

STATE OF TEXAS §
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COUNTY OF TRAVIS §

**CONTRACTUAL AGREEMENT
TO PROVIDE THIRD-PARTY ADMINISTRATION OF THE SELF-FUNDED
STATE OF TEXAS VISIONSM PLAN UNDER THE
TEXAS EMPLOYEES GROUP BENEFITS PROGRAM**

Article 1. Background

- 1.1 The Employees Retirement System of Texas (“**ERS**”) is a trust fund established by the Texas Constitution and is described in Article XVI, Section 67, Texas Constitution. ERS is also organized pursuant to Subtitle B, Title 8, Texas Government Code, as well as 34 Texas Administrative Code, Sections 61.1, *et seq.* ERS administers defined benefit pension plans for State employees, law enforcement and custodial officers, elected State officials and judges. ERS invests State and member contributions in the retirement trust funds and administers the trust funds with a fiduciary obligation to the members and retirees of ERS who are its beneficiaries. ERS also administers the Texas Employees Group Benefits Program, which consists of health benefits, life insurance and other optional benefits to participating individuals eligible to receive those benefits under applicable law. The Board of Trustees for ERS (the “**Board**”) is the trustee for trust funds maintained and administered by ERS.
- 1.2 On June 20, 2022, ERS issued a Request for Proposal (entitled Request for Proposals to Provide Third-Party Administration of the Self-Funded State of Texas VisionSM Plan under the Texas Employees Group Benefits Program, RFP No. 20-10845-001) (the “**RFP**”), which is attached hereto as Exhibit A and is incorporated herein for all purposes as if restated in full.
- 1.3 EyeMed Vison Care, LLC, and its wholly-owned subsidiary First American Administrators, Inc. (together, “**CONTRACTOR**”) submitted a proposal (the “**Proposal**”) in response to the RFP seeking to provide those services, benefits and/or products for or on behalf of ERS as described in the RFP (the “**Services**”). The Proposal shall remain on file with ERS and is attached hereto as Exhibit B and is incorporated herein by reference for all purposes as if restated in full, except to the extent it conflicts or is inconsistent with this Contractual Agreement (the “**Contract**,” as more fully defined in Article 34 herein) or the RFP and ERS has not accepted such conflicting terms or inconsistent provisions in accordance with the clarifications referenced and defined below.
- 1.4 As used herein, CONTRACTOR shall mean and necessarily include the business entity selected by ERS to provide the Services pursuant to the Contract, and also includes CONTRACTOR’s Agents (as defined below) involved in performing, delivering or providing any representations, warranties, services, coverages, equipment, or products relating to the Contract or the Services. The term “**Agent**” shall mean affiliates, subsidiaries, joint venturers, representatives, officers, directors, principals, partners, employees, agents, assigns, any subcontractors and independent contractors, and any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR (whether or not CONTRACTOR sought the benefit). References hereafter to the Contract listing Agent, Agents and/or any of the above specific entities, in addition to CONTRACTOR, are for emphasis only and are not intended to limit the scope of the foregoing definition of CONTRACTOR.
- 1.5 Prior to its selection by ERS, in addition to CONTRACTOR submitting its Proposal and Clarifications, if any, CONTRACTOR participated in extensive interviews and meetings with and made representations to ERS’ staff and representatives regarding its ability to provide the Services to aid ERS in determining which entity seeking to provide the Services for ERS would be most capable of delivering the Services at the best value to ERS (“**RFP/Proposal Process**”). To the extent that Clarifications are made a part of this Contract, they are attached hereto and incorporated herein as Exhibit C.

- 1.6 For and in consideration of the mutual promises, covenants, and consideration herein expressed, the receipt and sufficiency of which is hereby acknowledged, the Contract is entered into by and between CONTRACTOR and ERS to be effective as of the date set forth herein.

Article 2. Contract Term, Renewal, Amendment and Termination

- 2.1 The Contract and all aspects of the Contract will be for a term beginning as of the date executed by an authorized representative of ERS as set forth on the signature page hereto ("**Effective Date**") and extending through August 31, 2029 (the "**Contract Term**") unless terminated as provided herein or further extended or renewed by written agreement of the parties. ERS and CONTRACTOR agree and acknowledge that the Services to be provided under the Contract are anticipated to be transacted primarily between September 1, 2023 and August 31, 2029 (the "**Service Period**").
- 2.2 Notwithstanding the immediately preceding paragraph, ERS and CONTRACTOR agree and acknowledge that there are duties and obligations specified by the Contract to be performed prior to, during and following the Service Period, and the parties each agree to perform all such duties and obligations, and all damages provisions and any applicable Performance Guarantee provisions included herein shall thereby be in effect during the Service Period. All contractual provisions related to CONTRACTOR's obligations that extend beyond the Service Period, shall survive the termination or expiration of the Contract. In the event any dispute arises in connection with any aspect of the Contract, CONTRACTOR and ERS each agree to continue to perform their obligations consistent with the undisputed terms of the Contract until the dispute is resolved and until termination of the Contract in accordance with the terms of the Contract.
- 2.3 CONTRACTOR agrees to act as a fiduciary in good faith, with candor and due diligence in connection with the performance of the Contract and any negotiations related thereto.
- 2.4 Termination
- (a) For Cause. Without limiting any other rights or remedies that ERS may have at law, equity or under contract, ERS shall have the right to terminate the Contract immediately in the event CONTRACTOR, in ERS' sole opinion, fails or refuses to perform, is negligent in performing, is unable to perform or it reasonably appears that CONTRACTOR will not perform any of its duties or obligations, in whole or in part, as provided by the Contract; or
- (b) Without Cause. In addition to and without restricting or waiving any other legal, contractual or equitable remedies otherwise available to ERS, ERS may terminate the Contract without cause by giving CONTRACTOR ninety (90) days written notice; or
- (c) Mutual Agreement. The parties agree that they may also terminate the Contract upon the mutual written agreement of their duly authorized representatives; or
- (d) Funding Out. ERS may terminate the Contract, either in whole or in part, without cause, if funds for the Contract are not approved by the Board of Trustees of the Employees Retirement System of Texas.
- 2.5 In the event that CONTRACTOR fails or refuses to perform or is negligent in performing any of its duties or obligations as required by the Contract, or fails or refuses to perform consistent with CONTRACTOR's statements, promises, and commitments made during the RFP/Proposal Process and in the Contract, then ERS, without limiting any other rights or remedies it may have by law, equity or under the Contract, will have the right to impose and collect liquidated damages as provided herein, to invoke any Performance Guarantees when applicable, to institute an action for actual damages and/or injunctive relief and/or to terminate the Contract immediately. Noncompliance with Performance Guarantees shall be subject to the Assessment Amount Calculation set forth in Exhibit E, Performance Guarantees, and not subject to additional liquidated damages as described in Article 9. ERS' termination of the Contract with or without cause shall

not limit or waive any remedies ERS may have for CONTRACTOR's breach of its past, present or future duties and obligations created by the Contract or otherwise required by applicable law.

- 2.6 Modifications. The Contract may be modified, amended, extended, or renewed only by written agreement properly executed by the duly authorized representatives of ERS and CONTRACTOR, subject to good faith negotiations of the parties concerning terms, fees and services required.
- 2.7 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 3. Rates and Payments; Tax Exempt Status

3.1 Administrative Fees. With regard to Administrative Fees for the State of Texas Vision Plan (the "***Vision Care Plan***"):

- (a) CONTRACTOR's administrative fees for the Services, coverages, benefits, Equipment, supplies and products that CONTRACTOR is required to perform, deliver or provide in connection with, arising out of or related to its performance of this Contract shall only be those submitted in writing by CONTRACTOR and specifically as described and accepted by ERS and attached hereto and fully incorporated herein as Exhibit D ("***Fee Schedule***"). ERS and CONTRACTOR acknowledge and agree that the rates reflected in Exhibit D are effective for the Contract Term, and such administrative fees shall remain unchanged for the Contract Term unless changed by written agreement of the parties or as required by law.
- (b) ERS and CONTRACTOR agree that CONTRACTOR shall not receive or charge any administrative fees or any other costs, expenses or fees in connection with the Contract unless it is included in the administrative fees set forth in Exhibit D. ERS shall promptly pay CONTRACTOR its administrative fees in accordance with and as provided by the Contract in connection with CONTRACTOR's performance of the Services.
- (c) CONTRACTOR warrants and represents that its Administrative Fees are adequate to cover all administrative expenses incurred during the Contract Term and during any runoff period following Contract termination.

3.2 Payment Methodology. The payment methodology to be utilized by ERS for the Vision Care Plan is fully set out in the RFP in Article X, Funding, Payment and Accounting Methodology Requirements. ERS agrees to make payments, and CONTRACTOR shall accept payments, as described therein. CONTRACTOR agrees not to submit billings to ERS, to the state, state agencies or institutions, or to individual Participants except in the case of copayments payable by the Participant. ERS enrollment records shall determine the obligation to make payment to CONTRACTOR. For purposes of this Contract, the term "***Participant***" will refer to any eligible person enrolled in the Vision Care Plan.

3.3 Funding Methodology. The funding methodology will be in accordance with RFP Article X and as agreed in writing by CONTRACTOR and ERS.

3.4 Claims Payments. Except as otherwise provided herein and in accordance with the RFP, CONTRACTOR shall pay all eligible claims and reimburse all eligible charges on behalf of eligible Participants before seeking any reimbursement for same from ERS. Thereafter, CONTRACTOR will promptly be reimbursed by ERS as provided in the RFP.

3.5 ERS reserves the right to revise the financial arrangements based on legislative, budgetary or other factors such as change in plan design. CONTRACTOR agrees that the obligations of ERS under the Contract are subject to the availability of funds lawfully appropriated for its purpose. CONTRACTOR also agrees that any legislative changes or plan design changes shall not entitle CONTRACTOR to any increase in compensation except for those changes that materially change the pricing or premium under the Contract.

- 3.6 ERS is a Texas governmental public trust fund and is, therefore, a tax-exempt governmental entity. Any fees to be paid by ERS in connection herewith (including any quote, proposal or lease schedule related thereto) do not include taxes of any kind (including premium and maintenance taxes), and have not been, and will not be, increased to compensate for the fact that ERS is tax-exempt. ERS does not agree to pay, and shall not pay, any taxes, including any property taxes of any kind whatsoever, on any lease, products or services related to this Contract or any quote, proposal or lease schedule related thereto. Neither CONTRACTOR nor any affiliated entity, successor or assign of CONTRACTOR shall submit any invoice to ERS for payment or reimbursement of any taxes of any kind or nature, including any property taxes of any kind or nature.
- 3.7 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 4. Scope of Services and Guidelines

- 4.1 Without limiting the importance of each provision of the RFP and CONTRACTOR's obligation to comply with the detailed requirements of the entire RFP, CONTRACTOR specifically agrees to provide the Services as described in the RFP and the Contract, as Contract is defined in Article 31 herein.
- 4.2 CONTRACTOR shall not revise the Services for the Contract Term, unless required by state or federal law or regulations applicable to the GBP as determined by ERS, or unless by written agreement between the authorized representatives of CONTRACTOR, as defined in Section 33.1, and ERS. CONTRACTOR understands and acknowledges that ERS may revise the Services or plan design at any time and agrees to cooperate with ERS and to negotiate in utmost good faith as to any adjustment of the rates reasonably related to such Services.
- 4.3 ERS must approve in writing any modification of the plan design or program specifications prior to any implementation thereof.
- 4.4 Any determination of or interpretation of eligibility and effective dates shall be made solely by ERS, and may include retroactive eligibility and effective date determinations, when deemed appropriate by ERS. The Executive Director of ERS, or his designee, by law and as acknowledged in this Contract, has exclusive authority to determine all questions relating to enrollment and eligibility in the GBP.
- 4.5 ERS also has the exclusive authority to determine enrollment for purposes of the payment methodology, as more fully described in the RFP and in this Contract.
- 4.6 CONTRACTOR may not cancel a Participant's coverage with CONTRACTOR under the Vision Care Plan until ERS has had an opportunity to review the facts and circumstances of the proposed cancellation and, in ERS' sole discretion, approve such cancellation.
- 4.7 CONTRACTOR may not impose any preexisting condition limitations or exclusions or require evidence of insurability as a condition for any individual participating in the Vision Care Plan.
- 4.8 CONTRACTOR shall not limit or discourage enrollment of any Participant of any agency, department, or commission of the state of Texas, by "quota" or other enrollment restrictions. CONTRACTOR understands that the Vision Care Plan is 100% voluntary.
- 4.9 As used in this Contract, the term "**Equipment**" means any computer systems and equipment including hardware, software, firmware, electronic components and computer-related products that are in any way utilized or relied upon by CONTRACTOR to perform, deliver or provide Services, coverages, benefits, Equipment, supplies or products to or on behalf of ERS, the GBP, and its Participants.

