

## APPENDIX A: MODEL CONTRACT PROVISIONS

### ***Introduction***

These model provisions are commonly used in State contracts, and where indicated, are prescribed by the Procurement Code or other laws or regulations. In most instances, the clauses may have to be adapted to the particular procurement situation. Commentary follows the clauses where the uses of the clause, or possible modifications to the clause, are not self-explanatory, and/or to provide additional information.

Optional provisions/phrases in the clauses, or those requiring tailored adaptation, are indicated with [brackets].

### ***A. PROVISIONS GENERALLY USED IN ALL CONTRACTS***

#### **Caption/Recitals**

Agency or Department Name

Department or Agency Number

Contract Routing Number

### **CONTRACT**

**THIS CONTRACT**, made this \_\_\_\_ day of \_\_\_\_\_ 20\_\_, by and between the State of Colorado for the use and benefit of the Department of \_\_\_\_\_ (*address*) hereinafter referred to as the “State” and \_\_\_\_\_, a \_\_\_\_\_ [*state entity type*] \_\_\_\_\_, hereinafter referred to as the “Contractor”, [*address*].

***SCO policy “Contract Dates” revision dated 2/10/03 states that State agencies are to enter as the “made date” in the first paragraph the date an authorized individual signs the contract for the state agency or institution.***

#### **FACTUAL RECITALS**

Authority exists in the Law and Funds have been budgeted, appropriated and otherwise made available and a sufficient uncommitted balance thereof remains available for encumbering and subsequent payment of this contract in Fund Number \_\_\_\_, Appropriation Account \_\_\_\_, Organization \_\_\_\_, and

Required approval, clearance and coordination has been accomplished from and with appropriate agencies; and

The State requires \_\_\_\_\_ (brief description of contract scope of work); and

The Contractor was selected in accordance with State law as a result of the State's issuance of (type of procurement).

***Include in this "Recitals" section the availability and identity of funds, source of legal authority, particular type of contract, procurement method and authority, necessary approvals obtained, etc.***

### **1. Priority of Interpretation**

The provisions of this contract shall govern the relationship of the State and the Contractor. In the event of conflicts or inconsistencies between this contract and its exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority: first, the Special Provisions incorporated within this contract, second, the terms and provisions of this contract; third, the [request for proposal] (Exhibit A), and fourth, the Contractor's proposal (Exhibit B).

***Where exhibits are attached that together define the scope of work, make sure you have a suitable provision that will govern conflicts or inconsistencies between exhibits and language in the contract. Don't rely on this provision to resolve all ambiguities: you have an obligation to review, in advance, all of the exhibits and negotiate to clarify any apparent conflicts between the State requirements and how the Contractor proposes to do the work.***

***Case law generally holds the party writing the contract responsible for drafting a clear and understandable contract. If the contract is not clear, it is usually construed against the party who wrote the contract. Since the State normally writes most provisions in the contract, it is important to remember this and write a clear contract.***

***The usual order of precedence is: first, the Special Provisions; second, the contract; third, the State's RFP or IFB provisions describing the requirements; and, finally, the Contractor's proposal. Often a Contractor will request that its proposal be put ahead of the State's solicitation in the order of precedence. Be careful about agreeing to this, as if something is included in the Contractor's proposal that contradicts your RFP requirements, the Contractor's proposal will then take precedence over your requirement.***

***If the contract results from an RFP and there are written clarifications by the Contractor and/or a Best and Final Offer involved, make sure you review these documents to determine if it is necessary to include them as exhibits to the contract and to define how they will fit into this provision of the contract. For example, sometimes elements of a Best and Final Offer will supersede the Contractor's proposal. To be safe, restate the most current clarifications in the "Scope of Work" section of the contract to ensure that your requirements will have first priority of interpretation.***

## 2. Scope of Work

*[Goods]* The Contractor shall deliver the goods described in Exhibit A.

*[Services]* The Contractor shall perform the services described in Exhibit A.

The Contractor shall perform the services in accordance with the RFP, Section 8, attached as Exhibit A, and the Contractor's proposal, chapter 4, attached as Exhibit B.

***If you have selected the Contractor using an IFB or RFP, attach the relevant portions of the IFB or RFP to the contract as exhibits. If the Contractor submitted a proposal that you intend to incorporate, attach the relevant portions of the proposal as an exhibit. If you chose to incorporate the entire RFP/IFB and/or the Contractor proposal, make reference to specific section and page numbers.***

***Use this "Scope of Work" section to describe in detail and/or clarify any elements of the work. Any language in this section will supersede language in the attachments (by virtue of Section 3, "Priority of Interpretation"), so this is your opportunity to set forth the requirements most important to the State, in accordance with the solicitation documentation.***

***If this contract does not result from a competitive solicitation (i.e. if it is a sole source situation or a no-cost contract), you will have to negotiate a statement of work and attach it as an exhibit. See Chapter 2 for guidance about writing statements of work.***

## 3. Contract Period

*(Services or services plus goods)* The time period to be covered by this contract shall begin on \_\_\_\_\_, 20\_\_, or the date the State Controller, or designee, executes this contract, whichever is later, shall be undertaken and performed in the sequence and manner set forth herein, and shall end \_\_\_\_\_, 20\_\_.

*(Goods)* The Contractor shall deliver the \_\_\_\_\_ *(description of goods)* [no later than 5:00 p.m. \_\_\_\_\_, 20\_\_] *(This date cannot be prior to the date on which the State Controller or designee executes the Contract.)*

*(Optional)* The parties agree that "time is of the essence," and failure of the Contractor to complete *[delivery of reports][the \_\_\_\_\_ milestone][performance][delivery]* by the date specified shall be grounds for termination for default, subject to adjustment of extension in the time of performance at the State's sole discretion.

***Fiscal Rule 3-1 02(E) states:***

***"All State Contracts shall contain a specific termination date, an event from which such date can be determined, or a provision for termination when determined by the State to be in its best interest."***

***The contract should have a provision that sets the period of performance, in the case of***

*services, and the delivery date, in the case of goods.*

*The "time is of the essence" clause should be used where time is particularly important, and failure to meet specified deadlines is considered so significant that the contract may be terminated for default. (See the discussion of performance remedies in Chapter 10.*

The Contractor understands and agrees that the State shall not be liable for payment of work or services or for costs or expenses incurred by the Contractor prior to the proper execution and State Controller approval of this contract.

*Fiscal Rule 3-1 states:*

*All State contracts shall be executed by the State Controller, or by an individual delegated to execute State Contracts by the State Controller. If an attempt is made to execute a State Contract without the approval of the State Controller or a delegate, the State Contract shall be null and void and not binding against the State. However, every person involved in incurring the obligation shall be jointly and severally liable for the obligation.*

*24-30-202(1), C.R.S., states:*

*Any state contract involving the payment of money by the state shall contain a clause providing that the contract shall not be deemed valid until it has been approved by the controller or such assistant as he may designate.*

*24-30-202(1), C.R.S., states:*

*No person shall incur or order or vote for the incurrence of any obligation against the state in excess of or for any expenditure not authorized by appropriation and approved commitment voucher except as expressly authorized by this section. Any such obligation so raised in contravention of this section shall not be binding against the state but shall be null and void ab initio [from the beginning] and incapable of ratification by any administrative authority of the state to give effect thereto against the state. But every person incurring or ordering or voting for the incurrence of such obligation and his surety shall be jointly and severally liable therefore.*

*24-109-404, C.R.S., (Procurement Code) states:*

*If any governmental body purchases any supplies, services or construction contrary to the provisions of this code or the rules promulgated pursuant thereto, the head of such governmental body and the public employee, which for the purposes of this section includes elected officials, actually making such purchase shall be personally liable for the costs therefore. If such supplies, services or construction are unlawfully purchased and paid for with state moneys, the amount thereof may be recovered in the name of the state in an appropriate civil action.*

*BE CAREFUL - The only remedy available to a Contractor, should a State agency approve performance of work without a properly executed and SCO-approved contract, may be for the Contractor to personally sue the individual who asked the Contractor to perform services.*

***Multiyear contracts (section 24-103-503, C.R.S.)***

***Multiyear procurements may be contracted for in several ways. A contract for one year with the option to "renew" or "extend" has the effect of extending contract performance, at the State's sole discretion, beyond the original contract performance period. This requires an affirmative act by the State to exercise the option and bind the Contractor to performance in future years or option periods. If the State fails to follow the contract procedure for exercising the option, the State may lose the right to require performance beyond the original contract term. Contracts with optional extension periods may be useful for maintenance or support services. The Contractor's performance can be evaluated by the State in the first contract year. If the performance is unsatisfactory, the State need not renew the contract.***

***By contrast, a multiyear contract can be written that obligates the State to pay for contract performance, subject only to availability of funds, over consecutive fiscal years. So long as the legislature appropriates the money, the State is obligated to pay the Contractor for continued performance. This kind of a multiyear contract does not require an option provision. However, by agreeing to multiyear contracts, the State forfeits an important right: the right to make a discretionary decision about whether to permit the Contractor to continue performance for an additional period of time. This type of multiyear contract is sometimes used for larger projects with longer time frames for completion.***

***The choice between an "extendible" or "renewable" contract, versus a multiyear contract subject only to appropriation of funds, must be carefully considered. For example, what is the State getting in return for waiving its rights to discontinue performance regardless of funding availability? If you choose a multiyear contract, because the State is getting something of value in return, or there is no other commercially feasible way to structure the contract, normally an annual option exercise letter would not be necessary.***

***Keep in mind that your solicitation document needs to set forth the term of the contract, and whether any contract extensions will be allowed at the State's discretion. Additionally, if you will be including option year(s), it is advisable to either cap the price increase the Contractor can charge (for example, 5% of current contract cost), or have the vendors price the option years as part of their solicitation response.***

***Options can be written to permit, not only more performance time, but also more services or goods. So long as these options are written to comply with the Controller's policy on change orders and modifications, these letters do not have to be reviewed by the Attorney General, although they still require approval by the Controller or his designee.***

***By Controller policy, options are permitted only if the option prices for additional services or goods, or contract extensions, are pre-priced in the contract, based on established catalog prices generally extended to the public, or otherwise set by law or regulation.***

***Contracts cannot be executed for a total term of more than five years without prior approval by the State Purchasing Director. See Procurement Rule R-24-103-503.***

***If you are intending to include options for the State to renew the Contract, make sure you indicate this in your solicitation document, as required by 24-103-503, C.R.S., of the Procurement Code.***

Sample forms of option exercise letters are including on the State Controller Web site under [Authoritative Guidance – Contract Policies](#) issued by the State Controller – State Contract Modifications (other than Capital Construction Contracts).

#### **4. Price/Cost**

*[Fixed Price]* The contract price is \$\_\_\_\_\_.

*[Time and materials/hourly labor contracts]* The State shall pay the Contractor at the rates set forth herein for labor and/or materials, not to exceed a ceiling price of \$\_\_\_\_\_. The Contractor shall successfully complete the contracted services in accordance with contract requirements within the ceiling price specified herein.

*[Cost reimbursement]* The State shall reimburse the Contractor's reasonable, allowable costs, as defined herein, not exceeding \$\_\_\_\_\_.

*[Optional language]* The above rates shall include all fees, costs and expenses, including, but not limited to, labor costs, travel expenses, parts, service, repair, removal, replacement, mileage charges, supplies, mailing charges, installation, testing, communications, order and order tracking, reporting, debugging, analysis, delivery charges and other expenses.

