any of its assets may be affected; or

(3) any law, order, judgment, ordinance, rule, regulation, or decree to which Contractor is a party or by which Contractor may be bound or its assets may be affected; or

(ii) give rise to any interest in the assets of Contractor.

10.4 Licenses. Contractor has all requisite Licenses required to carry on its business as now conducted and to perform its obligations under this Agreement. No event has occurred with respect to any of the Licenses that either permits, or after notice or lapse of time or both would permit, revocation or termination of the Licenses or any of them.

10.5 Consents. No permit, consent, filing, or approval of any third party is required to be obtained or made by Contractor in connection with the execution, delivery, and performance of this Agreement in order to (i) render this Agreement valid and effective and (ii) enable Contractor to perform the obligations contemplated hereby.

10.6 Capabilities. Contractor has, either by itself or with the assistance it reasonably expects to receive from subcontractors, the facilities, equipment, authorizations of third parties, and know-how to perform its obligations under this Agreement, including the knowledge and ability to develop the System and perform the Administrative Services. Such knowledge and ability includes the knowledge of all pertinent rules and regulations (both governmental and private) pertaining to the processing of claims as anticipated by this Agreement.

10.7 Quality of the Services. Contractor warrants that the Services shall be performed in a workmanlike manner.

10.8 Legal Matters. There is no claim, legal action, counterclaim, suit, arbitration, governmental investigation or other legal, administrative, or tax proceeding, or any order, decree or judgment of any court, governmental agency, or arbitration tribunal that is in progress, pending, or threatened against or relating to Contractor or the assets of Contractor that would individually or in the aggregate have a material adverse effect on Contractor's ability to perform the obligations contemplated by this Agreement. Without limiting the generality of the representation of the immediately preceding sentence, Contractor is not currently the subject of a voluntary or involuntary petition in bankruptcy, does not presently contemplate filing any such voluntary petition, and is not aware of any intention on the part of any other Person to file such an involuntary petition against it.

10.9 Compliance with All Laws.

10.9.1 Contractor is in material compliance with all applicable federal, state, and local laws, regulations, ordinance, and administrative orders, the noncompliance with which would have a material adverse effect upon Contractor's ability to perform the obligations contemplated by this Agreement.

10.9.2 Contractor agrees to comply with applicable federal and state laws, rules and regulations, and the State's policy concerning nondiscrimination in employment practices because of political affiliation, religion, race, color, sex, physical handicap, age, or national origin. Nondiscrimination in employment practices is applicable to employees for employment, promotions, dismissal and other elements affecting employment.

10.9.3 Contractor agrees that all work done as part of this Agreement will comply fully with applicable administrative and other requirements established by applicable federal and state laws and regulations and guidelines, including §1902(a)(7) of the Social Security Act and DCH Policies and Procedures, and assumes responsibility for full compliance with all such applicable laws, regulations, and guidelines. Contractor shall fully reimburse DCH for any loss of funds or resources or overpayment resulting from the failure to comply with same by Contractor, or its staff, agents, or subcontractors. Contractor acknowledges that the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) and the rules and regulations as promulgated by the United States Department of Labor in Title XXIX of the Code of Federal Regulations are applicable to this Agreement. Contractor shall abide by all federal laws that affect the delivery of services under this Agreement, including the Titles VI, VII, XIX of the Social Security Act, the Federal Rehabilitation Act of 1973, the Davis Bacon Act (40 U.S.C. § 276a et seq.), the Copeland Anti-Kickback Act (40 U.S.C. § 276c), and the Americans with Disability Act of 1993 (including 28 C.F.R. § 35.100 et seq.). Contractor shall comply all requirements or regulations as the United States Department of Health and Human Services that are currently applicable or become applicable from time to time.

10.10 No Kickbacks / Gratuities. Contractor is not, and has not been, a party to any agreement, whether written or oral, calling for Contractor's payment to any third party, whether directly or indirectly, of any commission, gratuity, "kickback," or other similar thing or amount to obtain, or in consideration of, DCH's entry into this Agreement. In the performance of this Agreement, Contractor shall not offer or give, directly or indirectly, to any employee or agent of the State of Georgia, any gift, money or anything of value, or any promise, obligation, or contract for future reward or compensation at any time during the term of this Agreement, and shall comply with the disclosure requirements set forth in O.C.G.A. § 45-1-6.

10.11 Drug-Free Workplace. Contractor has, and will maintain throughout the Term, a "drug-free workplace," as required by the "Drug-Free Workplace Act" (O.C.G.A. Section 50-24-1). Contractor shall include and enforce a similar provision in any subcontracts.

10.12 Truth and Correctness. No representation or warranty by Contractor herein, nor any written statement or certificate or other instrument furnished to DCH by Contractor pursuant to this Agreement or in connection with the transactions contemplated by this Agreement (i) contains, or will contain, any untrue statement of a material fact or (ii) omits, or will omit, to state a material fact necessary to make the statements contained herein or therein, in light of the circumstances under which such statements are made, not misleading.

10.13 Survival of Representations and Warranties. The representations and warranties made in this Agreement shall survive the execution of this Agreement and the termination of the License (or any License Right to the extent that this Agreement expressly provides for severable termination of License Rights) except as may be expressly indicated otherwise.

## 11. PERFORMANCE WARRANTIES AND REMEDIES.

11.1 *Warranty Period.* The “**Warranty Period**” begins on the Acceptance Date. The Warranty Period expires if and when (i) the Term expires, or (ii) the License is terminated, whichever occurs first.

### 11.2 *As-documented Warranty.*

11.2.1 *Definition of As-Documented Warranty.* Contractor warrants to DCH that during the Warranty Period the System will operate in all Material respects in accordance with the Contractor's Proposal, the Licensed Documentation, and any Additional Performance Standards set forth in one or more Change Order Schedules. Such warranty is referred to in this Agreement as the “**As-Documented Warranty.**”

11.2.2 *Deadline for Reports of Breaches of As-Documented Warranty.* No instance of noncompliance with the As-Documented Warranty will be deemed to be a Breach of that warranty, unless DCH reports it to Contractor in accordance with Section 9.1 of this Agreement, relating to Bug Reports, prior to the expiration of the Warranty Period.