- 4.10 Good Faith Performance of Services. CONTRACTOR warrants and represents that it shall act in utmost good faith in performing, delivering and providing all Services, coverages, benefits, Equipment, supplies and products specified in the Contract, and in its negotiation of an agreement to any amendments and/or contract modifications that ERS subsequently requests to be made by written agreement between CONTRACTOR and ERS.
- 4.11 Fraud and Incorrect Billing/Payments. CONTRACTOR shall continue to maintain for ERS, as it may relate to ERS and the GBP, a comprehensive plan, as described in the RFP, including automated systems, to detect and prevent Participant and vision care provider fraud, malfeasance, criminal and improper activity, unnecessary vision treatments and procedures, unreasonably long delays for Participants to wait to obtain vision services, and other similar abuses and improprieties, including, but not limited to intentionally perpetrated fraud, theft, embezzlement, misappropriation of funds, commingling, misuse of the GBP, overcharges, overpayments, wrongful and incorrect payments, deceptive, and duplicate or suspicious billings, and the failure to disclose material information (hereinafter collectively "**Improprieties**") by CONTRACTOR, CONTRACTOR's officers, employees, affiliates, agents, subsidiaries and independent contractors and subcontractors (to the extent their information is available to CONTRACTOR), and Participants. Whether or not an Impropriety exists or may have been committed includes, but is not limited to, by way of example, the following circumstances and/or factors:
- (a) if a person or entity, either intentionally or negligently, presents or causes to be presented to ERS, the GBP or CONTRACTOR a claim for services, eligible benefits, supplies or products, or for any other manner of payment or reimbursement that (i) contains any statement or representation that the person or entity knows or reasonably should have known was false or misleading, and/or (ii) fails to disclose material information; or
 - (b) if CONTRACTOR or a vision care provider providing services for Participants refuses to provide an individual with a vision benefit or service that CONTRACTOR or the vision care provider is required to provide under this Contract or applicable laws and regulations; or
 - (c) if CONTRACTOR or a vision care provider providing services for Participants repeatedly or explicitly refuses to provide information required to be provided to ERS by law or under this Contract (or to CONTRACTOR, in the case of vision care provider billing) in order to establish the legitimacy of a claim, charge or billing; or
 - (d) if CONTRACTOR or any vision care provider engages in actions that indicate a pattern of wrongful denial of reimbursement for eligible benefits or services that CONTRACTOR or any vision care provider is required to provide under this Contract or applicable laws and regulations, or that indicate a pattern of wrongful payment or requests for payment for vision care services, eligible benefits, supplies, products, or services not delivered or improperly billed.
 - (e) If any person or entity commits any act or omission that could reasonably be considered a violation of Tex. Ins. Code §§ 1551.066 and 1551.351, whether or not these sections of Chapter 1551 specifically apply to that person or entity. Chapter 1551 of the Texas Insurance Code shall be referred to herein as the "**Act.**"
 - (f) CONTRACTOR shall enforce and implement all aspects of its comprehensive plan and the requirements of this Contract, in order to prevent, detect, investigate, and eliminate Improprieties. CONTRACTOR shall conduct investigations on its own, in cooperation with vision care providers, other vendors and Carriers or Administering firms (as those two terms are defined in the Act) when directed by ERS or as CONTRACTOR otherwise deems in good faith to be appropriate in the

exercise of reasonable due diligence, with regard to Improprieties and as further provided in the RFP.

- (g) CONTRACTOR shall notify ERS in a timely manner whenever it reasonably believes that any of the Improprieties described herein or other similar occurrences have occurred in connection with the GBP and/or in connection with CONTRACTOR's performance under this Contract.
 - (h) CONTRACTOR shall provide reports to ERS regarding such Improprieties in a timely manner upon their detection by CONTRACTOR, and also as may be requested by ERS.
 - (i) CONTRACTOR agrees to comply with all other policies or directives, as they are developed by ERS and agreed to by CONTRACTOR, in connection with the prevention, detection, investigation, and elimination of fraud, abuse, and Improprieties in connection with the GBP and as they may apply to CONTRACTOR.
 - (j) CONTRACTOR further agrees that it will maintain all ERS and GBP-related information and all pertinent books, documents, computer information, papers and records of CONTRACTOR, as well as encounter data, including, but not limited to services provided by vision care providers, dates of service, to whom the service was provided and identification of the vision care providers providing the service, as provided in the RFP and as required by this Contract, and for at least the period of time stated in Article 15.1 of this Contract, and CONTRACTOR acknowledges and agrees that ERS or its designated representatives shall have reasonable and timely access to all such information and documents, including computer records related to ERS and the GBP.
 - (k) CONTRACTOR agrees that it shall fully assist and cooperate with ERS, the Office of the Attorney General of Texas, any other applicable state or federal agency and law enforcement authorities in the prosecution of administrative and civil actions and/or criminal prosecution of those individuals or entities who have engaged in the commission of Improprieties.
 - (l) In the event ERS determines that CONTRACTOR has made an error in the handling of a Participant's account, CONTRACTOR shall compensate the Participant for his reasonable out-of-pocket loss by either direct payment to the Participant or credit to his account, at the Participant's election. The cost of such payment or credit shall be borne entirely by CONTRACTOR and shall not be charged back to the Participant, ERS, the Vision Care Plan, the GBP, or the state of Texas.
 - (m) This entire Section 4.11 shall survive any termination, expiration, renewal, or extension of this Contract.
- 4.12 Provider Documentation Fees. For contracts that CONTRACTOR enters into or renews with vision care providers on or after the date of this Contract, CONTRACTOR will notify the vision care providers that they may only charge or bill Participants for the routine execution of forms documenting vision status, and the copying and providing of vision records. Additionally, any issues relating to inappropriate billing by vision care providers will be addressed by CONTRACTOR's network management process.
- 4.13 Performance Guarantees. To the extent that CONTRACTOR has agreed to Performance Guarantees ("**Performance Guarantees**") in connection with its performance under the Contract, then they are attached hereto as Exhibit E and are incorporated herein for all purposes as if restated

in full. ERS and CONTRACTOR agree that the Performance Guarantees as further described in Exhibit E, if applicable, shall apply to CONTRACTOR's performance under the Contract.

- 4.14 Credentialing. The parties acknowledge and agree that CONTRACTOR is solely responsible for credentialing, re-credentialing and contracting with all vision providers, and CONTRACTOR warrants and represents that it has acted and shall continue to act in good faith and has used and shall continue to use its best efforts: (a) to properly and diligently screen and investigate the credentials of all vision care providers prior to allowing same to participate in the CONTRACTOR network utilized by Participants. This includes, but is not limited to, all vision care providers participating in CONTRACTOR's network as of the effective date of the Contract, and continuing throughout the Contract Term and any amendments, renewals or extensions thereto; and (b) to contract only with licensed vision care providers in good standing in their profession and with the appropriate state and/or federal licensing and regulatory agencies for their profession.
- 4.15 System Access. As further described in the RFP and subject to Exhibit H, Data Security and Breach Notification Agreement, CONTRACTOR shall provide ERS and its authorized representatives access to those system(s) that provide data regarding the GBP records, including, but not limited to Participant information, enrollment, demographic, individual claims information and group specific data for ad hoc actuarial analysis.
- 4.16 Runoff. Following expiration or termination of the Contract for any reason, CONTRACTOR shall continue to be responsible for processing and paying claims incurred during the Contract Term.
- 4.17 Unclaimed Funds. Any funds unclaimed by Participants, including lost, returned and uncashed checks, reimbursement or otherwise, shall be managed by CONTRACTOR in accordance with § 1551.401(g) of the Texas Insurance Code. After making a good faith effort to locate the person entitled to the unclaimed funds, CONTRACTOR shall return the funds to the Plan. Such funds are neither subject to escheatment to any state, nor are they to be turned over to the Comptroller of Public Accounts as "unclaimed property" to be held for the benefit of the recipient because they are trust funds as set forth in Texas Insurance Code § 1551.401.

Article 5. Conformity with Contract, Rules, Laws, and Regulations

- 5.1 CONTRACTOR warrants and represents that it shall comply with each aspect, requirement, specification or obligation set forth in the RFP, as amended or modified as accepted by ERS, regardless of whether or not it is specifically addressed herein.
- 5.2 CONTRACTOR warrants and represents that it shall comply with each aspect, requirement, specification, or obligation set forth in the additional documents incorporated herein by reference, regardless of whether or not specifically addressed herein.
- 5.3 CONTRACTOR warrants and represents that it shall comply with all aspects of the Contract and all applicable laws and regulations, both state and federal, and requirements of any organization or entity with any oversight authority over CONTRACTOR throughout the entire Contract Term and any extension, amendment or renewal thereof.
- 5.4 CONTRACTOR warrants and represents that it shall instruct its Agents that they must comply with all applicable United States state and federal laws and regulations and also applicable foreign laws and regulations and with all requirements of any organization or entity with any oversight authority over CONTRACTOR or its agents in connection with the performance of the Contract throughout the entire Contract Term and any extension, amendment or renewal thereof.
- 5.5 CONTRACTOR warrants and represents that it, and its Agents, to the best of CONTRACTOR's knowledge, are presently in compliance with all existing United States state and federal laws and regulations and also applicable foreign laws and regulations, a violation of which would or could affect ERS and/or would or could materially adversely affect CONTRACTOR's ability to fulfill its obligations and undertakings set forth in the Contract.

Article 6. Governing Law

- 6.1 The Contract and the parties' performance of same and all matters in connection with the relationship of the parties shall be governed by and construed and performed in accordance and conformity with the laws of the state of Texas, without regard to conflicts of law provisions.
- 6.2 To the extent that federal or Texas state laws or regulations change or a change of circumstances require ERS to include additional language in its contracts, CONTRACTOR agrees to act in good faith and to cooperate in the execution of any contract amendment necessary to effectuate such federal or state law or regulation change or a change of circumstances. In any situation under the Contract where a question arises regarding the applicability of state or federal laws or regulations, then ERS' interpretation of the applicability of such law or rule shall control.
- 6.3 Subject to and without waiving ERS' or the state of Texas' sovereign or official immunity and pursuant to Texas Government Code Ann. § 811.010, ERS and CONTRACTOR agree and consent to Austin, Travis County, Texas as the proper venue for any court proceedings between the parties, and that a Texas state court sitting in Austin, Travis County, Texas shall have jurisdiction over CONTRACTOR in connection with any action or proceeding arising out of, in connection with or related to the Contract or the parties' relationship.
- 6.4 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 7. Sovereign Immunity

- 7.1 The parties agree and acknowledge that nothing contained in the Contract, or in any amendment, extension or renewal thereof, is intended to nor will it have the effect of waiving the sovereign or official immunity of ERS, its past, present or future trustees, officers, employees and agents, or of the state of Texas, its past, present or future officers, employees, agents, or its departments, or agencies, nor does ERS' acceptance of any services, benefits, supplies or products under the Contract constitute any waiver, express, implied or otherwise, of sovereign or official immunity to suit or liability of ERS, its trustees, officers, agents or employees or of the state of Texas. As described herein, ERS' sovereign immunity includes, but is not limited to, all immunities, privileges, defenses, rights or actions available to ERS and its employees, trustees, and directors based on ERS' sovereign status and such protections to which it may be entitled as an agency of the state of Texas under Texas law (by comity or otherwise) and under the Eleventh Amendment to the Constitution of the United States of America. The parties further agree that ERS' exercise of any legal, regulatory, equitable or contractual remedies in connection with the Contract shall not constitute a waiver of the immunities identified herein.
- 7.2 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 8. Notification of Management Changes and Personnel

- 8.1 Without contravening applicable law, CONTRACTOR agrees to notify ERS' Executive Director immediately upon being able to lawfully make a public announcement of reaching any form of binding agreement in connection with and prior to any merger, acquisition, business reorganization, or other material change of CONTRACTOR's management, ownership or business structure or similar Change of Control.
- 8.2 Before CONTRACTOR's personnel are assigned to perform any Services, ERS must be provided the name and qualifications of each person CONTRACTOR proposes to utilize to perform any aspect of the Services. ERS, in its sole discretion, may approve each individual or require that additional names be submitted. Once assigned, if any CONTRACTOR personnel are determined by ERS to be unsatisfactory for the proper and satisfactory completion of any Services, such person will immediately be removed from ERS' account and cease providing the Services and will be replaced by CONTRACTOR as soon as reasonably possible.
- 8.3 This Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 9. Liquidated Damages and Performance Guarantees

- 9.1 CONTRACTOR acknowledges that with respect to the performance of, or a violation of, its duties and obligations under the Contract, it is impossible or impractical to estimate certain damages with any degree of certainty. Therefore, the parties agree that, in addition to ERS' right to terminate the Contract as otherwise set forth herein, CONTRACTOR shall pay to ERS as fixed, agreed, and liquidated damages, for each instance of delay, non-compliance, or non-performance, the sum set forth in Section 9.7 below in any of the following situations (each, a "**Default**"):
- (a) upon ERS' receipt of information that CONTRACTOR is not reasonably in compliance with the Contract, or that CONTRACTOR by its action, inaction, or declaration of intent, will not be in compliance with any of its obligations under the Contract;
 - (b) in the event that CONTRACTOR fails to perform, deliver or provide the Services within the time (i) specified in the Contract, (ii) otherwise specified by ERS in writing if a deadline specified in the Contract is reasonably changed by ERS and CONTRACTOR is notified of same within a reasonable time before performance is required, or (iii) otherwise specified by ERS in writing if a deadline is not currently specified in the Contract but later provided to CONTRACTOR within a reasonable time before performance is required; or
 - (c) if, in the sole opinion of ERS, delivery or performance is inexcusably delayed by CONTRACTOR, or if it becomes apparent that CONTRACTOR will not or has no apparent intent or ability to perform, deliver or provide all or any portion of the Services in accordance with the terms of the Contract.

