

# STANDARD TERMS AND CONDITIONS

Department of Public Safety of the State of Texas

OGC Approved 9/1/2021

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## **ARTICLE 1, INTRODUCTION**

Any contract resulting from a DPS solicitation incorporates the following Standard Terms and Conditions. Subcontractors must also comply with these provisions.

### **1.1 GLOBAL DRAFTING CONVENTIONS**

- A. "Includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration. Use of the terms does not create a presumption that components not expressed are excluded.
- B. Any references to laws, rules, regulations, and guidance in the Contract are references as they exist at the time of execution and as they may be amended, changed, or supplemented during the life of the Contract.

### **1.2 HEADINGS**

The headings, captions, and arrangements used in the Contract are, unless specified otherwise, for reference and convenience only and do not alter the interpretation of the Contract.

### **1.3 AUTHORIZED REPRESENTATIVES**

- A. Contractor must designate its authorized representative in its solicitation response but also no later than the effective date of the Contract. Contractor's authorized representative may designate other people (such as a contract manager or project manager) to assist in the performance of certain obligations required by the Contract.
- B. DPS's authorized representative is the only person authorized to make or approve changes in any Contract requirements. If Contractor makes any change at the direction of any person other than the Director or his legally designated representatives (his Deputy Directors), DPS will consider the change to have been made without authority and no adjustment will be made in the Contract price to cover any increase in cost incurred as a result.

### **1.4 SEVERABILITY**

The parties acknowledge that if a dispute between the parties arises out of the Contract or the subject matter of the Contract, including a dispute over possibly ambiguous language, they would want the court to interpret the Contract as follows:

- A. With respect to any provision that it holds to be unenforceable, by changing that provision to the minimum extent necessary to make it enforceable or, if that change is not permitted by law, by disregarding that provision;
- B. If an unenforceable provision is changed or disregarded in accordance with this section, by holding that the rest of the Contract will remain in effect as written;
- C. By holding that any unenforceable provision will remain as written in any circumstances other than those in which the provision is held to be unenforceable; and
- D. If changing or disregarding the unenforceable provision would result in failure of an

essential purpose of the Contract, by holding the entire Contract unenforceable.

**1.5 APPLICABLE LAW; VENUE**

The Contract will be governed by and construed in accordance with the laws of the State of Texas. The venue of any suit arising under the Contract is fixed in any state court of competent jurisdiction in Travis County, Texas.

**ARTICLE 2, REMEDIES AND DISPUTES**

**2.1 TERMINATION**

The Contract may be terminated or cancelled in any of the following circumstances.

**2.1.1 Termination with Notification and Opportunity to Cure**

DPS will notify Contractor in writing of any failure, cause, or default if Contractor fails to carry out or comply with any requirements of the Contract (including any statement, affirmation, disclosure, certification, representation, or warranty in the Contract that is false, misleading, or erroneous in any material respect). DPS's notification will demand that the failure, cause, or default be remedied within ten days. DPS will have the right to cancel the Contract upon ten days from written notice if Contractor fails to remedy such failure, cause, or default within the ten days' period.

**2.1.2 Termination for Unavailability of Funds**

- A. The parties understand and agree that the obligations of DPS and its liabilities under the Contract are subject to the availability of funds given to DPS: (1) through appropriations from the Texas Legislature, (2) through federal funds, or (3) both.
- B. If DPS is unable to perform its obligations under the Contract as a result of the suspension, termination, or withdrawal of funding to DPS, the failure to fund DPS, or lack of sufficient funding of DPS for any activities or functions contained within the scope of the Contract, DPS may immediately terminate the Contract without prior notice and without penalty to or any liability whatsoever on the part of DPS, the State of Texas, and the United States, if these funds become unavailable to DPS. Contractor will have no right of action against DPS.
- C. DPS will make its best efforts to provide reasonable written advance notice to Contractor. In the event of a termination under this section, Contractor must, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination, either on the particular order if an order is being terminated, or the Contract if the Contract is being terminated. DPS will be liable for payments limited only to the portion of work DPS authorized in writing and which Contractor has completed, delivered to DPS, and which has been accepted by DPS in writing in accordance with all requirements of the Contract. All such work must have been completed, tested, and accepted in writing, per the requirements of the Contract,

prior to the effective date of termination.

### **2.1.3 Termination for Convenience**

DPS reserves the right to terminate the Contract any time, in whole, or in part, without cost or penalty, by providing 30 days' advance written notice of such termination to Contractor, if DPS determines that such termination is in the best interest of the State.

### **2.1.4 Termination by Mutual Agreement**

The Contract may be terminated upon mutual written agreement.

### **2.1.5 Termination for Failure to Perform**

- A. The Contract may be terminated by DPS if Contractor fails to perform as agreed or is otherwise in default, without the necessity of complying with the requirements in the section entitled "Termination with Notification and Opportunity to Cure." DPS will provide Contractor with written notice to terminate the Contract, which termination will become effective immediately upon Contractor's receipt of the notice.
- B. If Contractor fails to provide the deliverables or other performance in accordance with the provisions of the Contract, or fails to comply with any of the terms or conditions of the Contract, DPS may, upon written notice of default to Contractor, immediately terminate all or any part of the Contract. Termination is not an exclusive remedy, but will be in addition to any other rights and remedies provided in equity, by law or under the Contract.
- C. DPS may exercise any other right, remedy, or privilege that may be available to it under applicable law of the State and any other applicable law or may proceed by appropriate court action to enforce the provisions of the Contract, or to recover damages for the breach of the Contract. The exercise of any of the foregoing remedies will not constitute a termination of the Contract unless DPS notifies Contractor in writing prior to the exercise of such remedy. Contractor must remain liable for all covenants and indemnities under the Contract. Contractor must be liable for all costs and expenses, including court costs, incurred by DPS with respect to the enforcement of any of the remedies listed in the Contract.

### **2.1.6 Termination for Listing on Federal Excluded Party List, the Terrorism List (Executive Order 13224) or on the State of Texas Debarred Contractor List**

DPS will have the absolute right to terminate the Contract without recourse as follows: (a) if Contractor becomes listed on the prohibited Contractor list authorized by Executive Order 13224 "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism," published by the United States Department of Treasury, Office of Foreign Assets Control; (b) if Contractor becomes suspended or debarred from doing business with the federal government as listed in the System for Award Management (SAM) maintained by the General Services Administration; or (c) if Contractor becomes listed on the Texas

Debarred Vendor List. DPS will provide Contractor with written notice to terminate the Contract, which termination will become effective immediately upon Contractor's receipt of the notice.

### **2.1.7 Termination by Change of Law**

DPS may immediately terminate the Contract, in whole or in part, without penalty to, or any liability whatsoever on the part of DPS, the State of Texas, and the United States if DPS or the subject matter of the Contract become subject to a legislative or regulatory change or the revocation of statutory or regulatory authority that would render the deliverables to be provided under the Contract impossible, unnecessary, void, substantially amended, or that would terminate the appropriations for the Contract. DPS is not required to provide 30 days' written notice as termination under this section is immediate.

### **2.1.8 General Termination Provisions; All Contracts are Non-Exclusive**

- A. The termination of the Contract, under any circumstances, will not affect or relieve Contractor from any obligation or liability that may have been incurred under the Contract, and such cancellation by DPS will not limit any other right or remedy available to DPS at law or in equity.
- B. The Contract does not grant Contractor a vested property right and Contractor has no guarantee of exclusivity. DPS reserves the right, in its sole discretion, to solicit or contract with other contractors for similar subject matter, services, or deliverables to those under the Contract at any time. Additionally, Contractor is not guaranteed any minimum amount of compensation.
- C. DPS will not be considered in default or breach of the Contract, nor will it give rise to any liability whatsoever on the part of DPS whether such claims of Contractor are for compensation of anticipated profits, unabsorbed overhead, interest on borrowing, or for any other reason in the event of termination.
- D. Contractor must, unless mutually agreed upon in writing, cease all work immediately upon the effective date of termination. DPS will be liable for payments limited only to the portion of the work DPS authorized in writing and which Contractor has completed, delivered to DPS, and which have been accepted by DPS. All such work will have been completed, per the Contract's requirements, prior to the effective date of termination.
- E. Contractor must deliver to DPS all completed, or partially completed work and any and all documentation or other products and results of these services no later than the first day after the termination of the Contract, or at DPS's request. Failure to timely deliver such work or all documentation or other products and results of the services will be considered a material breach of the Contract. Contractor will not make or retain any copies of the work or any documentation or other products and results of the services without the prior written consent of DPS.