11.2.3 *Attempts to Correct Alleged Breach.* Upon receipt of notice of such alleged Breach of the As-Documented Warranty, Contractor will attempt to correct the Breach, and DCH may attempt to correct the Breach itself, in either case in accordance with the corrective-maintenance provisions of Section 9 of this Agreement.

11.2.4 *Remedies for Breach.* If Contractor is unable to correct, or otherwise fails to correct, the Breach of the As-Documented Warranty within thirty (30) days after Contractor receives notice thereof, then DCH may terminate all or any part of this Agreement and, in its sole and absolute discretion, avail itself of either the Refund Remedy or the Cover Remedy, as well as the rights under Section 5.5 of this Agreement.

### 11.3 *Physical Media Warranty.*

11.3.1 Contractor warrants to DCH, subject to the warranty exclusions set forth in this Section 11.3 and in Section 11.6 of this Agreement, that each Licensed Copy of any part of the System that Contractor provides to DCH is and will be free from physical defects in the media that tangibly embodies the Copy (the “**Physical Media Warranty**”), subject to the following provisions in this Section 11.3. The Physical Media Warranty does not apply to defects discovered more than thirty (30) days after the date of delivery of the Copy by Contractor.

11.3.2 The Physical Media Warranty does not apply to defects arising from acts of non-Contractor Personnel, misuse, theft, vandalism, fire, water, acts of God, or other peril.

11.3.3 DCH's sole remedy for Breach of the Physical Media Warranty, to the exclusion of all other remedies therefor, will be replacement by Contractor, at Contractor's expense and including shipping and handling costs, of any copy provided by Contractor that does not comply with the Physical Media Warranty.

11.4 No Surreptitious Code Warranty.

11.4.1 Contractor warrants to DCH that no part of the System contains or will contain any Self-Help Code or any Unauthorized Code (defined below). This warranty is referred to in this Agreement as the “**No Surreptitious Code Warranty.**”

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

11.4.3 As used in this Agreement, “**Unauthorized Code**” means any virus, Trojan horse, worm, or other software routines or hardware components that are designed: (i) to permit unauthorized access in order to disable, erase, or otherwise harm software, hardware, or data, or (ii) to perform any other such actions. The term Unauthorized Code does not include Self-Help Code.

11.5 Y2K Compliance. Contractor represents and warrants that the System will be designed to be used with data created prior to, during, and after the calendar year 2000 A.D., and that the System will operate without error relating to date data, specifically including any error relating to, or the product of, date data which represents or references different centuries or more than one century.

11.5.1 Without limiting the generality of the foregoing, Contractor further represents and warrants:

- (i) That the System will not abnormally end or provide invalid or incorrect results as a result of date data, specifically including date data which represents or references different centuries or more than one century;
- (ii) That the System has been designed to ensure year 2000 compatibility, including date data century recognition, calculations that accommodate same century and multi-century formulas and date values, and date data interface values that reflect the century; and
- (iii) That the software includes Year 2000 Capabilities.

11.5.2 For the purposes of this Agreement, “**Year 2000 Capabilities**” means the System:

- (i) will manage and manipulate data involving dates, including single century formulas and multi-century formulas, and will not cause an abnormally ending scenario within the application or generate incorrect values or invalid results involving such dates; and

- (ii) provides that all date-related user interface functionalities and data fields include the indication of century; and
- (iii) provides that all date-related data interface functionalities include the indication of century.

11.5.3 If Contractor is unable to correct, or otherwise fails to correct, a Breach of the warranty contained in this Section 11.5, within thirty (30) days after Contractor receives notice thereof, then DCH may terminate all or any part of this Agreement and, in its sole and absolute discretion, avail itself of either the Refund Remedy or the Cover Remedy, as well as the rights under Section 5.5 of this Agreement

11.6 *Scalability*. Throughout the Term, the number of concurrent Authorized Users that the System can support will be scalable. As the intended or expected number of Authorized Users increases, the number of servers responding to, and supporting the transactions of, the Authorized Users will increase. Contractor will design and build the System on a platform that will accommodate scalable growth.

11.6.1 The System will permit database and application processing to be spread across multiple servers in a synchronized manner. The architecture of the System will enable efficient utilization of server resources.

11.6.2 The System will contain design features, such as fault tolerance and load balancing, that reduce the System's reliance on any one hardware or software component and thereby ensure that the System will provide consistent and reliable service throughout the Term.

11.6.3 Contractor will ensure that, during the Term, the System is able to accommodate at least a twenty percent (20%) annual increase in the number of Authorized Users without suffering any degradation of its performance and without any additional cost to DCH. If the number of Authorized Users increases by more than twenty percent (20%) in one year, then Contractor may charge DCH the Direct Costs required to ensure that the System can accommodate the increase in Authorized Users, to the extent the increase exceeds said twenty percent (20%).

11.7 *Warranty Limitations*. Contractor's warranties are limited, and apply only, as follows:

11.7.1 Contractor's warranties do not extend to operation of the System on any hardware configuration, nor in any operating environment (e.g., operating system), other than as defined by the As-Documented Warranty.

11.7.2 Contractor's warranties do not extend to operation of the System in conjunction with any computer program (e.g., "terminate and stay resident" utility programs) other than as defined by the As-Documented Warranty.

11.7.3 Except as may be expressly agreed in writing by Contractor, Contractor's warranties do not apply to:

- (i) any part of the System that is modified by any Person other than Contractor; or
- (ii) Use of the System other than in accordance with the most current operating instructions provided by Contractor; or
- (iii) Bugs caused by defects, problems, or failures of hardware or software that is not or was not provided by Contractor.