Noncompliance with Performance Guarantees shall be subject to the Assessment Amount Calculation set forth in Exhibit E, Performance Guarantees, and will not be considered a Default hereunder.

- 9.2 In the event of a Default as described herein, ERS will provide written or electronic notification ("**Notice**") to CONTRACTOR that the Default must be corrected by the date specified by ERS in the Notice, which date shall be at least five (5) days after such Notice has been given, unless ERS reasonably determines in its sole discretion that more immediate performance is required, in which case any shorter deadline contained in the Notice shall apply. CONTRACTOR shall correct the Default by the time stated in the Notice. If, however, the Default has not been fully corrected within the time specified in the Notice ("**Notice Period**"), then ERS may, in its sole discretion, enforce the liquidated damages provision of the Contract beginning five (5) days following the Notice Period, or invoke Performance Guarantees if applicable, or both, as further specified below.
- 9.3 The liquidated damages permitted hereunder shall accrue each calendar day and/or ERS may invoke the agreed upon Performance Guarantees, if any, until such time as CONTRACTOR complies with the Contract or satisfactorily performs, delivers and/or provides the Services or until the time ERS may reasonably obtain performance, delivery or provision of similar services or products from another source. In the event CONTRACTOR fails or refuses to comply, or it becomes apparent that CONTRACTOR will not or has no apparent intent or ability to comply with all or any portion of its obligations under the Contract, ERS may be required, because of such non-compliance, to obtain services and/or products from another source. In this event, ERS may elect to charge the full increase in costs to CONTRACTOR as an element of actual damages and/or to invoke the agreed upon liquidated damages and/or Performance Guarantee provisions, if any. The liquidated damages and/or Performance Guarantees shall be in addition to any other remedy or damages available to ERS.
- 9.4 The parties hereto agree that the liquidated damages and, if applicable, Performance Guarantees provided in the Contract, and any amounts assessed in connection therewith, are neither a penalty nor a forfeiture and shall compensate ERS solely for ERS' inability to use or benefit from the Services, and they are not intended to, and do not include:

- (a) any damages, additional costs or extended costs incurred by ERS for extended or substituted administration of the Contract or by ERS' agents, representatives, consultants, or independent contractors for extended or substituted administration of the Contract;
 - (b) any increases in financing costs resulting from delay in performance; or
 - (c) any additional services relating to, or arising as a result of, CONTRACTOR's delay in performance.
- 9.5 ERS shall be entitled to claim against CONTRACTOR, as part of ERS' actual damages, including, but not limited to, direct, indirect and consequential damages, any amounts not specifically included within the liquidated damages and/or Performance Guarantees as set forth herein. Such actual damages shall be computed separately. Together with liquidated damages and/or Performance Guarantees, all such damages shall, in ERS' sole discretion, be either deducted from any monies due to CONTRACTOR under the Contract, billed to CONTRACTOR or otherwise collected in accordance with applicable law.
- 9.6 CONTRACTOR shall not be charged with liquidated damages when, in ERS' determination, the delay in delivery or performance arises out of causes beyond the control and without any fault or negligence of CONTRACTOR.
- 9.7 The amount of such liquidated damages, as referred to herein, shall be up to and including \$10,000.00 (Ten Thousand Dollars) for each Default or each calendar day beyond the Notice Period or deadline, as applicable, that CONTRACTOR delays or fails to perform its obligations under this Contract, whichever ERS determines is appropriate.
- 9.8 This entire Article and ERS' right to any and all remedies, including, but not limited to, liquidated damages, Performance Guarantees, if applicable, actual damages, injunctive relief or other remedies available under the Contract, at equity or pursuant to applicable statutory, regulatory, and common law, shall survive any termination, expiration, renewal, or extension of the Contract.

Article 10. Independent Contractor Status

- 10.1 CONTRACTOR and ERS understand and agree that CONTRACTOR is an independent contractor performing, providing, and delivering the Services. It is expressly understood and agreed by the parties hereto that personnel assigned by CONTRACTOR to perform or provide any of the Services are employees of CONTRACTOR, and are not employees, agents, joint venturers, representatives or partners of ERS or the state of Texas for any purpose. Therefore, as an independent contractor, CONTRACTOR agrees that its employees are not eligible for or entitled to receive any retirement benefits as a member of the employee class pursuant to Texas Government Code Ann. § 812.003, or any insurance benefits pursuant to Chapter 1551 of the Texas Insurance Code Ann., or any other kind of benefit ordinarily provided by the state of Texas to its employees. Further, CONTRACTOR shall be responsible for obtaining, paying and maintaining all insurance and payroll withholding obligations that may be required by state or federal law in its performance of the Contract, including, but not limited to, federal and state payroll taxes, income taxes, and health and worker's compensation insurance, if required. No employer or other responsibilities to such personnel are, or may be, assumed by ERS, its past, present or future officers or employees, the Board, or the state of Texas.

Article 11. Cumulation of Remedies

- 11.1 All remedies available to ERS for CONTRACTOR's breach or anticipatory breach of the Contract are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies. Liquidated damages, actual damages, cost projections, injunctive relief and/or Performance Guarantees may also be invoked either separately or combined with any other remedy in accordance with applicable law; provided, however, that noncompliance with Performance

Guarantees shall be subject to the Assessment Amount Calculation set forth in Exhibit E, Performance Guarantees, and not subject to additional liquidated damages as described in Article 9. Repudiation by CONTRACTOR of any provisions of the Contract and any failure by CONTRACTOR to disclose information to ERS as required by the Contract also constitutes a breach of the Contract.

11.2 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 12. Historically Underutilized Businesses

12.1 If CONTRACTOR has indicated in its Proposal that subcontracting opportunities for historically underutilized businesses, as defined in Texas Government Code Ann. § 2161.001, are available, then CONTRACTOR warrants and represents that such subcontracting will only be permitted and performed in a manner consistent with ERS' and CONTRACTOR's fiduciary duties.

12.2 HSP Prime Contractor Progress Assessment Report. All HUB and non-HUB subcontractor information shall be reported to ERS using the HSP Prime Contractor Progress Assessment Report form. The report shall be submitted to ERS' Purchasing Section. The report shall be submitted monthly even during the months no invoice is submitted to ERS. All payments made to subcontractors shall be reported. ERS may verify the amounts being reported as paid by requesting copies of canceled checks paid to subcontractors.

Article 13. Public Information Act and Confidentiality

13.1 CONTRACTOR acknowledges that ERS is an agency of the state of Texas and is subject to the Texas Public Information Act, Texas Government Code Ann. ch. 552 (the "**PIA**"). CONTRACTOR agrees that it is required by Texas law to make any information pursuant to this Contract, and not otherwise excepted from disclosure under the PIA, available in a format that is accessible by the public at no additional charge to ERS.

13.2 In accordance with Section 552.372 of the Texas Government Code, CONTRACTOR agrees to (1) preserve all contracting information related to the contract as provided by the records retention requirements applicable to ERS for the duration of the contract, (2) promptly provide to ERS at no additional charge any contracting information related to the contract that is in the custody or possession of the CONTRACTOR on request of ERS, and (3) on termination or expiration of the contract, either provide at no cost to ERS all contracting information related to the contract that is in the custody or possession of the CONTRACTOR or preserve the contracting information related to the contract as provided by the records retention requirements applicable to ERS

13.3 CONTRACTOR warrants and represents that it will comply with all requirements of § 552.372(a) of the Texas Government Code. CONTRACTOR acknowledges that except as provided for in § 552.374(c) of the Texas Government Code, the requirements of Subchapter J, Chapter 552 of the Government Code may apply to the Contract and the CONTRACTOR agrees that the Contract can be terminated if CONTRACTOR knowingly or intentionally fails to comply with a requirement of that subchapter.

- 13.4 ERS maintains documents and information that are considered confidential by law. In connection with the Contract, CONTRACTOR will have access to information that is considered confidential. CONTRACTOR understands that public availability of individual items of ERS' confidential information does not release its obligation of confidentiality. CONTRACTOR is not permitted to disregard its obligations of confidentiality by use of items of ERS' confidential information to guide a search of publicly available information. CONTRACTOR also is not permitted to piece together a series of items of information from unconnected sources and fit these items of information together by use of ERS' confidential information to make a showing that all or part of ERS' confidential information was "public." CONTRACTOR warrants and represents that during and after the Contract, except as necessary to fulfill CONTRACTOR's obligations under the Contract, such confidential information shall not be sold, assigned, provided, conveyed, released, disseminated, or otherwise disclosed by CONTRACTOR, its Agents or any other persons or entities without ERS' express written permission, and that CONTRACTOR shall instruct its Agents, representatives, subcontractors and/or independent contractors that they shall not so use or disclose such confidential information to any other person or entity, during or after the Contract, without the express written permission of ERS, except as absolutely necessary for CONTRACTOR to provide the Services or as required by law. CONTRACTOR warrants and represents that it has a tested and proven system in effect to protect all confidential information as defined herein.
- 13.5 As used herein, "**confidential information**" means all trade secrets, confidential or proprietary information, and all other knowledge, information, documents or materials, owned, developed, or possessed by ERS or in any way related to its members, retirees, participants, alternate payees, beneficiaries and annuitants (each, a "**Participant**"), whether in electronic, tangible or intangible form, the confidentiality of which ERS or its Participants take reasonable measures to protect. Confidential information includes, but is not limited to, information relating to ERS' processes, operations, Participants (including the identities of Participants or prospective Participants), business relationships, products/services (including prices, costs, sales, or materials/processes used to make/provide the products/services), financial information, employee salaries, employee or retiree benefits, business methods, business plans, databases, computer programs, designs, models, operating procedures, drawings, specifications, and any other information owned, developed, or possessed by ERS. Examples of such confidential information include, but are not limited to, all records and information contained in the claims or membership records of all Participants in any program or retirement system administered by ERS, all information that is subject to protection from disclosure pursuant to Texas or federal laws and regulations including, without limitation all privacy protections as provided in Texas Health & Safety Code Ann. Chapter 181 and in the "Privacy Rule" adopted pursuant to the federal Health Insurance Portability and Accountability Act of 1996 [Pub. L. No. 104-191], amended by the Health Information Technology for Economic and Clinical Health Act, as incorporated in the American Recovery and Reinvestment Act of 2009, and the implementing regulations issued and amended by the U.S. Department of Health and Human Services Secretary (45 C.F.R. Parts 160 and 164) (hereinafter referred to as "**HIPAA**"), information that is provided or made available to CONTRACTOR by ERS, its Administering firms and Carriers (as defined in Chapter 1551, Texas Insurance Code), if applicable, and consulting actuaries in connection with the Contract. Confidential information also includes any and all "access devices," as that term is defined by § 552.136 of the PIA, and information relating to computer network security or to the design, operation, or defense of a computer network.
- 13.6 CONTRACTOR further warrants and represents that it will comply with all applicable Texas and federal laws and regulations, including, without limitation Chapter 1551, Texas Insurance Code Ann., Texas Health & Safety Code Ann., Chapter 181 as it may apply, the federal HIPAA law and regulations promulgated pursuant to HIPAA, and all other applicable state and federal laws and regulations. If applicable, the parties' Business Associate Agreement required by HIPAA is attached and incorporated by reference as Exhibit F. CONTRACTOR warrants and represents that CONTRACTOR and its affiliates, subsidiaries, employees, officers, directors, principals, agents, representatives, assigns and/or successors shall not, and that CONTRACTOR shall instruct its independent contractors and subcontractors that they shall not, use, appropriate, sell, assign, convey, provide, release, access, obtain, disclose or otherwise disseminate any confidential or

protected health information except as is absolutely necessary for CONTRACTOR to perform its obligations under the Contract, and in any event shall not do so in violation of any applicable state or federal law or regulation. In any situation under the Contract where a question arises regarding the applicability of state or federal laws or regulations, then ERS' interpretation of the applicability of such law or rule shall control.