*[Optional language]* The State does not guarantee the Contractor a minimum number of hours/minimum quantity of goods to be ordered pursuant to this contract.

*[The following language is required in certain contract circumstances when cost or pricing data is required to be submitted:*

The price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the State finds that such price was increased because the Contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon by the parties.”  
*see 24-103-403, C.R.S. for applicability and guidance.]*

***Fiscal Rule 3-1 .02(B) requires the contract to include a ceiling cost, the maximum amount of money that can be expended on a contract without an amendment.***

***The Fixed Price option specifies a firm, fixed price or "lump sum" that is due to the Contractor upon successful completion of contracted work no matter how much it costs the Contractor to perform.***

***The Time and Materials/hourly labor option is a cost-type contract that requires the State to pay at specified rates for labor and/or materials and makes it clear that the Contractor must complete performance within the ceiling amount specified.***

***For larger scale contracts, it may be advisable to set up milestones/deliverables, so that the***

***Contractor must reach a pre-defined delivery stage to receive payment. The State will not pay the Contractor until the State's acceptance of the deliverable.***

***The Cost Reimbursement option can be used in either grant or commercial contracts, where the Contractor's costs are reimbursed. Commercial cost reimbursement contracts are rarely used in the State. A commercial cost reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the State than any other type of contract, or that it is impracticable to obtain the supplies, services or construction required unless the cost-reimbursement contract is used. See Section 24-103-501, C.R.S. The tests for "allowability" are discussed in the Procurement Code, 24-107-101, C.R.S. (for commercial contracts) and OMB Circulars (for grants to state and local governments and educational institutions). See the discussion about cost reimbursement contracts in Chapter 5.***

*[Price Increases]* Prices shall remain firm through \_\_\_\_\_, 200\_. The Contractor may seek a price increase, not to exceed \_\_\_% of the then current price, in any succeeding period, by submitting detailed written justification to the State's representative as designated in the "Notices" section of this contract. Only one such increase will be allowed in any twelve-month period of this contract. Any request for increase must be submitted to the State's representative no less than \_\_\_\_\_ (\_\_) days prior to the proposed effective date of the increase and must be accompanied by the detailed justification. If an increase is requested and justification is not deemed acceptable by the State, an increase of less than \_\_\_% may be negotiated by the Contractor and the State. In the event the negotiations do not result in any agreement between both parties, this contract may be canceled and may be rebid with no penalty to the State.

***Sometimes predetermined price increases are permitted following an initial period of fixed price. If this is your intent, make sure you state this up front in your solicitation document.***

***The limit on price increases prevents a Contractor from providing a low price initially, and then increasing the price once the contract is awarded. It is also helpful in determining budget projections.***

## **5. Maximum Compensation**

The maximum amount available for the purchase of goods and services under this contract for fiscal year 200\_-200\_, which ends on June 30, 200\_, is \$\_\_\_\_\_.

The maximum amount available for the purchase of goods and services under this contract for fiscal year 200\_-200\_, which ends on June 30, 200\_, is \$\_\_\_\_\_.

The maximum amount available for the purchase of goods and services under this contract for fiscal year 200\_-200\_, which ends on June 30, 200\_, is \$\_\_\_\_\_.

*[For use with contract renewal language – Section 3 above]* Should this contract be renewed by the State pursuant to Section 3, "Contract Period", the maximum amount available for services shall be defined in Addendum\_, the option exercise letter.

[For use with price increase language – Section 4 above] Should a price increase be requested and granted pursuant to Section 4, “Price/Cost”, the maximum amount payable will be adjusted accordingly.

[Per Fiscal Rule 3-1 .02(B), the following language shall be used where a maximum amount cannot readily be determined. Use of this provision requires an encumbrance waiver from the SCO.] “Payment pursuant to this contract shall be made as earned, in whole or in part, from available State funds in an amount not to exceed \$\_\_\_\_\_ for the purchase of \_\_\_\_\_. It is further understood and agreed that the maximum amount of State funds available for fiscal year \_\_\_\_\_ for the purchase of \_\_\_\_\_ is \$\_\_\_\_\_. The liability of the State, at any time, for such payment shall be limited to the unexpended amount remaining of such funds.”

[Per Fiscal Rule 3-1 .02(C), the following language shall be used with all State contracts involving Federal funds:] “This contract is subject to and contingent upon the continuing availability of Federal funds for the purposes hereof.”

## 6. Payment

**[Other than cost reimbursement]** The State shall establish billing procedures and pay the Contractor the contract price or rate for services performed and accepted or goods delivered and accepted pursuant to the terms of this contract. The Contractor shall submit statements on forms and in a manner prescribed by the State. Payments pursuant to this contract shall be made as earned, in whole or in part, from available funds encumbered for the purchase of the described services and/or goods.

*[Progress Payments]* Progress payments shall be made monthly based on invoices submitted to and in a form prescribed by the State, providing a detailed account of the amount of costs incurred. Ten percent (10%) of the invoiced amount shall be withheld by the State until final acceptance by the State of the services or goods under this contract.

The liability of the State, at any time, for such payments shall be limited to the amount remaining of such encumbered funds.

Incorrect payments by the State to the Contractor due to omission, error, fraud, or defalcation shall be recovered from the Contractor by deduction from subsequent payments under this contract or other contracts between the State and the Contractor or as a debt due to the State.

Invoices shall be sent to State of Colorado, Department of \_\_\_\_\_,  
\_\_\_\_\_, Attention: \_\_\_\_\_.

Payment shall be mailed to \_\_\_\_\_, Attention:  
\_\_\_\_\_.

The State shall make payment in full with respect to each invoice within [forty-five (45)] days of receipt thereof; provided that the amount invoiced represents goods and/or services which have

been accepted by the State and the form of the invoice is acceptable to the State.. Uncontested amounts not paid by the State within [forty-five days] shall bear interest on the unpaid balance beginning with the [forty-sixth (46) day] at a rate of one percent per month until paid in full. A liability shall not arise if a good faith dispute exists as to the State's obligation to pay all or a portion of the liability. The Contractor shall invoice the State separately for interest on delinquent amounts due. The billing shall reference the delinquent payment, the number of days interest to be paid and the applicable interest rate.

**[Cost reimbursement]** The State shall pay reasonable, allocable, allowable costs of performance. Unless otherwise provided, and where appropriate:

- A. The State shall establish billing procedures and pay the Contractor the reasonable, allocable, and allowable costs for work performed and accepted under this contract, based on the submission of monthly statements in the format prescribed by the State. To be considered for payment, billings for payment pursuant to this contract must be received within 60 days after the period for which payment is being requested and final billings on this contract must be received by the State within 60 days after the end of the contract term.
- B. Payments pursuant to this contract shall be made as earned, in whole or in part, from available funds encumbered for the purchase of the described services. The liability of the State, at any time, for such payments shall be limited to the amount remaining of such encumbered funds.
- C. In the event this contract is terminated, final payment to the Contractor may be withheld at the discretion of the State until completion of final audit.
- D. Incorrect payments to the Contractor due to omission, error, fraud, or defalcation shall be recovered from the Contractor by deduction from subsequent payment under this contract or other contracts between the State and the Contractor, or by the State as a debt due to the State. The Contractor shall submit requests for reimbursement monthly, stating in the invoice a detailed description of the amounts of services performed, the dates of performance, and amounts and description of reimbursable expenses. [The State procurement rules governing allowability and allocability of cost shall govern.] [The Uniform Administrative Requirements for Grants and Cooperative agreements to State and Local Governments (the "Common Rule"), and the applicable OMB Circulars cited therein, shall govern the allowability and allocability of costs under this contract.] The State [and federal government] reserves the right to audit the Contractor's books and records for a period of three years after contract expiration or termination in order to validate the allowability of costs paid under this contract, and any costs not allowable under the State Procurement Rules shall be reimbursed by the Contractor, or offset against current obligations due by the State to the Contractor, at the State's election.

***Use the first payment clause alternative, modified as necessary to meet your agency requirements, for contracts with a fixed price or fixed rate of payment. The optional provision permits payment of progress payments; Chapter 6 has a discussion of the use of progress***

*payments. Use the second payment clause for cost reimbursement type contracts (rarely used in commercial contracts) where payment of allowable, allocable costs up to a specified ceiling cost is specified. Federal program oversight agencies may specify different provisions for use in grant programs.*

*Advance payments to Contractors are only allowed in limited circumstances. See Fiscal Rule 3-1 and State Controller policy, "Advance Payments to Vendors." See "Model Clauses to be Used When Appropriate" for advance payment language.*

## **7. Legal Authority**

The Contractor warrants that it possesses the legal authority to enter into this contract and that it has taken all actions required by its procedures, by-laws, and/or applicable law to exercise that authority, and to lawfully authorize its undersigned signatory to execute this contract and to bind the Contractor to its terms. The person(s) executing this contract on behalf of the Contractor warrant(s) that such person(s) have full authorization to execute this contract.

*This clause assures the State that the person the State is dealing with has the authority to bind the contracting party. If the person signing the contract does not have authority, then very simply, the State may not be able to hold the contracting party to the terms of the contract. If the State has been harmed by these circumstances, they may want to sue and, if the signatory does not have authority, these provisions allow the State to hold the person signing the contract personally liable for breach of his or her assurances to the contrary. For more information on signature authority, see Chapter 6.*

## **8. Rights in Data, Documents, and Computer Software (State Ownership)**

Any software, research, reports, studies, data, photographs, negatives or other documents, drawings or materials prepared by the Contractor in the performance of its obligations under this contract shall be the exclusive property of the State and all such materials shall be delivered to the State by the Contractor upon completion, termination, or cancellation of this contract. The Contractor shall not use, willingly allow, or cause to have such materials used for any purpose other than the performance of the Contractor's obligations under this contract without the prior written consent of the State. The ownership rights described herein shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use the works.

*Not only may there be instances where the State does not wish the work products of the Contractor to be made available to any other entity, public or private, but also the Contractor is not entitled to any additional profit or benefit where payment for the said products was by public funds, unless the State has given its prior approval of the Contractor's use of the materials.*

*This clause gives the "ownership" rights in all works to the State, including software, developed or created under the contract. This allocation of rights would be equitable where all development was funded at State expense. If some development is funded at the expense of the Contractor, or commercially available software is part of the deliverable, then a*

*modification of the clause is necessary to identify the license rights that exist to the software where the State does not have an ownership interest. Chapter 6 includes a discussion of license rights. Consult counsel in cases where tailored allocation of intellectual property rights is required.*

*Make sure you not only have "rights," but have also specified the delivery of reports, documents, data, and software somewhere in the contract. Clause B4 is an example of how to specify delivery and format for software documentation.*

## **9. Inspection and Acceptance**

The State reserves the right to inspect services and/or goods provided under this contract at all reasonable times and places during the term of this contract, including any extensions. "Services" as used in this clause includes services performed or tangible material produced or delivered in the performance of services. If any of the services and/or goods do not conform to contract requirements, the State may require the Contractor to perform the services or provide goods again in conformity with contract requirements, at no additional cost to the State. When defects in the quality or quantity of services and/or goods cannot be corrected by re-performance, the State may (1) require the Contractor to take necessary action to ensure that the future performance conforms to the contract requirements and (2) equitably reduce the payment due the Contractor to reflect the reduced value of the services performed and/or goods provided.

These remedies shall in no way limit the remedies available to the State in the termination provisions of this contract, or remedies otherwise available at law.