11.8 *Disclaimer of All Other Warranties and Representations.* The express warranties and express representations set forth in this Agreement are in lieu of, and Contractor disclaims, any other warranties, conditions, or representations (express or implied, oral or written), with respect to the System or any part thereof, including any implied warranties or conditions of title, noninfringement, merchantability, or fitness or suitability for any purpose (regardless of whether Contractor knows, has reason to know, has been advised, or is otherwise in fact aware of any such purpose), whether alleged to arise by law, by reason of custom or usage in the trade, or by course of dealing.

## 12. INTELLECTUAL PROPERTY MATTERS.

### 12.1 *Rights in Inventions, Works, and Data.*

#### 12.1.1 Definitions. As used in this Agreement:

- (i) "**Conceived**" and "**Conception**," as to an Invention, are used in the same sense as in the patent laws of the United States, and generally speaking refer to the formation of a complete mental picture of the Invention, requiring only routine work by a hypothetical person of ordinary skill in the art to which the Invention pertains to reduce the Invention to practice.
- (ii) "**Invention**" means any invention, discovery, process, art, method (including mathematical algorithms), machine, manufacture, composition of matter, or improvement thereof, whether or not patentable, to the extent that it is the subject of an Intellectual Property Right.
- (iii) "**Work of Authorship**" means: (i) a work of authorship protectable under the copyright laws of an applicable jurisdiction, or (ii) a mask work protectable under the semiconductor chip protection laws of an applicable jurisdiction.
- (iv) "**Relating to the System**" (i) with respect to an Invention, means that the Invention was Conceived or reduced to practice as a direct result of Development Services; and (ii) with respect to a Work of Authorship, means that the Work of Authorship was created within the scope of Development Services.

- (v) “**Licensed-Back,**” with respect to an Invention or Work of Authorship created by one or more DCH Personnel (alone or jointly with one or more Contractor Personnel), means that Contractor has a worldwide, nonexclusive, royalty-free, irrevocable license to engage in all Licensable Activities utilizing the Invention or Work of Authorship that are encompassed by one or more Intellectual Property Rights owned or assertable by DCH.

12.1.2 Ownership of Inventions and Works of Authorship. The ownership of any Inventions or Works of Authorship relating to the System that may be made by Contractor Personnel during the Term shall be owned by Contractor, but shall be subject to the License.

12.1.3 No Ownership by the Federal Government. The Parties specifically agree, in accordance with Federal Acquisition Regulation (FAR) 12.212, that the rights to any software or computer program licensed or developed by Contractor pursuant to this Agreement shall rest and remain with Contractor, and Contractor shall not be required to:

- (i) Furnish technical information related to commercial computer software programs or commercial computer program documentation to the Federal Government; or
- (ii) Relinquish to, or otherwise provide, the Federal Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer program or commercial computer program documentation.

12.1.4 Ownership and Use of Data. All data generated by the System (“**DCH Data**”) are owned by DCH or its Affiliates. Contractor is expressly prohibited from sharing or publishing the DCH Data without the prior written consent of DCH.

12.1.5 State Property. Contractor agrees that any papers, materials and other documents that are produced or that result, directly or indirectly, from or in connection with Contractor’s provision of the Services shall be the property of DCH, upon creation of such documents, for whatever use that DCH deems appropriate. Contractor further agrees to execute any and all documents, or to take any additional actions that may be necessary in the future to effectuate this provision fully. Contractor shall be responsible for the proper custody and care of any state-owned property furnished for Contractor’s use in connection with the performance of this Agreement. Contractor will also reimburse DCH for its loss or damage, normal wear and tear excepted, while such property is in the Contractor’s custody or use.

## 12.2 Noninfringement Representation and Warranty.

12.2.1 Representation and Warranty Concerning Noninfringement. Contractor hereby makes a Knowledge Representation and warrants to DCH that the Exercise of License Rights pursuant to this Agreement will not infringe any valid and subsisting Intellectual Property Right owned by Persons other than DCH or an Affiliate of DCH (the “**Noninfringement Warranty**”).

12.2.2 No Representation Concerning Combination Use. Contractor makes no representation concerning any Knowledge or lack thereof with respect to the possibility of such infringement as a result of Combination Use of the System. The Parties agree that Contractor has no duty to investigate or to warn DCH of any such possibility of infringement by Combination Use. As used in this Agreement, “**Combination Use**” of software means Use of software in combination or conjunction with any of the following, unless such Use is shown to be infringing when not in combination or conjunction with any of the following, or unless such use is expressly described in the user documentation or expressly identified as noninfringing in this Agreement:

- (i) any software other than the software in question;
- (ii) any apparatus; and/or
- (iii) any non-Use activities by any Person.

12.2.3 Notice of Breach. Upon receipt of an allegation of a Breach of the Noninfringement Warranty, DCH shall notify Contractor in accordance with Section 17.7 of this Agreement.

### 12.3 Defense of Infringement Claims by Third Parties.

12.3.1 Initial Remedy for Infringement. Upon receipt of allegations or proof of a Breach of the Noninfringement Warranty, DCH may, in its sole and absolute discretion, invoke the infringement defense provisions of this Section 12.3.

12.3.2 Limited Covenant to Defend. If DCH invokes the provisions of this Section 12.3, Contractor, at its own expense and subject to the terms and conditions of this Section 12.3, will Defend Claims brought against DCH or its Affiliates by third parties that any of the following activities by DCH or its Affiliates constitutes infringement of an Intellectual Property Right under the laws of the United States or any of its states:

- (i) any making or distribution of copies of any portion of the System that is expressly permitted by this Agreement (but not the creation of derivative works except as may be expressly agreed otherwise in writing by Contractor);
- (ii) Use of the System (unaltered and unmodified by any Person other than Contractor) in accordance with the term of this Agreement for a purpose (or to achieve an effect) that is described in the Licensed Documentation and consistent with the terms and conditions of this Agreement, other than Combination Use of the System.

12.3.3 Conditions for Contractor Defense. To be entitled to Defense by Contractor against a third-party infringement Claim:

- (i) DCH shall notify Contractor of the existence of the Claim, by the most expeditious reasonable means, immediately upon learning of the assertion of

the Claim against DCH (whether or not litigation or other proceeding has been filed or served); and

- (ii) DCH shall permit Contractor to have the sole right to control the Defense and/or settlement of all such Claims, in litigation or otherwise, so long as no such settlement adversely affects DCH's ability to exercise the License Rights without DCH's prior consent.