- 13.7 The items designated herein as confidential information are the exclusive property of ERS and the Texas Employees Group Benefits Program (the "**GBP**"), as applicable, and CONTRACTOR agrees that the confidential information shall be kept confidential as required herein, and by the above-cited statutes and applicable regulations, and Texas Government Code Ann. §§ 552.0038, 615.045, 815.503 and 840.402; § 1551.063 Texas Insurance Code Ann. and any and all other applicable Texas and federal laws and regulations. This paragraph shall, to the extent possible, be interpreted to be consistent with the terms of HIPAA, but in the event of a conflict with HIPAA, the terms of HIPAA shall control unless this Section is more strict in protecting confidential information.
- 13.8 CONTRACTOR warrants and represents that it shall instruct its Agents that any release of any confidential information to any person or entity, including any Public Servants and any person or entity who has undertaken to advise, consult, or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR (whether or not CONTRACTOR sought the benefit), may be authorized only by ERS in writing unless such release is absolutely required to provide the Services, and that such release must be in accordance with the applicable laws and regulations cited herein. If CONTRACTOR receives a request for any information connected with the Services, confidential or otherwise, from any person or entity, including any Public Servants and any person or entity who has undertaken to advise, consult, or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR (whether or not CONTRACTOR sought the benefit), CONTRACTOR shall immediately send, if possible, a copy of such request to ERS by facsimile, electronic mail or similar means to ensure same or next day arrival at ERS, and in no event shall such notice be sent later than one (1) business day after CONTRACTOR's receipt of the request, so that ERS can determine if a disclosure is required or permitted. CONTRACTOR shall maintain and protect from unauthorized disclosure, all confidential information and materials it receives or creates in connection with the Contract.
- 13.9 Except as expressly stated herein, neither CONTRACTOR nor any Agent of CONTRACTOR may use or permit to be used, released, conveyed, assigned, provided, transmitted, disclosed or otherwise disseminated to any other person or entity, any confidential information obtained as a result of CONTRACTOR's or any Agent's duties under the Contract without the prior written consent of ERS, except as is absolutely necessary for CONTRACTOR to perform the Services or as otherwise required by applicable law. CONTRACTOR shall establish, maintain, and enforce agreements with its Agents who have access to any confidential information to fulfill CONTRACTOR's duties and obligations in the Contract and to specifically prohibit any use, sale, assignment, conveyance, provision, release, disclosure or other dissemination of any confidential information, except as otherwise required by law or authorized by ERS in writing.
- 13.10 CONTRACTOR shall immediately report to ERS any and all unauthorized use, appropriation, sale, assignment, conveyance, provision, release, access, acquisition, disclosure or other dissemination of any confidential information of which it or its Agent is aware or has knowledge or reasonably should have knowledge. CONTRACTOR shall also promptly furnish to ERS full details of the unauthorized use, appropriation, sale, assignment, conveyance, provision, release, access, acquisition, disclosure or other dissemination, or attempt thereof, and use its best efforts to assist ERS in investigating or preventing the reoccurrence of such event in the future. CONTRACTOR shall cooperate with ERS in connection with any litigation and investigation deemed necessary by ERS to protect any confidential information. CONTRACTOR further agrees to promptly prevent a reoccurrence of any unauthorized use, appropriation, sale, assignment, conveyance, provision, release, access, acquisition, disclosure, or other dissemination of confidential information.

- 13.11 CONTRACTOR acknowledges that any improper use, appropriation, sale, assignment, conveyance, provision, release, access, acquisition, disclosure or other dissemination of any confidential information to others may cause immediate and irreparable harm to ERS and/or a Participant and may violate state or federal laws and regulations. If CONTRACTOR or its Agents improperly use, appropriate, sell, assign, convey, provide, release, access, acquire, disclose or otherwise disseminate such confidential information to any person or entity in violation of the Contract, or applicable laws or regulations, ERS will immediately be entitled to injunctive relief and/or any other rights or remedies available to ERS under the Contract, at equity or pursuant to applicable statutory, regulatory and common law without a cure period.
- 13.12 ERS and its auditors, advisors, consultants, and custodians, if applicable, (a) are entitled to use and retain copies of all written materials generated by CONTRACTOR under this Contract and (b) to the extent permitted by ERS in its sole discretion, may disclose such materials to third parties. CONTRACTOR should assume that all reports created by it for ERS may be publicly available records, in accordance with Texas law, and may be subject to the PIA and that any discussions regarding the reports and advice rendered by CONTRACTOR that ERS may deem necessary to be conducted in an open meeting will comply with applicable Texas open meetings laws. CONTRACTOR acknowledges and agrees that materials it delivers to ERS may be included in board materials provided to the public in connection with an open meeting of the Board or one of its committees. **If CONTRACTOR includes materials that are deemed confidential and/or proprietary or copyrighted materials of any third party source in any report or document delivered to ERS, CONTRACTOR shall clearly and prominently label such confidential and/or proprietary materials as such and shall include the appropriate trademark, service mark or copyright notices in such trademarked, service marked or copyrighted materials and identify the specific materials subject to trademark, service mark or copyright. CONTRACTOR acknowledges that trademarked, service marked or copyrighted material may under some circumstances be copied by ERS in response to a request under the PIA. CONTRACTOR further acknowledges that trademarked, service marked or copyrighted information and other information that CONTRACTOR claims is confidential and/or proprietary may nevertheless be determined by the Office of the Texas Attorney General to be public information under the PIA and subject to inspection upon request. In assembling materials delivered to ERS, CONTRACTOR shall use its reasonable best efforts to separate any trademarked, service marked or copyrighted materials, clearly designated as such, from non-trademarked, non-service marked or non-copyrighted materials and confidential and/or proprietary information, also clearly designated as such, from information that is not confidential and/or proprietary. CONTRACTOR acknowledges that ERS does not have any duty to designate CONTRACTOR information as confidential and proprietary or to otherwise advocate for such information to be considered confidential and proprietary.**
- 13.13 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 14. Ownership and Use of Intellectual Property

- 14.1 As between CONTRACTOR and ERS, the Work Product and Intellectual Property Rights therein are and shall be owned exclusively by ERS, and not CONTRACTOR. CONTRACTOR specifically agrees that all Work Product shall be considered a "work made for hire" and that the Work Product shall, upon creation, be owned exclusively by ERS. To the extent that the Work Product, under applicable law, may not be considered a work made for hire, CONTRACTOR hereby agrees that the Contract effectively transfers, grants, conveys, assigns, and relinquishes exclusively to ERS all right, title and interest in and to all ownership rights in the Work Product, and all Intellectual Property Rights in the Work Product, without the necessity of any further consideration, and ERS shall be entitled to obtain and hold in its own name all Intellectual Property Rights in and to the Work Product. **Work Product** is defined as any electronic, tangible or intangible items or things that have been or will be prepared, created, maintained, utilized, serviced or developed by CONTRACTOR (or such third parties as CONTRACTOR may be permitted to engage) at any time following the Effective Date, for or on behalf of ERS under the Contract, including, but not limited to, any (a) works of authorship (such as literary works, musical works, dramatic works, choreographic

works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works, which includes, but is not limited to, documents, plans, forms, reports, analyses, and account information, databases, data, Member information, Member lists, or communications in any communication medium, written or otherwise, manuals, instructions, printed material, graphics, artwork, images, illustrations, photographs, computer software, scripts, object codes, source codes or other programming codes, HTML codes, multimedia files, text web pages or websites, other written or machine readable expression of such works fixed in any tangible media, and all other copyrightable works), (b) trademarks, service marks, trade dress, trade names, logos, or other indicia of source or origin, (c) ideas, designs, concepts, personality rights, methods, processes, techniques, apparatuses, inventions, formulas, discoveries, or improvements, including any patents, trade secrets and know-how, (d) domain names, (e) copies, and similar or derivative works to any of the foregoing, (f) all documentation and materials related to any of the foregoing, and (g) all other goods, services or deliverables to be provided to ERS under the Contract. **Intellectual Property Rights** means the worldwide legal rights or interests evidenced by or embodied in: (a) any idea, design, concept, personality right, method, process, technique, apparatus, invention, formula, discovery, or improvement, including any patents, trade secrets, and know-how (e.g., patents); (b) any work of authorship, including any copyrights, moral rights or neighboring rights (e.g., copyrights); (c) any trademark, service mark, trade dress, trade name, or other indicia of source or origin; (d) domain name registrations; and (e) any other proprietary or similar rights. The Intellectual Property Rights of a party include all worldwide legal rights or interests that the party may have acquired by assignment or license with the right to grant sublicenses.

- 14.2 CONTRACTOR, upon request and without further consideration, shall perform any acts that may be deemed necessary or desirable by ERS to evidence more fully the transfer of ownership of all Work Product to ERS to the fullest extent possible, including, but not limited to, the execution, acknowledgement and delivery of such further documents in a form determined by ERS. In the event ERS shall be unable for any reason to obtain the CONTRACTOR's signature on any document necessary for any purpose set forth in the foregoing sentence, CONTRACTOR hereby irrevocably designates and appoints ERS and its duly authorized officers and agents as the CONTRACTOR's agent and the CONTRACTOR's attorney-in-fact to act for and in the CONTRACTOR's behalf and stead to execute and file any such document and to do all other lawfully permitted acts to further any such purpose with the same force and effect as if executed and delivered by CONTRACTOR.
- 14.3 CONTRACTOR hereby irrevocably and forever waives, and agrees never to assert, any Moral Rights in or to the Work Product which CONTRACTOR may now have or which may accrue to the CONTRACTOR's benefit under U.S. or foreign copyright laws and any and all other residual rights and benefits which arise under any other applicable law now in force or hereafter enacted. "**Moral Rights**" means any and all rights of paternity or integrity of the Work Product and the right to object to any modification, translation or use of the Work Product, and any similar rights existing under the judicial or statutory law of any country in the world or under any treaty, regardless of whether or not such right is denominated or referred to as a moral right.
- 14.4 Upon the request of ERS, but in any event upon termination of the Contract, CONTRACTOR shall surrender to ERS all documents and things pertaining to the Work Product, including, but not limited to, drafts, memoranda, notes, records, drawings, manuals, computer software, reports, data, and all other documents or materials (and copies of same) generated or developed by CONTRACTOR or furnished by ERS to CONTRACTOR, including all materials embodying the Work Product, any ERS confidential information, or Intellectual Property Rights, regardless of whether complete or incomplete. This Section is intended to apply to all Work Product made or compiled by CONTRACTOR, as well as to all documents and things furnished to CONTRACTOR by ERS or by anyone else that pertains to the Work Product.
- 14.5 CONTRACTOR hereby warrants and represents to ERS that individuals or characters appearing or depicted in any Work Product have provided their written consent for the use of their persona or

personality rights, including name, biographical information, picture, portrait, likeness, performance, voice and/or identity ("**Personality Rights**"), and have been compensated for such Personality Rights, if appropriate. CONTRACTOR agrees to indemnify, defend and hold ERS harmless from any claims, including, but not limited to, claims for invasion of privacy, infringement of the right of publicity, libel, unfair competition, false advertising, intentional or negligent infliction of emotional distress, copyright or trademark infringement, and/or claims for attorney's fees, resulting from use of the Personality Rights.