- F. DPS reserves the right to recover reasonable costs, fees, expenses, and other amounts or damages available to DPS under the Contract or under applicable law, including, attorneys' fees and court costs, if termination is at Contractor's request or if termination is for cause. This right is in addition to any other remedies available to DPS under the Contract or applicable law. DPS reserves the right to pursue all applicable rights and remedies if the Contract is terminated for any reason and DPS expressly waives no such rights or remedies.
- G. DPS reserves the right to cancel the Contract without notice and either re-solicit or re-award the Contract to the next best responsive and responsible contractor if Contractor defaults on the Contract. DPS will not consider the defaulting Contractor in the re-solicitation and DPS may not consider the defaulting Contractor in future solicitations for the same type of work, unless the specification or scope of work significantly changes. DPS will determine the period of suspension based on the seriousness of the default.
- H. DPS and the State of Texas will not be liable to Contractor for any damages, claims, losses, or any other amounts arising from or related to any such termination if the Contract is terminated for any reason. However, Contractor may be entitled to the remedies provided in Tex. Gov't Code Chapter 2260.
- I. The transition duties of Contractor survive the termination of the Contract, regardless of the reason for the termination.

## 2.2 CURE; DISPUTE RESOLUTION

### 2.2.1 Further Opportunity to Cure

- A. If an Event of Default of the type specified in section entitled "Termination with Notification and Opportunity to Cure" occurs and if Contractor reasonably believes that such Event of Default cannot be cured within the ten business days allowed in the section entitled "Inspection of Services" but that such Event of Default can be cured through a diligent, on-going, and conscientious effort on the part of Contractor, within a reasonable period not to exceed three months, then Contractor may, within the ten-day cure period, submit a detailed plan for curing the Event of Default to DPS.
- B. DPS will promptly review Contractor's plan for curing an Event of Default and may, at its discretion, allow Contractor to pursue such plan of cure.
- C. DPS will communicate its decision in writing to Contractor.
- D. DPS may not exercise its remedies hereunder with respect to such Event of Default while Contractor diligently, conscientiously, and timely undertakes to cure the Event of Default in accordance with the approved plan.
- E. The ten-day time period will be tolled during the time the request was pending, if DPS does not allow Contractor an extension of the cure period.

### **2.2.2 Dispute Resolution**

- A. Any dispute arising under the Contract, which is not disposed of by mutual agreement between DPS and Contractor will be resolved as follows:
1. The dispute resolution process provided for in Tex. Gov't Code Chapter 2260 must be used, as further described in this section, by Contractor to attempt to resolve all disputes or contract claims arising under the Contract.
  2. Contractor's claim for breach of the Contract that the parties cannot resolve in the ordinary course of business must be submitted to the negotiation process provided in Tex. Gov't Code Chapter 2260, Subchapter B.
  3. Contractor must initiate the process by submitting written notice, as required by Subchapter B, to the Procurement and Contract Services Director or designee, at 5805 North Lamar Blvd, Bldg. A, Austin, Texas 78752.
  4. Said notice will specifically state that the provisions of the Tex. Gov't Code Chapter 2260, Subchapter B, are being invoked, and will also be given to all other representatives of DPS and Contractor otherwise entitled to notice under the Contract.
  5. Compliance by Contractor with the Tex. Gov't Code Chapter 2260, Subchapter B, is a condition precedent to the filing of a contested case proceeding under Chapter 2260, Subchapter C.
  6. The contested case process provided in Tex. Gov't Code Chapter 2260, Subchapter C, is Contractor's sole and exclusive process for seeking a remedy for an alleged breach of the Contract by DPS if the parties are unable to resolve a dispute under this subparagraph (A).
  7. Compliance with the contested case process provided in the Tex. Gov't Code Chapter 2260, Subchapter C, is a condition precedent to sue from the Legislature under Tex. Civ. Prac. & Rem. Code Chapter 107.
  8. Neither the execution of the Contract by DPS nor any other conduct of any representative of DPS related to the Contract will be considered a waiver of sovereign immunity to suit.
- B. In addition to complying with Tex. Gov't Code Chapter 2260, Contractor must comply with DPS administrative rules published in 37 Tex. Admin. Code Chapter 34, Subchapter C, Mediation of Certain Contract Disputes.
- C. Contractor must continue providing the deliverables as directed, in a diligent manner and without delay, and must conform to DPS directives, decisions, or orders, be governed by all applicable provisions of the Contract, unless directed otherwise in



writing by DPS at all times during the course of the dispute resolution process.

Contractor may suspend performance during the pendency of such claim or dispute if Contractor has complied with all provisions of Tex. Gov't Code § 2251.051 and such suspension of performance is expressly applicable and authorized under that law.

### **2.3 ROLLING ESTOPPEL**

- A. DPS will be conclusively deemed to have fulfilled its obligations under the Contract, unless DPS receives a deficiency report from Contractor within five business days of the occurrence of the alleged deficiencies and Contractor identifies specific deficiencies in DPS's fulfillment of its obligations in that report. Deficiencies will be described in terms of how they have impacted the specific performance requirements of Contractor. Contractor is estopped from claiming that a situation has arisen that might otherwise justify changes in the project timetable, the standards of performance under the Contract, or the project cost, if Contractor knew of that problem and failed to include it in the applicable report. The deficiency report will be sent to DPS's Contract Monitor.
- B. In the event Contractor identifies a situation in which DPS is impairing Contractor's ability to perform for any reason, Contractor's deficiency report will contain Contractor's suggested solutions to the situation(s). These suggestions should be in sufficient detail so that the DPS Contract Monitor can make a prompt decision as to the best method of dealing with the problem and continuing the project in an unimpeded fashion.

### **2.4 SURVIVAL OF OBLIGATIONS**

Termination of the Contract for any reason will not release Contractor from any liability or obligation set forth in the Contract that is expressly stated to survive any such termination or by its nature would be intended to be applicable following any such termination, including the provisions regarding confidentiality, indemnification, warranty, transition, records, audit, property rights, dispute resolution, invoice and fees verification, and any other provisions of the Contract that impose continuing obligations on either of the parties or that govern the rights and limitations of either of the parties after the expiration or termination of the Contract.

### **2.5 NO WAIVER OF DEFENSES**

Nothing in the Contract will be construed as a waiver of the state's sovereign immunity. The Contract will not constitute or be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to the State of Texas. The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to the State of Texas under the Contract or under applicable law will not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or to be considered as a basis for estoppel. DPS does not waive any privileges, rights, defenses, or immunities available to DPS by entering into the Contract or by its conduct prior to or subsequent to entering into the Contract.

## **2.6 FORCE MAJEURE**

Neither Contractor nor DPS will be liable for failure or delay to perform obligations under the Contract, which have become practicably impossible because of circumstances beyond the reasonable control of the applicable party. The existence of such causes of delay or failure will extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. Force Majeure is defined as natural disasters; acts of God; acts of terrorism; war; government acts or orders; epidemics, pandemics or outbreak of communicable disease; quarantines; national or regional emergencies; or any other cause, whether similar in kind to the foregoing or otherwise, beyond the party's reasonable control. The applicable party must inform the other in writing, with proof of receipt, within five business days of the existence of such force majeure and actions taken to minimize the impact, or otherwise waive this right as a defense. All delivery dates under the Contract affected by force majeure will be tolled for the duration of the force majeure event. When feasible, the parties agree not to cancel, but reschedule the pertinent obligations and deliverables for mutually agreed upon dates as soon as practicable after the force majeure condition ceases to exist.