12.4 *Infringement Injunctions Obtained by Third Parties.* If a third-party infringement Claim, of which Contractor was notified, is sustained in a final judgment from which no further appeal is taken or possible, and such final judgment includes an injunction prohibiting DCH from continued Use of the System or portions thereof, then Contractor shall, in its sole election and at its expense:

- (i) procure for DCH the right to continue to use the System pursuant to this Agreement; or
- (ii) replace or modify the System to make it noninfringing; or
- (iii) direct DCH to cease use of the System or of the specific function(s) of the System that resulted in the final judgment.

12.5 *DCH's Remedies.* If Contractor directs DCH to cease use of all or any part of the System or of one or more specific functions of the System pursuant to Section 12.4 of this Agreement, then DCH will have the options set forth in this Section 12.5.

12.5.1 DCH, in its sole and absolute discretion, may avail itself of the Refund Remedy or the Cover Remedy.

12.5.2 Notwithstanding the remedy selected by DCH pursuant to Section 12.5.1 of this Agreement, DCH may direct Contractor to pay or otherwise satisfy any monetary award entered against DCH as part of a final judgment in connection with a third-party infringement Claim, to the extent that such award is adjudged in such final judgment to arise from such infringement, and provided Contractor was notified.

12.6 *Contractor's Confidential/Proprietary Information.* Because DCH is a public agency of the State of Georgia, any information received by DCH is subject to disclosure under the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.* (the “**Open Records Act**”).

12.6.1 If Contractor deems any information submitted by Contractor under this Agreement to be a “trade secret” under Georgia law, which information should not be disclosed by DCH under the provisions of the Open Records Act, Contractor shall mark such information “TRADE SECRET.”

12.6.2 Contractor shall include with the information marked as a trade secret a memorandum that sets forth the factual and legal basis for the classification of the information as a trade secret, including:

- (i) why the information derives economic value from not being generally known,
- (ii) how other persons may obtain economic value from the disclosure of such information, and
- (iii) a summary of the procedures that have been employed by Contractor to maintain the secrecy of the information.

12.6.3 DCH shall advise Contractor of any request for inspection of records under the Open Records Act, if such request seeks information that includes information that Contractor submitted to DCH and marked as a trade secret. Prior to making a decision to disclose such information, DCH will provide Contractor with an opportunity to respond to such request.

12.6.4 If DCH determines that the information marked as a trade secret fails to meet the requirements of the Open Records Act and should be disclosed, then DCH shall so notify Contractor and shall not disclose such information prior to 4:30 p.m. of the third day following the day of notification of Contractor, unless earlier disclosure is required under the Open Records Act. Unless otherwise required by court order or direction, no disclosure shall be made while legal proceedings regarding the issue of disclosure are pending. Any disclosure may be made under such limiting conditions as DCH shall determine to be appropriate.

12.7 Confidential/Proprietary Information of DCH and its Affiliates. Contractor acknowledges and agrees that the DCH Data includes sensitive personal medical information concerning Plan Participants, the confidentiality of which is subject to various federal and state laws, including regulations promulgated from time to time by the Healthcare Financing Administration. Contractor shall safeguard such information in accordance with this Section 12.6 and applicable law, as in effect from time to time.

12.7.1 Restrictions. Contractor, using utmost care, shall hold in trust for DCH and its Affiliates and shall not, except in order to carry out Contractor's rights and obligations under this Agreement, use or disclose to any other party or allow any other party to inspect, copy or use any confidential information pertaining to DCH, its Affiliates, or any Plan Participants, which information may, from time to time, be disclosed to Contractor in connection with Contractor's performance of the Services.

12.7.2 Definition of Confidential Information of DCH and its Affiliates. As used herein, the term "**DCH Confidential Information**" means the DCH Data and any other information that relates to the operation of the Plans, the health care services provided to Plan Participants, or other information concerning the business, financial, or personal affairs of DCH, its Affiliates, or any Plan Participants, except such information that: (i) is in the public domain at the time of its disclosure to Contractor, (ii) Contractor rightfully received from a third party without restrictions, or (iii) DCH and/or its Affiliates has agreed to permit Contractor to disclose to third parties.

12.7.3 Survival. The obligations imposed by this Section 12.6 shall survive any expiration or termination of this Agreement.

12.7.4 Security Procedures. At all times during the performance of this Agreement and any Services, Contractor shall abide by all applicable security standards, guidelines, and procedures of federal and state law and of DCH and its Affiliates, including those set forth in this Agreement or the RFP. Contractor shall include and enforce such provisions in subcontracts and in contracts of employment of individuals engaged in the performance of Services, as shall be necessary to ensure the non-disclosure of DCH Confidential Information by such Persons.

### **13. RISK ALLOCATION / INDEMNITY / INSURANCE.**

13.1 Exclusion of Incidental and Consequential Damages. Independent of, severable from, and to be enforced independently of, any other enforceable or unenforceable provision of this Agreement, other than for infringement of one Party's Intellectual Property Rights by the other Party (including any engagement in activities by DCH beyond the scope of the License), neither Party will be liable to the other Party (nor to any Person claiming rights derived from the other Party's rights) for incidental, consequential, special, punitive, or exemplary damages of any kind— including lost profits, loss of business, or other economic damage, and further including injury to property, but specifically excluding the Refund Remedy and the Cover Remedy – as a result of Breach of any warranty or other provision of this Agreement, regardless of whether the Party liable or allegedly liable was advised, had other reason to know, or in fact knew of the possibility thereof.

13.2 Intentional Risk Allocation. Contractor and DCH each acknowledges that the provisions of this Agreement were negotiated to reflect an informed, voluntary allocation between them of all risks (both known and unknown) associated with the transactions associated with this Agreement. The warranty disclaimers and limitations in this Agreement are intended to limit the circumstances of liability. The remedy limitations, and the limitations of liability, are separately intended to limit the forms of relief available to the Parties.