- 14.6 Notwithstanding any other provision in this Article, CONTRACTOR shall retain all of its rights in its own Intellectual Property now possessed or subsequently developed by CONTRACTOR and CONTRACTOR shall not be restricted in any with respect thereto. To the extent that any pre-existing rights are embodied or reflected in the Work Product, or work for hire, CONTRACTOR hereby grants to ERS the irrevocable, perpetual, non-exclusive, worldwide, royalty-free right and license to (a) use, execute, reproduce, display, perform, distribute copies of, and prepare derivative works, based upon such pre-existing rights and any derivative works thereof, and (b) authorize others to do any or all of the foregoing.
- 14.7 CONTRACTOR agrees that it shall have and maintain, during the performance of any Services arising under this Contract, written agreements with all employees, contractors or agents engaged by CONTRACTOR in performance hereunder, granting CONTRACTOR rights sufficient to support all performance and grants of rights by CONTRACTOR.
- 14.8 If the Work Product or the Intellectual Property Rights therein become the subject of a lawsuit or claim of infringement, or CONTRACTOR becomes aware that such items are likely to become the subject of a lawsuit or claim of infringement, CONTRACTOR shall exercise one (1) of the following two (2) options in order to provide ERS with continued and uninterrupted use of the Work Product and Intellectual Property Rights therein: (a) obtain for ERS the right to continue the use of the alleged infringing Work Product at no additional cost to ERS, or (b) obtain alternative, substitute or new works for the allegedly infringing Work Product, which are of equivalent or superior quality to the allegedly infringing Work Product, at no additional cost to ERS, and subject to the acceptance of ERS in its sole discretion.
- 14.9 CONTRACTOR obtains no rights in or to the Work Product or Intellectual Property Rights therein by virtue of this Contract, other than the limited right to use such materials for purposes of performing Services for or on behalf of ERS pursuant to the Contract, and CONTRACTOR must receive prior authorization from ERS before any such use. With respect to CONTRACTOR's use of ERS trademarks, service marks or logos ("**Marks**") for the foregoing purpose, upon receipt of such authorization, CONTRACTOR shall use the Marks without any modifications, distortions or blurring whatsoever, and CONTRACTOR must maintain, among other aspects of the Marks, proportions, color, brightness and contrast of the Marks. Furthermore, the Marks cannot be altered in any way, including, but not limited to, custom treatments such as additional lines, graphics, or clip art; special effects such as halos or drop shadows; or embossed into a photographic background. In instances where the Marks are used in conjunction with other logos, CONTRACTOR agrees not to attempt to join the Marks with, or make it/them look like part of, another logo, and CONTRACTOR agrees to maintain size and spacing in a way to maximize the impact of each logo as a separate, individual brand. CONTRACTOR shall not affix its company name, label, logo, or any other identifying information to, on or in connection with the Marks, without prior express written permission. CONTRACTOR agrees to submit an example of any use of the Marks to ERS' Benefits Communications Division for prior approval, which will not be unreasonably withheld. All use of the Work Product or Intellectual Property Rights therein inures to the sole benefit of ERS.

Article 15. Records, Audits and Compliance Review

- 15.1 Notwithstanding any other provision of the Contract, except for such records as are provided to a third party by CONTRACTOR at the request of ERS, CONTRACTOR must retain copies of ERS-related records in accordance with the Contract throughout the entire Contract Term and any

extension or renewal thereof, and for a period of seven (7) years following the termination, for any reason, of the Contract. Such records shall be in their original form or in a form acceptable with current industry standards. In addition, CONTRACTOR shall maintain such records indefinitely to the extent there is any legal action, investigation or audit related to the Contract and CONTRACTOR is notified of same.

- 15.2 Unless there is currently pending or anticipated litigation or audits related to the records, CONTRACTOR shall destroy all ERS-related records in a commercially reasonable manner following the applicable retention periods, and CONTRACTOR shall provide to ERS a written certification, guarantee and verification identifying: the records destroyed, date and manner of destruction, and who performed such destruction. With regard to Participants' personally identifying and/or sensitive personal information and, if applicable, protected health information ("**PHI**") (together, "**Personal Data**"), CONTRACTOR shall comply with the Data Security and Breach Notification Agreement (Exhibit H) with regard to secure retention, maintenance and irreversible destruction of Personal Data.
- 15.3 All ERS-related records may be audited by ERS or its authorized representative at any reasonable time during regular business hours and following commercially reasonable advance notice of such audit. ERS shall bear its cost of any audit; provided, however, that in the event ERS imposes liquidated damages or seeks any remedy or damages under this Contract, ERS may seek to recover the cost of any audit. Except as otherwise specified in this Article, the Executive Director of ERS will determine who will act as the authorized representatives of ERS in conducting such audits. CONTRACTOR shall cooperate with ERS or its representatives in connection with an audit of CONTRACTOR's performance in connection with the Contract. As appropriate, ERS reserves the right to be present during CONTRACTOR's performance of the Contract to verify that CONTRACTOR is faithfully and fully performing its contractual duties and obligations. Neither ERS nor the auditors will indemnify CONTRACTOR for any costs incurred in connection with any audits performed pursuant to this Article.
- 15.4 CONTRACTOR agrees, both individually and on behalf of its subcontractors, that the Texas state auditor may conduct an audit or investigation of CONTRACTOR and its subcontractors in connection with CONTRACTOR's receipt of funds from the state directly under the Contract or the subcontractor's receipt of funds from the state indirectly through a subcontract under the Contract. Under the direction of the legislative audit committee, an entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor reasonably and in good faith considers relevant to the investigation or audit.
- 15.5 The parties agree that ERS has the right to conduct, at ERS' expense and in ERS' sole discretion, one or more compliance reviews of CONTRACTOR. Additionally, the parties agree that, in the event ERS determines that CONTRACTOR is not satisfactorily performing its obligations under the Contract, ERS, or its designated representatives, may travel to CONTRACTOR's offices to audit and inspect CONTRACTOR's business practices in connection with its performance under the Contract.
- 15.6 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 16. Conflicts of Interest

- 16.1 CONTRACTOR acknowledges and agrees that it has not and shall not engage in any actions that are or could be perceived to be a conflict of interest, appearance of impropriety or Prohibited Communication (as defined below) in connection with the performance of its obligations under the Contract.
- 16.2 The intent of this Article is to ensure that ERS contracting decisions are made exclusively on the merits of the business opportunity, and to ensure that all business decisions, recommendations and processes are free of improper influence or the appearance thereof. Furthermore, in order to

ensure that ERS' RFP/Proposal and contracting processes are transparent and that all persons or entities seeking to engage in business with ERS are afforded the same opportunities, ERS requires all persons or entities to make the following warranties and representations:

- (a) CONTRACTOR warrants and represents that for a period of two (2) years prior to the Effective Date of the Contract, CONTRACTOR and its Agents (which includes any person or entity who has undertaken to advise, consult or communicate with Public Servants (as defined below) on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents sought the benefit), have not communicated with, caused or permitted any other person or entity to communicate with:
- (1) any member of the Board or the Investment Advisory Committee ("**IAC**"),
 - (2) any member of the Group Benefits Advisory Committee ("**GBAC**");
 - (3) ERS' Executive Director or designee or other member of ERS executive management; or
 - (4) any member, officer, or staff employee of any office of the executive or legislative branches of the state of Texas (collectively referred to as "**Public Servants**"),

in any way related to the subject matter of this Contract or any other contract or program administered by ERS; or that in any manner affects ERS' administration of any existing or prospective contract; or that attempts to facilitate and/or influence the obtaining of any contract, rights, payment, or direct or indirect benefit in relation to the subject matter of this Contract. This warranty and representation also applies if CONTRACTOR or its Agents knew or should have known that any of the foregoing occurred and did not stop or prevent the communication.

This warranty and representation does not apply to communications scheduled or approved by ERS between CONTRACTOR and/or (i) the Board, (ii) the GBAC, (iii) the IAC, (iii) ERS' Executive Director or his designee and other ERS executive management, or (iv) related to Solution Sessions or similar meetings scheduled by ERS. It also does not apply to communications with the Board, the GBAC, the IAC, or ERS' Executive Director or his designee and other ERS executive management, regarding matters related to any other contract between CONTRACTOR and ERS if such communications are expressly permitted under the relevant contract or expressly authorized by ERS' Executive Director or designee.

- (b) CONTRACTOR further warrants and represents that throughout the Contract Term, any renewal or extension thereof, and for a period of two (2) years following the Contract's termination:
- (1) CONTRACTOR and its Agents (which includes any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents sought the benefit)), have been instructed and agree that, except as otherwise expressly permitted in the Contract or expressly authorized by ERS' Executive Director or designee, they are prohibited from any Prohibited Communications (as defined below); and
 - (2) Except as otherwise expressly permitted in the Contract or expressly authorized by ERS' Executive Director or designee, CONTRACTOR shall refrain from making, directly or indirectly, on its own or through any person or entity, including any person or entity who undertakes to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents seeks the benefit), any Prohibited Communications.

“Prohibited Communications” specifically includes any communications to any member of the Board, the GBAC or IAC, any officer or employee of ERS, or any Public Servants (including advising, consulting or communicating with any Public Servants) regarding (i) this Contract; (ii), the subject matter of this Contract or any other contract or program administered by ERS; (iii) anything that in any manner affects ERS’ administration of any existing or prospective contract; or (iv) any attempt to facilitate and/or influence the obtaining of any contract, rights, payment, or direct or indirect benefit in relation to the subject matter of this Contract.

- (c) CONTRACTOR warrants and represents that it shall not recruit, retain or employ any ERS personnel who have worked on projects relating to the subject matter of the Contract, throughout the Contract Term and any renewal or extension thereof and for a period of two (2) years following termination or expiration of the Contract. Additionally, CONTRACTOR warrants and represents that it shall not recruit, retain or employ any ERS personnel who participated on behalf of ERS in the procurement or negotiation of the Contract before the second anniversary of the date the personnel’s employment with ERS has ceased.
 - (1) Unless specifically permitted to do so by ERS, CONTRACTOR warrants and represents that it has not and will not in any manner engage in Prohibited Communications or communicate with any person or entity other than CONTRACTOR’s officers, directors, affiliates, subsidiaries, assigns, employees, subcontractors, independent contractors, representatives and/or agents, regarding the Request for Proposal and any responses thereto, this Contract, and CONTRACTOR’s performance under the Contract and/or the RFP at any time following ERS’ issuance of the RFP through the award of the Contract to CONTRACTOR.
- (d) CONTRACTOR further warrants and represents that the information in the Proposal and Clarifications, if any, was not knowingly disclosed prior to the award of the Contract, directly or indirectly, to any competitor of CONTRACTOR or any other person or entity engaged in a line of business competitive with CONTRACTOR’s during the procurement process for the RFP by CONTRACTOR or CONTRACTOR’s officers, directors, affiliates, subsidiaries, assigns, employees, subcontractors, independent contractors, representatives and/or Agents, including any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents sought the benefit). No attempt has been made by CONTRACTOR to induce any other vendor to submit or not submit a proposal in connection with the RFP for any purpose.
- (e) CONTRACTOR further warrants and represents that, except as otherwise expressly provided in the Contract, it has neither directly nor indirectly given, offered to give, nor intends to give at any time prior to the Contract’s Effective Date and thereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, benefit, service, or other consideration to any of the Public Servants, any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents sought the benefit) in connection with the award and/or performance of the Contract.
- (f) CONTRACTOR warrants and represents that it has not in any manner, directly or indirectly, participated in the preparation of the RFP.
- (g) CONTRACTOR understands and acknowledges that, except for the receipt of insurance and retirement benefits as a member of ERS, Public Servants, or any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR (whether or not CONTRACTOR sought the benefit) shall not

have a direct or indirect interest in the gains or profits of the Contract and may not receive any pay or emolument for any service performed for the CONTRACTOR. In the case that any Public Servant, any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents sought the benefit) receives any payment from CONTRACTOR for (i) any services performed for CONTRACTOR, (ii) being awarded the Contract, or (iii) any gains or profits of the Contract, then ERS may terminate its relationship with the CONTRACTOR immediately and may pursue all rights and remedies available to ERS under the Contract, at equity or pursuant to applicable statutory, regulatory and common law. Under such circumstances, the CONTRACTOR must, if so directed by ERS, complete any outstanding transactions as soon as possible, and thereafter, fully comply with all duties and obligations that survive the termination of the Contract.

- (h) CONTRACTOR agrees that, during the Contract Term, neither it nor any of its Agents will offer, give, deliver (or agree to later offer, give, or deliver) to ERS, any ERS employee, any Board member, any GBAC member or any IAC member any monetary or in-kind gift (any such item being a "**Gift**"). For breach or violation of this provision of this Contract, ERS shall have the right, in its sole and absolute discretion, to (i) terminate this Contract without liability to ERS, (ii) deduct from the amount payable under the Fee Schedule, or otherwise recover, the full value of such Gift, or (iii) exercise any other remedies that may be available to ERS under this Contract, at law, or in equity. CONTRACTOR further represents and warrants that it has reviewed Chapter 36 of the Texas Penal Code and the ERS Ethics Policy and agrees that, during the Contract Term, it will not engage in any act that would be a violation thereof or that would cause the violation thereof by any ERS employee, any Board member, any GBAC member or any IAC member.
- (i) CONTRACTOR warrants and represents that, as of the Effective Date of the Contract and to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to any actual or perceived conflict of interest, appearance of impropriety or Prohibited Communication with regard to the Contract. CONTRACTOR warrants and represents that, if at any time after the Effective Date of the Contract, CONTRACTOR discovers or is made aware of an actual or perceived conflict of interest, appearance of impropriety or Prohibited Communication that pre-existed the Contract's Effective Date or arose thereafter, CONTRACTOR shall immediately disclose such interest, appearance or communication in writing to ERS. In addition, CONTRACTOR must promptly disclose any relationship that might be perceived or represented as a conflict of interest after its discovery by CONTRACTOR or by ERS as a potential conflict. Such disclosure must include a description of the actions that CONTRACTOR has taken or proposes to take to cure, avoid or mitigate such conflicts.