*Where the contract represents a transaction in "goods" governed by the Uniform Commercial Code, a buyer's right to inspect goods is set forth in section 4-2-513, C.R.S.*

## **10. Remedies**

In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law, the State may exercise the following remedial actions if the Contractor substantially fails to satisfy or perform the duties and obligation in this contract. Substantial failure to satisfy the duties and obligations shall be defined to mean significant insufficient, incorrect or improper performance, activities, or inaction by the Contractor. These remedial actions are as follows:

- A. Suspend the Contractor's performance pending necessary corrective action as specified by the State without the Contractor's entitlement to adjustment in price/cost or schedule; and/or
- B. Withhold payment to the Contractor until the necessary services or corrections in performance are satisfactorily completed and/or acceptable goods are provided; and/or
- C. Request the removal from work on this contract of employees or agents of the Contractor whom the State justifies as being incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued employment on this contract the State deems to be contrary to the public interest or not in the best interest of the State; and/or
- D. Deny payment for those services or obligations which have not been performed and/or for goods that have not been provided and which due to circumstances caused by the Contractor

cannot be performed, or if performed would be of no value to the State. Denial of the amount of payment must be reasonably related to the value of work or performance lost to the State; and/or

E. Terminate this contract for default.

The above remedies are cumulative and the State, in its sole discretion, may exercise any or all of them individually or simultaneously.

***Although contract law provides for numerous remedies for contract breach, occasionally it may be beneficial to specifically mention some in the contract. Note that the clause begins with “In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law. . .” This specifically does not limit remedies under the contract to those listed. See Chapter 10, Section 7 for a discussion of performance remedies.***

## **11. Termination for Convenience (Short Form)**

The State may terminate this contract at any time the State determines that the purposes of the distribution of State moneys under this contract would no longer be served by completion of the project. The State shall effect such termination by giving written notice of termination to the Contractor and specifying the effective date thereof, at least twenty (20) days before the effective date of such termination. In that event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the Contractor under this contract shall, at the option of the State, be delivered by the Contractor to the State and shall become the State’s property. The Contractor shall be entitled to receive just and equitable compensation for any satisfactory services and goods delivered.

If this contract is terminated by the State as provided herein, the Contractor will be paid an amount which bears the same ratio to the total compensation as the services satisfactorily performed bear to the total services of the Contractor covered by this contract, less payments of compensation previously made, provided, however, that if less than sixty percent (60%) of the services covered by this contract have been performed upon the effective date of such termination, the Contractor shall be reimbursed (in addition to the above payment) for that portion of the actual out-of-pocket expenses (not otherwise reimbursed under this contract) incurred by the Contractor during the contract period which are directly attributable to the uncompleted portion of the services covered by this contract. In no event shall reimbursement under this clause exceed the contract amount. If this contract is terminated for cause, or due to the fault of the Contractor, the Termination for Cause or Default provision shall apply.

***This short form version of the termination for convenience clause is used in contracts with political subdivisions and other contracts not subject to the Procurement Code, and in service contracts having fixed level-of-effort where the State is receiving value as the services are being performed. Janitorial services contracts, for example, would be examples of contracts where this short-form clause may be appropriate, because payment for services in proportion to the performance period completed would fairly reimburse the Contractor and still ensure that the State receives fair value for its payments. For contracts with commercial entities not meeting these criteria -- e.g. software development/integration contracts involving significant start-up costs -- the Procurement Rules “long form” clause, the next clause in this Appendix, is more appropriate.***

***Occasionally, Contractors will ask to make the termination for convenience clause “mutual,”***

*permitting either party to terminate the contract at will by giving specified advance, written notice. In such cases, exercise extreme care, and consider getting legal advice or the assistance of a more experienced purchasing/contracting professional. It is particularly important to consider: the effect of the Contractor termination on advance or progress payments, and the obligation of the Contractor to return them; whether the right of the Contractor to compensation after it terminates is clearly stated and requires the State to pay only reasonable compensation for acceptable, completed deliverables having value to the State; whether the milestones and associated progress payments are distinguished from the compensation due the Contractor for acceptable, completed services and deliverables after termination, since progress payments are often not sufficiently based on the value of services received by the State; whether the possibility of a Contractor's exercising the termination for convenience clause will compromise the State's business needs; and whether there is procurement authority to acquire replacement or continued services within the needed time. In general, while the termination for convenience clauses in this Appendix are adequate to give the State the right to terminate for convenience, they are not generally adequate to define the Contractor's right to terminate at will and receive compensation.*

## 12. Termination for Convenience (Long Form)

### Termination

The State may, when the interests of the State so require, terminate this contract in whole or in part, for the convenience of the State. The State shall give written notice of the termination to the Contractor specifying the part of this contract terminated and when termination becomes effective. Exercise by the State of the Termination for Convenience Clause in no way implies that the State has breached this contract.

### Contractor's Obligations

The Contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. All finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the Contractor under this contract shall, at the option of the State, be delivered by the Contractor to the State and shall become the State's property. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The State may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the State. The Contractor shall complete and deliver to the State the work not terminated by the Notice of Termination and may incur obligations as are necessary to do so.

### Compensation

- A. The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If the Contractor fails to file a termination claim within 90 days from the effective date of termination, the State may pay the Contractor, if at all, an amount set in accordance with subparagraph C of this Section.
- B. The State and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data and that the settlement does not exceed

the total contract price plus settlement costs, reduced by payments previously made by the State, the proceeds of any sales of goods and manufactured materials made under agreement, and the contract price of the work not terminated.

C. Absent complete agreement, under subparagraph B of this Section, the State shall pay the Contractor the following amounts, provided the payments agreed to under subparagraph B shall not duplicate payments under this subparagraph:

- 1) Contract prices for goods or services accepted under this contract;
- 2) Reasonable costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid to or to be paid for accepted goods or services; provided, however, that if it appears that the Contractor would have been sustained a loss if this entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.
- 3) Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the Contractor's obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph B of this Section.
- 4) The reasonable settlement costs of the Contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of this contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the terminated portion of this contract.
- 5) The total sum to be paid the Contractor under this subparagraph C shall not exceed the total contract price plus settlement costs payable pursuant to subparagraph C(4), reduced by the amount of payments otherwise made, the proceeds of any sales of goods and manufacturing materials under subparagraph B, and the contract price of work not terminated.

D. Costs claimed or agreed to under this section shall be in accordance with applicable sections of the Colorado State Procurement Code, C.R.S. 24-101-101, et al.

*This long form version of the termination for convenience clause is prescribed in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01. See the comments under Termination for Convenience (Short Form) with respect to the proper use of each clause, as well as cautions in making the clauses "mutual" and the contract terminable at will by the Contractor.*

### **13. Termination for Default/Cause (Short Form)**

If, through any cause, the Contractor shall fail to fulfill, in a timely and proper manner, its obligations under this contract, or if the Contractor shall violate any of the covenants, agreements, or stipulations of this contract, the State shall thereupon have the right to terminate

this contract for cause by giving written notice to the Contractor of its intent to terminate and at least ten (10) days opportunity to cure the default or show cause why termination is otherwise not appropriate. In the event of termination, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the Contractor under this contract shall, at the option of the State, become its property, and the Contractor shall be entitled to receive just and equitable compensation for any services and goods delivered and accepted. The Contractor shall be obligated to return any payment advanced under the provisions of this contract. This provision shall in no way limit other remedies available to the State in this contract, or remedies otherwise available at law.

Notwithstanding the above, the Contractor shall not be relieved of liability to the State for any damages sustained by the State by virtue of any breach of this contract by the Contractor, and the State may withhold any payment to the Contractor for the purposes of mitigating its damages until such time as the exact amount of damages due to the State from the Contractor is determined.

If after such termination it is determined, for any reason, that the Contractor was not in default, or that the Contractor's action/inaction was excusable, such termination shall be treated as a termination for convenience, and the rights and obligations of the parties shall be the same as if this contract had been terminated for convenience, as described herein.

***This short form termination for default clause is customarily used in contracts with political subdivisions and nonprofit entities.***

#### **14. Termination for Default/Cause (Long Form)**

##### Termination by the Contractor

If the State fails to pay the amount due to the Contractor pursuant to this contract within sixty (60) days from the date of the invoice, the Contractor may, by written notice to the State, indicate that the State is in default and the Contractor's intent to terminate the contract. The State shall have ten (10) days' opportunity, or such time as mutually agreed, to cure the default or show reasonable cause why termination is otherwise not appropriate.

Non-payment by the State pursuant to the "Remedies" section of this contract shall not be cause for the Contractor to terminate this contract for default.

##### Termination by the State

If the Contractor refuses or fails to perform any of the provisions of this contract, with such diligence as will ensure its completion within the time specified in this contract, the State may notify the Contractor in writing of the non-performance, and if not promptly corrected within the time specified, the State may terminate the Contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination, all finished or unfinished documents, data, studies, surveys, reports or other materials prepared by the Contractor pursuant to this contract shall, at the option of the State, become the State's property and, if in the possession of the Contractor, shall immediately be returned to the State. The Contractor shall continue performance of the contract to the extent it

is not terminated and shall be liable for excess costs incurred by the State in procuring similar goods or services elsewhere.

Notwithstanding the above, the Contractor shall not be relieved of liability to the State for any damages sustained by the State by virtue of any breach of this contract by the Contractor, and the State may withhold any payment to the Contractor for the purpose of mitigating the State's damages until such time as the exact amount of damages due to the State from the Contractor is determined.

Notwithstanding termination of this contract and subject to any direction from the State, the Contractor shall take timely, reasonable and necessary action to protect and preserve property in the possession of the Contractor in which the State has an interest.

#### Compensation

Payment for completed supplies delivered and accepted by the State shall be at the contract price. The State may withhold amounts due to the Contractor as the State deems to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders and to reimburse the State for the excess costs incurred in procuring similar goods and services.

#### Excuse for Nonperformance or Delayed Performance

The Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms if such failure arises out of force majeure. Unless otherwise defined in this contract, "force majeure" shall mean acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. Upon request of the Contractor, the State shall ascertain the facts and extent of such failure, and, if the State determines that any failure to perform was a result of force majeure, and that, but for the force majeure, the Contractor's progress and performance would have met the terms of this contract, the delivery schedule shall be revised accordingly, subject to the rights of the State.

#### Erroneous Termination for Default

If after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience clause.

***This long form version of the termination for default clause is "mutual" and based on the clause set forth in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01.***

## 15. Standard Insurance Requirements

A. The contractor shall obtain, and maintain at all times during the term of this contract, insurance in the following kinds and amounts:

- 1) Workers' Compensation Insurance as required by state statute, and Employer's Liability Insurance covering all of contractor's employees acting within the course and scope of their employment.
- 2) Commercial General Liability Insurance written on ISO occurrence form CG 00 01 10/93 or equivalent, covering premises operations, fire damage, independent contractors, products and completed operations, blanket contractual liability, personal injury, and advertising liability with minimum limits as follows:
  - a. \$1,000,000 each occurrence;
  - b. \$1,000,000 general aggregate;
  - c. \$1,000,000 products and completed operations aggregate; and
  - d. \$50,000 any one fire.

If any aggregate limit is reduced below \$1,000,000 because of claims made or paid, the contractor shall immediately obtain additional insurance to restore the full aggregate limit and furnish to the State a certificate or other document satisfactory to the State showing compliance with this provision.

- 3) Automobile Liability Insurance covering any auto (including owned, hired and non-owned autos) with a minimum limit as follows: \$1,000,000 each accident combined single limit.
- 4) Professional liability insurance with minimum limits of liability of not less than \$\_\_\_\_\_.

***Consider adding this subparagraph 4) to subsection A of model provision A15 if the contract that you are drafting is for professional services, such as services from physicians or computer programmers in large systems development/integration projects or other high risk technology contracts. Professional liability insurance protects professionals from errors and omissions and, in some circumstances, bodily injury and property damage. In the case of design professionals on construction, State Buildings and Real Estate Programs agreements include the required limits that are consistent with industry practice. If you are requiring professional liability insurance for other professional services, consult your program office or the Office of Risk Management for guidance concerning recommended limits.***

B. The State of Colorado shall be named as additional insured on the Commercial General Liability and Automobile Liability Insurance policies (leases and construction contracts will require the additional insured coverage for completed operations on endorsements

CG 2010 11/85, CG 2037, or equivalent). Coverage required of the contract will be primary over any insurance or self-insurance program carried by the State of Colorado.

- C. The Insurance shall include provisions preventing cancellation or non-renewal without at least 45 days prior notice to the State by certified mail.
- D. The contractor will require all insurance policies in any way related to the contract and secured and maintained by the contractor to include clauses stating that each carrier will waive all rights of recovery, under subrogation or otherwise, against the State of Colorado, its agencies, institutions, organizations, officers, agents, employees and volunteers.
- E. All policies evidencing the insurance coverages required hereunder shall be issued by insurance companies satisfactory to the State.
- F. The contractor shall provide certificates showing insurance coverage required by this contract to the State within 7 business days of the effective date of the contract, but in no event later than the commencement of the services or delivery of the goods under the contract. No later than 15 days prior to the expiration date of any such coverage, the contractor shall deliver the State certificates of insurance evidencing renewals thereof. At any time during the term of this contract, the State may request in writing, and the contractor shall thereupon within 10 days supply to the State, evidence satisfactory to the State of compliance with the provisions of this section.
- G. Notwithstanding subsection A of this section, if the contractor is a “public entity” within the meaning of the Colorado Governmental Immunity Act CRS 24-10-101, *et seq.*, as amended (“Act”), the contractor shall at all times during the term of this contract maintain only such liability insurance, by commercial policy or self-insurance, as is necessary to meet its liabilities under the Act. Upon request by the State, the contractor shall show proof of such insurance satisfactory to the State.

*As a matter of policy, an insurance provision is required in all competitive procurements. An insurance provision is automatically included in competitive solicitations posted on the Bid Information and Distribution System (BIDS). It is also an advisable clause in any contract where the contractor is performing services on State property or other contracting situations where the State may be at risk of suit by a third party on an “agency” theory. See the discussion in this chapter for definitions of the different types of insurance, as well as the distinction between an “occurrence based” and “claims made” policy.*

## 16. Representatives and Notice

- A. Representatives. For the purpose of this contract, the individuals identified below are hereby designated representatives of the respective parties. Either party may from time to time designate in writing new or substitute representatives:

For the State:

Name \_\_\_\_\_ Title \_\_\_\_\_  
Telephone: ( ) \_\_\_\_ - \_\_\_\_\_

For the Contractor:

Name \_\_\_\_\_ Title \_\_\_\_\_  
Telephone: ( ) \_\_\_\_ - \_\_\_\_\_

***It is advisable that the responsible employees of the parties be clearly identified, since it is often necessary for parties to a contract to have a continuous course of dealing as the contract is performed.***

***This provision is not a delegation of signatory authority for the purposes of contracting initially or entering into modifications or amendments. If you want to specify the specific authority of the representative, do so using a provision substantially like the one that follows. Note that you cannot ever give the representative the authority to amend the contract and commit more funds--you must use an approved modification.***

- B. Authority. With respect to the representative of the State, such individual shall have the authority to \_\_\_\_\_, inspect and reject services, approve invoices for payment, and act otherwise for the State, except with respect to the execution of formal contract amendments to or termination of this contract.
- C. Notices. All notices required to be given by the parties hereunder shall be hand delivered or sent by certified or registered mail to the individuals at the addresses set forth below. Either party may from time to time designate in writing substitute addresses or persons to whom such notices shall be sent.

For the Contractor:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
( ) \_\_\_\_ - \_\_\_\_  
email: \_\_\_\_\_

For the State:

State of Colorado  
Department of \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Colorado \_\_\_\_\_  
Attn: \_\_\_\_\_  
( ) \_\_\_\_ - \_\_\_\_  
email: \_\_\_\_\_

***This provision will help avoid practical problems caused by misdirected mail. Several representatives may be listed if necessary. Certified or registered mail is preferred, but regular U.S. Mail is a reasonable alternative.***

## 17. Assignment and Successors

The Contractor agrees not to assign rights or delegate duties under this contract [or subcontract any part of the performance required under this contract] without the express, written consent of the State [which shall not be unreasonably withheld]. Such consent may include, at the State's sole discretion: 1) the execution by the State, the Contractor and the Assignee of a Novation Agreement in a form prescribed by the State, which Novation Agreement will become effective upon State approval or 2) verification by the State of the assignment. Except as herein otherwise provided, this contract shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. This provision shall not be construed to prohibit assignments of the right to payment to the extent permitted by section 4-9-318, CRS, provided that written notice of assignment adequate to identify the rights assigned is received by the controller for the agency, department, or institution executing this contract. Such assignment shall not be deemed valid until receipt by such controller -- as distinguished from the State Controller -- at the address as hereinafter provided below. The Contractor assumes the risk that such written notice of assignment is received by the controller for the agency, department, or institution involved.

State of Colorado

Department of \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_, Colorado \_\_\_\_\_

ATTN: \_\_\_\_\_, Controller

*Especially in contracts for personal services, but for most State contracts in general, if the State has selected a certain vendor or contractor, it has done so through a process governing State procurement in order to allow for fairness to all potential contractors. If the vendor assigns a contract with the State to another party, then the public confidence in the competitive process may be compromised. Section 4-9-318, CRS, permits Contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract.*

*Despite the prohibition on nonconsensual assignment, if a Contractor goes into bankruptcy, its accounts and contract may be assigned. If a company reorganizes or merges with another under a different name, it will have successors. The clause assures that these other entities will be bound by the law to complete the contract if the State desires, even though they are not technically parties to the contract.*

*This clause references the use of a Novation Agreement as prescribed by Procurement Rule R-24-106-101-109.*

## 18. Force Majeure

Neither the Contractor nor the State shall be liable to the other for any delay in, or failure of performance of, any covenant or promise contained in this contract, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to the extent that, such delay or failure is caused by "force majeure". As used in this contract "force majeure" means acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

***“Force majeure” means those events for which neither party will be held accountable. The long-form termination for default clause has an excusable delay provision that also excuses delays caused by the list of “force majeure” events. Generally, if the long-form termination for default clause is used, this “force majeure” clause need not also be added to the contract. The list of events constituting “force majeure” can be negotiated and modified by the parties.***

### **19. Third Party Beneficiaries**

It is expressly understood and agreed that the enforcement of the terms and conditions of this contract and all rights of action relating to such enforcement, shall be strictly reserved to the State and the Contractor. Nothing contained in this contract shall give or allow any claim or right of action whatsoever by any other third person. It is the express intention of the State and the Contractor that any such person or entity, other than the State or the Contractor, receiving services or benefits under this contract shall be deemed an incidental beneficiary only.

### **20. Governmental Immunity/Limitation of Liability**

Notwithstanding anything herein to the contrary, no term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions of the “Colorado Governmental Immunity Act”, Section 24-10-101, *et seq.*, CRS, as now or hereafter amended. The parties understand and agree that the liability of the State for claims for injuries to persons or property arising out of negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of Section 24-10-101, *et seq.*, CRS, as now or hereafter amended and the risk management statutes, Section 24-30-1501, *et seq.*, CRS, as now or hereafter amended. Any liability of the State created under any other provision of this contract, whether or not incorporated herein by reference, shall be controlled by, limited to, and otherwise modified so as to conform with, the above cited laws.

### **21. Severability**

To the extent that this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of this contract, the terms of this contract are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

***Common law allows for an argument that if any one provision of a contract is deemed invalid, illegal, or inoperative for some other reason, all the provisions in the contract are then suspect and the contract can be rescinded or voided entirely. This clause prevents that argument and allows the State to still hold a Contractor liable for parts of the contract that have not been deemed invalid.***

### **22. Waiver**

The waiver of any breach of a term, provision, or requirement of this contract shall not be construed or deemed as waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision, or requirement.

### **23. Integration of Understanding**

This contract is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal,

addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a writing executed and approved pursuant to the State Fiscal Rules.

*Parties' memories of what was agreed to may get foggy in time and that's why written contracts are valuable. This clause prevents parties from later claiming that there were other provisions agreed to that were not put into the contract. This clause has the effect of saying that, "If it is not written down, it is not valid and the court won't recognize it." Secondly, it makes it clear that changes to the contract must be properly approved and processed under the fiscal rules.*

*If, at any point after a contract is signed, the parties agree to something different from or in addition to what is contained in the contract, these changes cannot be informally accepted, but must be set forth in writing and embodied in an amendment or approved modification.*

#### **24. Survival of Certain Contract Terms**

Notwithstanding anything herein to the contrary, the parties understand and agree that all terms and conditions of this contract and the exhibits and attachments hereto which may require continued performance, compliance, or effect beyond the termination date of this contract shall survive such termination date and shall be enforceable by the State as provided herein in the event of such failure to perform or comply by the Contractor.

*Examples of these types of long-lived contract terms include: records retention, maintenance and replacement provisions, land use covenants, inspections and certification, indemnification, audit rights, rights in data and software, warranties, etc.*

#### **25. Modification and Amendment**

This contract is subject to such modifications as may be required by changes in Federal or State law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this contract on the effective date of such change as if fully set forth herein. Except as provided above, no modification of this contract shall be effective unless agreed to in writing by both parties in an amendment to this contract that is properly executed and approved in accordance with applicable law.

#### **26. Confidentiality**

The Contractor acknowledges that it may come into contact with confidential information contained in the records of the State. The Contractor shall provide and maintain a secure environment that ensures confidentiality. The confidentiality of all information will be respected, and no confidential information shall be distributed or sold to any third party nor used by the Contractor or the Contractor's assignees and/or subcontractors in any way except as authorized by this contract. Confidential information shall not be retained in any files or otherwise by the Contractor. Disclosure of such information may be cause for legal action against the Contractor. Defense of any such action shall be the sole responsibility of the Contractor.

*Note: Section B includes additional optional confidentiality language that adds education and marking requirements.*

**27. Cooperation of the Parties**

The Contractor and the State agree to cooperate fully, to work in good faith, and to mutually assist each other in the performance of this contract. In connection herewith, the parties shall meet to resolve problems associated with this contract. Neither party will unreasonably withhold its approval of any act or request of the other to which the party's approval is necessary or desirable.

**28. Tax Exempt Status**

It is hereby recognized and acknowledged by the Contractor that the State of Colorado is not liable for any sales, use, excise, property or other taxes imposed by any federal, state or local government tax authority. The State is also not liable for any taxes of the Contractor for franchise or related to the income of the Contractor. No taxes of any kind shall be charged to the State.

**29. Compliance with Law**

The Contractor agrees to strictly adhere to and comply with all applicable Federal, State and Local laws, statutes, regulations, and executive orders, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract.

## **B. MODEL CLAUSES TO BE USED WHEN APPROPRIATE**

### **1. Advance Funds or Payment (Where Approved by the State Controller)**

The State shall pay the Contractor \$\_\_\_\_\_ within 30 days of State Controller (or designee) approval of this contract. If funds are not used for the purposes herein described by the dates established in this contract, or if this contract is terminated, with or without cause, all such funds shall be immediately returned to the State.

*Advance payments to Contractors are only allowed in limited circumstances. See Fiscal Rule 3-1 and the State Controller policy, "[Advance Payments to Vendors](#)."*

### **2. Cost or Pricing Data**

The Contractor shall submit cost or pricing data with change or modification proposals where the aggregate increase/decrease in costs plus associated profit exceeds \$50,000. "Cost Data" is factual information concerning the cost of labor, material, overhead, and other cost elements which are expected to be incurred or which have been actually incurred by the Contractor in performing this contract, such as vendor quotations, non-recurring costs, and unit cost trends, and which can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. "Price Data" is factual information concerning prices for goods, services, or construction substantially identical to those being procured, including offered or proposed selling prices, historical selling prices, and current selling prices of such items, which can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. The Contractor will promptly certify that, to the best of their knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of a mutually determined, specified date on or before the date of conclusion of negotiations. Such certification shall contain a provision that the price to the State, including profit or fee, will be adjusted to exclude any significant sums by which such price was increased because the Contractor-furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between the parties.

*The Procurement Rules require submission of cost or pricing data when modifications exceed \$500, although the scope and format of the data are not defined. This clause requires detailed, comprehensive cost or pricing data—and certification of that data—when modifications exceed a specified threshold, one that is high enough to justify the more extensive data required by the clause. See Chapter 5 for a discussion of contract pricing and cost reimbursement contracts in general.*

### **3. Reporting**

Unless otherwise provided, in service contracts having a performance term longer than three (3) months, the Contractor shall submit, on a quarterly basis, a written program report specifying progress made for each activity identified in the Contractor's duties and obligations, regarding

the performance of this contract. Such written analysis shall be in accordance with the procedures developed and prescribed by the State. The preparation of reports in a timely manner shall be the responsibility of the Contractor, and failure to comply may result in delay of payment of funds and/or termination of this contract. Required reports shall be submitted to the State not later than the end of each calendar quarter, or at such time as otherwise specified.

#### **4. Data and Document Deliverables**

The Contractor shall deliver, by the dates specified in Exhibit \_\_, the data or documents described therein.

Unless otherwise specified, software documentation shall be delivered that meets the following standards:

- A. The documentation shall be in paper, human readable format, which clearly identifies the programming language and version used, and when different programming languages are incorporated, identifies the interfaces between code programmed in different programming languages.
- B. The documentation shall contain source code in a paper, human readable format, which describes the program logic, relationship between any internal functions, and identifies the disk files that contain the various parts of the code.
- C. Detailed "commenting" of source code may be used to partially satisfy the documentation requirements, although documentation shall also include a flow chart that identifies the program flow between files and functions. Comments may be used to document internal flow control in functions.
- D. Files containing the source code shall be delivered, or may be left on the host machine so long as the files and their location are identified, and their significance to the program described, in the documentation.
- E. Documentation shall describe error messages and the location in the source code, by page, line number, or other suitable identifier, where the error message is generated.

It is the intent of the parties that documentation be written so persons reasonably proficient in the use of the program language involved can efficiently use the documentation to understand the program structure, iterative and other control techniques, and decipher error messages should they occur. Within the rights granted elsewhere in this contract, the Contractor warrants that the delivered software will be sufficiently descriptive to enable maintenance and modification of the software to permit change to addresses and telephone numbers in computer generated documentation, addition of fields to the database, revisions of report formats, including breakpoints and summary computations, \_\_\_\_\_.

***Contract clauses can give rights in data, documents, and software, but if you haven't ordered the documents, data, or software in the contract, you may have "lots of rights to nothing." One alternative is to reference an Exhibit defining the requirements for data or document delivery. Alternatively, you can specify the content requirements in the contract itself, as has been done in this model software documentation clause. One caveat: before using this provision, consult with a software programming expert to see if there are better ways, such as***

***use of national standards, with which to specify the requirements for software documentation.***

## **5. Confidentiality of Records**

A. In the event the Contractor shall obtain access to any records or files of the State in connection with this contract, or in connection with the performance of its obligations under this contract, the Contractor shall keep such records and information confidential and shall comply with [*specific statutory citations (if any)* and,] all laws and regulations concerning the confidentiality of such records to the same extent as such laws and regulations apply to the State. [The Contractor shall notify its employees that they are subject to the confidentiality requirements as set forth above, and shall provide each employee with a written explanation of the confidentiality requirements before the employee is permitted access to confidential data.]

***If the Contractor will have access to confidential data, use this clause to obligate the Contractor to maintain confidentiality. Insert specific references to statutory provisions (if any) that govern confidentiality and release of information for the particular program.***

***Where it is anticipated that more than a few of the Contractor's personnel will be dealing with confidential data, it is usually a good idea to require the Contractor to provide each such employee with an explanation of the confidentiality requirements, using a clause similar to the optional sentence at the end of the clause. Additionally, you may want to develop a "Statement of Confidentiality" form to be attached as an exhibit to the contract, for the Contractor and/or its employees to sign.***

B. Except as required by law, the State will not disclose to third persons, other than Contractors or consultants of the State whose performance of services require disclosure, any information marked as "confidential" or "proprietary" or otherwise marked as agreed by the parties. Except as otherwise agreed, "confidential" or "proprietary" information of the Contractor which may be marked is information relating to its research, development, trade secrets, business affairs, internal operations and management procedures and like information of its customers, clients, or affiliates, but does not include information lawfully obtained from third parties, information in the public domain, exhibits, attachments, or appendices to this contract, or information required to be delivered to the State pursuant to the terms of this contract. With respect to any such disclosure to other contractors or consultants of the State, the State agrees to inform them concerning the restrictions on disclosure and include suitable nondisclosure provisions in their agreements. Nothing herein is intended or shall operate as a waiver of any applicable law governing disclosure of records, including the Colorado Open Records Act (Section 24-72-101. CRS). The State agrees to provide the Contractor with prompt written notice of requests for disclosure under such laws of contract information within the scope of this clause.

***This clause may be used when the Contractor requests that the State keep Contractor information confidential.***

## **6. Licenses, Permits, and Responsibilities**

The Contractor certifies that, at the time of entering into this contract, it has currently in effect all

necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform the services and/or deliver the goods covered by this contract. The Contractor warrants that it will maintain all necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform this contract, without reimbursement by the State or other adjustment in contract price. Additionally, all employees of the Contractor performing services under this contract shall hold the required licenses or certification, if any, to perform their responsibilities. The Contractor further certifies that, if it is a foreign corporation or other entity, it currently has obtained and shall maintain any applicable certificate of authority to do business in the State of Colorado and has designated a registered agent in Colorado to accept service of process. Any revocation, withdrawal or non-renewable of necessary licenses, certifications, approvals, insurance, permits, etc. required for the Contractor to properly perform this contract shall be grounds for termination of this contract by the State for default.

**7. Availability of Funds – Lease/Purchase and Installment Purchases**

- A. The parties hereto understand and agree this contract is contingent upon continuing availability of funds as provided in Special Provision paragraph two (2) hereinafter, and that the State is prohibited by law from making fiscal commitments beyond the term of its current fiscal period. The State may terminate this contract as provided in the following paragraphs.
- B. The State has reason to believe that sufficient funds will be available for the full term of this contract. Where, for reasons beyond State's control, its funding entity does not allocate funds for any fiscal period beyond the one in which this contract is entered into, where the State has exhausted efforts to obtain funds legally available for future fiscal periods, and where such failure to obtain funds does not result from any act or failure to act on the part of the State, the State will not be obligated to make the payments remaining beyond the State's then current fiscal period, nor shall the State be liable for any penalty therefore. In that event, the State shall notify the Contractor of such non-allocation of funds by sending written notice thereof to the Contractor thirty (30) days prior to the effective date of termination.
- C. To supplement the provisions of Special Provision paragraph 2 of this contract regarding fund availability, and to make certain the understanding of the parties because this contract will extend beyond the current fiscal year, the State and the Contractor understand and intend that the obligation of the State to pay the annual charges hereunder constitutes a current expense of the State payable exclusively from State's funds and shall not in any way be construed to be a general obligation indebtedness, or other multiple fiscal year financial obligation whatsoever, of the State of Colorado or any agency or department thereof, within the meaning of any provision of sections 1, 2, 3, 4 or 5 of article XI, Section 20 of article X, of the Colorado Constitution, or any other constitutional or statutory limitation or requirement applicable to the State concerning the creation of indebtedness. Neither the State, nor the Contractor on its behalf, has pledged the full faith and credit of the State, or any agency or department thereof, to the payment of the charges hereunder, and this contract shall not directly or contingently obligate the State, or any agency or department thereof, to apply money from, or levy or pledge any form of taxation to, the payment of the annual charges.

**8. State-furnished Property**

- A. The State shall deliver to the Contractor, for use in connection with and under the terms

of this contract, the State-furnished property described in this contract together with any related data and information that the Contractor may request and is reasonably required for the intended use of the property (hereinafter referred to as "State-furnished property").

- B. If State-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt of it, notify the State, detailing the facts, and, as directed by the State and at State expense, either repair, modify, return, or otherwise dispose of the property. After completing the directed action and upon written request of the Contractor, the State shall make an equitable adjustment as provided in paragraph (f) of this clause.
- C. If damage occurs to State property, the risk of which has been assumed by the State under this contract, the State shall replace the items or the Contractor shall make such repairs as the State directs. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose of the property as directed by State. When any property for which the State is responsible is replaced or repaired, the State shall make an equitable adjustment in accordance with paragraph (F) of this clause.
- D. The State and all its designees shall have access at all reasonable times to the premises in which any State property is located for the purpose of inspecting the State property. The Contractor shall maintain an inventory and accountability system acceptable to the State, and mark or tag the property in accordance with State procedures.
- E. Risk of loss. Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, State property upon its delivery to the Contractor. However, the Contractor is not responsible for reasonable wear and tear to State property or for State property properly consumed in performing this contract.
- F. Equitable adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the State may initiate an equitable adjustment in favor of the State. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The State shall not be liable to suit for breach of contract for:
  - 1) Any delay in delivery of State-furnished property;
  - 2) Delivery of State-furnished property in a condition not suitable for its intended use;
  - 3) A decrease in or substitution of State-furnished property; or
  - 4) Failure to repair or replace State property for which the State is responsible.
- G. Upon completing this contract, or at such earlier dates as may be fixed by the State, the Contractor shall submit, in a form acceptable to the State, inventory schedules covering all items of State property (including any resulting scrap) not consumed in performing this contract or delivered to the State. The Contractor shall prepare for shipment, delivery f.o.b. origin, or dispose of the State property as may be directed or authorized by the State. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to the State as the State directs.

***For a discussion of contract management considerations when using State-furnished property, see Chapter 10.***

## **9. State-Provided Facilities and Access**

The State will supply limited workspace at the State's \_\_\_\_\_ office located at \_\_\_\_\_ or in another office space located within the same office building. At a minimum, the State will provide the Contractor with approximately \_\_\_ square feet of office space, \_\_\_\_\_, and appropriate work surfaces and chairs as necessary in order for the Contractor to fulfill its obligations as outlined in this contract.

The Contractor shall be responsible for the cost of any repair or replacement of State property occurring as a result of the Contractor's negligence, improper use, use contrary to manufacturer's instructions or permanent removal by the Contractor, its employees or subcontractors from the State-provided facilities. The Contractor shall notify the State in writing within 48 hours of any such damage or loss. The State shall provide a written statement to the Contractor setting forth any costs for repair or replacement. Such costs will be deducted from the subsequent contract payment by the State to the Contractor.

Upon the State's notification to the Contractor of the completion of the \_\_\_\_\_ or termination of this contract, whichever occurs sooner, the Contractor, its employees and/or subcontractors shall, within \_\_\_\_\_ (\_\_) calendar days, vacate the State-provided facilities. The Contractor, its employees and/or subcontractors shall surrender to the State any identification cards, keys, and password or access code information. The Contractor shall return all State equipment and any other State property to the State in good working condition. The Contractor shall ensure that the State-provided facilities are left in broom-clean condition.

Provision by the State to the Contractor of State facilities and access pursuant to this contract shall in no way serve to invalidate or offset the requirements set forth in the "Independent Contractor" paragraph of the Special Provisions.

## **10. Warranties**

*[Example 1 - goods]* The Contractor warrants that all goods furnished under this contract shall be new and in good working order, free from defects in materials or workmanship, installed properly and in accordance with manufacturers recommendations or other industry standards, [will function in a failure-free manner for a period of one year from the date of delivery/installation]. The Contractor shall, at its option, repair or replace any goods that fail to satisfy this warranty during the warranty period. Additionally, the Contractor agrees to assign to the State all written manufacturer's warranties relating to the goods and to deliver such written warranties to the customer.

*[Example 2 - goods]* The Contractor warrants that the software used to perform the requirements set forth in this contract are merchantable and serviceable and are free of defects for the duration of this contract. The Contractor shall replace defective goods at its own expense.

*[Example 3 – goods and services]* The Contractor warrants all Contractor developed deliverables, goods and services for a period of \_\_\_\_\_ (\_\_) months following the State’s final written acceptance of \_\_\_\_\_, at no additional cost to the State. This period will be referred to as the “warranty period.” Support shall include but not be limited to: system performance assessment, problem determination and requisite software modification, testing, resolution, implementation, and documentation.

*[Example 4 – labor/parts reimbursement]* The Contractor shall make its best efforts to recover labor and parts costs for repairs/replacements performed by the Contractor on equipment under manufacturer’s warranty at the time of the repair/replacement.

Labor costs recovered by the Contractor for equipment under warranty shall be directly credited to the State. This credit shall appear on and be applied to the next monthly invoice immediately following the recovery of the labor costs by the Contractor from the manufacturer.

Recovered part(s) costs for equipment under warranty shall be applied as a credit to the State. This credit shall appear on and be applied to the next monthly invoice immediately following the recovery of the part(s) costs by the Contractor from the manufacturer, at the Contractor’s cost of acquiring the same part(s).

*[Example 5 – services]* The Contractor expressly warrants and guarantees complete performance of the work in a manner acceptable to the State.

*[Additional optional language]* The foregoing warranty will be provided as part of the minimum work requirements of this contract, and as such will be at no additional cost to the State.

### **Disclaimer of Warranties**

**THE PARTIES HEREBY EXCLUDE ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND THE IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE. THERE ARE NO WARRANTIES THAT EXTEND BEYOND THE DESCRIPTION ON THE FACE OF THIS CONTRACT.**

*This clause would not normally be inserted in a State contract by the agency. However, Contractors may insist on exclusion of implied warranties, although you may be able to get a price concession if you agree to the disclaimer. These implied warranties are defined in sections 4-2-314 and 315, CRS.*

## **11. Stop Work Orders**

### Order to Stop Work

The State may, by written order to the Contractor, at any time, and without notice to any surety, require the Contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period after the order is delivered to the Contractor. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurring of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, as legally extended, the State shall either:

- 1) Cancel the stop work order; or
- 2) Terminate the work covered by such order; or
- 3) Terminate this contract.

Cancellation or Expiration of the Order

If a stop work order issued under this clause is properly canceled, the Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and this contract shall be modified in writing accordingly, if:

- 1) The stop work order results in increased time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and
- 2) The Contractor asserts claim for such an adjustment within 30 days after the end of the period of work stoppage.

Termination of Stopped Work

If the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise and such adjustment shall be in accordance with the Price Adjustment Clause of this contract.

**12. Liquidated Damages**

When the Contractor is given notice of delay or nonperformance and fails to cure in the time specified, in addition to any other damages that are applicable, the Contractor shall be liable for \$\_\_\_\_\_ [amount to be filled in for each contract] per calendar day from date set for cure until either the State reasonably obtains similar goods or services if the Contractor is terminated for default, or until the Contractor provides the goods or services if the Contractor is not terminated for default. To the extent that the Contractor's delay or nonperformance is excused under the [Force Majeure] [\_\_\_\_\_] paragraph or the Termination for Default Clause of this contract, liquidated damages shall not be due the State. [The parties agree that the damages from breach of this contract are difficult to prove or estimate, and the amount of liquidated damages specified herein represents a reasonable estimation of damages that will be suffered by the State from late performance, including costs of additional inspection and oversight, and lost opportunity for additional efficiencies that would have attended on-time completion of performance, . . .] Assessment of liquidated damages shall not be exclusive of or in any way limit remedies available to the State at law or equity for Contractor breach.

*A liquidated damages provision is a contract clause that gives one party the right to withhold payment at an agreed rate per calendar day if the specified performance is late. This right does not exist unless it is in the contract. Use of these clauses is common in construction contracts. They are not commonly used in supply and most service contracts.*

*Damages for breach (i.e. late performance) by either party can be liquidated in the contract, but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty (emphasis added). See Section 4-2-718, CRS.*

*Place a memorandum in the contract file explaining the rationale for the liquidated damages*

*amount, e.g. the rental costs of substitute facilities or equipment, the labor costs of continued oversight or inspection when services contracts are delayed, lost opportunity for improved efficiencies because of late or unsatisfactory performance, or other specific elements of costs that might have been avoided had performance been completed on-time.*

### 13. Intellectual Property Indemnification (Short Form)

Contractor shall indemnify, hold harmless and defend, at the Contractor's expense, the State (including its employees and agents), against any and all loss, cost, expense or liability (including but not limited to attorney fees, including court costs and other legal expenses, and damages) arising out of a claim that the Product, or its use, infringes a patent, copyright, trademark, trade secret or other intellectual property right.

The Contractor's obligation hereunder shall not extend to any combination of the Product with any other product, system or method, unless:

(1) the product, system or method is:

(a) provided by the Contractor or the Contractor's subsidiaries or affiliates;

(b) specified by the Contractor to work with the Product; or

(c) reasonably required, in order to use the Product in its intended manner, and the infringement could not have been avoided by substituting another reasonably available product, system or method capable of performing the same function;  
or

(2) it would be reasonably expected to use the Product in combination with such product, system or method.

The State shall notify the Contractor within a reasonable time after receiving notice of a claim. Provided that the Contractor promptly and reasonably investigates and defends any such claim, the Contractor shall have control over the defense and settlement thereof; provided, however, that any such settlement shall be for money damages only unless the State otherwise consents in writing. The State shall furnish, at the Contractor's reasonable request and expense, information and assistance necessary for such defense. In the event the Contractor fails to vigorously pursue the defense and/or settlement of such claim, the State may assume the defense and settlement thereof and the Contractor shall be liable for all costs and expenses incurred by the State in the pursuit thereof.

In the event of such a claim, and if (1) the Product is held to be infringing, (2) the Contractor reasonably believes the Product will be held to infringe, or (3) where the Contractor's use is restricted as a result of a claim of infringement, the Contractor shall, at its expense, either obtain the right for the State to continue using the Product or replace or modify the Product to be non-infringing and of equivalent functionality. If none of the alternatives is reasonably possible, the Contractor shall refund a pro-rata portion of the amounts paid hereunder (based on the expected

life of the Product) and reimburse the State for all reasonable expenses for removal and replacement of the Product.

***Limitation of Liability Provisions. The following alternative provisions are model provisions consistent with commercial practices that can be used to specify limitations on liability. Normally, these would not be proposed in the first instance by the State. Practically, these clauses operate to limit potential contractor liability, since the State's performance obligation typically is payment.***

*[Limitation of Liability Alternative #1]* Other than the indemnification obligations and liability provided in this contract, including without limitation, obligations and liability for personal injury, death, property damage [and liability under \_\_\_\_\_ (*other clauses*)], neither party is liable to the other for any consequential, incidental, indirect or special damages, including commercial loss, however caused and regardless of legal theory or foreseeability, which directly or indirectly arises under this contract.

*[Limitation of Liability Alternative #2]* The express remedies provided herein as the State's sole remedies for breach of any and all warranties and for the Contractor's liability arising from the Products and any other performance by the Contractor pursuant to this contract. In no event shall the Contractor's contractual liability to the Customer for damages exceed the total charges payable under this contract. This limitation of liability provision and any other limitation or exclusion of damages in this contract does not limit or exclude the Contractor's liability for intellectual property rights infringement or for death or bodily injury or property damage arising out of contract performance and caused by the Contractor, its employees, agents or subcontractors.

#### **14. Intellectual Property Indemnification (Long Form)**

- A. The Contractor shall defend, at its sole expense, any claim(s) or suit(s) brought against the State alleging that the use by the State of any product(s), or any part thereof, supplied by the Contractor under this contract constitutes infringement of any patent, copyright, trademark, or other proprietary rights, provided that the State gives the Contractor written notice within twenty (20) days of receipt by the State of such notice of such claim or suit, provides reasonable assistance and cooperation to the Contractor in connection with such action, and the Contractor has sole authority to defend or settle the claim; provided, that such settlement shall be for money damages only. The Contractor shall consult the State regarding such defense and the State may, at its discretion and expense, participate in any defense. Should the State not choose to participate, the Contractor shall keep the State advised of any settlement or defense. In the event the Contractor fails to vigorously pursue the defense and/or settlement of such claim, the State may assume the defense and settlement thereof and the Contractor shall be liable for all costs and expenses incurred by the State in the pursuit thereof.
- B. The Contractor shall have liability for all such claims or suits, except as expressly provided herein, and shall indemnify the State for all liability incurred by the State as a result of such infringement. The Contractor shall pay all reasonable out-of-pocket costs and expenses,

including attorneys fees, court costs and other legal expenses, and damages finally awarded by a court of competent jurisdiction, awarded or agreed to by the Contractor regarding such claims or suits.

- C. If the product(s), or any part thereof, become the subject of any claim, suit or proceeding for infringement of any patent, trademark or copyright, or in the event of any adjudication that the product(s), or any part thereof, infringes any patent, trademark or copyright, or if the sublicense or use of the product(s), or any part thereof, is enjoined, the Contractor, after consultation with the State, shall do one of the following at the Contractor's expense: (i) produce for the State the right under such patent, trademark or copyright to use or sublicense, as appropriate, the product or such part thereof; or (ii) replace the product(s), or part thereof, with other suitable products or parts conforming to the original license and State specifications; or (iii) suitably modify the products, or part thereof. Except as otherwise expressly provided herein, the Contractor shall not be liable for any costs or expenses incurred without its prior written authorization.
- D. The Contractor shall have no obligation to defend against or to pay any costs, damages or attorney's fees with respect to any claim based upon: (i) the use of an altered release if the Contractor had not consented to the alteration, or (ii) the combination, operation or use of the product(s) with programs or data which were not furnished by the Contractor, if such infringement would have been avoided if the programs or data furnished by persons or entities other than the Contractor had not been combined, operated or used with the product(s), or (iii) the use of product(s) on or in connection with equipment or software not permitted under this contract if such infringement would have been avoided by not using the product(s) on or in connection with such other equipment or software.

## 15. Litigation Reporting

The Contractor shall promptly notify the State in the event that the Contractor learns of any actual litigation in which it is a party defendant. The Contractor, within five (5) days after being served with a summons, complaint, or other pleading in a case which involves services provided under this contract and which has been filed in any Federal or State court or administrative agency, shall deliver copies of such document to the representative designated in the "Notices" section of this contract. Notification requirements pursuant to this section also apply to any current and/or pending litigation.

***The Executive Director of the contracting agency, as well as the Attorney General's Office, needs to know if the Agency is being sued, or even if the party with which the State is contracting is being sued.***

## 16. Venue

The parties agree that exclusive venue for any action related to performance of this contract shall be in the City and County of Denver, Colorado.

***Paragraph 7 of the Special Provisions makes Colorado law the governing law under the contract. This clause requires any court actions to be filed in the City and County of Denver, especially important when you are dealing with corporations whose principal place of business is outside the State of Colorado.***

## 17. Retainage

An amount equivalent to \_\_\_\_ percent (\_\_\_%) of the amount shown to be due to the Contractor on each invoice shall be withheld by the State until \_\_\_\_\_. The \_\_\_% retainage shall be applied to [both] services performed [and goods provided] by the Contractor.

The Contractor's invoices shall reflect both the total amount and the amount due and payable, incorporating the \_\_\_% retainage.

Any funds withheld by the State pursuant to this subsection shall not be considered delinquent and therefore shall not be subject to interest calculations as set forth in the "Payment" section of this contract.

### **18. Third Party Maintenance**

The State reserves the right to engage any third party for the maintenance and/or support at any time for any portion of \_\_\_\_\_, to the extent that maintenance and/or support does not result in an interruption of the performance of the Contractor's required duties as set forth in this contract. The Contractor shall not develop any system(s) or take any action(s) that in any way prohibits or restricts the State from engaging third party maintenance/support provider(s).

### **19. Equipment Ownership**

Title to \_\_\_\_\_ ("Equipment), including but not limited to hardware and software, shall be and remain vested at all times with the Contractor and nothing in this contract or schedules shall give or convey to the State any right, title or interest therein unless purchased by the State pursuant to this contract. Nameplates, stencils or other indicia of the Contractor's ownership affixed or to be affixed to the equipment shall not be removed or obliterated by the State.

The Equipment will be housed at the locations set forth in \_\_\_\_\_ of this contract. The State shall provide and maintain the necessary space and environment for the installation and location of the Equipment in accordance with the manufacturer's then current specifications, including power supplies, phone connections and building security. The State shall protect the Equipment from damage (normal wear and tear excepted) or other loss, and shall adhere to the Contractor's and the manufacturer's reasonable instructions concerning the Equipment. The State shall not change the location or modify the Equipment without the prior express written consent of the Contractor. The State shall use the Equipment only for business or commercial purposes in accordance with applicable laws, rules and regulations and only at the locations set forth in \_\_\_\_\_.

Except with the prior express written consent of the Contractor, the State shall not make alterations to the Equipment nor permanently attach the Equipment to real estate. The parties acknowledge that the cost of potential personal property taxes on the Equipment has not been factored into the price of this contract. Should personal property taxes be successfully assessed by counties and/or the State of Colorado, the parties agree to negotiate an amendment to this contract incorporating said costs.

The Contractor hereby grants to the State a license to use the Equipment owned by the Contractor in accordance with the instructions provided to the State by the Contractor and the manufacturer.

Insurance

The Contractor shall maintain adequate insurance coverage, for the duration of this contract, including any extension, for loss of or damage to all Equipment, including but not limited to hardware and software.

***The clause can be used when the Contractor has equipment located on State property.***

**20. No-Cost Schedule Changes**

At the time of the execution of this contract, the parties recognize that the performance schedule associated with this contract is not fixed and that, at the direction of the State, the schedule for Contractor deliverables may change. The parties agree that any change(s) in the schedule of Contractor deliverables shall be accomplished by the Contractor at no additional cost to the State.

**21. Changes**

A written order

By a written order, at any time, and without notice to any surety, the State may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

- 1) [Drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the purchasing agency in accordance therewith] [description of services to be performed];
- 2) Method of shipment or packing [time of performance of services]; or
- 3) Place of delivery or performance of services.

Adjustments of Price or Time or Performance

If any such change order increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and this contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment

Failure of the parties to agree to an adjustment shall not excuse the Contractor from proceeding with this contract as changed, provided that the purchasing agency promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the Contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of the time for completion.

Time Period for Claim

Within 30 days after receipt of a written change order pursuant to this clause, unless such period is extended by the State in writing, the Contractor shall file notice of intent to assert a claim for an adjustment.

Claim Barred After Final Payment

No claim by the Contractor for an adjustment hereunder shall be allowed if asserted after final payment under this contract.

*Without a "changes" clause, the right of the State to direct changes in statement/scope of work or specifications is dependent on the willingness of the Contractor to agree to amend the contract. "Changes" clauses give the State a limited right to direct changes to the contract that are "within the scope of the contract." Of course, the Contractor would be entitled to an equitable adjustment in price/cost and/or schedule if such a change is ordered. Because the State would be committing to a payment of money by exercising this right, use of the changes clause would require review by the Attorney General and approval by the Controller.*

*The Modification policies on the State Controller's Web site has expanded versions of the changes clause that permit a bilateral "change order letter" without the necessity of Attorney General review. See Authoritative Guidance – Contract Policies issued by the State Controller – [State Contract Modifications](#) (other than Capital Construction).*

*This changes clause, an important right to reserve for the State, could be exercised unilaterally (after approval by the State Controller), although a bilateral change is most common using an amendment or other approved modification format. If you are anticipating use of the clause unilaterally, consult counsel and the State Controller's Office.*

**22. Price Adjustments**

A. Price Adjustment Method. Any adjustment in contract price pursuant to the application of a clause in this contract shall be made in one or more of the following ways:

- 1) By agreement on a fixed-price adjustment;
- 2) By unit prices specified in this contract;
- 3) In such other manner as the parties may mutually agree; or
- 4) In the absence of agreement between the parties, by a unilateral determination by the State of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee.

B. Submission of Cost or Pricing Data. The Contractor shall provide cost or pricing data for any price adjustment, subject to the provisions of the Cost or Pricing Data Section of the Colorado State Procurement Rules.

*If there are any clauses in the contract which give the Contractor an adjustment in price/schedule for certain events, the contract should also set out how the adjustment will be done. This clause is set forth in the Procurement Rules for general use, but it "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01.*

### **23. Health Insurance Portability and Accountability Act (HIPAA)**

*The Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. Sections 1320d – 1320d-8 (2003), and its implementing regulations, 45 C.F.R. Parts 160 and 164 ("HIPAA Privacy Rule"), is a federal law that was enacted in part to establish a national floor for the protection of certain personal health information. HIPAA's health information disclosure rules apply to "covered entities", a term defined to only include a health plan, a health care clearinghouse, and a health care provider who transmits protected health information in electronic form in connection with a covered transaction.*

*If a covered entity uses an outside entity to perform covered functions on its behalf, and that outside entity has access to protected health information, that outside entity is considered a "business associate" under HIPAA. HIPAA requires that the covered entity obtain written assurances from its business associates that they will use and safeguard PHI in accordance with the HIPAA Privacy Rule. A Business Associate agreement or addendum to a contract, is required between any State Covered Entity and its business associates.*

*The State Controller's Web site has additional information about [HIPAA](#) and model terms and conditions under HIPPA – Model HIPPA contract clause and addendum for new contracts and amendments. Agencies needing to use these provisions should seek the assistance of counsel familiar with HIPAA requirements.*

## C. PROVISIONS APPLICABLE TO GRANT-TYPE CONTRACTS

The following clauses are generally applicable to and used in grant-type contracts. However, be aware that although the grants management "Common Rule (The Common Rule--Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) specifies requirements generally applicable to grant contracts, federal programs also levy their own requirements and formats. These provisions are typically in the Code of Federal Regulations titles for the cognizant federal agency (e.g., Health and Human Services, 45 CFR 92). Grant requirements are also levied in [Forms and Circulars](#) published by the Office of Management and Budget.

Common forms and circulars that specify federal grant requirements are:

- A-87 Cost Principles for State, Local, and Indian Tribal Governments
- A-21 Cost Principles for Education Institutions
- A-102 Grants and Cooperative Agreements With State and Local Governments
- A-110 Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, Other Nonprofit Organizations
- SF 424B Standard Assurances from the Office of Management and Budget, Standard Form 424B (non construction)

Clause A6 has optional clauses that incorporate the cost accounting standards that govern federal grants.

### 1. Federal Funding

This contract is subject to and contingent upon the continuing availability of Federal funds for the purposes hereof. [The parties hereto expressly recognize that the Contractor is to be paid, reimbursed, or otherwise compensated with funds provided to the State by the United States Department of Labor under the Comprehensive Employment and Training Act of 1973, as amended for the purpose of contracting for the services provided for herein, and therefore, the Contractor expressly understands and agrees that all its rights, demands, and claims to compensation arising under this contract are contingent upon receipt of such funds by the State. In the event that such funds or any part thereof are not received by the State, the State may immediately terminate this contract without liability, including liability for termination costs.]

***This clause prevents the State from being held accountable for the amount of a contract if the funding is not allocated for some reason. Without this clause, it is unclear whether the State is obligated to pay from other funds where the federal funds are not made available.***

***This provision limits the liability of the State where particular moneys, such as special grant funds, CETA funds, or developmental grants have been obtained for the purposes of the contract. The State wishes to have no liability beyond the moneys obtained. This would prohibit the Contractor from making a claim on general State revenues where an external funding source withholds money or discontinues funding the project. This provision supplements paragraph 2 of the State Special Provisions required by Fiscal Rule.***

***The language of the paragraph is purposefully general, and can be modified – as shown in the bracketed language -- to refer to the particular grant, the funding sources, or to otherwise identify the matter more specifically.***

## 2. Matching Fund Requirements

The Contractor shall provide "matching funds," as that term is defined in the [CFR or OMB Circular Citation][Exhibit A][other provisions of this contract], in the amount of \$\_\_\_\_\_.

## 3. Legal Authority - Matching Funds

The governing body (City Council; Board of County Commissioners; Corporation Board of Directors; etc.) shall execute and provide to the State a resolution, or other document as appropriate, which: obligates the full amount of the Local Share of the funds required by this contract; and authorizes a specific individual to execute this contract and bind the Contractor/grantee to its terms.

***This clause supplements the Legal Authority clause. Where the Contractor/grantee is required by the contract to provide matching funds, and especially where the State Agency is contracting for the work instead of merely reimbursing the Contractor for the State/Federal share after the Contractor has spent its match share in performing the work, State agencies use this provision because the governing body of the Contractor has sole authority to obligate/appropriate funds).***

## 4. Maintenance of Records

The Contractor shall maintain a complete file of all records, documents, communications, and other written materials which pertain to the operation of programs or the delivery of services under this contract, and shall maintain such records for a period of three (3) years after the date of termination of this contract or final payment hereunder, whichever is later, or for such further period as may be necessary to resolve any matters which may be pending. All such records, documents, communications and other materials shall be the property of the State, and shall be maintained by the Contractor in a central location and the Contractor shall be custodian on behalf of the State.

***Where the Contractor is conducting a program which involves substantial service delivery—especially those benefiting third parties--records may have to be kept. Also, where the State retains an audit right, as in cost reimbursement contracting, records must be maintained. Frequently, it is only through examination of the Contractor's records that the State is able to determine if the Contractor has, in fact, performed its contract obligations. When such a situation is presented in a particular instance, the Contractor should be required to keep records.***

## 5. Audit, Inspection of Records, and Monitoring

The Contractor shall permit the State, Federal Government, or any other duly authorized agent of a governmental agency to audit, inspect, examine, excerpt, copy and/or transcribe the Contractor's records during the term of this contract and for a period of three (3) years following termination of this contract or final payment hereunder, whichever is later, to assure compliance

with the terms hereof, or to evaluate the Contractor's performance hereunder. The Contractor shall also permit these same described entities to monitor all activities conducted by the Contractor pursuant to the terms of this contract. As the monitoring agency may in its sole discretion deem necessary or appropriate, such monitoring may consist of internal evaluation procedures, examination of program data, special analyses, on-site check, or any other reasonable procedure.

***This provision supplements the record-keeping requirement. It is short and general, and can be expanded if circumstances dictate. Your program may have alternative clauses. Note the State's right to monitor the Contractor.***

## **6. Federal Examination of Records Clause**

The Contractor, and its subcontractors and subgrantees, will give the State, the awarding Federal agency, and the Comptroller General of the United States, through any authorized representatives, access to and the right to examine all records, books, papers, or documents related to the award and this contract; and will establish a proper accounting system in accordance with generally accepted accounting standards.

## **7. Federal Audit Provisions**

The Office of Management and Budgets (OMB) Circular No. A-133 Audits of States, Local Governments, and Non-Profit Organizations defines audit requirements under the Single Audit Act of 1996 (Public Law 104-156). All state and local governments and non-profit organizations expending \$500,000 or more from all sources (direct or from pass-through entities) are required to comply with the provisions of Circular No. A-133. The Circular also requires pass-through entities to monitor the activities of subrecipients and ensure that subrecipients meet the audit requirements. To identify its pass-through responsibilities, the State of Colorado requires all subrecipients to notify the State when expected or actual expenditures of federal assistance from all sources equal or exceed \$500,000.

***Confirm that the cognizant Federal agency has not established a different audit threshold for the program involved.***

## **8. Conflict of Interest**

The Contractor (and subcontractors or subgrantees permitted under the terms of this contract) shall maintain a written code of standards governing the performance of its employees engaged in the award and administration of contracts. No employee, officer or agent of the Contractor, subcontractor, or subgrantee shall participate in the selection, or in the award or administration of a contract or subcontract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- 1) The employee, officer or agent;

- 2) Any member of the employee's immediate family;
- 3) The employee's partner; or
- 4) An organization which employs, or is about to employ, any of the above,

has a financial or other interest in the firm selected for award. The Contractor's, subcontractor's, or subgrantee's officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.

## **9. Patent Rights - Federal Funds**

If any invention, improvement, or discovery of the Contractor/grantee or any of its subcontractors or subgrantees is conceived or first actually reduced to practice in the course of or under this contract work, and if such is patentable, the Contractor/grantee shall notify the State immediately and provide a detailed written report. The rights and responsibilities of the Contractor/grantee, third party contractors, and the State with respect to such invention, improvement, or discovery will be determined in accordance with applicable federal laws and regulations in existence on the date of execution of this contract which define Contractor title, right to elect title, federal government "march in" rights, and the scope of the federal government's right to a nonexclusive, irrevocable, paid-up license to use the subject invention for its own. The Contractor/grantee shall include the requirements of this paragraph in its third party contracts for the performance of the work under this contract.

*This clause will not grant the State much of a right in any invention reduced to practice during performance of a federally funded contract. Unless the invention is covered by the limited circumstances of a "shop right," the State would likely have little interest in the invention unless an assignment, license, or other allocation of ownership exists pursuant to contract. This clause is intended to invoke federal rules governing title to inventions, and the federal government's rights in those inventions. In a case in which development is expected to be funded with State funds, contact legal counsel for assistance in drafting necessary contract provisions.*

## **10. Rights In Data and Copyright - Federal Reserved Rights**

Except for its own internal use, the Contractor/grantee shall not publish or reproduce any data/information, in whole or part, that is recorded in any form or medium whatsoever and that is delivered or specified to be delivered under this contract, nor may it authorize or permit others to do so, without the written consent of the federal government, through the State, until such time as the federal government may have released such data/information to the public.

As authorized by 49 CFR 18.34, the federal government, through the State, reserves a royalty free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize the State and others to use: a) any work developed under this contract or a resulting third party contract irrespective of whether or it is copyrighted; and b) any rights of copyright to which a Contractor/grantee, sub-recipient, or third party contractor purchases ownership with federal assistance.

## **11. Grant Assurances**

If this contract involves the expenditure of federal funds, the Contractor shall at all times during the execution of this contract strictly adhere to and comply with all applicable federal laws and regulations, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract. The Contractor shall also require

compliance with these statutes and regulations in subgrant agreements permitted under this contract. The federal laws and regulations include:

- The "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (Common Rule), at 49 Code of Federal Regulations, Part 18.
- Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60). [All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees]
- The Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). [All contracts and subgrants for construction or repair in excess of \$2,000]
- The Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). This act requires that all laborers and mechanics employed by Contractors or sub-contractors that work on construction projects financed by federal assistance must be paid wages not less than those established for the locality of the project by the Secretary of Labor. [Construction contracts in excess of \$2,000 awarded by grantees and subgrantees when required by Federal grant program legislation]
- Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). [Construction contracts awarded by grantees and subgrantees in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers]
- Standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h), Section 508 of the Clean Water Act (33 U.S.C. 1368). Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15). [contracts, subcontracts, and subgrants of amounts in excess of \$100,000]
- Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).
- Office of Management and Budget Circulars A-87, A-21 or A-122, and A-102 or A-110, whichever is applicable.
- The Hatch Act (5 USC 1501-1508) and Public Law 95-454, Section 4728. These statutes state that federal funds cannot be used for partisan political purposes of any kind by any person or organization involved in the administration of federally-assisted programs.
- USC 6101 *et seq.*, 42 USC 2000d, 29 USC 794, and implementing regulation, 45 C.F.R. Part 80 *et seq.* These acts require that no person shall, on the grounds of race, color, national origin, age, or handicap, be excluded from participation in or be subjected to discrimination in any program or activity funded, in whole or part, by federal funds;
- The Americans with Disabilities Act (Public Law 101-336; 42 USC 12101, 12102, 12111-12117, 12131-12134, 12141-12150, 12161-12165, 12181-12189, 12201-12213, 47 USC 225 and 47 USC 611.
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended

(Public Law 91-646, as amended and Public Law 100-17, 101 Stat. 246-256). [If the Contractor is acquiring real property and displacing households or businesses in the performance of this contract]

- The Drug-Free Workplace Act (Public Law 100-690 Title V, subtitle D, 41 USC 701 *et seq.*).
- The Age Discrimination Act of 1975, 42 U.S.C. Sections 6101 *et seq.* and its implementing regulation, 45 C.F.R. Part 91;
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, and implementing regulation 45 C.F.R. Part 84.

***These grant assurance provisions were taken from the Department of Transportation model provisions. You should check the applicable federal agency overseeing the grant for required assurances.***

## **12. Federal Certifications**

### **Suspension and Debarment**

Certification Regarding Debarment, Suspension, Ineligibility  
And  
Voluntary Exclusion-Lower Tier Covered Transaction

#### **Instructions for Certifications**

1. By signing and submitting its proposal and signing this contract, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.
4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted or with whom this contract is made for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting its proposal and signing this contract that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal and signing this contract that it will include this clause titled “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction,” without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility an Voluntary Exclusion-Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal and execution of this contract, that neither it nor its principals is presently declared ineligible, or voluntarily excluded from participation in this transaction by an Federal department or agency.
2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to its proposal.

## **Certification Regarding Drug-Free Workplace Requirements**

### **Instructions for Certifications**

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.
2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant and executes the contract. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.
3. For grantees other than individuals, Alternate I applies.
4. For grantees that are individuals, Alternate II applies.
5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.
6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).
7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

### **Drug-Free Workplace Certifications**

#### **Alternate I. (Grantees Other Than Individuals)**

- A. The grantee/contractor certifies that it will or will continue to provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition:
2. Establishing an ongoing drug-free awareness program to inform employees about-
  - a) The dangers of drug abuse in the workplace;
  - b) The grantee's policy of maintaining a drug-free workplace;
  - c) Any available drug counseling, rehabilitation, and employee assistance programs; and
  - d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
3. Making it a requirement that each employee to be engaged in the performance of the grant/contract be given a copy of the statement required by paragraph 1;
4. Notifying the employee in the statement required by paragraph 1 that, as a condition of employment under the grant/contract, the employee will:
  - a) Abide by the terms of the statement; and
  - b) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
5. Notifying the agency in writing, within ten calendar days after receiving notice under paragraph 4(b) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant/contract activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant/contract;
6. Taking one of the following actions, within 30 calendar days of receiving notice under paragraph 4(b), with respect to any employee who is so convicted:
  - (a) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
  - (b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;
7. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs 1,2,3,4,5, and 6.

B. The grantee/contractor may insert in the space provided below the site(s) for the performance of work done in connection with this grant/contract:

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Alternate II. (Grantees Who Are Individuals)

1. The grantee/contractor certifies that, as a condition of the grant/contract, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant/contractor;
2. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant/contract activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant/contract.

**Certification Regarding Lobbying**

(Certification for Contracts, Grants, Loans, and Cooperative Agreements of \$100,000 or more)

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an office or employee of any agency, a Member of Congress, an office or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact

upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

### **Statement for Loan Guarantees and Loan Insurance**

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with this commitment providing for the United States to ensure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

### **Tobacco Free Certification**

Public Law 103-227, the Pro-Children Act of 1994, requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by any entity and used routinely or regularly for the provision of health, day care, education, or library services to children under the age of 18, if the services are funded by Federal programs either directly or through State or local governments, by Federal grant, contract, loan, or loan guarantee. The law does not apply to children's services provided by private residences, facilities funded solely by Medicare or Medicaid funds, and portions of facilities used for inpatient drug or alcohol treatment. By submitting and signing the application and this contract, the Contractor certifies that it will comply with the requirements of the Act. The Contractor further agrees that it will require the language of this certification to be included in any subawards which contain provisions for children's services and that all subgrantees shall certify and perform accordingly.

***All of these certifications may not be required for particular grant programs, although normally the first three certifications (suspension and debarment, drug free work place, and anti-lobbying) are required. The program administrator should check with the cognizant federal agency, or its implementing regulations, concerning the content of required certifications. Some federal agencies have particular certification forms and instructions for their completion. Some federal agencies have particular certification forms and instructions for their completion. If the certifications are executed as a part of the grant application or proposal submission, they need not also be included in the contract.***

***D. SPECIAL PROVISIONS***

*Two page Special Provisions (that include the signature page) are required by Fiscal Rule 3-1 to be used in every State contract, including grants. Current versions of the Special Provisions are maintained on the State Controller's Web site under [Authoritative Guidance – Fiscal Rule – Effective April 1, 2004 – Chapter 3: Contracts.](#)*