13.3 Indemnity. Contractor will defend DCH against any and all claims, and hold DCH harmless against any and all losses or expenses, subject to the limitations of warranties, remedies, and liability herein, arising from or otherwise in respect of:

13.3.1 any inaccuracy in any representation, and any Breach of any warranty or covenant, of Contractor contained in this Agreement or in any certificate, document, or instrument delivered to DCH by Contractor pursuant to this Agreement; and

13.3.2 the operation of Contractor's business relating to the System both before and after the date of this Agreement, including Contractor's provision of the Development Services, the Administrative Services, and the Support Services.

13.4 Indemnity and Defense Administrative Provisions.

13.4.1 Applicability of this Section. The provisions of this Section 13.4 shall govern all Defenses against Claims, Indemnities against Losses or Expenses, and claims to entitlement to Defense or Indemnity.

13.4.2 Defense Procedure. DCH shall notify Contractor within thirty (30) days of the assertion of any Claim(s) or discovery of any fact upon which DCH intends to base a claim for Defense and/or Indemnification under this Agreement. DCH's failure to so notify Contractor will not, however, relieve Contractor from any liability under this Agreement to DCH with respect to Defense or Indemnity with respect to such Claim(s).

13.4.3 Participation in and Control of Defense. If Contractor Defends DCH in a lawsuit, arbitration, negotiation, or other proceeding concerning a Claim pursuant to this Agreement:

- (i) DCH will have the right to engage separate counsel, at Contractor's expense, to monitor and advise DCH about the status and progress of the matter.
- (ii) With respect to any issue involved in a matter as to which Contractor has acknowledged the obligation to Indemnify DCH, Contractor will have the sole right to control the Defense of (and/or to settle or otherwise dispose of) the matter on such terms as Contractor in its judgment deems appropriate, provided the Office of the Attorney General of the State of Georgia notifies DCH that it is satisfied that Contractor has the financial ability to carry out its Defense obligations (and its Indemnity obligations if any).

13.4.4 Offset of Indemnity Amounts. If Contractor is required to Indemnify DCH, DCH may offset, against any payments subsequently due to Contractor from DCH, any amount remaining unpaid under such Indemnity.

13.4.5 No Defense or Indemnity for Own Negligence or Misconduct. Contractor will not be required to Defend or Indemnify DCH with respect to Losses or Expenses finally adjudged to have been caused by the negligence or willful misconduct (i.e., misconduct in bad faith) of DCH or its Affiliate.

13.4.6 Advancement of Defense Expenses to DCH. Contractor shall pay or reimburse reasonable expenses incurred by DCH if DCH is, or is threatened to be, made a named defendant or respondent in a matter, in advance of the final disposition of the proceeding, after Contractor receives a written undertaking by or on behalf of DCH to repay the amount paid or reimbursed, if and to the extent it is ultimately determined that DCH was not entitled to be Defended under this Section 13.4.

13.5 Performance Bond. During the Term, Contractor shall obtain and maintain a performance bond issued by a reputable surety company authorized to do business in the State of Georgia or an irrevocable letter of credit in the amount of [aggregate dollar amount of the Agreement] (\$\_\_\_\_) and shall deliver such bond to DCH within five (5) days following the effective date of the Agreement. The performance bond shall be forfeited, or the letter of credit shall be redeemed, by DCH if Contractor is unable to perform the Agreement and/or the Agreement is terminated by default or bankruptcy.

13.6 Payment Bond. During the Term, Contractor shall obtain and maintain a payment bond issued by a licensed surety company authorized to do business in the State of Georgia or an irrevocable letter of credit in the amount of \_\_\_\_ *[total amount due to subcontractors or suppliers]*

*under the terms of Contractor's Proposal*] \_\_\_\_\_ (\$ \_\_\_\_\_) and shall deliver such bond to DCH within five (5) days following the effective date of the Agreement. The payment bond shall be forfeited or the letter of credit redeemed if necessary to ensure that Contractor pays, as required by law, of all persons supplying labor and/or material in the execution of the Services.

#### **14. TERM / BREACH / TERMINATION.**

##### **14.1 Term of the Agreement.**

14.1.1 General Term. The term of this Agreement (the "**Term**") shall begin on the Effective Date and will expire on June 30, 2002, unless renewed as provided herein. DCH shall have six (6) options to renew this Agreement, each for an additional one (1) state fiscal year (July 1st through June 30<sup>th</sup>) (the "**Renewal Option**"), subject to Section 14.1.2 of this Agreement. Each Renewal Option shall be exercisable by DCH, in its sole and absolute discretion, by providing written notice of renewal to Contractor. Except as set forth in Section 3.3 and 5.4 of the main body of the RFP, each Renewal Option shall be upon the same terms, conditions, and price in effect at the time of the renewal.

14.2.2 BOR Plans. As of the Effective Date of this Agreement, the BOR Plans are operated on a calendar year basis (January 1st through December 31st). Each Renewal Option shall apply to both the DCH Plans and the BOR Plans, subject to the implementation dates for each Plan pursuant to **Appendix A**. Notwithstanding any provision to the contrary, however, in the event this Agreement is not renewed for any reason pursuant to Section 14.1.1 of this Agreement, including the expiration of the final Renewal Option, this Agreement shall remain in full force and effect for purposes of the BOR Plans until December 31st of the then current calendar year.

14.2 Notice of Breach; Cure Period. If Contractor Breaches any warranty, covenant, or other provision of this Agreement occurs, then the following notice and cure procedures shall apply.

14.2.1 DCH shall give Contractor notice describing the Breach and stating the time, as provided below, within which the Breach must be cured. If a provision of this Agreement sets forth a specific cure period for the Breach in question, then that provision shall take precedence over any cure period set forth in this Section 14.2.