16.3 CONTRACTOR acknowledges that any violation of this Article may cause immediate and irreparable harm to ERS, programs administered by ERS and/or the state of Texas and may violate state or federal laws and regulations. If CONTRACTOR or any of its Agents (which includes any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents sought the benefit)) should engage in any actions or failures to act in violation of this Article, ERS will immediately be entitled to injunctive relief and/or to pursue all rights and remedies available to ERS under the Contract, at equity or pursuant to applicable statutory, regulatory, and common law. CONTRACTOR further agrees, understands and acknowledges that ERS may disqualify CONTRACTOR from participating in the RFP/Proposal process or terminate the Contract immediately if ERS obtains information reflecting that CONTRACTOR is not able to in good faith make any of the warranties and representations in this Article or ERS subsequently learns of any violation of this Article.

- 16.4 CONTRACTOR agrees that in addition to any other rights and remedies ERS may have as a result of a violation of this Article of the Contract, ERS may, for the purpose of rectifying and preventing other actual or potential conflicts of interest, appearances of impropriety or Prohibited Communications, provide notice of the violation to any person or entity, including, but not limited to, all state agencies, departments, commissions, state institutions of higher learning or other governmental or law enforcement entities of the state of Texas and all officers, members and staff of any office in the legislative and executive branches of the state of Texas. CONTRACTOR agrees that ERS, any Public Servants, the state of Texas, any person or entity notified by ERS, and any other persons or entities will not be liable to CONTRACTOR or to CONTRACTOR's Agents (which includes any person or entity who has undertaken to advise, consult or communicate with Public Servants on behalf of or to the benefit of CONTRACTOR and its Agents (whether or not CONTRACTOR and its Agents sought the benefit)) in any respect in connection with such notification. CONTRACTOR acknowledges and understands that ERS may also determine, in its sole discretion, that as a result of CONTRACTOR's violation of this Article, CONTRACTOR shall not be eligible to (a) be considered for this RFP/Proposal Process or Contract, (b) participate in any future RFP or similar bidding opportunities, or (c) otherwise be eligible to engage in business with ERS for any period of time as determined by ERS.
- 16.5 CONTRACTOR acknowledges, understands and agrees that any findings, interpretations and decisions in connection with this Article shall be made by ERS, in its sole discretion, regarding the existence of any actual or perceived conflicts of interest, appearance of impropriety, Prohibited Communications or any violation of this Article, and CONTRACTOR agrees, warrants and represents that it shall abide by ERS' decision without any right to appeal, protest or seek any legal redress related to ERS' determination.
- 16.6 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 17. Prohibited Solicitation and Marketing

- 17.1 CONTRACTOR warrants and represents that CONTRACTOR and any officer, director, principal, employee, agent, affiliate, subsidiary, representative, assign and/or successor of CONTRACTOR shall not, and that CONTRACTOR shall instruct its independent contractors and subcontractors, if any, that they shall not, for any purpose, including, but not limited to, the purpose of soliciting or marketing products to Participants, use, sell, assign, convey, provide or otherwise disseminate, copy, make available or otherwise distribute to any person or entity, other than to ERS or to a person or entity designated by ERS, any information regarding ERS or the Participant(s), including, but not limited to, any list of Participants, information regarding eligible or covered employees and dependents, confidential information, claims-related information or other participant data, any protected health information, or any identifiable personal information, without the prior express written consent of ERS' authorized representative, and except as is absolutely necessary for CONTRACTOR to perform its obligations under the Contract or as required by law. Nothing in this provision restricts CONTRACTOR's ability to offer benefits and services to Texas residents as part of CONTRACTOR's normal business activities as long as neither CONTRACTOR nor any of its Agents solicits Participants knowingly or intentionally, so long as CONTRACTOR does not utilize Participant data or confidential information obtained directly or indirectly as a result of, or in connection with, CONTRACTOR's relationship with ERS arising from the Contract.
- 17.2 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 18. Employment Verification

- 18.1 By entering into this Contract, CONTRACTOR certifies and ensures that it utilizes and will continue to utilize, for the term of this Contract, the U.S. Department of Homeland Security's E-Verify system, or another similar system as approved by ERS, in accordance with that system's established rules and requirements, to determine the eligibility of: (1) All persons employed to perform duties within Texas, during the term of the Contract; and (2) All persons (including subcontractors) assigned by CONTRACTOR to perform work pursuant to the Contract, within the United States of America.

- 18.2 ERS shall have the right to audit CONTRACTOR's compliance with this Article 18 at any time during the term of this Contract. If ERS elects to conduct such audit, CONTRACTOR is required to provide documentation (at CONTRACTOR's own expense) that is satisfactory to ERS in its sole discretion to show that CONTRACTOR is in compliance with Section 18.1.
- 18.3 If the certification at Section 18.1 is falsely made or CONTRACTOR does not comply with Section 18.2, the Contract may be immediately terminated, at the discretion of ERS and at no fault to ERS, with no prior notification. CONTRACTOR shall also be responsible for the costs of any re-solicitation that ERS must undertake to replace the terminated Contract, if applicable.

Article 19. Indemnification and Liability Insurance

- 19.1 In addition to any requirements elsewhere in the Contract, CONTRACTOR shall defend with counsel selected by ERS in consultation with the Office of the Attorney General of Texas and with sole settlement authority retained by ERS), indemnify, save and hold harmless ERS, its past, present and future officers, directors, trustees, and employees, Participants, and the state of Texas and its past, present and future officers, employees, agents and representatives ("*Indemnified Parties*") from any and all claims, damages, losses, causes of action of whatever kind or nature, expenses, judgments, or any other amounts, including, but not limited to, reasonable attorneys' and experts' fees and costs, arising from or related to any acts or omissions of CONTRACTOR and/or CONTRACTOR's Agents arising or resulting from, in connection with, or related to their acts or omissions under the Contract, including, but not limited to:
- (a) The refusal or inability of CONTRACTOR, its Agents, any vision care provider, or any of them to perform, deliver or provide Services, coverages, Equipment, benefits, products or supplies in connection with the Contract;
 - (b) The wrongful and/or negligent provision or omission of such Services, coverages, Equipment, benefits, products, supplies by CONTRACTOR and/or any vision care provider or any of them in connection with the Contract;
 - (c) Any failure, refusal, inability or negligence of CONTRACTOR and/or any vision care provider or any of them in meeting or complying with any and all obligations under the Contract or to perform, deliver or provide any Services, benefits, coverages Equipment, supplies or products required by this Contract;
 - (d) CONTRACTOR's actions and/or omissions in connection with the RFP/Proposal Process, and/or the administration of its obligations pursuant to this Contract; or
 - (e) Any and all claims or causes of action asserted against an Indemnified Party arising from or related to services rendered by CONTRACTOR and/or any vision care provider in CONTRACTOR's network and/or, with respect to payment, any vision care provider whose claims are adjudicated at the network level as agreed by ERS and CONTRACTOR or any of them in connection with this Contract.
- 19.2 This indemnification will not apply to any judgment or award if the court or agency making the award determines that the liability underlying the judgment or award was caused solely by the gross negligence, fraud, or criminal misconduct of ERS, its officers, trustees, employees, or representatives.
- 19.3 CONTRACTOR shall maintain, during the Contract Term and any amendment, renewal or extension thereof, fidelity and liability insurance coverage with limits of not less than \$1,000,000 per occurrence and in the aggregate per policy year, with excess or umbrella liability coverage in an amount not less than \$5,000,000 per policy year that shall apply to CONTRACTOR's obligations under the Contract. To this end, attached hereto as Exhibit G and incorporated herein for all purposes as if restated in full, are copies of all applicable

declarations pages representing CONTRACTOR's liability and fidelity insurance coverage in connection with CONTRACTOR's performance under the Contract. Evidence that such coverage is being maintained during the primary term or any renewal of the Contract Term shall be furnished to ERS upon the anniversary date of the policies reflected in Exhibit G and otherwise promptly upon ERS' request. Such insurance coverage shall be in addition to CONTRACTOR's Indemnification obligations as provided herein.

19.4 ERS agrees to provide CONTRACTOR with reasonable notice of any claim or cause of action of which it has knowledge and which ERS reasonably believes may be subject to this Indemnification provision.

19.5 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 20. Disaster Recovery

20.1 CONTRACTOR warrants and represents that it has a written disaster recovery plan that provides for the recovery of CONTRACTOR's electronic data and data processing equipment. CONTRACTOR further warrants and represents that the business related functions that CONTRACTOR uses to provide Services to ERS during the performance of this Contract are addressed by the written disaster recovery plan, and CONTRACTOR agrees that the disaster recovery plan will be tested every two (2) years.

20.2 CONTRACTOR agrees that all Services provided to ERS under this Contract will be fully operational within ninety-six (96) hours after any business interruption

20.3 CONTRACTOR further agrees to deliver to ERS, on an annual basis, one of the following:

(a) A copy of the disaster recovery plan and the disaster recovery test results. These shall include, but not be limited to: (a) the disaster recovery plans plus a description of the changes from the previous year's plans, if any; and (b) the exercise test results conducted within the last twelve (12) months of the disaster recovery and business continuity tests referencing the adequacy of these plans. The test results must include the Recovery Time Objective (RTO) and Recovery Point Objective (RPO) of the systems and applications that provide service to ERS. If these are a part of a SOC II Type 2 report, CONTRACTOR shall provide the portions of the report that refer to the normal, annual disaster recovery and business and continuity tests, plus copies of the service auditor's report. CONTRACTOR further agrees to be available for and respond to reasonable inquiries by ERS of the disaster recovery plan and tests.

(b) A summary of the latest disaster recovery test results and a summary of the disaster recovery programs. The test results shall include the RTO and RPO of the systems and applications that provide service to ERS. CONTRACTOR must attest annually, by signature, that the disaster recovery tests will ensure that systems that CONTRACTOR uses to provide Services to ERS will be available within ninety-six(96) hours of outage and will experience a maximum twenty-four (24) hours of data loss. CONTRACTOR further agrees to be available for and respond to reasonable inquiries by ERS of the disaster recovery plan and tests.

20.4 CONTRACTOR agrees to exercise reasonable care and prudence to provide all legally required and any other appropriate security measures for the purpose of preventing the transmission of viruses, worms, spyware, and/or Trojan horses, and for protecting ERS' information, confidential or otherwise, and for protecting ERS from losses caused by the alteration, damage or erasure of electronic data related to this Contract.

20.5 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 21. Transition; Maintenance of Records and Data

- 21.1 If the Service Period does not begin immediately upon execution of the Contract, then CONTRACTOR agrees that it will maintain appropriate, sufficient and qualified staff, technical capabilities and resources to provide the Services to ERS upon the inception of the Service Period. CONTRACTOR further agrees that it will not permit any current or prospective business, projects or other matters to interfere in any manner with the smooth and timely transition from ERS' existing Services provider to CONTRACTOR. Furthermore, CONTRACTOR understands and agrees that time is of the essence in the performance of the Contract and in the transition from ERS' existing Services provider to CONTRACTOR.
- 21.2 Upon request by ERS for any reason, or upon termination or expiration of the Contract, CONTRACTOR agrees to coordinate and cooperate with ERS and any entity providing all or part of the Services to ERS following such termination (as designated in writing by ERS, the "**Successor Firm**") in the transition of responsibilities and obligations under the Contract (the "**Transition**") to the Successor Firm. Such cooperation shall include making CONTRACTOR personnel available to answer questions relating to the Services or the Transition and providing other assistance as reasonably requested by ERS or the Successor Firm. Upon termination or expiration of the Contract, or upon request by ERS or its designee, CONTRACTOR shall promptly, in good faith, and with the standard of care required under the Contract, assign, transfer and/or deliver the ERS-related records and data in its possession to ERS and/or the Successor Firm. The records and data shall be provided to ERS and/or the Successor Firm in the format contemplated by Section 21.3 below in a duly organized manner, as they are kept in the ordinary course of business. Any coordination and cooperation provided by CONTRACTOR pursuant to this Section 21.2 shall be provided without any additional cost or expense to ERS or any Successor Firm.
- 21.3 CONTRACTOR hereby acknowledges that the intent of Section 21.2 above is to provide for the smooth and orderly transition from CONTRACTOR to ERS or a Successor Firm, and CONTRACTOR will use all reasonable efforts in good faith to prepare and provide for such smooth and orderly transition. In furtherance thereof (and not as a limitation of CONTRACTOR's obligations under the prior sentence), CONTRACTOR hereby represents and warrants to ERS that during the Contract Term, CONTRACTOR will maintain all records and data relating to the Services in a format that can be read, accessed and used by ERS and/or any Successor Firm during the Contract Term and following the Transition, without any requirement for ERS or such Successor Firm to utilize any specialized software or take any other action. CONTRACTOR shall permit ERS to audit its compliance with this Section 21.3 upon reasonable notice at no additional cost to ERS.
- 21.4 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 22. No Third Party Beneficiaries

- 22.1 Except as otherwise provided in the Contract, a person or entity that is not a party to the Contract shall have no right to enforce any provision of the Contract.