## **2.7 FORESEEABLE DELAY**

If a delay in delivery of a deadline or other performance under the Contract is foreseeable and the delay is not caused by a force majeure event, Contractor must give written notice to DPS. DPS has the right, in its sole discretion, to extend the delivery date if DPS determines the reasons for the delay are acceptable to DPS. Contractor must keep DPS advised at all times of the status of the delay.

Contractor's failure to perform under the Contract and failure to meet the requirements of the Contract, including Contractor delays not accepted by DPS, may result in DPS issuing a new solicitation or entering into another contract for the subject matter of the Contract.

Contractor must pay all costs to DPS due to a re-solicitation or contracting under this section.

## **2.8 NOTICES**

Any notice required or permitted under the Contract will be directed to Contractor's Project Manager and DPS's Contract Administrator and will be deemed received: (1) When delivered in hand and a receipt granted; (2) Three days after it is deposited in the United States mail by certified mail, return receipt requested; or (3) When received if sent by confirmed facsimile or confirmed email.

Either of the parties may change its address or designated individual(s) to receive notices by giving the other party written notice as provided above, specifying the new address or individual and the date upon which it will become effective.

## **2.9 NO LIABILITY FOR INCREASED COSTS OR DAMAGES**

DPS will not be liable to Contractor for any increased costs or expenses that may be incurred by Contractor, or for any other damages that may be suffered by Contractor as a result of any act

or omission of any other contractor to the State of Texas or DPS.

**ARTICLE 3, AMENDMENTS AND CONTRACTOR CHANGES**

**3.1 AMENDMENTS**

DPS and Contractor may amend the Contract through a written amendment signed by an authorized signatory on behalf of the respective party.

**3.2 NO AMOUNTS PAID FOR UNAUTHORIZED PERFORMANCE**

Contractor will not receive compensation for performance not authorized under the Contract, including any performance prior to the effective date of a written Contract amendment signed by both parties. Any such performance is at the sole risk of Contractor.

**3.3 NO CONFLICT WITH LAWS OF THE STATE OF TEXAS**

Any subsequent addition to the solicitation or amended language to the Contract that conflicts with the laws of the State of Texas is void.

**3.4 OPTION TO EXTEND THE INITIAL TERM OF THE CONTRACT**

DPS may, at its sole discretion, extend the term of the Contract by written Contract amendment to Contractor prior to the Contract's expiration. The preliminary notice does not commit DPS to an extension. If DPS exercises this option, the extended Contract will be considered to include this option provision.

**3.5 OPTION TO EXTEND SERVICES PAST ALL EXERCISED TERMS**

DPS may require continued performance of any services within the scope and at the rates specified in the Contract. DPS reserves the right to extend the Contract by written Contract amendment for a no more than six-month period at the end of all exercised optional Contract renewal periods for the purpose of re-advertising the commodity or service, awarding a new Contract, or transitioning into a new Contract.

**3.6 CONTRACTOR CHANGES (INCLUDES SUCCESSORS AND ASSIGNEES)**

Contractor may not assign or transfer any interest in or duty under the Contract without the express, prior written consent of DPS, with DPS providing such consent at its sole discretion. An attempted assignment in violation of this provision is null and void. Any approved assignment will not relieve the assignor of any liability or obligation under the Contract.

Contractor must submit timely written notification to DPS of any changes in Contractor status, including changes in Contractor's name, organizational structure, ownership, affiliated entities, principals, mergers, acquisitions, address, telephone number, facsimile number, or email address with an effective date of such change. Contractor must submit to DPS a copy of any "DBA" registration and any legal corporate name change filed with the Secretary of State.

Contractor must provide written notification to DPS of any contractor changes prior to the change; however, assignment of the Contract and performance under the Contract are limited as provided under the Contract.

Contractor must provide detailed information requested by DPS, including without limitation the tax identification number of the proposed new contractor. All written notifications of organizational change must include a detailed statement specifying the change and supporting documentation evidencing continued right of Contractor or successor entity, as applicable, to maintain its status as a party to the Contract.

Notwithstanding DPS's receipt of written notification by Contractor under this section, DPS may, in its sole discretion, terminate the Contract due to any change that DPS believes materially alters Contractor's ability to perform under the Contract in accordance with all terms and conditions.

DPS may require a novation agreement dependent upon the change, but especially in the event of a merger or acquisition. DPS may have to amend the Contract dependent upon the change.

### **ARTICLE 4, INDEMNIFICATION**

#### **4.1 INDEMNIFICATION (GENERAL)**

**CONTRACTOR MUST DEFEND, INDEMNIFY, AND HOLD HARMLESS THE STATE OF TEXAS AND DPS, AND THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES ARISING OUT OF, OR RESULTING FROM ANY ACTS OR OMISSIONS OF CONTRACTOR OR ITS AGENTS, EMPLOYEES, SUBCONTRACTORS, ORDER FULFILLERS, OR SUPPLIERS OF SUBCONTRACTORS IN THE EXECUTION OR PERFORMANCE OF THE CONTRACT AND ANY PURCHASE ORDERS ISSUED UNDER THE CONTRACT. THE DEFENSE MUST BE COORDINATED BY CONTRACTOR WITH THE OFFICE OF THE TEXAS ATTORNEY GENERAL (OAG) WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CONTRACTOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM OAG. CONTRACTOR AND DPS AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.**

#### **4.2 INDEMNIFICATION (INTELLECTUAL PROPERTY)**

**CONTRACTOR MUST DEFEND, INDEMNIFY, AND HOLD HARMLESS DPS AND THE STATE OF TEXAS FROM AND AGAINST ANY AND ALL CLAIMS, VIOLATIONS, MISAPPROPRIATIONS, OR INFRINGEMENT OF ANY PATENT, TRADEMARK, COPYRIGHT, TRADE SECRET, OR OTHER INTELLECTUAL PROPERTY RIGHTS OR OTHER INTANGIBLE PROPERTY, PUBLICITY, OR PRIVACY RIGHTS OR IN CONNECTION WITH OR ARISING FROM: (1) THE PERFORMANCE OR ACTIONS OF CONTRACTOR UNDER THE CONTRACT; (2) ANY DELIVERABLE, WORK PRODUCT, CONFIGURED SERVICE, OR OTHER SERVICE PROVIDED UNDER THE CONTRACT; OR DPS'S USE OF OR ACQUISITION OF ANY REQUESTED SERVICES OR OTHER ITEMS PROVIDED TO DPS BY CONTRACTOR OR OTHERWISE TO WHICH DPS HAS ACCESS AS A RESULT OF CONTRACTOR'S PERFORMANCE UNDER THE CONTRACT. CONTRACTOR AND DPS AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. CONTRACTOR WILL BE LIABLE TO PAY ALL COSTS OF DEFENSE, INCLUDING ATTORNEYS' FEES. THE DEFENSE WILL BE COORDINATED BY CONTRACTOR WITH OAG WHEN TEXAS STATE AGENCIES ARE NAMED**

**DEFENDANTS IN ANY LAWSUIT AND CONTRACTOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM OAG. IN ADDITION, CONTRACTOR WILL REIMBURSE DPS AND THE STATE OF TEXAS FOR ANY CLAIMS, DAMAGES, COSTS, EXPENSES, OR OTHER AMOUNTS, INCLUDING ATTORNEYS' FEES AND COURT COSTS, ARISING FROM ANY SUCH CLAIM. IF DPS DETERMINES THAT A CONFLICT EXISTS BETWEEN ITS INTERESTS AND THOSE OF CONTRACTOR OR IF DPS IS REQUIRED BY APPLICABLE LAW TO SELECT SEPARATE COUNSEL, DPS WILL BE PERMITTED TO SELECT SEPARATE COUNSEL AND CONTRACTOR WILL PAY ALL REASONABLE COSTS OF DPS'S COUNSEL.**

**ARTICLE 5, CONTRACT PERFORMANCE**

**5.1 NO SUBSTITUTIONS**

Contractor may not substitute or cancel commodities or services without the prior written approval of an authorized representative of DPS.

**5.2 DELIVERY TIMES**

Contractor may only deliver during normal business hours only or as written into the solicitation, unless prior written approval for late delivery has been obtained from DPS's authorized representative.

**5.3 TITLE AND RISK OF LOSS**

As required by state law, title and risk of loss for deliverables will not pass to DPS until DPS actually receives, takes possession, and accepts the deliverables at the point or points of delivery.

**5.4 RECALL NOTICE**

Upon discovery of any recall notice, Contractor must immediately advise DPS of all required replacements or changes to any equipment or hardware provided under the Contract or the withdrawal of any such equipment or hardware due to a safety hazard or recall regardless of the nature of it. Contractor must submit a written confirmation to the DPS Contract Monitor no later than 24 hours after any verbal notification.

**5.5 TESTING; ACCEPTANCE; RETURN; REVOCATION**

- A. All samples requested in the solicitation will be subject to inspection and testing by DPS or the State of Texas. DPS reserves the right to test samples upon request and Vendor bears all costs of such testing.
- B. After Contract award, but prior to payment, DPS may conduct acceptance testing on the commodities and services delivered under the Contract. If the delivered and installed items fail to meet the acceptance criteria or any other requirements, DPS may refuse to accept such items. Upon DPS's acceptance that the commodities and services meet or exceed all Contract requirements, DPS will notify Contractor in writing that Contractor may submit an invoice to DPS. DPS reserves the right to revoke prior acceptance for, among other things, latent defects.

- C. If relevant to the type of services provided under the Contract, Contractor must have a separate Production, Quality Assurance (QA), and User Acceptance (UAT) testing environment. Updates must be tested and approved by DPS prior to deployment to production. If incorporated, reference the exhibit entitled IT Standards and Requirements.

### 5.6 INSPECTION

- A. DPS has the right to inspect and validate all commodities and services in the Contract, to the extent practicable at all times and places during the Contract. DPS will perform inspections in a manner that will not unduly interfere with Contractor's performance of the Contract. Contractor must furnish, and must require subcontractors to furnish, at no increase in the Contract's price, all reasonable assistance for the safe and convenient performance of these duties.
- B. If any deliverables do not conform to the Contract's requirements, DPS will require Contractor to perform the deliverables or services again in conformity with the Contract's requirements, at no increase in the Contract's amount, in addition to all other legal and equitable remedies.
- C. DPS will, subject to limitations provided by law with respect to rights of privacy, have the right to reasonably prompt access and to examine all records of Contractor, including financial records, maintenance records, employee records including time, and attendance records generated by Contractor and its subcontractors in connection with performance of the Contract.
- D. If subject to the outcome of an audit, it is determined that Contractor is in non-compliance with any provisions of the Contract or that money is owed to DPS by Contractor, then DPS will exercise its rights of recovery of money owed as authorized by the Contract.
- E. If any services are non-compliant with the Contract's requirements, Contractor will be notified describing specific areas of non-compliance. Contractor will have a ten-day period to file a written response detailing corrective action taken to address all such items of non-compliance. The response will include supporting documentation. Unless otherwise specified, or previously agreed to by DPS, the submission of a corrective action plan will not be accepted as corrective action. For all items of non-compliance satisfactorily resolved by agreement between Contractor and DPS, no further action regarding such items will be taken. If an item of non-compliance cannot be resolved between Contractor and DPS, and such item remains uncorrected for a period of ten days or longer after written notification to Contractor, then such item will be declared to be an "event of default."
- F. Contractor must provide entry at all times to DPS, the Public Safety Commission, or any authorized employee or agent for inspections and other official purposes. The Governor,

- members of the Legislature, and all other members of the Executive and Judicial Departments of the State of Texas, as well as any other persons designated by DPS, including the Office of the Inspector General, will be admitted to monitor the delivery of deliverables.
- G. Contractor must provide and maintain all documentation pertaining to quality testing, acceptance of deliverables, maintenance and warranty records, inventories of equipment per location, and all reports necessary under the terms of the Contract, in a manner acceptable to DPS for the deliverables provided under the Contract. Complete records of all inspection work performed by Contractor must be maintained and made available to DPS during the Contract's performance and for a period of seven years after the termination of the Contract.

### 5.7 PERSONNEL

#### 5.7.1 Qualifications of Personnel

- A. Contractor warrants that all personnel assigned to the Contract are Contractor employees, agents, or subcontractors and meet all qualifications as defined within the Contract to perform the work required.
- B. DPS must approve Contractor's selected upper level management personnel for administration of contracted services. DPS will not withhold approval unreasonably.
- C. Contractor must assign all personnel identified in the Contract to complete all of its planned and assigned responsibilities in connection with performance of the Contract. DPS will have the right to approve the assignment and replacement by Contractor of all personnel assigned to provide deliverables or to provide on-site representation of Contractor.
- D. If DPS requests it, Contractor must provide the name of an employee, agent, or subcontractor working on the Contract and all previous and pending investigations and disciplinary actions.

#### 5.7.2 Replacement of Personnel

- A. Contractor must notify DPS before assigning a replacement individual for any of the personnel commitments identified in the Contract. Contractor must notify DPS of the proposed assignment, must introduce the individual to the appropriate DPS representatives, must provide a transfer of knowledge validation, and must provide to DPS a résumé and any other information about the individual reasonably requested by DPS. DPS reserves the right to interview the individual before granting approval. Contractor must obtain prior written approval from DPS for any replacement personnel before beginning any work assignments.
- B. DPS reserves the right to require Contractor to replace Contractor's personnel (employees, agents, and subcontractors) whom DPS judges to be incompetent, careless,



- unsuitable, otherwise objectionable, or whose continued use DPS deems contrary to the best interests of DPS or the State of Texas. Before DPS issues a written request, DPS representatives and Contractor will discuss the circumstances of the proposed personnel replacement. Upon receipt of a written request from DPS's Contract Administrator, Contractor will be required to proceed with the replacement. The replacement request will include the desired replacement date and the reason for the request. Contractor must use its best efforts to effect the replacement in a manner that does not degrade performance or quality. Contractor must also provide DPS with evidence of a sufficient transfer of knowledge to the proposed replacement.
- C. Replacement of personnel, if approved by DPS, must be with personnel of equal or greater ability and qualifications. DPS will be the arbiter of whether the replacement personnel have equal or greater ability and qualifications than the personnel being replaced.
  - D. This provision will not give DPS the right to require Contractor to terminate any Contractor employee's employment. Rather, this provision gives DPS the right to require Contractor to discontinue using particular personnel in the performance of deliverables for DPS.

### **5.7.3 Unauthorized Removal of Personnel**

It is critical to the overall success of the project that Contractor not remove or reassign, without DPS's prior written approval, any of the assigned personnel until the personnel have completed all of their planned and assigned responsibilities in connection with performance of Contractor's obligations under the Contract. Without prior written approval from DPS, personnel must only be changed in the event of death, personal injury, debilitating illness, or termination of employment with Contractor. DPS will consider the unauthorized removal of personnel by Contractor as a material breach of the Contract and grounds for contract remedies, including termination.

## **5.8 WARRANTIES**

### **5.8.1 Third-Party Warranties**

If, under the Contract, Contractor procures any materials or products for DPS, Contractor must assign or otherwise transfer to DPS, or afford DPS the benefits of, any manufacturer's warranty for such materials or products that Contractor receives. Contractor must not knowingly infringe the intellectual property or proprietary rights of any third party. Contractor or any subcontractor will not use or copy any intellectual property owned by a third party without paying any required license fees or royalties.

### **5.8.2 Contractor Warranties**

Contractor and any subcontractor represent and warrant that it has the requisite qualifications, experience, personnel, and other resources to provide goods or services in the manner required by the Contract.



**5.9 SUSPENSION OF WORK**

- A. DPS may order Contractor, in writing, to suspend, delay, or interrupt all or any part of the Contract for the period of time that the Contract Monitor determines appropriate for the convenience of DPS.
- B. If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted:
  - 1. By an act of the Contract Monitor in the administration of the Contract, or
  - 2. By the Contract Monitor's failure to act within the time specified in this Contract (or within a reasonable time if not specified), an adjustment will be made for any increase in the cost of performance of the Contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the Contract changed in writing accordingly.
- C. A claim under this provision will not be allowed:
  - 1. For any costs incurred more than 20 days before Contractor will have notified the Contract Administrator in writing of the act or failure to act involved (but this requirement will not apply as to a claim resulting from a suspension order); and
  - 2. Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the Contract.

**5.10 STOP-WORK ORDER**

- A. The Contract Administrator may at the request of DPS, at any time, by written order to Contractor, require Contractor to stop all, or any part, of the work called for by the Contract for a period of up to 90 days after the order is delivered to Contractor, and for any further period to which the parties may agree. The order will be specifically identified as a stop-work order issued under this provision. Upon receipt of the order, Contractor must, at DPS's expense, immediately comply with its terms and take all reasonable steps to minimize the incurrence of cost allocable to the work covered by the order during the period of work stoppage. Within a period of up to 90 days after a stop-work order is delivered to Contractor, or within any extension of that period to which the parties must have agreed, the Contract Administrator may either:
  - 1. Cancel the stop-work order; or
  - 2. Terminate the work covered by the order as provided in the stop-work order of this Contract.
- B. If a stop-work order issued under this provision is canceled or the period of the order or any extension thereof expires, Contractor must resume work. DPS will make an equitable adjustment in the delivery completion schedule, the estimated cost, or both, and the Contract will be changed, in writing accordingly, if:

1. The stop-work order results in an increase in the time required for, or in Contractor's cost properly allocable to, the performance of any part of the Contract; and
  2. Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided that the Contract Administrator decides the facts justify the action, the Contract Administrator may receive and approve the claim submitted at any time before final payment under the Contract.
- C. If a stop-work order is not canceled and the work covered by the order is terminated, the Contract Administrator may allow reasonable cost resulting from the stop-work order in arriving at the termination settlement.
- D. An appropriate equitable adjustment may be made in any related contract of Contractor that provides for adjustment and is affected by any stop-work order under this provision. DPS will not be liable to Contractor for damages or loss of profits because of a stop-work order issued under this provision.

### 5.11 MONITORING CRITERIA

- A. DPS will monitor the quality of Contractor's performance under the Contract.
- B. Contractor must cooperate fully with DPS in obtaining the requisite information needed to complete such audits and to assess the quality of Contractor's performance.
- C. Monitoring may include document reviews and on-site audits conducted by DPS. Such monitoring by DPS will not relieve Contractor of any of its obligations under the Contract.
- D. The Contract Monitor and other DPS staff will provide written findings regarding non-compliant conditions, processes, procedures, and observations that could, if not addressed by Contractor, become an item of non-compliance.

### 5.12 SUBCONTRACTS

- A. Contractor must assume full responsibility for all deliverables and performance under the Contract. DPS will consider Contractor to be the sole point of contact with regard to contractual matters, including payment of any charges under the Contract. If any part of the Contract is planned to be subcontracted, Contractor must include a list of all subcontractors, including the firm name, address, and contact person of each subcontractor, a complete description of the deliverables or other work to be subcontracted, financial statements for each subcontractor, and descriptive information concerning each subcontractor's qualifications.
- B. Contractor may not delegate any duties under the Contract to a subcontractor unless DPS has given prior, written consent to the delegation. DPS must approve all subcontractors and will require Contractor to replace any subcontractor found, either

- initially or based on performance, to be unacceptable in DPS's opinion.
- C. The management of any subcontractor will be the sole responsibility of Contractor, and failure by a subcontractor to perform will be deemed to be failure of Contractor. Contractor must make all payments to subcontractors and suppliers. DPS will not direct payments for deliverables acquired in connection with the Contract other than to Contractor, nor will DPS release Contractor from having to perform any obligations under the Contract, notwithstanding the fact that a subcontractor may have been engaged by Contractor to perform those obligations.
  - D. Contractor will furnish to DPS copies of all subcontracts upon request. All subcontracts will include all applicable provisions contained in the Contract and any provisions required by law.
  - E. Contractor is solely responsible and accountable for the completion of all work for which Contractor has subcontracted. Should Contractor subcontract any of the commodities and services provided under the Contract, Contractor understands and acknowledges that in entering into such subcontracts, DPS is in no manner liable to any subcontractor of Contractor. In no event will this provision relieve Contractor of the responsibility for ensuring the commodities delivered and services rendered under all subcontracts are delivered and rendered in compliance with the Contract.

### 5.13 WORK MADE FOR HIRE

- A. For the purposes of the Contract, the term "Work" is defined as all reports, statistical analyses, work papers, work products, materials, approaches, designs, specifications, systems, documentation, methodologies, concepts, research, materials, intellectual property or any other property prepared, created, developed, produced, or generated in connection with the Contract specifically for DPS and defined as Work. Work does not include that which was prepared, created, developed, produced, or generated prior to the Contract award date (such as Contractor's preexisting assets, code, software, or COTS), but does include prior Work prepared, created, developed, produced, or generated specifically for DPS through any other or previous DPS contract with Vendor if there was Work in that contract (if, for example, Vendor is an incumbent with a contract for prior Work).
- B. All Work performed under the Contract is made the exclusive property of DPS. All rights, title, and interest in and to said property will vest in DPS upon creation and will be deemed to be a Work for Hire and made in the course of the services rendered under the Contract. To the extent that title to any such Work may not, by operation of law, vest in DPS, or such Work may not be considered a Work Made for Hire, Contractor grants DPS a perpetual, irrevocable, fully paid, royalty-free, worldwide license to reproduce, create derivative works from, distribute, publicly display, publicly perform, use, make, have made, offer for sale, sell or otherwise dispose of, and import the Work, with the right to sublicense each and every right. DPS will have the right to obtain and to

hold in its name all patents, copyrights, trademarks, registrations, or such other protection as may be appropriate to the subject matter, and any extensions and renewals. Contractor must give DPS or the State of Texas, as well as any person designated by DPS or the State of Texas, all assistance required to perfect the rights defined in the Contract without any charge or expense beyond those amounts payable to Contractor for services rendered under the Contract.

### 5.14 DPS OWNERSHIP

#### 5.14.1 Rights to Data, Documents, and Computer Software (State Ownership)

- A. Any DPS-owned data, DPS-created data, and DPS-loaned data from other governmental entities, biographic data, demographic data, image data inclusive of fingerprints, photograph and signatures or any other data or metadata in any form acquired or accessed by Contractor in the performance of its obligations under the Contract will be the exclusive property of the State of Texas and all such data will be delivered to DPS by Contractor upon completion, termination, or cancellation of the Contract.
- B. Contractor may not use, willingly allow, or cause to have such data used for any purpose other than the performance of Contractor's obligations under the Contract without the prior written consent of DPS.
- C. The ownership rights described within this section will include the right to copy, publish, display, transfer, prepare derivative works, or otherwise use the works.
- D. If DPS is not purchasing a license under the terms of the Contract, Contractor must provide, at no additional charge, appropriate licenses for DPS to use and access Contractor's deliverables and Contractor's pre-existing software or other intellectual or proprietary property that Contractor determines is necessary to facilitate the performance of Contractor's obligations under the Contract.

#### 5.14.2 Ownership of Property in Contracts that require Contractor to develop a report

- A. As used in this Section, the term "Contractor's Technology" means all intellectual property and pre-existing assets of Contractor created by Contractor prior to the Contract award date and used by Contractor, in its discretion, in performing services to DPS under the Contract. Notwithstanding anything else in the Contract to the contrary, the Final Report delivered by Contractor to DPS under the Contract will be the exclusive property of DPS and the State of Texas. DPS is not procuring and will not acquire ownership of any of Contractor's Technology under the Contract, and therefore, Contractor will not deliver to DPS a Final Report that includes Contractor's Technology that otherwise creates or could create issues of ownership and use for DPS or the State of Texas.
- B. Contractor may include its name and logo on the Final Report, but Contractor may not copyright the Final Report. Contractor understands that the Final Report will be subject

to the Texas Public Information Act and other law applicable to a consulting report commissioned by and delivered to the State of Texas.

### **5.15 OTHER CONTRACTS**

During the course of the Contract, DPS may award additional contracts to other contractors for similar services or transition services. DPS will provide notification to Contractor regarding any additional contractors and the scope of work that the additional contractors will be performing if necessary for Contractor to perform under the Contract. Contractor must work cooperatively with the additional contractors to ensure that contract performance is not delayed unnecessarily. Contractor will not commit or permit any act that would unduly interfere with the performance of work by any other contractors. This includes work during the term of the Contract as well as transitioning work to another Vendor or back to DPS.

### **5.16 INDEPENDENT CONTRACTOR**

Contractor (and its employees, representatives, agents, and any subcontractors) will serve as an independent contractor in providing deliverables or otherwise in its performance under the Contract. DPS will not deem Contractor and its employees, representatives, agents and any subcontractors as DPS employees.

### **5.17 PAYMENTS**

#### **5.17.1 Billing and Payment**

- A. Tex. Gov't Code Chapter 2251 (the Prompt Payment Act) will govern payment, payment disputes, and accrual of interest on any overdue payments.
- B. If DPS, for any reason, including lack of supporting documentation from Contractor, disputes any items in any invoices submitted by Contractor, DPS will place a hold on the disputed items and may pay the remaining amount of the invoice if undisputed. DPS will timely notify Contractor of the dispute and request clarification or remedial action.
- C. If the dispute is resolved in Contractor's favor, DPS will pay the remaining portion of the original invoice in accordance with the Prompt Payment Act. If the dispute is resolved in DPS's favor, Contractor must resubmit to DPS a revised and accurate invoice reflecting all corrections.

#### **5.17.2 Payment Adjustment**

- A. DPS may elect to deduct from Contractor payment as specified in this section or any amount specified in or any money determined to be due as specified in the Contract.
- B. If it is determined that the remaining amount of Contractor payment is not adequate to cover the money determined to be due to DPS, then all remaining Contractor payments will be withheld and an invoice issued to Contractor for the remaining amount due.

- C. Contractor must pay the invoiced amount within 30 days of receipt unless Contractor and DPS mutually agree on an alternative payment method.

**5.17.3 Deductions for Unacceptable Compliance**

If Contractor fails to comply with the terms of the Contract, DPS may withhold Contractor's payment. If non-compliance results in DPS purchasing goods or services from another entity to remedy the non-compliance, DPS will deduct those costs from Contractor's payment.

**5.17.4 Withholding of Payment**

- A. DPS will have the right to withhold Contractor's payment until the failures described below have been corrected.
  - 1. Failure to submit reports or other documentation required;
  - 2. Failure to comply with background check or security requirements;
  - 3. Failure to respond to audit reports; and
  - 4. Failure to correct identified areas of non-compliance to the satisfaction of DPS within ten days upon receipt of written notification.
- B. DPS will not pay interest to Contractor for monies so withheld.
- C. Contractor's withheld payment will be released upon DPS's satisfaction that compliance has been achieved for 30 consecutive days.
- D. In the event that money is due to DPS for Contractor's failure to provide adequate maintenance or replacement of the property as required in the Contract, the amount required for DPS to correct deficiencies and replace property will be withheld from the final payment.
- E. With the exception of disputed issues, such withholding of final payment by DPS will not exceed 120 days from date of the Contract's termination.

**5.17.5 Debts and Delinquencies**

DPS is prohibited from issuing any payment to a person or entity that has been reported as having an indebtedness or delinquency to the State of Texas. Contractor agrees and understands that, to the extent Contractor owes any debt or delinquent taxes to the State of Texas, DPS will apply any payments or other amounts Contractor is otherwise owed under the Contract toward the debt or delinquent taxes until the debt or delinquent taxes are paid in full. Contractor must comply with all applicable laws regarding satisfaction of debts or delinquencies to the State of Texas.

**5.17.6 Right to Offset**

In the event that DPS determines that Contractor owes money to DPS under any contract or purchase order, DPS, upon providing Contractor with written notice of its intent to offset, will have the right to withhold monies due to Contractor with respect to the Contract or with respect to any other contract or purchase order with DPS and apply such monies to the money due to DPS.

### **ARTICLE 6, PUBLICITY, MARKETING, AND PUBLIC INFORMATION**

#### **6.1 NEWS RELEASES, ADVERTISEMENTS, MARKETING, AND PUBLICITY**

- A. Contractor may not (1) make any news releases, public announcements, or public disclosures; (2) market to DPS employees or send emails to DPS employees that do not specifically pertain to contract requirements; or (3) have any conversations with representatives of the news media, pertaining to the Contract, without the express, prior written approval of DPS, and then only in accordance with explicit written instructions from DPS.
- B. Contractor may not use the name of the State of Texas or DPS or any state insignia in any advertisement, promotion or otherwise for any purpose regarding the Contract without the express prior written consent of DPS. DPS is not authorized to provide endorsements.
- C. Notwithstanding the foregoing, Contractor may make any disclosure required by law or regulation without the approval of DPS.

#### **6.2 PUBLIC INFORMATION ACT**

- A. Notwithstanding any provisions of the Contract to the contrary, Contractor understands that DPS is subject to and will comply with the Texas Public Information Act, Tex. Gov't Code Chapter 552, as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. DPS will notify Contractor in writing within a reasonable time from receipt of a request for information related to Contractor's work under the Contract. Contractor must cooperate with DPS in the production of documents responsive to the request. DPS will make a determination whether to submit a Public Information Act exception request to the Attorney General. Contractor must notify DPS within 24 hours of receipt of any third party requests for information that was provided by DPS for use in performing the Contract. The Contract and all data and other information generated or otherwise obtained in its performance may be subject to the Texas Public Information Act. Contractor must maintain the confidentiality of information received from DPS during the performance of the Contract, including information which discloses confidential personal information particularly, social security numbers.
- B. Contractor must make any information created or exchanged with a state governmental entity (as defined by Tex. Gov't Code § 2252.907(d)) under the Contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in at least one of the following formats that is accessible by the public at no additional



charge to the State of Texas and DPS : portable document format (pdf) compatible with the latest version of Adobe Acrobat®; Microsoft Word®; Microsoft Excel®; or, hard copy (paper).

- C. If Contractor must provide a Draft Report and Final Report according to the terms of the Contract, this section C applies. If not, this section is inapplicable to the Contract.
1. In a separate appendix to both the Draft Report and the Final Report, Contractor must include all information which DPS asserts is confidential under the Texas Public Information Act, including without limitation on the foregoing, any information which DPS asserts is confidential under Tex. Gov't Code § 552.139 related to computer network security, restricted information under Section 2059.055, or to the design, operation, or defense of a computer network. Contractor will not release any of DPS's information under the Contract without the prior written approval of DPS and Contractor must promptly refer any requests for this information to DPS for handling.
  2. As provided under Tex. Gov't Code § 2254.041, DPS may, in its discretion, distribute the Final Report delivered by Contractor under the Contract and post the public portion of the Final Report on DPS's Internet website or the website of a standing committee of the Texas Legislature. This Section does not affect the application of Tex. Gov't Code Chapter 552, to the Final Report.

### **ARTICLE 7, FEDERAL, STATE, AND LOCAL LAWS, RULES, AND REGULATIONS**

#### **7.1 DRUG-FREE WORKPLACE**

Contractor must comply with the applicable provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. Sections 8101-8106).

#### **7.2 DISCLOSURE OF INTERESTED PARTIES**

If DPS determines that Tex. Gov't Code § 2252.908 may apply to any contract awarded as a result of this solicitation, DPS will advise Vendor of its obligation to disclose interested parties to the Texas Ethics Commission (TEC) and DPS as specified in the statute. If Vendor is excepted under the limited provisions of Tex. Gov't Code § 2252.908(c), Vendor must affirmatively tell DPS and provide written documentation proving its exception.

When DPS determines this section applies, to execute a contract with DPS, Vendor must submit the required disclosures to TEC by completing TEC Form 1295, Certificate of Interested Parties. Even if Vendor has no interested parties to disclose, Vendor must still complete the TEC Form 1295 process to affirmatively declare that it has no interested parties.

TEC Form 1295 is an online form available at TEC's website:

[https://www.ethics.state.tx.us/whatsnew/elf\\_info\\_form1295.htm](https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm).

Upon completion, Vendor must submit the form online to TEC and then print the completed



form that includes the Certificate Number automatically assigned by TEC. Vendor's authorized agent must fill out all portions of the form, including the unsworn declaration, sign the printed form, and submit the form to DPS. The address for submission will be provided to the potential awardee(s).

For further information, see Tex. Gov't Code § 2252.908 and 1 Tex. Admin. Code Ch. 46 as well as TEC's website.

If Vendor does not timely submit a completed, declared, and signed TEC Form 1295 to DPS, DPS is prohibited by law from executing a contract with Vendor, even if Vendor is otherwise eligible for award. DPS may award the contract to the next successful potential awardee, who will then be subject to this procedure.

### **7.3 BUY TEXAS**

In accordance with Tex. Gov't Code § 2155.4441, Contractor agrees that during the performance of a contract for services it will purchase products and materials produced in Texas when they are available at a price and time comparable to products and materials produced outside Texas.

### **7.4 COMPLIANCE WITH STATE, FEDERAL, AND LOCAL LAWS, RULES, AND REGULATIONS**

- A. Contractor must comply with all applicable state, federal and local laws and ordinances in providing deliverables to DPS under the Contract. Without limiting the generality of the foregoing, Contractor must be able to demonstrate compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of W-2s to common law employees. Contractor must provide both federal and state unemployment insurance coverage and standard workers' compensation insurance coverage. Contractor must comply with all federal and state tax laws and withholding requirements. DPS will not be liable to Contractor/subcontractor or its employees for any unemployment insurance or workers' compensation coverage or federal or state tax withholding requirements. Contractor may be required to demonstrate compliance with such laws at the written request of DPS.
- B. Except as stated otherwise in the Contract, Contractor must provide all labor and equipment necessary to furnish the commodities and services under the Contract. All employees of Contractor must be the required minimum legal age for employment and experienced in the type of work to be performed. Absent prior, written permission from DPS, no visitors or relatives of Contractor's employees and subcontractors are allowed on state property.
- C. Contractor must ensure that at all times its personnel will observe and comply with all laws, regulations, and rules pertaining to state facilities, including, parking and security regulations and non-smoking policies. Additionally, Contractor and Contractor's personnel must comply with all relevant DPS policies and requirements that relate to the security of data and confidentiality of information, which requirements may include

the Federal Bureau of Investigation Criminal Justice Information Services (CJIS) Security Policy and Security Addendum, as they now exist and as they may be amended.

- D. DPS will have the right to require Contractor to remove any of Contractor's personnel from involvement in the Contract who have failed to comply with such laws, regulations, or rules.

### **7.5 APPLICABLE LAW AND CONFORMING AMENDMENTS**

Contractor must comply with all laws, regulations, requirements and guidelines applicable to a contractor providing services to the State of Texas as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of the Contract. DPS reserves the right, in its sole discretion, to unilaterally amend the Contract throughout its term to incorporate any necessary changes to ensure DPS's or Contractor's compliance with all applicable state and federal laws, rules, and regulations.

### **7.6 TAXES; UNEMPLOYMENT; WORKERS COMPENSATION**

DPS, as an agency of the State of Texas, qualifies for exemption from state and local sales and use taxes under the provisions of the Texas Limited Sales, Excise, and Use Tax Act. Contractor may claim exemption from payment of applicable state taxes by complying with such procedures as may be prescribed by the Comptroller of Public Accounts.

DPS makes no representation to Contractor that it may claim any exemptions from any taxes of any type including without limitation any federal, state, local or any other taxes based on Contractor entering into the Contract with DPS or its performance under the Contract.

DPS will not be responsible for or pay any taxes of any type under or because of the Contract. All taxes are the sole responsibility of Contractor without any contribution by DPS.

Contractor represents and warrants that it must pay all taxes or similar amounts for Contractor and its employees. Contractor represents and warrants that it will comply with all federal, state, and local tax laws and withholding requirements.

Contractor must demonstrate on-site compliance with all applicable tax provisions, including without limitation, the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, including without limitation the issuance of Form W-2s to Contractor's employees.

Contractor must comply with all federal and state requirements regarding unemployment insurance coverage and workers compensation insurance coverage.

Contractor must comply with all laws, regulations, requirements, and guidelines applicable to this section as those laws, regulations, requirements, and guidelines currently exist and as they are amended throughout the term of the Contract. DPS reserves the right, in its sole discretion, to unilaterally amend the Contract throughout its term to incorporate any changes necessary for DPS's or Contractor's compliance with all applicable laws, regulations, requirements, and

guidelines.

**7.7 IMMIGRATION AND E-VERIFY**

Contractor must comply with the requirements of the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.) and all subsequent immigration laws and amendments as applicable to Contractor. To the extent not prohibited by federal law or regulation and only as required under Texas Executive Order No. RP-80, Respondent certifies that it uses and will continue to use the U.S. Department of Homeland Security’s E-Verify system to determine the eligibility of those employed or subcontracted to perform contract duties under the Contract.

**7.8 FRAUD, WASTE, OR ABUSE**

- A. In accordance with Tex. Gov’t Code Chapter 321, the State Auditor’s Office is authorized to investigate specific acts or allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds.
- B. If there is a reasonable cause to believe that fraud, waste or abuse has occurred at DPS, it can be reported to the State Auditor’s Office by calling 1-800-892-8348 or on that agency’s website at [www.sao.texas.gov](http://www.sao.texas.gov). It can also be reported to DPS’s Office of the Inspector General at (512) 424-2015, DPS Chief Auditor’s Office at 512-424-4403, or Crime Stoppers at 1-800-832-8477.
- C. Contractor represents and warrants that it has read and understood and must comply with DPS’s Anti-Fraud Policy, as such policy reads as stated below and as amended throughout the term of the Contract.
- D. Fraud is a serious violation of law that DPS will not tolerate. Fraud offenses can be found in Tex. Penal Code Chapter 32. Generally, it is theft of, or any means used to misappropriate state property or resources. Employees or Contractors who suspect fraud is occurring in the workplace should immediately notify their supervisors or the Contract Monitor as applicable. If for some reason the employee or Contractor is uncomfortable with notifying their supervisor or Contract Monitor, they may notify the Office of Inspector General (OIG) or the State Auditor’s Office.

**7.9 RIGHT TO AUDIT**

- A. Under Tex. Gov’t Code § 2262.154, the State Auditor’s Office, or successor agency, may conduct an audit or investigation of Contractor or any other entity or person receiving funds from the State directly under the Contract or indirectly through a subcontract under the Contract.
- B. Contractor understands that acceptance of funds by Contractor or any other entity or person directly under the Contract or indirectly through a subcontract under the Contract acts as acceptance of the authority of the State Auditor’s Office, or any successor agency, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds.

Under the direction of the legislative audit committee, Contractor or other entity that is the subject of an audit or investigation must provide the State Auditor's Office with access to any information the State Auditor's Office considers relevant to the investigation or audit.

The Contract may be amended unilaterally by DPS to comply with any rules and procedures of the State Auditor's Office in the implementation and enforcement of Tex. Gov't Code § Section 2262.154.

Contractor must ensure that this section's provisions concerning the authority to audit funds received either directly or indirectly by subcontractors through Contractor and the requirement to cooperate is included in any subcontract that the Contractor awards.

- C. DPS reserves the right to audit Contractor's records and documents regarding compliance with the Contract. Contractor is also subject to audit by any other department or agency, including federal agencies, responsible for determining that DPS and Contractor have complied with the applicable laws, procedures, policies, and best practices.
- D. If such an audit reveals any overpayment errors by DPS to Contractor, Contractor must refund DPS the full amount of such overpayments within 30 days of Contractor's receipt of notice of such audit findings. DPS reserves the right, in its sole discretion, to deduct such amount owing to DPS from any payments to Contractor.

**7.10 CONSTITUTIONAL AND STATUTORY LIMITATIONS**

Any provision of the Contract that conflicts with the laws of the State of Texas is void.

DPS and Contractor are aware that there may be constitutional and statutory limitations on the authority of DPS to enter into certain terms and conditions of the Contract, including, those terms and conditions relating to disclaimers and limitations of warranties; disclaimers and limitations of liability for damages; waivers, disclaimers, and limitations of legal rights, remedies, requirements, and processes; limitations of periods to bring legal action; granting control of litigation or settlement to another party; liability for acts or omissions of third parties; payment of attorneys' fees; dispute resolution; indemnities; and confidentiality (collectively in this section, the "limitations"), and terms and conditions related to the limitations will not be binding on DPS except to the extent authorized by the laws and Constitution of the State of Texas.

**ARTICLE 8, CERTIFICATIONS**

**8.1 REPRESENTATIONS AND CERTIFICATIONS; FALSE STATEMENTS; CONTINUING DUTY TO AMEND, SUPPLEMENT, AND CORRECT**

By signing the Contract, including all incorporated documents and exhibits, Contractor makes all the representations and certifications included in the Contract. If Contractor signs the Contract with a false statement or it is subsequently determined that Contractor has violated any of the

representations or certifications included in the Contract, Contractor will be in default under the Contract and DPS may terminate or void the Contract for cause and pursue other remedies available to DPS under the Contract and applicable law.

Contractor has a continuing duty to amend, supplement, or correct any such representations or certifications in writing to DPS not later than ten days after discovering additional information relating to any of its representations or certifications.

### **8.2 BUSINESS CONTINUITY AND DISASTER RECOVERY PLAN**

As required by 13 Tex. Admin. Code § 6.94(a)(9), DPS must require a third-party custodian of electronic state records to provide DPS with descriptions of its business continuity and disaster recovery plans regarding how the custodian will protect DPS's vital state records.

### **8.3 NOTICE UNDER TEX. GOV'T CODE § 2261.252**

Under Tex. Gov't Code § 2261.252, DPS may not enter into a contract for the purchase of goods or services with a private vendor if members of the Public Safety Commission or certain positions within the agency including the Executive Director, the General Counsel, the Procurement Director, or their covered family members have a financial interest in the vendor. Any contract found to violate Tex. Gov't Code § 2261.252 is void.

### **8.4 PROHIBITED USE OF APPROPRIATED OR OTHER FUNDS UNDER CONTROL OF STATE AGENCY; LOBBYING**

Contractor represents and warrants that DPS payments to Contractor and Contractor's receipt of appropriated or other funds under the Contract are not prohibited by the Tex. Gov't Code §§ 556.005 and 556.008.

### **8.5 NON-DISCRIMINATION**

- A. In the performance of the Contract, Contractor warrants that it will not discriminate against any person, employee, subcontractor, participant, or provider on the basis of race, color, disability or perceived disability, religion, sex, sexual orientation, national origin, creed, political belief, genetic information, or age, and in accordance with the following.
- B. Contractor must state that it is an equal opportunity employer in all solicitations or advertisements for employees or the purchase of commodities or services, provided however, that notices, advertisements and solicitations placed in accordance with federal and state law, rule, or regulation will be deemed sufficient for meeting this requirement.

### **8.6 EMPLOYEE NON-SOLICITATION**

Contractor will not, during the term of the Contract and for a period of 12 months after the term of the Contract, directly solicit for employment any person who is a DPS employee or was a DPS employee during the previous 12 months with whom Contractor had substantial contact in the course of performing its obligations under the Contract.

### **8.7 ANTITRUST AFFIRMATION**

Contractor affirms under penalty of perjury of the laws of the State of Texas that: (1) Contractor is duly authorized to execute this contract; (2) in connection with its response, Contractor has not violated any provision of the Texas Free Enterprise and Antitrust Act, Tex. Bus. & Comm. Code Chapter 15; (3) In connection with its response, Contractor has not violated any federal antitrust law; and (4) Contractor has not directly or indirectly communicated any of the contents of its response to a competitor or any other Vendor engaged in the same line of business as Contractor.

### **8.8 FELONY CRIMINAL CONVICTIONS**

Contractor represents that Contractor has not and Contractor's employees and subcontractors performing work under the Contract have not been convicted of a felony criminal offense. Alternatively, if such a conviction has occurred, Contractor has fully advised DPS as to the facts and circumstances surrounding the conviction and DPS has given Contractor written approval for Contractor or Contractor's employees or subcontractors to perform work under or related to the Contract (whether or not the work involves physical or logical access).

Contractor may not allow any employee or subcontractor convicted of a felony criminal offense to perform work under or related to the Contract without such disclosure to DPS and the prior written approval of DPS for the employee or subcontractor to perform work under or related to the Contract.

Contractor must amend, supplement, or correct representations and warranties in this section in writing to DPS not later than five business days after discovering any additional information that would change Contractor's representation or warranty.

### **8.9 DPS BACKGROUND CHECK AND ID CARD REQUIREMENTS**

- A. Contractor must not allow any personnel (employee or subcontractor) with physical or logical access to DPS to work on the Contract that have not submitted to and successfully completed a DPS fingerprint-based Criminal History Background Investigation. DPS has the right to prevent Contractor's personnel from gaining access to DPS's buildings and computer systems if DPS determines that such personnel did not pass the background check or failed to otherwise maintain a security clearance.
- B. Contractor certifies that Contractor and any of its employees or subcontractors will wear and make visible any DPS-issued identification cards at all times while working on the Contract.

### **8.10 BOOKS AND RECORDS**

- A. Contractor must retain all financial records, supporting documents, statistical records, and any other records or books relating to the performance under the Contract. Contractor must retain these records for a period of seven years after the expiration of the Contract, or until DPS or the State Auditor's Office (SAO) is satisfied that all audit and litigation matters are resolved, whichever period is longer. Contractor must grant

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- access to all books, records, and documents pertinent to the Contract to DPS, the SAO, and any state or federal governmental entity that has authority to review records due to state or federal funds being spent under the Contract.
- B. In the disclosure of its financial affairs, Contractor must allow DPS, SAO, or their authorized representatives access to all of its corporate books relative to the Contract and must cooperate in any audits.
  - C. Notwithstanding anything else in this section or any other provision of the Contract to the contrary, Contractor must fully cooperate with state and federal representatives in audits of Contractor's performance and receipt of funds under the Contract or applicable law.

### **8.11 LIMITATION ON AUTHORITY; NO OTHER OBLIGATIONS**

Contractor certifies that it understands it will have no authority to act for or on behalf of DPS or the State of Texas except as expressly provided for in the Contract; no other authority, power, or use is granted or implied. Contractor may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of the State of Texas or DPS.