14.2.2 No cure period is required if:

- (i) this Agreement sets forth specific deadline dates for the obligation allegedly Breached, or
- (ii) the termination is to be in connection with the DCH's invocation of the Refund Remedy in accordance herewith, or
- (iii) this Agreement otherwise states that no cure period is required in connection with the termination in question.

14.2.3 If Contractor's Breach relates to an obligation to pay money or Contractor's **nonwillful** Breach of an obligation relating to DCH's Intellectual Property Rights, then

Contractor shall have five (5) Business Days to cure the Breach after DCH provides Contractor with written notice of such Breach.

14.2.4 If Contractor's Breach is a **willful** Breach of an obligation relating to DCH's Intellectual Property Rights, then DCH may, in its sole and absolute discretion, specify in the notice of Breach that no cure period will be permitted.

14.2.5 If Contractor's Breach is other than a Breach of the kind described in either Sections 14.2.3 or 14.2.4 of this Agreement, then the cure period will be for thirty (30) days after DCH gave notice of the Breach to Contractor.

14.3 Terminations of the License Rights and/or All or a Portion of the Services.

14.3.1 Terminations by Mutual Consent. The Parties may terminate the License, any License Right, or all or any portion of the Services by mutual consent and upon such terms as the Parties may agree in writing.

14.3.2 Unilateral Termination by DCH. DCH may unilaterally terminate the License at any time, effective immediately upon notice to Contractor. Further, DCH may unilaterally terminate the Administrative Services and retain the Support Services, or vice versa. Finally, DCH may unilaterally terminate the Administrative Services and/or the Support Services, to the extent such Services relate to the BOR Plans and retain such Services as they relate to all other Plans. If DCH unilaterally terminates all or any portion of the Administrative Services or the Support Services, then the Administrative Services Fee and/or the Support Services Fee shall, as appropriate, be proportionately reduced.

14.3.3 Termination for Breach. If Contractor fails to cure a Breach by the end of its cure period (if any), then this Agreement shall terminate immediately upon the expiration of that cure period, without the need for further action on the part of DCH.

14.4 Other Terminations. The License shall terminate automatically, to the extent permitted by applicable law in the jurisdiction or jurisdictions in question (*e.g.*, bankruptcy law), in any of the following events:

14.4.1 If Contractor files a petition in bankruptcy (or is the subject of an involuntary petition in bankruptcy that is not dismissed within sixty (60) days after the effective filing date thereof); or is or becomes insolvent; or admits of a general inability to pay its debts as they become due; then in any such event this Agreement shall immediately terminate automatically and without notice; **provided, however**, that the License shall continue and DCH may exercise its rights under Section 5.5 of this Agreement.

14.4.2 DCH may terminate this Agreement immediately upon the discovery that Contractor made a Material false statement or other Material misrepresentation in connection with this Agreement.

14.4.3 DCH may terminate this Agreement immediately upon any failure by Contractor to provide, within ten (10) Business Days after notice, satisfactory and adequate

assurances to DCH that Contractor is able and willing to fully and effectively perform its obligations under this Agreement.

14.5 Post-termination Procedures. Upon termination or expiration for any reason of the Agreement, the License, or of a License Right:

14.5.1 The Parties shall comply with their respective post-termination obligations, if any, as set forth herein.

14.5.2 Except as may be expressly provided otherwise herein, within ten (10) Business Days after the effective date of termination or expiration of the License, each Party shall pay the other Party any amounts that as of that effective date were due and owed thereto pursuant to this Agreement.

14.5.3 DCH shall surrender to Contractor (or, at DCH's option with Contractor's consent, destroy and provide Contractor with a certificate signed by an executive officer of DCH attesting to such destruction) all copies of any part of the System remaining in the possession of DCH or any Person acquiring any such copy through DCH.

14.5.4 Contractor shall surrender to DCH (or, at Contractor's option with DCH's consent, destroy and provide DCH with a certificate signed by an executive officer of Contractor attesting to such destruction) all copies of any DCH Confidential/Proprietary Information, including the DCH Data, that are remaining in the possession of Contractor or any Person acquiring any such copy through Contractor.

14.6 Refund Remedy Definition.

14.6.1 The “**Refund Remedy**” will be for Contractor to pay DCH (and/or credit against any amounts owed or becoming owed to Contractor by DCH) an amount of money determined as set forth in Section 14.6.2 of this Agreement. If invoked, the Refund Remedy shall be to the exclusion of all other remedies available to DCH, except as expressly stated otherwise in this Agreement.

14.6.2 The amount of money to be paid or credited to DCH by Contractor as the Refund Remedy will be equal to the sum of:

- (i) the Administrative Services Fee and the Support Services Fee for the then-current period for which the Administrative Services Fee and the Support Services Fees are paid under Section 8.2 of this Agreement, *plus*
- (ii) a declining percentage of the Development Services Fee (100% of the Development Services Fee during the first year of the Term; 80%, 60%, 40%, and 20% of the Development Services Fee in the second, third, fourth, and fifth years, respectively, of the Term; and 0% thereafter).

14.6.3 The Refund Remedy will be exercisable by DCH only in connection with a termination of the License by DCH upon a failure of other remedies enumerated herein for Breach of a warranty or covenant made by Contractor.

14.7 Cover Remedy Definition.

14.7.1 The “**Cover Remedy**” will be for Contractor to pay DCH (and/or credit against any amounts owed or becoming owed to Contractor by DCH) an amount of money determined as set forth in Section 14.7.2 of this Agreement. If invoked, the Cover Remedy shall be to the exclusion of all other remedies available to DCH, except as expressly stated otherwise in this Agreement.

14.7.2 The amount of money to be paid or credited to DCH by Contractor as the Cover Remedy will be equal to the sum of all Losses that DCH incurs in connection with obtaining the Services from a substitute contractor, including the difference between the cost of such Services, obtained in such manner, and the cost of such Services under the terms of this Agreement, as well as any penalties assessed by federal or state law. Contractor acknowledges and agrees that, for a variety of reasons, such damages may significantly exceed the costs of obtaining the Services pursuant to the terms of this Agreement.