Article 23. No Contract Assignment

23.1 CONTRACTOR shall not assign, or otherwise attempt to transfer or convey the Contract or any of its rights, title, interests and/or obligations hereunder or delegate any of its duties or obligations hereunder to any person or entity without the prior express written consent of ERS' Executive Director. A Change of Control, as defined herein, shall be deemed an assignment. Any attempted assignment or delegation without such consent shall be voidable at ERS' option, and ERS may terminate the Contract immediately and pursue all rights and remedies available to ERS under the Contract, at equity or pursuant to applicable statutory, regulatory and common law. A "**Change of Control**" shall include (a) any merger, consolidation, or sale or exchange of capital stock or equity interests in which the owners of the capital stock or equity interests of CONTRACTOR immediately prior to the transaction have less than 50% of the outstanding capital stock or equity interests of the surviving entity immediately after the transaction, or (b) a sale, lease, exchange or other transfer of all or substantially all the assets of CONTRACTOR. Notwithstanding and without waiving the foregoing, any assignee of or legal successor in interest to CONTRACTOR shall assume and retain all of the obligations of CONTRACTOR to ERS and the state of Texas as provided under the Contract, as if the same had been expressly entered into by or wholly conveyed to the assignee or successor in interest upon ERS' written agreement to such assignment.

23.2 This Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 24. Privacy and Antitrust Claims

24.1 In addition to any other contractual obligations that CONTRACTOR has with regard to confidential information and to otherwise maintain the confidentiality of Participants' and ERS' information, CONTRACTOR warrants and represents that it shall comply with the terms of HIPAA, the Health Information Technology for Economic and Clinical Health Act ("**HITECH**") and the HIPAA Privacy Rule to the extent applicable, and any other applicable federal and state laws and regulations regarding privacy, security and the disclosure of confidential information or **PHI**, as PHI is defined in the HIPAA Privacy Rule.

24.2 CONTRACTOR agrees to cooperate with ERS in complying with the requirements of HIPAA and HITECH.

24.3 CONTRACTOR warrants and represents that it shall comply with all obligations HIPAA and HITECH impose on Covered Entities in connection with its performance under the Contract.

24.4 CONTRACTOR agrees that whether or not it is a "Covered Entity" under the HIPAA Privacy Rule, because CONTRACTOR will have regular access to PHI, CONTRACTOR agrees to enter into a Business Associate Agreement with ERS that complies with the requirements of HIPAA, the HIPAA Privacy Rule and HITECH, which is attached hereto as Exhibit F and fully incorporated herein as if restated in full, and will require any subcontractors or agent handling PHI to comply with the terms of CONTRACTOR's Business Associate Agreement.

24.5 CONTRACTOR warrants and represents that it shall comply with all requirements of Exhibit H, Data Security and Breach Notification Agreement, which is attached hereto and incorporated herein for all purposes as if restated in full. In addition, if CONTRACTOR subcontracts with any other person or entity for processing or in any manner handling, accessing or viewing ERS data, then CONTRACTOR warrants and represents that it shall ensure that such party agrees to adhere to CONTRACTOR's data security requirements. CONTRACTOR specifically assumes all liability for ensuring that its affiliates, subsidiaries, representatives, officers, directors, principals, employees, agents, assigns, and any subcontractors and independent contractors abide by the Data Security and Breach Notification Agreement and shall, in any event, be liable for performance of any Services related to the Contract, including any Services performed by subcontractors.

24.6 CONTRACTOR agrees to mask the social security numbers of ERS Participants in electronic and print communications, and only to expose the last four digits of the social security number when necessary for self-identification verification of the Participant.

- 24.7 CONTRACTOR hereby assigns to ERS any and all present or future claims as may be required by applicable law associated with this Contract that arise under the antitrust laws of the United States, 15 U.S.C.A. §§ 1 et seq. ("**U.S. Antitrust Laws**"), as may be applicable and that arise under the antitrust laws of the state of Texas, Texas Business and Commerce Code Ann. §§ 15.01 et seq. ("**Texas Antitrust Laws**"), as may be applicable.
- 24.8 CONTRACTOR warrants and represents that neither CONTRACTOR nor its Agents has violated the U.S. Antitrust Laws or the Texas Antitrust Laws.
- 24.9 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 25. Technology Access Requirement

- 25.1 As applicable, CONTRACTOR must ensure the products procured by ERS under this Contract (as further defined at Article 34), if any, comply with the state of Texas Accessibility requirements for Electronic and Information Resources specified in 1 Texas Administrative Code Chapter 213.

Article 26. Buy Texas

- 26.1 In accordance with Texas Government Code § 2155.4441, if products and/or materials are used in the performance of the service work, CONTRACTOR shall use commercially reasonable efforts to purchase Texas products and/or materials when they are available at a comparable price, quality and delivery schedule.

Article 27. ERS Premises

- 27.1 Security. When on ERS' premises, CONTRACTOR agrees to comply with ERS' security requirements for contractors and subcontractors.
- 27.2 Parking Access. Parking at ERS may be provided in accordance with ERS' policies and procedures for contractors and subcontractors.
- 27.3 Drug and Alcohol-Free Workplace and Smoking Policy. ERS is committed to maintaining an alcohol-free, drug-free and smoke-free workplace. ERS prohibits CONTRACTOR's employees from the use of any tobacco products or possession, use, or being under the influence of alcohol or controlled substances while on ERS' premises.

Article 28. Boycott of Israel

- 28.1 In accordance with Texas Government Code, Chapter 2271, CONTRACTOR certifies that either (i) it qualifies for an exemption under § 2271.002; or (ii) it does not currently boycott Israel, and agrees that it will not boycott Israel during the term of the Contract. "Boycott Israel" is defined in Texas Government Code, § 808.001.

Article 29. Foreign Terrorist Organizations

- 29.1 CONTRACTOR warrants and represents that it is not engaged in business with Iran, Sudan, or a foreign terrorist organization, as prohibited by § 2252.152 of the Texas Government Code.

Article 30. Human Trafficking Prohibition

- 30.1 Under § 2155.0061 of the Texas Government Code, CONTRACTOR certifies that it is not ineligible to receive this contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.

Article 31. Additional Warranties and Representations

- 31.1 CONTRACTOR warrants and represents that it has and shall maintain the capability to adequately carry out any record-keeping and reporting requirements as set forth in the Contract.
- 31.2 CONTRACTOR acknowledges that all of its representations and warranties contained in any part of the Contract are material and have been relied upon by ERS in selecting and continuing to

contract with CONTRACTOR to provide the Services and in entering into the Contract with CONTRACTOR. CONTRACTOR shall promptly notify ERS in the event that at any time any representations and warranties provided herein are no longer true and correct.

- 31.3 CONTRACTOR warrants and represents that it has adequate financial capital and security to fully indemnify the Indemnified Parties, as provided herein, should same be necessary.
- 31.4 Under Texas Government Code Ann. § 403.055 and Texas Government Code Ann. §§ 2155.004 and 2155.006, and 2261.053 CONTRACTOR certifies that it is eligible to receive the Contract, it acknowledges that the Contract may be terminated and payment withheld if this certification is inaccurate, and in the event CONTRACTOR is indebted to ERS or the state of Texas or delinquent in paying any taxes owed the state of Texas at the time the Contract is entered into, CONTRACTOR agrees that any payment owed to CONTRACTOR under the Contract shall first be applied towards such debt or delinquent taxes until the debt or delinquent taxes are paid in full. CONTRACTOR warrants and represents that at the time it entered into the Contract, CONTRACTOR was not indebted to ERS or the state of Texas or delinquent in paying any taxes owed the state of Texas.
- 31.5 In accordance with Texas Family Code Ann. § 231.006, relating to delinquent child support obligations, CONTRACTOR certifies that it is eligible to receive payments in connection with the Contract and acknowledges that, in addition to other remedies available to ERS, the Contract may be terminated immediately and any such payments withheld if this certification is inaccurate.
- 31.6 CONTRACTOR warrants and represents that if, during the term of this Contract, CONTRACTOR enters into any agreement with any other governmental customer or any commercial customer not affiliated with CONTRACTOR, of a similar size or smaller, by which CONTRACTOR agrees to perform, deliver or provide equivalent Services, coverages, benefits, supplies or products that CONTRACTOR is providing in accordance with this Contract for the following: lower administrative fees, lower compensation, more generous discounts, more generous rebates, or more generous financial incentives or terms, then this Contract, at ERS' sole option, shall be amended to accord equivalent advantage to ERS. CONTRACTOR further warrants and represents that it shall notify ERS promptly in the event it enters into any such agreement containing any one or more of the above matters, and CONTRACTOR shall provide ERS with the applicable terms of such agreement.
- 31.7 Neither CONTRACTOR nor to the best of CONTRACTOR's knowledge any Agent of CONTRACTOR is subject to any present or past civil or criminal litigation, administrative proceeding, inquiry or investigation of or before any court, administrative or regulatory body which could affect ERS and/or could have a material adverse effect on CONTRACTOR or its ability to discharge its responsibilities under the Contract, or could otherwise be detrimental to ERS' interests nor, to its knowledge, is any such litigation, proceeding, inquiry or investigation presently threatened against any of them or their property.
- 31.8 CONTRACTOR warrants and represents that it and its Agents are in good standing with the state of Texas and all its political subdivisions, departments and agencies, and any self-regulatory agency with any oversight authority over such person or entity, and that neither it nor its principals are debarred, suspended, proposed for debarment, declared ineligible, or otherwise excluded from participation in the Contract by any state or federal agency.
- 31.9 CONTRACTOR certifies that it is not listed in the prohibited vendors list authorized by Executive Order No. 13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism,*" published by the United States Department of the Treasury, Office of Foreign Asset Control.
- 31.10 CONTRACTOR warrants and represents that neither CONTRACTOR nor any of its affiliates, subsidiaries, employees, principals, directors or officers, nor, to its knowledge, CONTRACTOR's agents, assigns, representatives, independent contractors, and/or subcontractors who are

involved, either directly or indirectly, in CONTRACTOR's performance of the Contract, are or may, at the time such parties become involved, be the subject(s) of any inquiry, investigation, or prosecution by any state or federal regulatory or law enforcement authority, including, but not limited to, such actions by the United States Department of Justice or the offices of any state's attorney general, the Department of Labor, Department of Health and Human Services, Centers for Medicare & Medicaid Services or any self-regulatory organization with oversight authority over CONTRACTOR or such parties concerning any violation of state or federal statutes, rules, regulations or other laws.