14.7.3 The Cover Remedy will be exercisable by DCH only in connection with DCH's termination of the Agreement in accordance with its terms or upon the failure of other remedies enumerated in this Agreement for Breach of a warranty or covenant made by Contractor.

**15. DISPUTE RESOLUTION.**

15.1 Progressive Dispute Negotiation Procedures. If a dispute, controversy, or claim arising out of, or connected with, this Agreement, including any question regarding the existence, validity, or termination of this Agreement arises, or if a dispute, controversy, or claim arising out of, or connected with the relationship of the Parties with regard to any matters set forth in this Agreement arises (a “**Dispute**”), and the Dispute is not resolved by agreement between the respective Personnel of the Parties responsible for day-to-day administration and performance of this Agreement, then the Parties shall attempt to resolve the Dispute by means of the procedure set forth in this Section 15.

15.1.1 Prior to the filing of any suit with respect to such a dispute, the Party believing itself aggrieved (the “**Invoking Party**”) will call for progressive management involvement in the dispute negotiation by notice to the other Party. Such a notice will be without prejudice to the Invoking Party's right to any other remedy permitted by this Agreement.

15.1.2 The Parties will use their best efforts to arrange personal meetings and/or telephone conferences as needed, at mutually convenient times and places, between negotiators for the Parties at the following successive management levels, each of which will have a period of allotted time as specified below in which to attempt to resolve the dispute:

**Prior to Acceptance:**

	CONTRACTOR	DCH	ALLOTTED TIME
First Level	Project Director	Project Director	10 Business Days
Second Level	_____	DCH Legal Counsel	10 Business Days
Third Level	_____	Commissioner of DCH	30 Business Days

**Following Acceptance (with regard to Administrative Services):**

	CONTRACTOR	DCH	ALLOTTED TIME
First Level	Administrative Services Coordinator	Administrative Services Coordinator	10 Business Days
Second Level	_____	DCH Legal Counsel	10 Business Days
Third Level	_____	Commissioner of DCH	30 Business Days

**Following Acceptance (with regard to Support Services):**

	CONTRACTOR	DCH	ALLOTTED TIME
First Level	Key Contractor Support Personnel	Authorized User Support Coordinator	10 Business Days
Second Level	_____	DCH Legal Counsel	10 Business Days
Third Level	_____	Commissioner of DCH	30 Business Days

15.1.3 The following principles shall apply to the negotiation schedule:

- (i) The allotted time for the first-level negotiators will begin on the effective date of the Invoking Party's notice.
- (ii) If a resolution is not achieved by negotiators at any given management level at the end of their allotted time, then the allotted time for the negotiators at the next management level, if any, will begin immediately.
- (iii) If a resolution is not achieved by negotiators at the final management level within their allotted time, then either Party may initiate litigation in accordance with parameters set forth in this Section 15.

15.2 Remedies. Except as otherwise provided herein or in this Agreement, the remedies set forth herein or in this Agreement are not exclusive, and either Party will be entitled alternatively or cumulatively to damages for Breach of this Agreement or to any other remedy available under applicable law.

15.3 Choice of Law. This Agreement, and any claims arising out of the relationship between the Parties as a result of this Agreement and the subject matter hereof, including claims arising under tort law as well as contract law, will be interpreted and enforced in accordance with the law of the State of Georgia applicable to agreements made and performed entirely in that state by Persons domiciled therein.

15.4 Jurisdiction and Venue. If any suit to enforce this Agreement or any provision of this Agreement is brought, it will be brought exclusively in the state courts located in Fulton County, Georgia, or in the federal court located in Atlanta, Georgia.

## **16. FEES AND TERMS OF PAYMENT.**

16.1 Procedures for Invoices. DCH shall compensate Contractor in accordance with the payment schedule set forth in Contractor's Proposal. Each invoice must: (i) reference this Agreement (Number GTA-000011), (ii) be itemized to identify the activities for which DCH is being billed, and (iii) include Contractor's tax identification number. Contractor should mail the invoices to the following address:

GA Department of Community Health  
Agreement and Procurement Administration  
P. O. Box 38026  
Atlanta, Georgia 30334

16.2 Payment for Development Services. DCH will pay each invoice related to Development Services Fees within thirty (30) days of receipt of the invoice and approval of deliverables by DCH's Project Director.

16.3 Payment for Administrative Services. DCH will pay each invoice related to Administrative Services within thirty (30) days of receipt of the invoice and approval by DCH's Administrative Services Coordinator.

16.4 Payment for Support Services. DCH will pay each invoice related to Support Services within thirty (30) days of receipt of the invoice and approval by one of DCH's Authorized User Support Coordinators.

16.5 Funding. Notwithstanding any other provision of this Agreement, this Agreement will terminate immediately and absolutely in whole or in part without further obligation of DCH at any time that appropriated and otherwise unobligated funds are no longer available to satisfy the obligations of DCH under the Agreement. Determination of the unavailability of funds shall be made in the sole discretion of DCH or its Affiliates. DCH shall give written notice to Contractor of the unavailability of funds and termination of this Agreement.

16.6 Payment of Taxes. Contractor will forthwith pay all taxes lawfully imposed upon it with respect to this Agreement or any product delivered, or Services performed, pursuant to this Agreement. DCH makes no representation whatsoever as to Contractor's liability for, or exemption from liability from, any tax imposed by any governmental entity.

## 17. GENERAL ADMINISTRATIVE PROVISIONS.

17.1 Assignment. No Party may assign and/or delegate any right or obligation under this Agreement, and any purported assignment will be null and void and a Breach of this Agreement, except for the following or as otherwise provided herein.

17.1.1 Either Party may assign some or all of its rights and/or delegate some or all of its obligations under this Agreement with the express prior written consent of the other Party, which consent may not be unreasonably withheld.

17.1.2 Any Party may assign all of its rights indivisibly to an Affiliate of that Party. The Affiliate in question must agree in writing to comply with the assigning Party's obligations under this Agreement and be bound by the terms of this Agreement. This clause does not in itself authorize the assigning Party to delegate its duties under this Agreement.

17.2 Entire Agreement.

17.2.1 Except as may be expressly provided otherwise herein, this Agreement constitutes the entire agreement between the Parties concerning the subject matter thereof. No prior or contemporaneous representations, inducements, promises, or agreements, oral or otherwise, between the Parties with reference thereto will be of any force or effect.

17.2.2 Each Party represents and warrants that, in entering into and performing its obligations under this Agreement, it does not and will not rely on any promise, inducement, or representation allegedly made by or on behalf of the other Party with respect to the subject matter hereof, nor on any course of dealings or custom and usage in the trade, except as such promise, inducement, or representation may be expressly set forth herein.

17.2.3 No modification or amendment to this Agreement will be valid or binding unless reduced to writing and duly executed by the Party or Parties to be bound thereby.

17.3 No Unauthorized Use of Trademarks. In order to preserve the value of each Party's name and/or any trademarks, service marks, trade names, or trade dress adopted and/or used by that Party from time to time, the other Party shall not make any use of any of the same for any reason (e.g., in advertising, press releases, or other publicity) except solely as may be expressly authorized by this Agreement or otherwise authorized in writing by that Party.

17.4 Survival of Restrictive Covenants. The covenants herein concerning Intellectual Property Rights will be construed as independent of any other provision hereof. The existence of any claim or cause of action by a Party against the other Party, whether predicated on this Agreement or otherwise, shall not constitute a defense to enforcement by the other Party of such covenants.

17.5 Effect of Partial Invalidity. If any one or more of the provisions of this Agreement should be ruled wholly or partially invalid or unenforceable by a court or other government body of competent jurisdiction, then:

- (i) the validity and enforceability of all provisions of this Agreement not ruled to be invalid or unenforceable will be unaffected;
- (ii) the effect of the ruling will be limited to the jurisdiction of the court or other government body making the ruling;
- (iii) the provision(s) held wholly or partly invalid or unenforceable will be deemed amended, and the court or other government body is authorized to reform the provision(s), to the minimum extent necessary to render them valid and enforceable in conformity with the Parties' intent as manifested herein; and
- (iv) if the ruling, and/or the controlling principle of law or equity leading to the ruling, is subsequently overruled, modified, or amended by legislative, judicial, or administrative action, then the provision(s) in question as originally set forth in this Agreement will be deemed valid and enforceable to the maximum extent permitted by the new controlling principle of law or equity.

17.6 Business Judgment. In any circumstance where this Agreement provides for either Party to make a determination in its judgment, that judgment will be conclusive and binding, regardless of any allegation of malice or bad faith on the part of that Party, unless it be shown by clear and convincing evidence that a prudent person in the management of his or her own affairs could not have made the judgment in question in the same circumstances.

17.7 Notices. Any notice or communication required or permitted in this Agreement shall be in writing and shall be deemed to have been duly given on the day of service if served personally or three (3) days after mailing if mailed by first class mail, registered or certified, postage prepaid, and addressed as follows:

Contractor: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DCH: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(with a copy, which shall not constitute notice, to): BOR: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

17.8 No Waiver. The failure of either Party at any time to require performance by the other Party of any provision of this Agreement shall in no way affect the right of such Party to require performance of that provision. Any waiver by either Party of any Breach of any provision of

this Agreement shall not be construed as a waiver of any continuing or succeeding Breach of such provision, a waiver of the provision itself, or a waiver of any right under this Agreement.

17.9 *Binding on Successors.* This Agreement will be binding upon and inure to the benefit of the Parties and their successors and assigns permitted by this Agreement.

17.10 *Section Headings.* The section headings contained in this Agreement are for reference purposes only and shall in no way control the meaning or interpretation of this Agreement.

17.11 *Representation of Counsel / Mutual Negotiation.* Each Party has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated and prepared at the joint request, direction, and construction of the Parties, at arms length, with the advice and participation of counsel, and will be interpreted in accordance with its terms without favor to any Party.

17.12 *Counterparts.* This Agreement may be executed in separate counterparts, each of which so executed and delivered shall constitute an original, but all such counterparts shall together constitute one and the same instrument. Any such counterpart may comprise one or more duplicates or duplicate signature pages any of which may be executed by less than all of the Parties, provided each Party executes at least one such duplicate or duplicate signature page. The Parties stipulate that a photostatic copy of an executed original will be admissible in evidence for all purposes in any proceeding as between the Parties.

17.13 *Compliance with Auditing and Reporting Requirements for Nonprofit Organizations.* Contractor shall comply with the provisions of the Federal Single Audit Act (the "**Audit Act**") as amended from time to time, as well as all applicable implementing regulations, including any disclosure requirements imposed upon non-profit organizations by the Georgia Department of Audits as a result of the Act, and shall make complete restitution to the Department of any payments that the Georgia Department of Audits, the Georgia Attorney General's Office, or any of their respective employees, agents, or assigns find to be improper under the provisions of the Audit Act.

17.14 *Incorporation by Reference and Conflict in Language.* The RFP, Contractor's Proposal, and the Development Plan are incorporated in this Agreement by this reference. In the event of a conflict in language between the various documents incorporated into this Agreement, the provisions and requirements shall be construed in the following order of priority: (i) this contract document, consisting of seventeen (17) sections, (ii) the Development Plan, (iii) the Appendices, (iv) the main body of the RFP, and (v) Contractor's Proposal.

17.15 *Time of the Essence*. Time is of the essence in the performance of the obligations described in this Agreement.

Executed the dates written below, to be effective as of \_\_\_\_\_, 20\_\_ (the “**Effective Date**”).

**CONTRACTOR:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**DEPARTMENT OF COMMUNITY HEALTH**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Solely for the purposes set forth in Section 2.1 of this Agreement.**

**BOARD OF REGENTS:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**SOFTWARE DEVELOPMENT AND LICENSE  
AGREEMENT**

**AND**

**ADMINISTRATIVE SERVICES  
AND  
SUPPORT SERVICES  
AGREEMENT**