- 31.11 CONTRACTOR warrants and represents that in the event it contracts with subcontractors to provide services in connection with the Contract, CONTRACTOR has exercised reasonable due diligence to ensure that all of CONTRACTOR's representations and warranties in the Contract pertaining to such subcontractors are true and correct, and that CONTRACTOR and each subcontractor has the commitment, capability, resources, security, and competence reasonably necessary to perform all services and obligations relating to the Contract in a good and workmanlike manner in accordance with applicable professional standards and the standard of care required by the Contract. CONTRACTOR further warrants and represents that it shall exercise the same reasonable due diligence in selecting any additional subcontractors who may perform future services relating to the Contract. CONTRACTOR shall advise each of its past, present or future subcontractors that said subcontractors shall not be entitled to any benefits or consideration from ERS in connection with the Contract. Furthermore, CONTRACTOR is solely responsible for all Contract services required to be performed to carry out the terms of the Contract, and CONTRACTOR specifically assumes all liability for any and all such services provided by subcontractors, if any.
- 31.12 CONTRACTOR further warrants and represents that it shall not violate the federal anti-kickback statute, set forth at 42 U.S.C. § 1320a-7b(b) ("**Anti-Kickback Statute**"), or the federal "**Stark Law**," set forth at 42 U.S.C. § 1395nn, with respect to the performance of its obligations under this Contract.
- 31.13 CONTRACTOR represents and warrants that the Contract is not prohibited by § 2272.003 of the Texas Government Code.
- 31.14 CONTRACTOR verifies that:
- a) it does not, and will not for the duration of this Contract, have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association, or
 - b) the verification required by Section 2274.002 of the Texas Government Code does not apply to this Contract, and if circumstances relevant to this provision change during the course of this Contract, CONTRACTOR shall promptly notify ERS.
- 31.15 CONTRACTOR verifies that:
- a) it does not, and will not for the duration of this Contract, boycott energy companies or
 - b) The verification required by Section 2274.002 of the Texas Government Code does not apply to this Contract, and if circumstances relevant to this provision change during the course of this Contract, CONTRACTOR shall promptly notify ERS.
- 31.16 Under §161.0085 of the Texas Health and Safety Code, CONTRACTOR certifies that it is not ineligible to receive this Contract.
- 31.17 CONTRACTOR represents and warrants that (1) CONTRACTOR does not, and will not for the duration of the Contract, boycott energy companies or (2) the verification required by Section 2274.002 of the Texas Government Code does not apply to the Contract. If circumstances relevant to this provision change during the course of the Contract, CONTRACTOR shall promptly notify ERS.

31.18 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 32. Notice

32.1 Any notice or report to be given pursuant to this Contract shall be delivered by certified mail, first class postage prepaid, with a copy by email, to:

- (a) CONTRACTOR at:
EyeMed Vision Care, LLC
4000 Luxottica Place
Mason OH 45040
Phone: (513) 917-8521
Email: jpereira@EyeMed.com
Attn: Jeremy Pereira

with copy to EyeMed Legal at the same mailing address

- (b) ERS at:
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207
Attn: Porter Wilson, Executive Director
Email: porter.wilson@ers.texas.gov

cc: Cynthia Hamilton, General Counsel
Email: general.counsel@ers.texas.gov

Either party may waive the requirement for a particular notice or report to be delivered via certified mail and instead accept it solely by email. Further, either party may change its notice information by sending written notice of such change to the other party in the manner set forth above, without any requirement to amend this Contract.

Article 33. Implementation Plan

33.1 CONTRACTOR agrees and acknowledges that time is of the essence in the performance of this Contract and in assuring a smooth, timely, efficient and effective implementation of CONTRACTOR's duties with respect to this Contract.

33.2 Following selection of CONTRACTOR by ERS and upon ERS' execution of this Contract, CONTRACTOR shall immediately staff an implementation team and name an implementation manager.

33.3 The names, positions and qualifications of the implementation team shall be communicated to ERS within fifteen (15) business days from the award of the Contract. The implementation team and manager must be acceptable to ERS, and ERS reserves the right to require that any or all of the implementation team and manager be replaced with individuals acceptable to ERS. The implementation manager shall serve as ERS' primary contact and shall be accessible to ERS at all times throughout the Contract. CONTRACTOR management with authority to make binding decisions for CONTRACTOR shall be accessible to ERS at all times throughout the Contract, including the Implementation Period and Service Period. CONTRACTOR understands and agrees that time is of the essence during the Implementation Period; therefore, the implementation manager, as primary contact for ERS, shall obtain necessary binding decisions by authorized CONTRACTOR management, in a seamless and expedited manner.

33.4 The period of time beginning with the selection of the CONTRACTOR by ERS and upon ERS' execution of this Contract to the point at which the CONTRACTOR assumes full responsibility for the duties specified hereunder, such date being no later than September 1, 2023, shall be known as the "**Implementation Period.**" Notwithstanding, CONTRACTOR acknowledges and agrees that

ERS, the Members and participants of the programs and funds administered by ERS, the GBP and the state of Texas will suffer irreparable harm if the Program Implementation is not substantially completed on or before August 1, 2023.

- 33.5 On the first day of the Implementation Period, CONTRACTOR shall begin implementation of its obligations under the Contract in accordance with the Implementation Plan agreed upon by ERS and CONTRACTOR ("**Implementation Plan**")
- 33.6 The Implementation Plan, attached hereto as Exhibit I and incorporated herein for all purposes, is the most up-to-date Implementation Plan at the time of Contract execution. ERS and CONTRACTOR agree that scheduled updates and/or amendments to the Implementation Plan will be necessary. CONTRACTOR agrees to confer at least weekly with ERS on any necessary updates and/or amendments to the Implementation Plan. Any modification to the Implementation Plan must be approved by ERS in writing prior to any implementation thereof. Failure by CONTRACTOR to adhere to the Implementation Plan will subject CONTRACTOR to possible Liquidated Damages and/or Performance Guarantees as specified in Exhibit E attached hereto and incorporated herein. In addition, CONTRACTOR further agrees that ERS may exercise any and all rights and remedies available to it under this Contract, at equity or pursuant to applicable statutory, regulatory, and common law.
- 33.7 During the Implementation Period, CONTRACTOR warrants, represents, and agrees to the following:
- (a) It shall maintain appropriate, sufficient, qualified staff, with technical capabilities and resources that are fully devoted to the Implementation of the Services.
 - (b) It shall not permit any current or prospective business, projects or other matters to interfere in any manner with the smooth, timely, and effective Implementation of the Services.
 - (c) It shall manage all aspects of the Services identified during the Implementation Period in a timely manner and with ERS' approval.
 - (d) CONTRACTOR shall exclusively utilize only those implementation materials approved by ERS to guide and manage all implementation activities and as deemed necessary by ERS for the successful delivery of Services throughout the Contract Term.
- 33.8 ERS may immediately assess against CONTRACTOR any liquidated damages and/or Performance Guarantees, without prior notice, in the event CONTRACTOR fails, refuses or is unable to perform, or is negligent in performing, or if it reasonably appears that CONTRACTOR will fail, refuse or be unable to complete or perform any aspect of this Contract in connection with the Implementation Plan.

Article 34. Entire Contract

- 34.1 This Contractual Agreement (the "**Contract**") includes all exhibits attached hereto and described herein, except to the extent any term or provision of such exhibit may conflict with or is inconsistent with the Contract or the RFP and ERS has not accepted such conflicting terms or inconsistent provisions, in accordance with the Contract, and all such exhibits are incorporated herein by reference for all purposes as if restated in full. Such exhibits include, but are not limited to, the RFP and its attachments; the Proposal and its attachments (to the extent there is no conflict with this Contractual Agreement) and any Clarifications agreed to in writing by ERS and accepted by ERS; the rates, fees, Performance Guarantees, reimbursements, and related costs and compensation presented to and accepted by ERS; all interrogatories in the RFP and any responses thereto in the Proposal; and all other exhibits to the Contract identified herein and incorporated herein by reference throughout this document for all purposes as if restated in full, shall collectively be referred to as and shall constitute the entire Contract between ERS and CONTRACTOR.
- 34.2 Each of the parties warrants and represents that the Contract and the documents identified herein as part of the Contract constitute a valid and binding agreement enforceable against each party in

accordance with their terms. Further, except as otherwise expressly stated in the Contract, the documents identified in this Contract embody the entire agreement between the parties and no other agreement or understanding between the parties, their agents or employees, oral or otherwise, will constitute a part of the Contract, will be binding upon the parties, or will be effective to interpret, change, restrict, or otherwise modify the provisions of the Contract, and any such other prior agreements, statements, or understandings between the parties, their agents, representatives or employees, oral or otherwise, are hereby superseded. ERS and CONTRACTOR agree that the Contract, including the component parts described herein and within each document, shall govern the responsibilities and obligations of the parties to the Contract.

- 34.3 CONTRACTOR acknowledges and agrees that its statements and representations to ERS and in the Contract are material and have been relied upon by ERS and/or the Board in selecting CONTRACTOR to provide the Services described in the Contract. CONTRACTOR further warrants and represents that throughout the entire Contract Term and any renewal, amendment or extension thereof, that it has a continuing duty to immediately notify ERS in the event any statements or representations made to ERS or any information contained in the Contract or any of its component parts are no longer true, correct or complete or may otherwise be misleading, and CONTRACTOR must immediately provide ERS with the applicable true, correct or complete information.
- 34.4 The parties acknowledge and agree that if it is determined that there is an inherent or implied conflict among the Contract and any component parts thereof, then the following shall be the order of priority of the documents described herein, with the first document in the list being the ultimate authority to the extent necessary to resolve any conflicts, ambiguities or inconsistencies between them, and then descending down the list that follows, but silence on any matter in a higher order document shall not negate, change, avoid, modify, or prevail over the provisions of a lower order document as to that matter:
- (a) This Contractual Agreement, as executed by authorized representatives of the parties hereto;
 - (b) The Business Associate Agreement (Exhibit F);
 - (c) The Data Security and Breach Notification Agreement (Exhibit H);
 - (d) The Fee Schedule (Exhibit D);
 - (e) The Performance Guarantees (Exhibit E);
 - (f) The Clarifications (Exhibit C);
 - (g) Implementation Plan (Exhibit I);
 - (h) The RFP (Exhibit A); and
 - (i) The Proposal (Exhibit B).
- 34.5 The invalidity, illegality, or unenforceability of any provision of the Contract shall in no way affect the validity, legality, or enforceability of any other provision, and if any court of competent jurisdiction shall determine that any provision, term or part of the Contract is void, unlawful, or unenforceable for any reason, that portion shall be severed and the remainder of the Contract shall remain valid and enforceable and shall be construed as if the severed provisions had never been included in the Contract. Toward this end, the provisions of the Contract are specifically declared to be severable, so that any one provision may be enforced without enforcement of any other.

34.6 The waiver of any particular provision by either party shall not constitute a waiver of any other provision. No waiver shall be valid unless the same is reduced to writing and executed by all parties. Furthermore, a breach of any provision of the Contract shall not constitute a waiver of any remedies available, whether at law, equity or under the Contract, for any subsequent breach of that provision or a breach of any provision hereof. Failure of either party to enforce at any time or from time to time any provision of the Contract shall not be construed as a waiver thereof.

34.7 This entire Article shall survive any termination, expiration, renewal, or extension of the Contract.

Article 35. Execution in Counterparts

35.1 The Contract may be executed in multiple counterparts, each of which shall be deemed an original, but all of which taken together shall be deemed to be but one and the same instrument.

35.2 The Contract and the documents incorporated by reference therein and any modifications, waivers, or amendments thereto may be executed and delivered by facsimile or electronic mail, and such facsimile or electronic mail delivery shall constitute the final agreement of the parties and conclusive proof of such agreement. Original signatures may be provided to the parties thereafter.

Article 36. Incumbency Certificate

36.1 CONTRACTOR warrants and represents that it has full power and authority to enter into the Contract, and that the Contract has been duly authorized, executed and delivered by CONTRACTOR's authorized representative on behalf of CONTRACTOR and constitutes a valid, binding, and legally enforceable agreement of CONTRACTOR. Attached hereto and incorporated herein for all purposes as Exhibit J is CONTRACTOR's Incumbency Certificate setting forth the true signature of each person authorized by CONTRACTOR to sign any binding legal documentation on behalf of CONTRACTOR, which Exhibit J may be amended and restated from time to time by CONTRACTOR, such amendment and restatement to be effective when furnished to ERS.

Article 37. List of Exhibits

37.1 The following exhibits are attached to this Contract and incorporated herein for all purposes as specified in Article 34 herein:

Exhibit No.	Exhibit Description
Exhibit A	The RFP
Exhibit B	The Proposal
Exhibit C	Clarifications
Exhibit D	Fee Schedule
Exhibit E	Performance Guarantees
Exhibit F	Business Associate Agreement
Exhibit G	Declaration Pages from Insurance Policies; Bond Information
Exhibit H	Data Security and Breach Notification Agreement
Exhibit I	Implementation Plan
Exhibit J	Incumbency Certificate

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IN WITNESS WHEREOF, ERS and CONTRACTOR, as the two signatories to the Contract, have memorialized this agreement by executing the Contract to be fully effective upon the Effective Date.


EYEMED VISION CARE, LLC

By: 

Matt MacDonald
President

Date: February 27, 2023

EMPLOYEES RETIREMENT SYSTEM OF TEXAS

DocuSigned by:
By: 
38EC8BA45AC04F3...

Porter Wilson
Executive Director

Date: 3/1/2023

FIRST AMERICAN ADMINISTRATORS, INC.

By: 

Matt MacDonald
President

Date: February 27, 2023

Reviewed As to Form by EyeMed Legal:

