

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

and

NCS PEARSON INC.

AGREEMENT NO. C000729

This Agreement (“Agreement”) is entered into by and between New York State Department of Civil Service (“Department” or “DCS”), having its principal office at the Empire State Plaza, Albany, NY, 12239 and NCS Pearson Inc. (“Contractor”), a corporation authorized to do business in the State of New York with a principal place of business located at 19500 Bulverde Road, Ste 201, San Antonio, TX 78259. The foregoing are collectively referred to as “the Parties.”

WITNESSETH

WHEREAS, the Employee Health Service (“EHS”) Unit of the Testing Services Division of the Department, provides to all New York State departments and agencies (“Customer Agencies”) medical examination services mandated by Civil Service Law; and

WHEREAS, the EHS uses Minnesota Multiphasic Personality Inventory (MMPI) Reports to test adult personality and psychopathology for pre-employment candidates in selected job titles; and

WHEREAS, on January 23, 2020, the New York State Office of the State Comptroller (“OSC”) approved a Sole Source exemption from advertising in the Contract Reporter for a contract with NCS Pearson, Inc. for the purchase of the MMPI Reports and associated services.

NOW, THEREFORE, in consideration of the mutual covenants and provisions contained herein, the Parties agree as follows:

SECTION 1: CONTRACTOR RESPONSIBILITIES AND QUALIFICATIONS

- 1.1 The Contractor is responsible for providing Project Services as set forth in section 5, in such a manner to comply with the requirements in the Agreement and for meeting all contractual obligations in this Agreement, including all exhibits, and any subsequent amendments mutually agreed to in writing between the Parties.

- 1.2 The Contractor's obligations to perform under the Agreement shall not be affected or impaired by any reorganization, consolidation or merger to which the Contractor is, or may become, a party. In any such event, the Contractor shall continue to be bound by, and shall perform under, all terms and conditions set forth herein.

SECTION 2: AGREEMENT DURATION AND AMENDMENTS

- 2.1 The Agreement shall begin on April 1, 2021 and end on March 31, 2026. This Agreement is subject to the prior approval of the New York State Attorney General's Office ("AG") and OSC.
- 2.2 The Agreement is subject to amendment(s) only upon consent of the Parties, reduced to writing and approved by the AG and OSC.

SECTION 3: DOCUMENT INCORPORATION AND ORDER OF PRECEDENCE

- 3.1 The Agreement shall be composed solely of the following documents which, in the event of an inconsistency or conflicting terms, shall be given precedence in the order indicated:
 - 3.1.1 Appendix A (Standard Clauses for All New York State Contracts), dated October 2019, attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein;
 - 3.1.2 Any Amendments to the body of the Agreement;
 - 3.1.3 The body of the Agreement (that portion preceding signatures);
 - 3.1.4 Appendix B (Standard Clauses for Department Contracts), dated February 2014, attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein;
 - 3.1.5 Intentionally omitted;
 - 3.1.6 Appendix D (Participation by Minority and Women-Owned Business Enterprises: Requirements and Procedures), attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein;
 - 3.1.7 Appendix D-1 (MWBE Equal Employment Opportunity Policy Statement) attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein;

- 3.1.8 Appendix E (Participation Opportunities for New York State Certified Service-Disabled Veteran-Owned Businesses), attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein;
- 3.1.9 Attachment 1 which sets forth the Department's procedures relative to the Procurement Lobbying Law as required by State Finance Law §139-j and §139-k;
- 3.1.10 Attachment 2 which sets forth the Contractor's fees for Project Services, attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein; and
- 3.1.11 Attachment 3 (Terms and Conditions of Sale and Use of Pearson Products), attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein.
- 3.2 Only documents expressly enumerated above shall be deemed a part of the Agreement, and references contained in those documents to additional Contractor documents not enumerated above shall be of no force and effect.
- 3.3 All prior agreements, representations, statements, negotiations and undertakings are superseded. All statements made by the Department shall be deemed to be representations and not warranties.
- 3.4 Nothing contained in this Agreement, expressed or implied, is intended to confer upon any person, corporation, or other entity, other than the Parties hereto and their successors in interest and assigns, any rights or remedies under or by reason of the Agreement.
- 3.5 The terms, provisions, representations, and warranties contained in the Agreement shall survive performance hereunder.

SECTION 4: LEGAL AUTHORITY TO PERFORM

- 4.1 The Contractor represents that it possesses the legal authority to perform Project Services in accordance with the terms and conditions of the Agreement.
- 4.2 The Contractor shall maintain appropriate corporate and/or legal authority, which shall include, but is not limited to, the maintenance of an administrative organization capable of delivering Project Services in accordance with the Agreement and the authority to do business in the State of New York or any other governmental jurisdiction in which the Project Services are to be delivered.

- 4.3 The Contractor shall provide the Department with prompt notice in writing of the initiation of any legal action or suit which relates in any way to the Agreement or which may affect performance of the Contractor's duties under the Agreement.

SECTION 5: PROJECT SERVICES

- 5.1 During the term of the Agreement, the Contractor shall be responsible for providing MMPI-2-RF Q Local Answer Sheets which will be used by EHS to record candidate responses to a predefined set of questions. Upon request by the Department, the Contractor shall deliver these Answer Sheets to the following address via regular ground delivery:

NYS Department of Civil Service
Empire State Plaza
Agency Building 1,
Mailroom, 11th floor
Albany, NY, 12239

- 5.2 The Department's administration of MMPI-2-RF Q Local Clinical Interpretive reports shall be conducted under the supervision of a qualified user (Qualified User), defined as one who assumes responsibility for all aspects of appropriate test use, including administration, scoring, interpretation, and application of results. Such Qualified User must have:
- 5.2.1 A doctorate degree in psychology, education, or closely related field with formal training in the ethical administration, scoring, and interpretation of clinical assessments related to the intended use of the assessment; OR
 - 5.2.2 A licensure or certification to practice in New York State in a field related to the purchase; OR
 - 5.2.3 A Certification by or full active membership in a professional organization that requires training and experience in the relevant area of assessment.
- 5.3 Upon request by the Department, the Contractor will provide the Qualified User with a Case Number which EHS will reference when they call Pearson to download additional Interpretive Report inventory directly to the EHS account. The EHS local computer has a report counter that keeps track of the report usages that EHS has available. To generate a report, EHS uses an OpScan scanner to transfer the Answer Sheet data into the Pearson Q Local system which scores and outputs the results as MMPI-2-RF Interpretive report, which is then reviewed by an EHS Qualified User to determine the psychological pre-employment candidate qualification, agency referral or reinstatement fit for duty psychological status.

SECTION 6: PAYMENT FOR SERVICES

- 6.1 The Department agrees to reimburse the Contractor a maximum of \$845,991.65 based on the fees set forth in Attachment 2.
- 6.2 The Contractor shall invoice the Department in accordance with the provisions set forth herein, for Project Services rendered, together with full supporting detail(s) as set forth below. Such invoice shall be emailed to accountspayable@ogs.ny.gov. The subject line should include the Invoice Number and the term "Department of Civil Service". Such invoice must include:
- 6.2.1 Name of the NYS Agency being billed;
- 6.2.2 The name of the vendor and NYS Statewide Financial System (SFS) Vendor Number; and
- 6.2.3 Contract number.
- 6.3 After review of the Contractor's invoice, the Department shall submit it to OSC for payment. OSC shall render payment for invoices under the Agreement in accordance with ordinary State procedures and practices. The Department will make best efforts to process all acceptable invoices within thirty (30) days of their receipt; however, failure to make payment within said timeframe shall not be considered a breach of contract. The Contractor acknowledges that timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article XI-A of the State Finance Law. Submission of an invoice and payment thereof shall not preclude the Department, as applicable, from reimbursement or demanding a price adjustment in any case where Project Services as delivered are found to deviate from the terms and conditions of the Agreement.
- 6.4 The State of New York is not liable for any cost incurred by the Contractor in preparation for or prior to the approval of an executed contract by the AG and OSC.

SECTION 7: USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION

- 7.1 For purposes of this section, the term "Protected Health Information" ("PHI") means any information, including demographic information collected from an individual, that relates to the past, present, or future physical or mental health or condition of an individual; or to the provision of health care to an individual; or to the past, present, or future payment for the provision of health care to an individual, that identifies the individual, or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual. Within the context of this Agreement, PHI may be received by the Contractor from the Department or may be created or received by the Contractor

on behalf of the Department. All PHI received or created by the Contractor as a consequence of its performance under this Agreement is referred to herein collectively as "Department's PHI."

- 7.2 The Contractor acknowledges that EHS within the Department is a "health care provider" as that term is defined in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) implementing regulations at 45 CFR 160.103. The Contractor further acknowledges that the Contractor is a HIPAA "business associate" of the Department as a consequence of the Contractor's provision of Project services on behalf of the Department within the context of the Contractor's performance under this Agreement; and that the Contractor's provision of Project services will involve the disclosure to the Contractor of individually identifiable health information from the Department or other service providers on behalf of the Department, as well as the Contractor's disclosure to the Department of individually identifiable health information as a consequence of the services performed under this Agreement.
- 7.3 The Contractor may use and/or disclose the Department's PHI solely in accordance with the specifications set forth in this Agreement. [45 CFR §164.504(e)(2)(i)].
- 7.4 The Contractor shall not use or further disclose the Department's PHI otherwise than as permitted or required by this Agreement or as otherwise required by law. [45 CFR §164.504(e)(2)(ii)(A)].
- 7.5 The Contractor shall use reasonable and appropriate safeguards to prevent the use or disclosure of the Department's PHI otherwise than as provided for by this Agreement. [45 CFR §164.504(e)(2)(ii)(B)]. The Contractor shall maintain a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the Contractor's operations and the nature and scope of its activities.
- 7.6 Breach Notification:
 - 7.6.1 The Contractor shall report to the Department any breach of unsecured PHI, including any use or disclosure of the Department's PHI otherwise than as provided for by this Agreement, of which the Contractor becomes aware.
 - 7.6.2 Such report shall include, to the extent possible:
 - a. A brief description of what happened, including the date of the Breach and the date of the discovery of the Breach, if known;
 - b. A description of the types of Unsecured Protected Health Information that were involved in the Breach (such as whether full name, social security number, date of birth, home address, account

number, diagnosis, disability code, or other types of information were involved);

- c. Any steps individuals should take to protect themselves from potential harm resulting from the breach;
- d. A description of what Business Associate is doing to investigate the Breach, to mitigate harm to individuals, and to protect against any further Breaches; and
- e. Contact procedures for the Department to ask questions or learn additional information.

7.6.3 The Contractor will be responsible to provide notification to individuals whose unsecured PHI has been or is reasonably believed to have been accessed, acquired or disclosed as a result of a breach, as well as the Secretary and the media, as required by 45 CFR Part 164.

7.6.4 The Contractor shall maintain procedures to sufficiently investigate the breach, mitigate losses, and protect against any future breaches, and to provide a description of these procedures and the specific findings of the investigation to the Department upon request.

7.6.5 For purposes of this Agreement, "Unsuccessful Security Incidents" include activity such as pings and other broadcast attacks on Business Associate's firewall, port scans, unsuccessful log-on attempts, denials of service, and any combination of the above, so long as no such incident results in unauthorized access, use, or disclosure of electronic PHI, and for which no additional reporting shall be required.

7.6.6 The Contractor shall mitigate, to the extent practicable, any harmful effects from any use or disclosure of PHI by the Contractor not permitted by this Agreement.

7.7 The Contractor shall make available to the Department such information as the Department may require to fulfill the Department's obligations to provide access to, to provide a copy of, and to account for disclosures with respect to the Department's PHI in accordance with HIPAA and its implementing regulations, including, but not limited to, 45 CFR Sections 164.524 and 164.528. [45 CFR §164.504(e)(2)(ii)(E) and (G)].

7.8 The Contractor shall make its internal practices, policies and procedures, books, records, and agreements relating to the use and disclosure of the Department's PHI, whether received from the Department or created or received by the Contractor on behalf of the Department, available to Department and/or the Secretary of the United States Department of Health and Human Services in a reasonable time and manner as designated by the Department and/or the

Secretary for purposes of determining the Department's compliance with HIPAA and its implementing regulations.

SECTION 8: NOTICES

- 8.1 The Contractor shall immediately notify the Department upon learning of any situation that can reasonably be expected to adversely affect the delivery of the MMPI reports.
- 8.2 All notices permitted or required hereunder shall be in writing and shall be transmitted via e-mail. Such notification must be sent to

State of New York Department of Civil Service

Name: [REDACTED]
Title: Assistant Director, Staffing Services Division
Address: Empire State Plaza, Agency Building 1, Albany, NY 12239
Telephone Number: [REDACTED]
E-Mail Address: [REDACTED]

NCS Pearson Inc.

Name: [REDACTED]
Title: Clinical Assessment Representative - Government/Public Safety
Address: 5601 Green Valley Dr. Bloomington, MN 55437
Telephone Number: [REDACTED]
E-Mail Address: [REDACTED]

- 8.3 Any such notice shall be deemed to have been given upon receipt of email.
- 8.4 The Parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The Parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the Parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

SECTION 9: GENERAL PROVISION AS TO REMEDIES

- 9.1 The Parties may exercise their respective rights and remedies at any time, in any order, to any extent, and as often as deemed advisable, without regard to whether the exercise of one right or remedy precedes, concurs with or succeeds

the exercise of another. A single or partial exercise of a remedy shall not preclude a further exercise of the right or remedy or the exercise of another right or remedy from time to time. No delay or omission in exercising a right or remedy, or delay, inaction, or waiver of any event of default, shall exhaust or impair the right or remedy or constitute a waiver of, or acquiescence to, an event otherwise constituting a breach or default under the Agreement.

9.2 In addition, the Department has the following remedies which may include, but are not limited to, the following:

9.2.1 The right for the Department to withhold payment of some or all of the amounts due and owed under the Agreement until Contractor's performance is brought within the specified parameters.

9.2.2 The application of credits against amounts due and owed by the Department under the Agreement.

SECTION 10: COOPERATION WITH INVESTIGATIONS AND AUDITS

10.1 In addition to the audit authority requirements specified in Appendices A and B to this Agreement, the Contractor agrees to cooperate with the Department, any other authorized State or Federal Department, and any law enforcement authority, in the investigation, documentation and litigation of any alleged illegal act, misconduct or unethical behavior related to the Agreement, or in connection with any audit.

SECTION 11: WARRANTIES

11.1 A breach of any provision of this section 11 shall be deemed a "material breach" for purposes of default under the Agreement. Contractor hereby warrants and represents:

11.1.1 That Contractor assumes responsibility for the cost and timely accomplishment of all obligations and duties required by the Agreement whether or not the Contractor, or subcontractors, performs such obligations or duties. Project Services rendered by the Contractor shall be performed in accordance with all the terms and conditions, covenants, statements and representations contained in the Agreement, including all appendices.

11.1.2 During the term of the Agreement, the Contractor will provide the necessary levels of qualified personnel to ensure proper performance by Contractor of its obligations and responsibilities under the Agreement.

- 11.1.3 The Contractor shall pay, at its sole expense, all applicable permits, licenses, tariffs, tolls and fees, and give all notices and comply with all laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Agreement. Prior to award and during the Agreement term and any extension thereof, Contractor must establish to the satisfaction of the Department that it meets or exceeds all requirements of the Agreement and any applicable laws, including but not limited to, permits, insurance coverage, licensing, proof of coverage for workers' compensation, and shall provide such proof as required by the Department. Failure to do so may constitute grounds for the Department to cancel or suspend the Agreement, in whole or in part, or to take any other action deemed necessary by the Department.
- 11.2 Survival of Warranties. All warranties contained in the Agreement shall survive the termination of the Agreement.
- 11.3 The warranties set forth in this Agreement are in lieu of all other warranties, express or implied, including but not limited to, the implied warranties of merchantability and fitness for a particular purpose.

SECTION 12: REPORTS OWNERSHIP

- 12.1 In addition to ownership provisions set forth elsewhere in Appendices A and B, the Contractor agrees that information and documents developed pursuant to the Agreement specifically for the Department are the property of the State of New York and that the Contractor will not discuss such information, documents and systems with a third party without the express written authorization of the Department.

SECTION 13: TERMINATION

In addition to the Termination of Agreement requirements specified in Appendices A, and B to this Agreement, the following provisions shall apply:

- 13.1 The State retains the right to cancel the Agreement without cause and in its sole discretion, provided that the Department shall give written notice to the Contractor not less than thirty (30) days prior to the date upon which termination shall become effective. Such notice shall be made via registered or certified mail, return receipt requested; by personal delivery; by expedited delivery service; or by e-mail. The date of such notice shall be deemed to be the date of postmark in the case of mail or the date of hand delivery. This provision should not be understood as waiving the right of the Department to terminate the Agreement for

cause or to stop work immediately for unsatisfactory work, but is supplementary to that provision. In the event of cancellation without cause by the Department under this Agreement, the Department agrees to negotiate a payment based on time, materials and other documented expenses directly attributable to the Agreement actually expended by Contractor.

- 13.2 If the Contractor ceases conducting business in the normal course, becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets, or avails itself of or becomes subject to any proceeding under the Federal Bankruptcy Act or any statute of any state relating to insolvency or the protection of rights of creditors, the Department, in its sole discretion, may terminate the Agreement or may exercise such other remedies as shall be available under the Agreement, at law and/or equity;
- 13.3 No delay or omission to exercise any right, power or remedy accruing to the State of New York or the Department upon breach or default by the Contractor under the Agreement shall impair any such right, power or remedy, or shall be construed as a waiver of any such breach or default, or any similar breach or default thereafter occurring, nor shall any waiver of a single breach or default be deemed a waiver of any subsequent breach or default. All waivers must be in writing;
- 13.4 Notices required by this section shall be provided consistent with section 8 of this Agreement.

SECTION 14: SECURITY RESPONSIBILITIES AND FEDERAL OR STATE DISCLOSURE PROHIBITIONS

14.1 The Contractor shall maintain the security, nondisclosure and confidentiality of all information in accordance with the following clauses in performance of its activities under the Agreement. Contractor shall ensure that its personnel, agents, officers and subcontractors, if any, are fully aware of the obligations arising under this Article and shall take all commercially reasonable steps to ensure compliance. The Agreement may be terminated for cause by the Department for a material breach of this Article.

- 14.1.1 Security Responsibilities:
Contractor warrants, covenants and represents that it shall comply fully with all security procedures and policies of the State of New York, which procedures and policies are communicated to the Contractor by the Department during the performance of the Agreement. Contractor shall hold the Department harmless from any loss or damage to the Department resulting from the violation by the Contractor, its officers, agents, employees, and subcontractors, if any of such security

procedures or policies resulting from any criminal acts committed by such officers, agents, employees, and subcontractors, while performing services under the Agreement.

- 14.1.2 Federal or State Disclosure Prohibitions:
In the event that it becomes necessary for the Contractor to receive confidential information, which Federal or State statute or regulation prohibits from disclosure, Contractor hereby agrees to return or destroy all such confidential information that has been received from the Department when the purpose that necessitated its receipt by Contractor has been completed. In addition, Contractor agrees not to retain any confidential information which Federal or State statute or regulation prohibits from disclosure after termination of the Agreement. Notwithstanding the foregoing, if the return or destruction of the confidential information is not feasible, Contractor agrees to extend the protections of the Agreement for as long as necessary to protect the confidential information and to limit any further use or disclosure of that confidential information. If Contractor elects to destroy confidential information, it shall use reasonable efforts to achieve the same and notify the Department accordingly. Contractor agrees that it will use all appropriate safeguards to prevent any unauthorized use or unauthorized disclosure of confidential information, which Federal or State statute or regulation prohibits from disclosure. Contractor agrees that it shall promptly report to the Department the discovery of any unauthorized use or unauthorized disclosure of such confidential information. The State may terminate the Agreement immediately for cause if it determines that Contractor has violated a material term of this Article. The terms of this Article shall apply equally to Contractor, its agents and subcontractors, if any. Contractor agrees that all subcontractors, if any and agents shall be made aware of and shall agree to the terms of this Agreement.

SECTION 15: RESPONSIBILITY TERMS

- 15.1 The Contractor covenants and represents that it has, to the best of its knowledge, truthfully and thoroughly completed Contractor's Vendor Responsibility Questionnaire (hereinafter "Vendor Responsibility Questionnaire") provided to the Contractor by the Department prior to execution of the Agreement. The Contractor further covenants and represents that as of the date of execution of the Agreement, there are no material events, omissions, changes, or corrections to such document requiring an amendment to the Vendor Responsibility Questionnaire.
- 15.2 The Contractor shall provide to the Department updates to the Vendor Responsibility Questionnaire if any material event(s) occurs requiring an

amendment or as new information material to such Vendor Responsibility Questionnaire becomes available.

- 15.3 Notwithstanding the above, the Department reserves the right, in its sole discretion, at any time during the term of the Agreement, (i) to require updates or clarifications to the Vendor Responsibility Questionnaire upon written request, (ii) to inquire about information included in or require information omitted from the Vendor Responsibility Questionnaire, and (iii) to require Contractor to provide such information to the Department within a reasonable timeframe.
- 15.4 The Department reserves the right to make a final determination of Contractor's non-responsibility (hereinafter "Determination of Non-responsibility") at any time during the term of the Agreement based on (i) any information provided in the Vendor Responsibility Questionnaire and/or in any updates, clarifications, or amendments thereof; or (ii) the Department's discovery of any other material information which pertains to Contractor's responsibility.
- 15.5 If the Department preliminarily determines Contractor to be non-responsible, the Department shall provide written notice to Contractor detailing the reason(s) for the preliminary determination and shall provide Contractor with an opportunity to be heard.
- 15.6 Upon a Determination of Non-responsibility of Contractor, the Department reserves the right to terminate the Agreement.

SECTION 16: CONFIDENTIALITY

In addition to the provisions in Appendix B, the following provisions shall apply

- 16.1 Individually identifiable information relating to any participant shall be held confidential and shall not be disclosed by the Contractor, its officers, agent and employees or subcontractors, without the prior written approval of the applicant, the Department, or except as permitted, or as required, by federal or State law.
- 16.2 Medical information and records obtained or created by the Contractor can only be released to EHS, or as provided for in the Agreement. The Contractor shall not release information to the State agency where an individual is employed or is a candidate for employment. Release of medical information generated pursuant to the Agreement is subject to Part 82 of the Civil Service Rules which prohibits the release of such information except in the following circumstances:
 - 16.2.1 Upon written authorization of the subject of the records on a form prepared by the Department; or

- 16.2.2 When required by law or court order, provided that notification is made to the subject of the record prior to such disclosure, unless such notification is prohibited by law.

SECTION 17: ENTIRE AGREEMENT

- 17.1 The Agreement and the appendices and attachments hereto constitute the entire agreement between the Parties hereto and no statement, promise, condition, understanding, inducement, or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid. The Agreement shall not be changed, modified, or altered in any manner except by an instrument in writing executed by the Parties hereto.

SECTION 18: LIMITATION OF LIABILITY

- 18.1 For all other claims against the Contractor where liability is not otherwise set forth in the Contract as being “without limitation” or not subject to the limitation of liability provisions, and regardless of the basis on which the claim is made, Contractor’s liability under the Contract for direct damages shall be limited to the greater of the following: (i) \$500,000 (Five Hundred Thousand Dollars); or (ii) two (2) times the amounts paid to the Contractor under the Contract during the twelve (12) months of the contract term which precedes the giving of notice of the claim by the State. For this purpose, amounts paid shall include, but not be limited to, payments made electronically, by check, by offset, or by the application of credits from the Contractor to the State. Unless otherwise specifically enumerated herein, neither party shall be liable for any incidental, punitive, consequential, indirect or special damages of any kind which may result directly or indirectly from the performance of this Contract, including, without limitation, damages resulting from loss of use or loss of profit by the State, the Contractor, or by others, however caused and regardless of the theory of liability even if such party has been informed of the possibility of such damages.

(Remainder of this page intentionally left blank)

Contract Number: C000729

IN WITNESS WHEREOF, the Parties hereto have hereunto signed this AGREEMENT on the day and year appearing opposite their respective signatures.

Agency Certification: "In addition to the acceptance of this Agreement, I also certify that original copies of this signature page will be attached to all exact copies of this Agreement."

Contractor Certification: By signing I certify my express authority to sign on behalf of myself, my company, or other entity and full knowledge and acceptance of this Agreement and all appendices. By signing, I affirm my understanding of and agreement to comply with the Department's procedures relative to the Procurement Lobbying Law as required by State Finance Law §139-j and §139-k.

**NEW YORK STATE
DEPARTMENT OF CIVIL SERVICE**

Name: Rebecca A. Corso
Title: Deputy Commissioner
By: [Redacted]
Date: 3/1/21

NCS PEARSON INC.

Name: Arthur Valentine
Title: Managing Director, Clinical Assessment,
a division of NCS Pearson, Inc.
By: [Redacted]
Date: January 6, 2021

**CORPORATION ACKNOWLEDGMENT
STATE OF } Texas**

COUNTY OF } Bexar

On the 6 day of January in the year 2021, before me personally appeared Arthur Valentine,

known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that he maintains an office at Town of San Antonio County of Bexar, State of Texas; and further

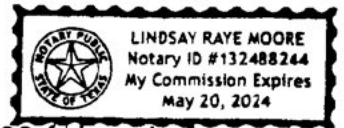
that: he is the Managing Director, Clinical Assessment of NCS Pearson, Inc.,

the corporation described in said instrument; that, by authority of the Board of Directors of said corporation, he is authorized to execute the foregoing instrument on behalf of the corporation for purposes set forth therein; and that, pursuant to that authority, he executed the foregoing instrument in the name of and on behalf of said corporation as the act and deed of said corporation.

Notary Public [Redacted]

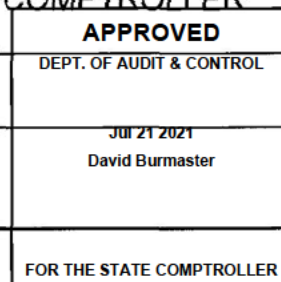
Date: January 6, 2021

Sworn Statement:



Approved as to form: _____
Letitia James
ATTORNEY GENERAL
By: _____
Date: _____

Approved: _____
Thomas P. DiNapoli
STATE COMPTROLLER
By: _____
Date: _____



APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

PLEASE RETAIN THIS DOCUMENT
FOR FUTURE REFERENCE.

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STANDARD CLAUSES FOR NYS CONTRACTS

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licenser, licensee, lessor, lessee or any other party):

1. EXECUTORY CLAUSE. In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

2. NON-ASSIGNMENT CLAUSE. In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

3. COMPTROLLER'S APPROVAL. In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$25,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed \$85,000 (State Finance Law § 163.6-a). However, such pre-approval shall not be required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

4. WORKERS' COMPENSATION BENEFITS. In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the

Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

5. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment, nor subject any individual to harassment, because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status or because the individual has opposed any practices forbidden under the Human Rights Law or has filed a complaint, testified, or assisted in any proceeding under the Human Rights Law. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. WAGE AND HOURS PROVISIONS. If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-

a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

7. NON-COLLUSIVE BIDDING CERTIFICATION. In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

8. INTERNATIONAL BOYCOTT PROHIBITION. In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR § 105.4).

9. SET-OFF RIGHTS. The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

10. RECORDS. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, the "Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the

agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION. (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN. In accordance with Section 312 of the Executive Law and 5 NYCRR Part 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of

\$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a," "b," and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this clause. The

contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

13. CONFLICTING TERMS. In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

14. GOVERNING LAW. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

15. LATE PAYMENT. Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

16. NO ARBITRATION. Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

17. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by

any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in § 165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES. In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

20. OMNIBUS PROCUREMENT ACT OF 1992. It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority- and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development
Division for Small Business
Albany, New York 12245
Telephone: 518-292-5100
Fax: 518-292-5884
email: opa@esd.ny.gov

A directory of certified minority- and women-owned business enterprises is available from:

NYS Department of Economic Development
Division of Minority and Women's Business Development
633 Third Avenue
New York, NY 10017
212-803-2414
email: mwb certification@esd.ny.gov
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>

The Omnibus Procurement Act of 1992 (Chapter 844 of the Laws of 1992, codified in State Finance Law § 139-i and Public Authorities Law § 2879(3)(n)-(p)) requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority- and

women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

21. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively, codified in State Finance Law § 165(6) and Public Authorities Law § 2879(5)) require that they be denied contracts which they would otherwise obtain. NOTE: As of October 2019, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii.

22. COMPLIANCE WITH BREACH NOTIFICATION AND DATA SECURITY LAWS. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law § 899-aa and State Technology Law § 208) and commencing March 21, 2020 shall also comply with General Business Law § 899-bb.

23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW. If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4)(g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

24. PROCUREMENT LOBBYING. To the extent this agreement is a "procurement contract" as defined by State Finance Law §§ 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law §§ 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.

To the extent this agreement is a contract as defined by Tax Law § 5-a, if the contractor fails to make the certification required by Tax Law § 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law § 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

26. IRAN DIVESTMENT ACT. By entering into this Agreement, Contractor certifies in accordance with State Finance Law § 165-a that it is not on the "Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012" ("Prohibited Entities List") posted at: <https://ogs.ny.gov/list-entities-determined-be-non-responsive-biddersofferers-pursuant-nys-iran-divestment-act-2012>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law § 165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

27. ADMISSIBILITY OF REPRODUCTION OF CONTRACT. Notwithstanding the best evidence rule or any other legal principle or rule of evidence to the contrary, the Contractor acknowledges and agrees that it waives any and all objections to the admissibility into evidence at any court proceeding or to the use at any examination before trial of an electronic reproduction of this contract, in the form approved by the State Comptroller, if such approval was required, regardless of whether the original of said contract is in existence.

New York State Department of Civil Service

APPENDIX B - STANDARD CLAUSES FOR ALL DEPARTMENT CONTRACTS

1. INTEGRATION

The contract executed between the Department and the Contractor (or Purchase Order issued by the Department) is hereinafter referred to as the Agreement. The Agreement, including all Exhibits and Appendices, including this Appendix B, copies of which are attached thereto, and incorporated therein by reference, constitutes the entire agreement between the Parties for the purpose of the fulfillment of Program Services or Project Services. All prior agreements, representations, statements, negotiations and undertakings are superseded hereby.

All statements made by the Department shall be deemed to be representations and not warranties.

2. EXECUTORY PROVISION

Section 112 of the State Finance Law requires that any contract made by a State department which exceeds fifty thousand dollars (\$50,000) in amount be first approved by the Comptroller of the State of New York before becoming effective. The Parties recognize that, if the Agreement is for fifty thousand dollars or more, it is wholly executory until and unless approved by the Comptroller of the State of New York.

3. CHOICE OF LAW

The Parties agree that the Agreement shall be interpreted according to the laws of the State of New York, except where the federal supremacy clause requires otherwise. The Contractor shall be required to bring any legal proceeding against the Department arising from the Agreement in New York State courts located in Albany County.

4. DISPUTE RESOLUTION

Except as otherwise provided in the Agreement, any dispute raised by the Contractor concerning any question of fact or law arising under the Agreement which is not disposed of by mutual agreement of the Parties shall be decided initially by the designee of the President of the Civil Service Commission (President). A copy of the written decision shall be furnished to the Contractor. The Parties shall proceed diligently with the performance of the Agreement and shall comply with the provisions of such decision and continue to comply pending further resolution of any such dispute as provided herein. The decision of the designee of the President shall be final and conclusive unless, within ten (10) Days from the receipt of such decision, the Contractor furnishes the President a written appeal. In the event of an appeal, the President shall promptly review the initial decision, and confirm, annul, or modify it. The decision of the President shall be final and conclusive unless, as determined by a court of competent jurisdiction, it violates one of the provisions of section 7803 of the Civil Practice Law and Rules. Pending final decision of any Article 78 Proceeding hereunder, both Parties shall proceed diligently with the performance of the Agreement in accordance with the President's decision.

5. WAIVER OF BREACH

No term or provision of the Agreement shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. No consent by a Party to, or waiver of, a breach under the Agreement shall constitute a consent to, a waiver of, or excuse for any other, different or subsequent breach.

6. NEW YORK STATE REQUIREMENTS

The Contractor acknowledges that it is bound by the terms of Appendix A, Standard Clauses For All New York State Contracts, which is attached and incorporated by reference to the Agreement.

7. OUTSIDE OF SCOPE

The Contractor agrees that any and all work performed outside the scope of the Agreement shall be deemed to be gratuitous and not subject to any charge, cost or payment of any kind.

8. NON-ASSIGNABILITY

Neither the rights nor the obligations of the Contractor under the Agreement may be conveyed, assigned, delegated, or otherwise transferred in any manner whatsoever by the Contractor, either in whole or in part, without the prior written approval of the Department.

9. NOTIFICATION

All notices permitted or required by the Agreement to be given by one Party to the other shall be in writing and shall be transmitted either (1) via certified or registered mail, return receipt requested; (2) by facsimile transmission; (3) by personal delivery; (4) by expedited delivery service; or (5) by e-mail.

10. INDEMNIFICATION

The Contractor agrees to indemnify, defend and save harmless the Department, the State, its officers, agents and employees, for any claims or losses the Department, the State or any individuals may suffer when such claims or losses result from the claims of any person or organization for any and all injuries or damages caused by the negligent acts or omissions of the Contractor, its officers, employees, agents, consultants and/or sub-contractors in performance of the Agreement. Furthermore, the Contractor agrees to indemnify, defend and save harmless the Department and the State, its officers, agents, and employees from any and all claims or losses caused by the acts or omissions of any and all contractors, sub-contractors, consultants and any other persons, firms, or corporations furnishing or supplying work, services, materials, or supplies in connection with the performance of the Agreement and from all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by the Contractor in the performance of the Agreement, and against any loss, damages or actions, including, but not limited to, costs and expenses, for violation of proprietary rights, copyrights, patents, or rights of privacy, arising out of the publication, translation, reproduction, delivery, performance, use, or disposition of any material, information or data furnished under the Agreement, or based on any libelous or otherwise unlawful matter contained in such material, information or data, except as otherwise provided in the Article entitled "Patent Copyright or Proprietary Rights Infringement" of this Appendix B.

The Contractor also shall provide indemnification against all losses, and/or cost expenses (including reasonable counsel fees) that may be incurred by reason of the Contractor's breach of any term, provision, covenant, warranty, or representation contained herein and/or in connection with the enforcement of the Agreement or any provision hereof.

The Department does not agree to any indemnification provisions in any documents attached hereto that require the Department or the State of New York to indemnify or save harmless the Contractor or third parties.

Notwithstanding anything to the contrary in the Agreement, neither the Department nor the Contractor shall be liable to the other for any special, consequential, or punitive damages, or loss of profits or revenues, whether such damages are alleged as a result of tort (including strict liability), contract,

warranty, or otherwise, arising out of or relating to either Party's acts or omissions under the Agreement.

11. PATENT, COPYRIGHT OR PROPRIETARY RIGHTS INFRINGEMENT

The Contractor, solely at its expense, shall defend any claim or suit which may be brought against the Department or the State for the infringement of United States patents, copyrights or proprietary rights arising from the Contractor's or the Department's use of any software, equipment, data, materials and/or information of any kind prepared, developed or furnished by the Contractor in connection with performance of the Agreement and, in any such suit, shall satisfy any final judgment for such infringement. The Department shall give the Contractor written notice for such claim or suit and full right and opportunity to conduct the defense thereof, together with full information and all reasonable cooperation.

If principles of governmental or public law are involved, the State of New York may participate in the defense of any action identified under this Article, but no costs or expenses shall be incurred upon the account of the Contractor without the Contractor's written consent.

If, in the Contractor's opinion, any software, equipment, data, materials and/or information prepared, developed or furnished by the Contractor is likely to or does become the subject of a claim of infringement of a United States patent, copyright or proprietary right, then, without diminishing the Contractor's obligation to satisfy any final award, the Contractor may, with the Department's prior written approval, substitute other equally suitable software, equipment, materials, data and/or information. In the event that an action at law or in equity is commenced against the Department arising out of a claim that the Department's use of any software, equipment, materials and/or information under the Agreement infringes on any patent, copyright, or proprietary right, such action shall be forwarded by the Department to the Contractor for defense and indemnification under this Article and to the Office of the Attorney General of the State of New York together with a copy of the Agreement. If upon receipt of such request for defense, or at any time thereafter, the Contractor is of the opinion that the allegations in such action, in whole or in part, are not covered by the defense and indemnification set forth herein, the Contractor shall immediately notify the Department and the Office of the Attorney General of the State of New York, in writing, and shall specify to what extent the Contractor believes it is and is not obligated to defend and indemnify under the terms and conditions of the Agreement. The Contractor shall in such event protect the interests of the State of New York and shall take the steps necessary to secure a continuance to permit the State of New York to appear and defend its interest in cooperation with the Contractor, as is appropriate, including any jurisdictional defenses which the State shall have.

12. DATE/TIME WARRANTY

The Contractor warrants that products furnished pursuant to the Agreement shall be able to accurately process, date/time data (including, but not limited to, calculating, comparing, and sequencing) transitions, including leap year calculations. Where a Contractor proposes or an acquisition requires that specific products and/or services must perform as a package or system, this warranty shall apply to the products and/or services as a system.

Where the Contractor is providing ongoing services, including but not limited to: i) consulting, integration, code or data conversion, ii) maintenance or support services, iii) data entry or processing, or iv) contract administration services (e.g. billing, invoicing, claim processing), the Contractor warrants that services shall be provided in an accurate and timely manner without interruption, failure, or error due to the inaccuracy of the Contractor's business operations in processing date/time data (including, but not limited to, calculating, comparing, and sequencing) various date/time transitions, including leap

year calculations. The Contractor shall be responsible for damages resulting from any delays, errors, or untimely performance resulting there from, including but not limited to the failure or untimely performance of such services.

This Date/Time Warranty shall survive beyond termination or expiration of the Agreement through a) ninety (90) days or b) the Contractor's or product manufacturer/developer's stated date/time warranty term, whichever is longer. Nothing in this warranty statement shall be construed to limit any rights or remedies otherwise available under the Agreement for breach of warranty.

13. VIRUS WARRANTY

Product contains no viruses, either known to the Contractor or which reasonably should have been known to the Contractor exercising due diligence. The Contractor is not responsible for viruses introduced at the Department's site.

14. TITLE AND OWNERSHIP WARRANTY

The Contractor warrants and represents it has (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver license rights to any Product(s) transferred to the Department under the Agreement. The Contractor shall be solely liable for any costs of acquisition associated therewith. The Department may require the Contractor to furnish appropriate written documentation establishing the above rights and interests as a condition of payment. The Department's request or failure to request such documentation shall not relieve the Contractor of liability under this warranty.

15. USE RESTRICTIONS AND INTELLECTUAL PROPERTY

Subject to Section 16 below, the Parties agree that all work by the Contractor for the Department is intended as work for hire. The Parties agree that the Contractor's work is specifically ordered and commissioned for use as contributions to a collective work, or is other such work as specified by section 101(2) of the U.S. Copyright Act [17 U.S.C. 101(2)], and is intended to be a work for hire that is made for the use and ownership of the State of New York and the Department. Furthermore, the Department and the Contractor agree that the State of New York and the Department are the owners of all copyrights regarding the work. The Contractor warrants to the State of New York and the Department that the Contractor, and all of its subcontractors and their employees, who have been, or may be used in regard to the Agreement, forfeits all past or future claims of title or ownership to the work produced.

Materials such as forms and publications used by the Contractor in the course of its performance under the Agreement which have been agreed upon by the Parties as generic materials are specifically excluded from this provision.

16. OWNERSHIP/TITLE TO PRODUCT DELIVERABLES

For purposes of this Article, the term "Department" is understood to mean the Department acting on behalf of the State.

(A) Definitions

1. Product(s): A deliverable furnished under the Agreement by or through the Contractor, including existing and custom Product(s), including, but not limited to: a) components of the hardware environment; b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings); c) third party software; d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components; and e) any properties embodied therein, whether in tangible or

intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, source code, object code).

2. Existing Product(s): Tangible Product(s) and intangible licensed Product(s) which exist prior to the commencement of work under the Agreement. The Contractor retains the burden of proving that a particular product existed before commencement of the Agreement.
3. Custom Product(s): Product(s), preliminary, final or otherwise, which are created or developed by the Contractor, or its subcontractors, partners, employees, or agents under the Agreement for the benefit of the Department.

(B) Title to Project Deliverables

The Contractor acknowledges that it is commissioned by the Department to perform services detailed in the Agreement. Unless otherwise specified in writing in the Agreement, the Department shall have ownership and/or license rights as follows:

1. Existing Product(s):
 - a) Hardware - Title and ownership of Existing Hardware Product shall pass to Department upon acceptance.
 - b) Software - Title and ownership to Existing Software Product(s) delivered by the Contractor under the Agreement which is normally commercially distributed on a license basis by the Contractor or other independent software vendor/proprietary owner ("Existing Licensed Product"), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with the Contractor or other independent software vendor/proprietary owner ("ISV"). Effective upon acceptance, such Product shall be licensed to the Department in accordance with the Contractor or ISV owner's standard license agreement, provided, however, that such standard license, must, at a minimum: (a) grant the Department a non-exclusive, limited license to use Existing Licensed Product up to the license capacity stated in the work order with all license rights necessary to fully effect the general business purpose(s) stated in the Agreement and (b) recognize the State of New York as the licensee. Where these rights are not otherwise covered by the ISV's standard license agreement, the Contractor shall be responsible for obtaining these rights at its sole cost and expense. The Department shall reproduce all copyright notices and any other legend of ownership on any copies authorized under this paragraph.
2. Custom Product(s):

Effective upon creation of Custom Product(s), the Contractor hereby conveys, assigns and transfers to State the sole and exclusive rights, title and interest in Custom Product(s), whether preliminary, final or otherwise, including all trademark and copyrights. The Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Product(s) are protected against unauthorized copying, reproduction and marketing by or through the Contractor, its agents, employees, or subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under the Agreement in the course of the Contractor's business.

Where payment for Custom Product does not involve Certificates of Participation (COPS) pursuant to Article 5-A of the State Finance Law or other third party financing, the Department may, by providing written notice thereof to the Contractor, elect in the alternative to take a non-exclusive perpetual license to Custom Products in lieu of State taking exclusive ownership and title to such Products. In such case, the Department shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purpose(s) as stated herein.

In the event that the Contractor wishes to obtain ownership rights to Custom Product(s), the sale or other transfer shall be at fair market value as determined by the Parties at the time of such sale or other transfer, and must be pursuant to a separate written agreement in a form acceptable to the State which complies with the terms of this paragraph.

3. Documentation, Data & Reports

The Department shall own title to all documentation, drawings, (e.g., engineering drawings, system diagrams, logic/schematics, plans, reports, training, maintenance or operating manuals), including network design, equipment configurations and other documentation prepared or developed pursuant to the Agreement, whether preliminary, final or otherwise. The Contractor shall deliver to the possession of the Department all work-in-progress documentation as it becomes available, but in no case longer than thirty (30) days after creation.

17. FORCE MAJEURE

Neither Party to the Agreement shall be liable or deemed to be in default for any delay or failure in performance under the Agreement resulting directly or indirectly from acts of God, civil or military authority, acts of public enemy, wars, riots, civil disturbances, insurrections, accident, fire, explosions, earthquakes, floods, the elements, acts or omissions of public utilities or strikes, work stoppages, slowdowns or other labor interruptions due to labor/management disputes involving entities other than the Parties to the Agreement, or any other causes not reasonably foreseeable or beyond the control of a Party. The Parties are required to use best efforts to eliminate or minimize the effect of such events during performance of the Agreement and to resume performance of the Agreement upon termination or cessation of such events.

18. TIME OF THE ESSENCE

The Department and the Contractor acknowledge and agree that time is of the essence for the Contractor's performance under the Agreement.

19. RIGHTS AND REMEDIES

The rights, duties and remedies set forth in the Agreement shall be in addition to, and not in limitation of, rights and obligations otherwise available at law.

20. FEDERAL AND STATE COMPLIANCE

The Contractor shall ensure that its employment practices comply with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended. Further, the Contractor shall ensure compliance with the Americans With Disabilities Act (42 USC §2101 et. seq.) such that programs and services provided during the course of performance of the Agreement shall be accessible under Title II of the Americans With Disabilities Act and as otherwise applicable under the Americans With Disabilities Act.

21. TAXES

It shall be understood that the Department, as an agency of the State of New York, is not liable for the payment of any sales, use, excise, or other form of tax however designated, levied or imposed, and shall agree to reimburse the Contractor for same only if taxes would have been incurred through the Department's normal business operations.

22. INDEPENDENT CONTRACTOR

The Parties agree that the Contractor is an independent contractor, and the Contractor, its officers, employees, agents, consultants and/or sub-contractors in the performance of the Agreement shall act in an independent capacity and not as agents, officers or employees of the State or the Department. Neither the Contractor nor any sub-contractor shall thereby be deemed an agent, officer, or employee of the State. The Contractor agrees, during the term of the Agreement, to maintain at the Contractor's expense those benefits to which its employees would otherwise be entitled by law, including health benefits, and all necessary insurance for its employees, including worker's compensation, disability and unemployment insurance, and to provide the Department with certification of such insurance upon request. The Contractor remains responsible for all applicable federal, State, and local taxes, and all FICA contributions.

23. NO THIRD PARTY BENEFICIARIES

Nothing contained in the Agreement, expressed or implied, is intended to confer upon any person, corporation, other than the Parties hereto and their successors in interest and assigns, any rights or remedies under or by reason of the Agreement.

24. HEADINGS OR CAPTIONS

The headings or captions contained within the Agreement are intended solely for convenience and reference purposes and shall in no way be deemed to define, limit or describe the scope or intent of the Agreement or any provisions thereof.

25. PARTIAL INVALIDITY

Each Party agrees that it shall perform its obligations under the Agreement in accordance with all applicable federal and State laws, rules, and regulations, policies and/or guidelines now or hereafter in effect. If any term or provision of the Agreement shall be found to be illegal or unenforceable, then, notwithstanding such term or provision, the Agreement shall remain in full force and effect, and such term or provision shall be deemed stricken.

26. CONFLICT OF INTEREST

The Contractor shall ensure that its officers, employees, agents, consultants and/or sub-contractors comply with the requirements of the New York State Public Officers Law ("POL"), as amended, including but not limited to sections 73 and 74, as amended, with regard to ethical standards applicable to State employees, and particularly POL sections 73(8)(a)(i) and (ii) regarding post-employment restrictions affecting former State employees. Additionally, the Contractor shall ensure that no violation of these provisions will occur by reason of the Contractor's proposal for or negotiation and execution of the Agreement or in its delivery of services pursuant to the Agreement. If, during the term of the Agreement, the Contractor becomes aware of a relationship, actual or potential, which may be considered a violation of the POL or which may otherwise be considered a conflict of interest, the Contractor shall notify the Department in writing immediately. Should the Department thereafter determine that such employment is inconsistent with State law; the Department shall so advise the Contractor in writing, specifying its basis for so determining, and may require that the contractual or

employment relationship be canceled. Failure to comply with these provisions may result in suspension or cancellation of the Agreement and criminal proceedings as may be required by law.

The Contractor is required to make full disclosure of any circumstances that could affect its ability to perform in complete compliance with the POL. Any questions as to the applicability of these provisions should be addressed by the Contractor to the New York State Ethics Commission, 540 Broadway, Albany, NY 12207 (518) 408-3976.

27. AUDIT AUTHORITY

The Contractor acknowledges that the Department and the Office of the State Comptroller have the authority to conduct financial and performance audits of the Contractor's delivery of Program Services (or Project Services) in accordance with the Agreement and any applicable State and federal statutory and regulatory authorities. Such audit activity may include, but not necessarily be limited to, the review of documentary evidence to determine the accuracy and fairness of all items on the Contractor's submission of claims for payment under the Agreement, and the review of any and all activities relating to the Contractor's performance and administration of the Agreement.

The Contractor shall make available documentary evidence necessary to perform such reviews. Documentation made available by the Contractor may include, but is not limited to, source documents, books of account, subsidiary records and supporting work papers, claim documentation and pertinent contracts and correspondence.

The audit provisions contained herein shall in no way be construed to limit the audit authority or audit scope of the Office of the State Comptroller as set forth in Appendix A of the Agreement - Standards Clauses for All New York State Contracts.

28. CONFIDENTIALITY

All records maintained by the Contractor and relating to the Agreement are confidential and shall be used by the Contractor and its officers, employees, and subcontractors or agents solely for the purpose of carrying out its obligations under the Agreement. Except as directed by a court of competent jurisdiction or as may be permitted or required by applicable New York State or federal law or regulations, no such records may be otherwise used or released to any person by the Contractor, its employees, subcontractors or agents, either during the term of the Agreement or in perpetuity thereafter. Deliberate or repeated accidental breach of this provision may, at the sole discretion of the Department, be grounds for termination of the Agreement.

The Contractor shall promptly advise the Department of all requests made to the Contractor for information regarding the performance of services under the Agreement, including any information provided by the Department, except as required by subcontractors or agents solely for the purpose of carrying out obligations under the Agreement or as required by law.

The Contractor shall be responsible for assuring that any agreement between the Contractor and any of its officers, agents and employees or applicable subcontractors contains a provision that conforms strictly to the provisions of this Article.

29. INFORMATION SECURITY REQUIREMENTS

In accordance with the Information Security Breach and Notification Act (ISBNA) (General Business Law §889-aa, State Technology Law §208), Contractor shall be responsible for complying with provisions of the ISBNA and the following terms contained herein with respect to any private information (as defined in ISBNA) received by Contractor under the Agreement (Private Information) that is within the control of the Contractor either on the Department's information security systems or the Contractor's information security system (System). In the event of a breach of the security of the System (as defined by ISBNA), Contractor shall immediately commence an investigation, in cooperation with the Department, to determine the scope of the breach and restore security of the System to prevent any further breaches. Contractor shall also notify the Department of any breach of the security of the System immediately following discovery of such breach.

Except as otherwise instructed by the Department, Contractor shall, to the fullest extent possible, first consult with and receive authorization from the Department prior to notifying any individuals, the State Office of Cyber Security and Critical Infrastructure Coordination (CSCIC), the State Consumer Protection Board and the Office of the Attorney General (OAG) or any consumer reporting agencies of a breach of the security of the System or concerning any determination to delay notification due to law enforcement investigations. Contractor shall be responsible for providing the notice to all such required recipients and for all the costs associated with providing such notice. Contractor shall be liable for any other costs associated with noncompliance of ISBNA if caused by the Contractor or Contractor's agents, officers, employees, or subcontractors. Nothing herein shall in any way impair the authority of the OAG to bring an action against the Contractor to enforce the provisions of ISBNA or limit Contractor's liability for any violation of the ISBNA. Additional information relative to the law and the notification process is available at: <http://www.cscic.state.ny.us/security/securitybreach>

Contemporaneous with the execution of the Agreement, the Contractor and its designees shall execute the Department's Third Party Connection and Data Exchange Agreement and any other protocol required by the Department, and shall ensure its employees, agents and designees complete the related Third Party Acceptable Use Policy and Agreement if applicable, to ensure the security of data transmissions and other information related to the administration of the Agreement. This request may be waived by the Department in its sole discretion.

30. NONDISCLOSURE OF CONFIDENTIAL INFORMATION

Except as may be required by applicable law or a court of competent jurisdiction, the Contractor, its officers, agents, employees, and subcontractors shall maintain strict confidence with respect to any Confidential Information to which the Contractor, its officers, agents, employees, and subcontractors have access in the course of the Contractor's performance under the Agreement. For purposes of the Agreement, all State information of which the Contractor, its officers, agents, employees and subcontractors becomes aware during the course of performing services for the Department shall be deemed to be Confidential Information (oral, visual or written). Notwithstanding the foregoing, information that falls into any of the following categories shall not be considered Confidential Information:

- (a) information that is previously rightfully known to the receiving party without restriction on disclosure;
- (b) information that becomes, from no act or failure to act on the part of the receiving party, generally known in the relevant industry or is in the public domain; and information that is independently developed by the Contractor without use of confidential information of the State.

The Contractor shall hold the State and the Department harmless from any loss or damage to the State or the Department resulting from the disclosure by the Contractor, its officers, agents, employees, and subcontractors of such Confidential Information.

The Contractor shall provide for its officers, agents, employees, and subcontractors to acknowledge and execute a nondisclosure agreement containing substantially the terms described in this Article, if requested to do so by the Department or the State.

This representation shall survive termination of the Agreement.

31. FREEDOM OF INFORMATION LAW

Disclosure of information and material provided to the Department by the Contractor in the course of the Contractor's performance under the Agreement shall be permitted consistent with the laws of the State of New York, and specifically the Freedom of Information Law (FOIL), Article 6 of the Public Officers Law. The Department shall take reasonable steps to protect from public disclosure any of the records relating to the Contractor's performance under the Agreement that otherwise are exempt from disclosure under FOIL.

If the Contractor believes that any information or material provided to the Department constitutes trade secret information that should be exempted from FOIL disclosure, the Contractor must, at the time of the materials' submission, request the exemption in writing, specifically identifying the material by page number, line, or other appropriate designation, and provide a particularized explanation as to why the material constitutes trade secret information and how the disclosure of the identified information would cause substantial injury to the Contractor's competitive position. The material sought to be protected from disclosure must be clearly marked in yellow highlighter, on a duplicate copy of the submission and may be provided in hardcopy or on a CD. Generically marking all material as "Confidential" will not be considered adequate for the purpose of this Article.

The Department's receipt of the Contractor's submission of material and the Contractor's request for protection of the material from FOIL disclosure does not constitute a determination that the information is exempt from disclosure under FOIL. In the event any information or material is requested pursuant to FOIL, the Department will address each party's interests fully in accordance with the procedures required by Article 6 of the Public Officers Law.

32. TERMINATION OF AGREEMENT

In addition to any termination provisions specified elsewhere in the Agreement, the following provisions also shall apply:

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

The Agreement may be terminated by the Department for cause upon the failure of the Contractor to comply with the terms and conditions of the Agreement, including any exhibits incorporated herein, provided that the Department shall give the Contractor written notice via registered or certified mail, return receipt requested, or hand delivery, such written notice to specify the Contractor's failure and the termination of the Agreement. Termination shall be effective ten (10) Business Days after receipt of such notice unless the Contractor, in the opinion of the Department, has cured such failure. The Contractor agrees to incur no new obligations nor to claim for any expenses made after receipt of the notification of termination. Upon termination for cause, the Department shall have the right to award a new contract to another contractor. Termination for cause shall create a liability upon the Contractor

for actual damages incurred and for all reasonable additional costs incurred in reassigning the Agreement.

The Agreement may be terminated if the Department deems that termination would be in the best interest of the State provided that the Department shall give written notice to the Contractor not less than thirty (30) Days prior to the date upon which termination shall become effective, such notice to be made via registered or certified mail, return receipt requested or hand delivered. The date of such notice shall be deemed to be the date of postmark in the case of mail or the date of hand delivery.

The Agreement may be terminated immediately in the event the Department determines that funds are unavailable. The Department agrees to provide notice to the Contractor as soon as it becomes aware that funds are unavailable in the event of termination under this paragraph. If the initial notice is via oral notification, the Department shall provide written notice immediately thereafter. The Department shall be obligated to pay the Contractor only for the expenditures made and obligations incurred by the Contractor until such time as notice of termination or received either orally or in writing by the Contractor from the Department.

In the event of termination for any reason, the Contractor shall not incur new obligations for the terminated portion. The Contractor agrees, after consultation with the Department, to cancel such outstanding obligations as the Contractor deems appropriate in the exercise of sound business judgment.

Upon termination of the Agreement each Party shall, if applicable, return to the other all papers, materials, and other properties of the other Party held by each for purposes of performance under the Agreement. In addition, each Party shall assist the other Party in orderly termination of the Agreement and the transfer of all aspects hereof, tangible, and intangible, as may be necessary to ensure the orderly administration of the State program.

33. CONTRACTOR PERSONNEL

The Contractor shall designate an Account Executive, who shall be the contact person for all matters arising under the Agreement.

The Contractor agrees to be solely responsible for the recruitment, hiring, provision of employment benefits, payment of salaries, and management of its personnel. These functions shall be carried out by the Contractor in accordance with the provisions of the Agreement and with all applicable federal and State laws and regulations.

34. OPERATIONAL CONTACTS

The Contractor shall maintain appropriate corporate and/or legal authority, which shall include, but not be limited to, the maintenance of an organization capable of delivering Program Services in accordance with the Agreement and the authority to do business in the State of New York or any other governmental jurisdiction in which Program Services are to be delivered pursuant to the Agreement. The Contractor also shall maintain operations, financial and legal staff that shall be directly available to the Department's operations, financial and legal staff, respectively. For purposes of the Agreement, maintenance of such staff and staff availability by the Contractor shall in no way create any agency relationship between the Department and the Contractor.

The Contractor acknowledges and agrees that no aspect of the Contractor's performance under the Agreement is contingent upon Department personnel or the availability of Department resources, with the exception of all proposed actions of the Contractor specifically identified in the Agreement as requiring the Department approval. With respect to such approval, the Department shall act promptly and in good faith.

The Contractor must cooperate fully with any other contractors who may be engaged by the Department relative to the Agreement.

The Contractor must ensure that all contacts by the Contractor personnel with other New York State agencies, external organizations (Federal Agencies, Unions, etc.) which result in any charge, cost or payment of any kind, must receive prior written authorization from the Department's Contract Manager.

35. SUBCONTRACTING

If allowed in the solicitation instrument (e.g., Request for Proposal, Invitation for Bids, etc.) that results in the Agreement, the Contractor may arrange for specified portion(s) of its responsibilities under the Agreement to be subcontracted to a Key Subcontractor(s). A "Key Subcontractor" means that vendor(s) with whom the Contractor subcontracts to provide any portion of Program Services. If the Contractor determines to subcontract a portion(s) of Program Services, the Key Subcontractors must be clearly identified and the nature and extent of its involvement in and/or proposed performance under the Agreement must be fully explained by the Contractor to the Department. The Contractor retains ultimate responsibility for all Program Services performed under the Agreement.

All subcontracts shall be in writing and shall contain provisions, which are functionally identical to, and consistent with, the provisions of the Agreement including, but not be limited to, the body of the Agreement, Appendix A - Standard Clauses For All New York State Contracts, Appendix B - Standard Clauses for All Department Contracts and if applicable as determined by the Department, Appendix C - Third Party Connection and Data Exchange Agreement. Unless waived in writing by the Department, all subcontracts between the Contractor and a Key Subcontractor shall expressly name the State of New York, through the Department, as the sole intended third party beneficiary of such subcontract. The Department reserves the right to review and approve or reject any subcontract with a Key Subcontractor, as well as any amendments to said subcontract(s), and this right shall not make the Department or the State of New York a party to any subcontract or create any right, claim, or interest in the Key Subcontractor or proposed Key Subcontractor against the Department.

The Department reserves the right, at any time during the term of the Agreement, to verify that the written subcontract between the Contractor and Key Subcontractor(s) is in compliance with all of the provision of this Article and any subcontract provisions contained in the Agreement. In addition to other remedies allowed by law, the Department reserves the right to terminate the Agreement for cause if an executed subcontract does not contain all of the provisions/statements stipulated above. If during the term of the Agreement, any executed subcontract between the Contractor and a Key Subcontractor is amended, the Contractor shall, within 30 calendar days of such amendment, provide a copy to the Department.

The Contractor shall give the Department immediate notice in writing of the initiation of any legal action or suit which relates in any way to a subcontract with a Key Subcontractor or which may affect the performance of the Contractor's duties under the Agreement. Any subcontract shall not relieve the Contractor in any way of any responsibility, duty and/or obligation of the Agreement.

36. PUBLICITY AND COMMUNICATIONS

The Contractor shall ensure that all requests for the Contractor's participation in events where the Contractor will be participating on behalf of the Department receive prior written authorization from the Department.

No public discussion or news releases relating to the Agreement shall be made or authorized by the Contractor or the Contractor's agent without the prior written approval of the Department, which written approval shall not be unreasonably withheld or delayed provided, however, that Contractor shall be authorized to provide copies of the Agreement and answer any questions relating thereto to any State or federal regulators or, in connection with its financial activities, to financial institutions for any private or public offering.

37. CONSULTANT DISCLOSURE REQUIREMENTS

Unless directed otherwise by the Department, the Contractor shall demonstrate its compliance with Chapter 10 of the Laws of 2006 throughout the term of the Agreement by submitting to the Department and to the Office of the State Comptroller a "State Consultant Services - Contractor's Annual Employment Report" for each State Fiscal Year. Such report shall be due no later than May 15th of each year following the end of the State Fiscal Year being reported. Such report shall be required of any contract that includes services for analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health and mental health services, accounting, auditing, paralegal, legal, or similar services. Such report shall conform with Bulletin No. G-226 – Form B as issued by the Office of the State Comptroller. The report must be submitted to the Office of the State Comptroller, Bureau of Contracts, 110 State Street, 11th floor, Albany, NY 12236, ATTN: Consultant Reporting; and to the Department's Contract Manager.

38. PROCUREMENT LOBBYING RESTRICTIONS UNDER STATE FINANCE LAW SECTIONS 139-j AND 139-k

The Contractor certifies that all information that it has provided or will provide to the Department pursuant to State Finance Law sections 139-j and 139-k is complete, true, and accurate, including but not limited to information regarding prior determinations of non-responsibility within the past four years based upon (i) impermissible contacts of other violations of SFL section 139-j, or (ii) the intentional provision of false or incomplete information to a governmental entity.

The Department reserves the right to terminate the Agreement in the event it is found that the Contractor's certification of its compliance with SFL sections 139-j or 139-k was intentionally false or intentionally incomplete. The Department may exercise this right to terminate the Agreement by providing written notification to the Contractor in accordance with Article 9 of this Appendix B.

39. VENDOR RESPONSIBILITY

The Contractor is required to provide the DCS with an updated Vendor Responsibility Questionnaire when requested to do so by the DCS throughout the term of the Agreement. Regardless, the Contractor is required to report to the DCS any material changes in the information reported in its initial Vendor Responsibility Questionnaire.

The Contractor shall at all times during the Contract term remain responsible. The Contractor agrees, if requested by the Commissioner or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

Suspension of Work (for Non-Responsibility): The Commissioner or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when s/he discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the Commissioner or his/her designee issues a written notice authorizing a resumption of performance under the Contract.

Termination (for Non-Responsibility): Upon written notice to the Contractor, a reasonable opportunity to be heard with the appropriate DCS officials or staff, the Contract may be terminated by the Commissioner or his/her designee to be non-responsible. In such an event, the Commissioner or his/her designee may complete the contractual requirements in any manner s/he may deem advisable and pursue legal or equitable remedies for breach.

40. TAX LAW SECTION 5-A - CERTIFICATION REGARDING SALES AND COMPENSATING USE TAXES

In the event the value of the Agreement exceeds \$100,000, the Contractor must file a properly completed Form ST-220-CA with the Department and a properly completed Form ST-220-TD with the Department of Taxation & Finance before the Agreement may take effect.

In addition, after the Agreement has taken effect, the Contractor must file a properly completed Form ST-220-CA with the Department if the Agreement's term is renewed; further, a new Form ST-220-TD must be filed with the Department of Taxation & Finance if no ST-220-TD has been filed by the Contractor or if a previously filed Form ST-220-TD is no longer correct and complete.

41. CONTRACT PAYMENT

Contractor shall provide complete and accurate billing invoices to the Department in order to receive payment. Billing invoices submitted to the Department must contain all information and supporting documentation required by the Agreement, the Department and the State Comptroller. Payment for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payment shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller's website at www.osc.state.ny.us/epay/index.htm, by e-mail at epunit@osc.state.ny.us, or by telephone at 518-474-4032. Contractor acknowledges that it will not receive payment on any invoices submitted under the Agreement if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

February 2014

Appendix D

PARTICIPATION BY MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES: REQUIREMENTS AND PROCEDURES

I. General Provisions

- A. The Department of Civil Service (the “Department”) is required to implement the provisions of New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the New York Codes, Rules and Regulations (“NYCRR”) for all State contracts, as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The contractor to the subject contract (the “Contractor” and the “Contract,” respectively) agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to the Department, to fully comply and cooperate with the Department in the implementation of New York State Executive Law Article 15-A and the regulations promulgated thereunder. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for New York State-certified minority and women-owned business enterprises (“MWBEs”). The Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR § 142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) and other applicable federal, state, and local laws.
- C. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of contract, leading to the assessment of liquidated damages pursuant to Section VII of this Appendix and such other remedies are available to the Department pursuant to the Contract and applicable law.

II. Contract Goals

- A. For purposes of this Contract, the Department hereby establishes an overall goal of **0 percent** for MWBE participation, **0 percent** for New York State-certified minority-owned business enterprise (“MBE”) participation and **0 percent** for New York State-certified women-owned business enterprise (“WBE”) participation (collectively, “MWBE Contract Goals”) based on the current availability of MBEs and WBEs.
- B. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the MWBE Contract Goals established in Section II-A hereof, the Contractor should reference the directory of MWBEs at the following internet address: <https://ny.newnycontracts.com>.

Appendix D

Additionally, the Contractor is encouraged to contact the Division of Minority and Women's Business Development at (212) 803-2414 to discuss additional methods of maximizing participation by MWBEs on the Contract.

- C. The Contractor understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR § 140.1, may be applied towards the achievement of the applicable MWBE participation goal. The portion of a contract with an MWBE serving as a broker that shall be deemed to represent the commercially useful function performed by the MWBE shall be 25percent of the total value of the contract.
- D. The Contractor must document "good faith efforts," pursuant to 5 NYCRR § 142.8, to provide meaningful participation by MWBEs as subcontractors and suppliers in the performance of the Contract. Such documentation shall include, but not necessarily be limited to:
 - 1. Evidence of outreach to MWBEs;
 - 2. Any responses by MWBEs to the Contractor's outreach;
 - 3. Copies of advertisements for participation by MWBEs in appropriate general circulation, trade, and minority or women-oriented publications;
 - 4. The dates of attendance at any pre-bid, pre-award, or other meetings, if any, scheduled by the Department with MWBEs; and
 - 5. Information describing specific steps undertaken by the Contractor to reasonably structure the Contract scope of work to maximize opportunities for MWBE participation.

III. Equal Employment Opportunity ("EEO")

- A. The provisions of Article 15-A of the Executive Law and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall apply to the Contract.
- B. In performing the Contract, the Contractor shall:
 - 1. Ensure that each contractor and subcontractor performing work on the Contract shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

Appendix D

2. The Contractor shall submit an EEO policy statement to the Department within seventy-two (72) hours after the date of the notice by the Department to award the Contract to the Contractor.
3. If the Contractor, or any of its subcontractors, does not have an existing EEO policy statement, the Department may require the Contractor or subcontractor to adopt a model statement (see Appendix D-1 Equal Employment Opportunity Policy Statement).
4. The Contractor's EEO policy statement shall include the following language:
 - a. The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability, or marital status, will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
 - b. The Contractor shall state in all solicitations or advertisements for employees that, in the performance of the contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.
 - c. The Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein.
 - d. The Contractor will include the provisions of Subdivisions (a) through (c) of this Subsection 4 and Paragraph "E" of this Section III, which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each subcontractor as to work in connection with the Contract.

C. Form EEO-100 - Staffing Plan

To ensure compliance with this Section, the Contractor shall submit a staffing plan to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories. The Contractor shall complete the staffing plan form and submit it as part of their bid or proposal or within a reasonable time, as directed by the Department.

Appendix D

D. Form EEO-101 - Workforce Utilization Report

1. The Contractor shall submit a Workforce Utilization Report, and shall require each of its subcontractors to submit a Workforce Utilization Report, in such form as shall be required by the Department on a Quarterly basis during the term of the Contract.
 2. Separate forms shall be completed by the Contractor and any subcontractors.
 3. Pursuant to Executive Order #162, contractors and subcontractors are also required to report the gross wages paid to each of their employees for the work performed by such employees on the contract on a quarterly basis.
- E. The Contractor shall comply with the provisions of the Human Rights Law, and all other State and Federal statutory and constitutional non-discrimination provisions. The Contractor and its subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

IV. MWBE Utilization Plan

- A. The Contractor represents and warrants that the Contractor has submitted an MWBE Utilization Plan, or shall submit an MWBE Utilization Plan at such time as shall be required by the Department, through the New York State Contract System ("NYSCS"), which can be viewed at <https://ny.newnycontracts.com>, provided, however, that the Contractor may arrange to provide such evidence via a non-electronic method to the Department, either prior to, or at the time of, the execution of the contract.
- B. The Contractor agrees to adhere to such MWBE Utilization Plan in the performance of the Contract.
- C. The Contractor further agrees that failure to submit and/or adhere to such MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, the Department shall be entitled to any remedy provided herein, including but not limited to, a finding that the Contractor is non-responsive.

Appendix D

V. Waivers

- A. If the Contractor, after making good faith efforts, is unable to achieve the MWBE Contract Goals stated herein, the Contractor may submit a request for a waiver through the NYSCS, or a non-electronic method provided by the Department. Such waiver request must be supported by evidence of the Contractor's good faith efforts to achieve the maximum feasible MWBE participation towards the applicable MWBE Contract Goals. If the documentation included with the waiver request is complete, the Department shall evaluate the request and issue a written notice of approval or denial within twenty (20) business days of receipt.
- B. If the Department, upon review of the MWBE Utilization Plan, quarterly MWBE Contractor Compliance Reports described in Section VI, or any other relevant information, determines that the Contractor is failing or refusing to comply with the MWBE Contract Goals, and no waiver has been issued in regards to such non-compliance, the Department may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.

VI. Quarterly MWBE Contractor Compliance Report

The Contractor is required to submit a quarterly MWBE Contractor Compliance Report through the NYSCS, provided, however, that the Contractor may arrange to provide such report via a non-electronic method to the Department by the 10th day following the end of each quarter during the term of the Contract.

VII. Liquidated Damages - MWBE Participation

- A. Where the Department determines that the Contractor is not in compliance with the requirements of this Appendix and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, the Contractor shall be obligated to pay to the Department liquidated damages.
- B. Such liquidated damages shall be calculated as an amount equaling the difference between:
 1. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and
 2. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.

Appendix D

- C. In the event a determination has been made which requires the payment of liquidated damages and such identified sums have not been withheld by the Department, the Contractor shall pay such liquidated damages to the Department within sixty (60) days after they are assessed. Provided, however, that if the Contractor has filed a complaint with the Director of the Division of Minority and Women's Business Development pursuant to 5 NYCRR § 142.12, liquidated damages shall be payable only in the event of a determination adverse to the Contractor following the complaint process.



Department of
Civil Service

MWBE – EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

M/WBE AND EEO POLICY STATEMENT

I, Arthur Valentine, the (awardee/contractor) NCS Pearson, Inc. agree to adopt the following policies with respect to the project being developed or services rendered at the New York State Department of Civil Service

M/WBE

This organization will and will cause its contractors and subcontractors to take good faith actions to achieve the M/WBE contract participations goals set by the State for that area in which the State-funded project is located, by taking the following steps:

- (1) Actively and affirmatively solicit bids for contracts and subcontracts from qualified State certified MBEs or WBEs, including solicitations to M/WBE contractor associations.
- (2) Request a list of State-certified M/WBEs from AGENCY and solicit bids from them directly.
- (3) Ensure that plans, specifications, request for proposals and other documents used to secure bids will be made available in sufficient time for review by prospective M/WBEs.
- (4) Where feasible, divide the work into smaller portions to enhanced participations by M/WBEs and encourage the formation of joint venture and other partnerships among M/WBE contractors to enhance their participation.
- (5) Document and maintain records of bid solicitation, including those to M/WBEs and the results thereof. The Contractor will also maintain records of actions that its subcontractors have taken toward meeting M/WBE contract participation goals.
- (6) Ensure that progress payments to M/WBEs are made on a timely basis so that undue financial hardship is avoided, and that, if legally permissible, bonding and other credit requirements are waived or appropriate alternatives developed to encourage M/WBE participation.

EEO

(a) This organization will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing programs of affirmative action to ensure that minority group members are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on state contracts.

(b) This organization shall state in all solicitation or advertisements for employees that in the performance of the State contract all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex disability or marital status.

(c) At the request of the contracting agency, this organization shall request each employment agency, labor union, or authorized representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of this organization's obligations herein.

(d) The Contractor shall comply with the provisions of the Human Rights Law, all other State and Federal statutory and constitutional non-discrimination provisions. The Contractor and subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

(e) This organization will include the provisions of sections (a) through (d) of this agreement in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each subcontractor as to work in connection with the State contract



Department of Civil Service

MWBE – EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

Agreed to this 6 day of October, 2020

By [Redacted]

Print: Arthur Valentine

Title: Managing Director, Clinical Assessment, a division of NCS Pearson, Inc.

N/A is designated as the Minority Business Enterprise Liaison (Name of Designated Liaison)

responsible for administering the Minority and Women-Owned Business Enterprises- Equal Employment Opportunity (M/WBE-EEO) program.

M/WBE Contract Goals

0 percent Minority and Women’s Business Enterprise Participation

0 percent Minority Business Enterprise Participation

0 percent Women’s Business Enterprise Participation

[Redacted Signature] (Authorized Representative)

Title: Managing Director, Clinical Assessment, a division of NCS Pearson, Inc.

Date: 10/6/2020

Appendix E

PARTICIPATION OPPORTUNITIES FOR NEW YORK STATE CERTIFIED SERVICE-DISABLED VETERAN-OWNED BUSINESSES

Article 17-B of the New York State Executive Law provides for more meaningful participation in public procurement by certified Service-Disabled Veteran-Owned Businesses (“SDVOBs”), thereby further integrating such businesses into New York State’s economy. The Department recognizes the need to promote the employment of service-disabled veterans and to ensure that certified service-disabled veteran-owned businesses have opportunities for maximum feasible participation in the performance of the Department’s contracts.

In recognition of the service and sacrifices made by service-disabled veterans and in recognition of their economic activity in doing business in New York State, Bidders/Contractors are strongly encouraged and expected to consider SDVOBs in the fulfillment of the requirements of the Contract. Such participation may be as subcontractors or suppliers, as protégés, or in other partnering or supporting roles.

For purposes of this procurement, the Department conducted a comprehensive search and determined that the Contract does not offer sufficient opportunities to set specific goals for participation by SDVOBs as subcontractors, service providers, and suppliers to Contractor.

Nevertheless, Bidder/Contractor is encouraged to make good faith efforts to promote and assist in the participation of SDVOBs on the Contract for the provision of services and materials. The directory of New York State Certified SDVOBs can be viewed at: <https://ogs.ny.gov/veterans/>

Bidder/Contractor is encouraged to contact the Office of General Services’ Division of Service-Disabled Veteran’s Business Development at VeteransDevelopment@ogs.ny.gov or 518-474-2015 to discuss methods of maximizing participation by SDVOBs on the Contract.



**Department of
Civil Service**

Albany, NY 12239

ADMINISTRATION SERVICES DIVISION

OFFICE OF COUNSEL

Procurement Lobbying Policy: Restrictions on
Contacts during the Procurement Process

ADM-982.1 (7/2019)

**Policy on Restrictions on Contacts During the Procurement Process
Procurement Lobbying, Ch.4, L. 2010 State Finance Law (SFL)
Sections 139-j and 139-k**

State Finance Law sections 139-j and 139-k enacted the Procurement Lobbying Law (Law), which regulates attempts to influence state and local procurement contracts in order to increase transparency and accountability in the public procurement process. Primarily, the Law regulates two related aspects of procurements: (i) activities by the business and lobbying community seeking procurement contracts (through amendments to the Legislative Law); and (ii) activities involving governmental entities establishing procurement contracts (through amendments to the State Finance Law).

In general, the Law requires the Department of Civil Service (DCS or Department) to collect and record certain information pertaining to those who contact it in an attempt to influence a governmental procurement and restricts the time frame and manner in which the business community and others may contact DCS with regard to attempting to influence a governmental procurement. DCS must collect, record, report (if applicable), and maintain specific information about contacts made during the restricted period. Under the Law, the business community and others are obligated to make only permissible contacts during the restricted period and may only contact those who are designated by DCS regarding a governmental procurement.

The Law places a series of obligations on DCS during the procurement process. In addition to setting up the formal rules for the exchange of information, DCS must include the following as part of the solicitation: Offeror affirmation of understanding, certification and termination right, question about prior non-responsibility determination and a summary of the Law.

This document sets forth DCS's policy implementing the Law. Please contact Counsel's Office with any questions you may have regarding this Law or policy. Additional information is available from the Advisory Council on Procurement Lobbying, available at <https://www.ogs.ny.gov/ACPL/>.

Restricted Period and Designated Contacts:

For each governmental procurement, DCS shall simultaneously impose a restricted period and designate a person or person(s) who are knowledgeable about the procurement and who may be contacted by Offerors relating to the governmental procurement (Designated Contacts). Each Offeror who contacts DCS during a procurement's restricted period is permitted to make permissible contacts only to the DCS Designated Contacts.

Offeror Affirmation of Understanding and Agreement to Comply:

As a threshold requirement to participating in a procurement, DCS shall require each Offeror to provide written affirmation of its understanding of an agreement to comply with the DCS' policy and procedures relating to permissible contacts during the governmental procurement's restricted period. Such a written affirmation by an Offeror shall be deemed to apply to any amendments to a procurement submitted by DCS after an initial affirmation is received with an initial bid.

Contact Documentation:

Upon any contact during the procurement's restricted period, DCS staff shall obtain identifying information about the person or organization making the contact. All contacts shall be recorded on the appropriate form(s) and included in the procurement record.

Non-responsibility Disclosure and Determination:

DCS staff shall ensure that each solicitation requires an Offeror to disclose findings of non-responsibility made within the previous four years by any governmental entity, where such prior finding of non-responsibility was due to:

- a) a violation of the procurement lobbying requirements established at SFL section 139-j; or
- b) the intentional provision of false or incomplete information to a government entity.

An Offeror's failure to timely disclose accurate or complete information to DCS regarding the above shall be considered as part of the responsibility determination. No procurement contract shall be awarded to any such Offeror, unless DCS finds that such award is necessary to protect public property or public health or safety, and that the entity is the only source capable of supplying the required article of procurement within the necessary timeframe. Such finding must be included in the procurement record.

Contractor Certification and Termination Clause:

Each solicitation shall require a certification by an Offeror that all information provided to the DCS with respect to the procurement lobbying requirements established by those sections is complete, true and accurate.

Each contract shall authorize DCS to terminate such contract in the event such certification is found to be intentionally false or intentionally incomplete. The DCS shall include in the procurement record a statement describing the basis for such

termination. (Note: As of January 2014, Appendix A contains the termination clause.)

Impermissible Contacts:

Any employee of DCS who becomes aware that an Offeror has made an impermissible contact(s) during the procurement shall immediately notify the DCS Ethics Officer or the DCS Director of Internal Audit. An impermissible contact includes an Offeror's contact with the Department regarding a procurement conducted by another governmental entity. If an Offeror violates these requirements with regard to permissible contacts at a governmental entity other than the DCS, the employee of that entity who becomes aware of the violation shall notify that entity's Ethics Officer, Inspector General, if any, or other official of that entity responsible for reviewing or investigating such matters, who shall in turn notify the DCS Ethics Officer or the DCS Director of Internal Audit.

DCS Review of Alleged Violations and the Imposition of Sanctions:

- a) If the DCS Ethics Officer or the DCS Director of Internal Audit receives notification of an allegation that an Offeror has made an impermissible contact during the procurement's restricted period, the DCS Director of Internal Audit shall immediately investigate such allegation. If the position of Director of Internal Audit is vacant, the Ethics Officer shall conduct the investigation, or the Commissioner may appoint a designee to investigate the allegation. In no event shall the person conducting the investigation be someone who has participated in the preparation of the solicitation document, the evaluation of proposals, or the selection decision.
- b) If the investigation indicates that sufficient cause exists to believe that the allegation is true, DCS shall give the Offeror reasonable notice that an investigation is ongoing and the availability of an opportunity to be heard in response to the allegation. At DCS' discretion, such opportunity to be heard may be provided by giving the Offeror the opportunity to meet with the DCS staff conducting the investigation or by the Offeror's submission of a written statement, or both. The Offeror may, but need not, be represented by counsel during the investigation. Any and all issues concerning the manner in which the investigation process is conducted shall be determined solely by the DCS staff conducting the investigation.
- c) If it is found that an Offeror has knowingly and willfully made an impermissible contact in violation of these requirements, then the DCS staff making such findings shall report to the head of DCS who shall issue the determination.

Sanctions:

- a) A finding that an Offeror has knowingly and willfully made an impermissible contact shall result in a determination of non-responsibility for such Offeror. Concomitantly, such Offeror and its subsidiaries, and any related or successor entity with substantially similar function, management, board of directors, officers and shareholders, shall not be awarded the procurement contract, unless the DCS finds that the award of the procurement contract to that entity is necessary to protect public property or public health or safety, and that the entity is the only source capable of supplying the required article of procurement within the necessary timeframe. In such case, the DCS shall include in the procurement record a statement describing the basis for such a finding.
- b) Any subsequent determination of an Offeror's non-responsibility due to violation of these requirements within four years of a prior determination of non-responsibility due to a violation of these requirements shall result in the Offeror being rendered ineligible to submit a proposal on or be awarded any procurement contract for a period of four years from the date of the second non-responsibility determination.
- c) All such findings shall be reported by Counsel's Office to the Office of General Services.

Model Language for Solicitation Documents

DCS staff shall ensure that this model language is included in all solicitation documents, subject to final review by the Office of Counsel.

Restrictions on Contacts Between Offerors and State Staff During the Procurement Process

- a) Pursuant to State Finance Law sections 139-j and 139-k, this procurement includes and imposes certain restrictions on communications between DCS and an Offeror during the procurement process. An Offeror is restricted from making contacts from the earliest posting, on DCS's website, in a newspaper of general circulation, or in the procurement opportunities newsletter in accordance with article four-C of the economic development law, of written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method provided for by law or regulation for soliciting a response from Offerors intending to result in a contract with DCS through final award and approval of the contract by DCS and, if applicable, the Office of the State Comptroller ("Restricted Period") to other than the DCS Designated Contacts (unless it is a Contact that is included among certain statutory exceptions set forth in State Finance Law §139-j(3)(a)). The DCS Designated Contacts for this procurement are set forth in section (b) below and on the first page of the Introductory section of

this solicitation. Staff is required to obtain certain information from an Offeror whenever contacted about the procurement during the restricted period and is required to make a determination of the Offeror's responsibility that addresses the Offeror's compliance with the statutory requirements. Certain findings of non-responsibility can result in rejection for contract award and in the event of two findings within a 4-year period, the Offeror is debarred from obtaining governmental Procurement Contracts.

The DCS' policy and procedures can be found at: <https://www.cs.ny.gov/extdocs/pdf/ADM-982.1.pdf>. Further information about these requirements can be found at: <https://www.ogs.ny.gov/ACPL/>.

- b) DCS strictly controls communications between any Offeror and participants in the procurement process. "Offeror" means the individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity, that contacts DCS about a governmental procurement during the restricted period of such governmental procurement whether or not the caller has a financial interest in the outcome of the procurement; provided, however, that a governmental agency or its employees that communicate with DCS regarding a governmental procurement in the exercise of its oversight duties shall not be considered an offeror. "Offeror" includes prospective Offerors prior to the due date for the submission of offers/bids in response to the solicitation document. All contacts and inquiries concerning this procurement must be made to a Designated Contact:

Brian Bopp
Office of Financial Administration
NYS Department of Civil Service
Agency Building 1 Albany, NY 12239
Telephone: [REDACTED]
E-mail: DCSProcurement@cs.ny.gov

ATTACHMENT 2

New York State Department of Civil Service Five Year Assessment Contract Proposal for MMPI-2-RF

Base Year 1

Line No.	Description	Item number	Quantity	Unit Price	Discount	Contract Price	Line Total
01	MMPI-2-RF Q LOCAL CLIN INTERP RPT ADMIN	51563	4900	\$37.40	10%	\$33.66	\$164,934.00
02	MMPI-2-RF Q A/S (25) <i>(total of 4900 answer sheets)</i>	51564	196	\$23.25	10%	\$20.92	\$4,100.32
03	Freight	Freight	1	4% of order total	0%	\$164.01	\$164.01
BASE YEAR 1 TOTAL							\$169,198.33

Optional Year 2

Line No.	Description	Item number	Quantity	Unit Price**	Discount	Contract Price	Line Total
01	MMPI-2-RF Q LOCAL CLIN INTERP RPT ADMIN	51563	4900	\$37.40	10%	\$33.66	\$164,934.00
02	MMPI-2-RF Q A/S (25) <i>(total of 4900 answer sheets)</i>	51564	196	\$23.25	10%	\$20.92	\$4,100.32
03	Freight	Freight	1	4% of order total	0%	\$164.01	\$164.01
OPTIONAL YEAR 2 TOTAL							\$169,198.33

Optional Year 3

Line No.	Description	Item number	Quantity	Unit Price**	Discount	Contract Price	Line Total
01	MMPI-2-RF Q LOCAL CLIN INTERP RPT ADMIN	51563	4900	\$37.40	10%	\$33.66	\$164,934.00
02	MMPI-2-RF Q A/S (25) <i>(total of 4900 answer sheets)</i>	51564	196	\$23.25	10%	\$20.92	\$4,100.32
03	Freight	Freight	1	4% of order total	0%	\$164.01	\$164.01
OPTIONAL YEAR 3 TOTAL							\$169,198.33

Optional Year 4

Line No.	Description	Item number	Quantity	Unit Price**	Discount	Contract Price	Line Total
01	MMPI-2-RF Q LOCAL CLIN INTERP RPT ADMIN	51563	4900	\$37.40	10%	\$33.66	\$164,934.00
02	MMPI-2-RF Q A/S (25) <i>(total of 4900 answer sheets)</i>	51564	196	\$23.25	10%	\$20.92	\$4,100.32
03	Freight	Freight	1	4% of order total	0%	\$164.01	\$164.01
OPTIONAL YEAR 4 TOTAL							\$169,198.33

Optional Year 5

Line No.	Description	Item number	Quantity	Unit Price**	Discount	Contract Price	Line Total
01	MMPI-2-RF Q LOCAL CLIN INTERP RPT ADMIN	51563	4900	\$37.40	10%	\$33.66	\$164,934.00
02	MMPI-2-RF Q A/S (25) <i>(total of 4900 answer sheets)</i>	51564	196	\$23.25	10%	\$20.92	\$4,100.32
03	Freight	Freight	1	4% of order total	0%	\$164.01	\$164.01
OPTIONAL YEAR 5 TOTAL							\$169,198.33

TOTALS

BASE YEAR 1 TOTAL	\$169,198.33	
OPTIONAL YEAR 2 TOTAL	\$169,198.33	
OPTIONAL YEAR 3 TOTAL	\$169,198.33	
OPTIONAL YEAR 4 TOTAL	\$169,198.33	
OPTIONAL YEAR 5 TOTAL	\$169,198.33	
GRAND TOTAL		\$845,991.65

ATTACHMENT 3
**TERMS AND CONDITIONS OF SALE AND USE
OF PEARSON PRODUCTS**

1. Acceptance Of Ts & Cs^a

Sales of Pearson Products^b and Other Publisher's Products^c (together referred to as "Products") by Pearson's Clinical Assessment group^d and the purchase and use of Products by Customer^e are conditioned upon acceptance of these Ts & Cs. Customer agrees to these Ts & Cs by submission of a User Acceptance Form, order(s) for tests or scoring services, or by paying part or all of a Pearson Invoice. If any provision of the Ts & Cs is found to be illegal or unenforceable, the remaining provisions will be enforced. These Ts & Cs may not be waived or modified except by prior written agreement signed by a Pearson Vice President. Issues involving copyright and patent will be resolved under US Federal Law. **Provisions Not Applicable In New Jersey: Pursuant to the New Jersey Truth in Consumer Contract Warranty and Notice Act (TCCWNA), Sections 2, 5, 6, and 9 of these Terms of use do not apply to those persons covered by that law.**

2. Warranty

Pearson warrants that the Pearson Products published directly or under license by Pearson in their standard form will not infringe any valid, third-party, U. S. patents or copyrights existing at the time of publication. This warranty does not extend to any Other Publisher's Product or to any infringement arising from the use of the Pearson Products in combination with any systems, software, or equipment supplied by a third party. Pearson may, in its sole discretion, furnish Customer with a non-infringing replacement product within sixty (60) days or repurchase the remaining unconsumed Pearson Product. EXCEPT AS STATED HEREIN, PEARSON MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE PRODUCTS. ALL OTHER WARRANTIES, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE DISCLAIMED.

3. Geographical embargoes and restrictions

Please note that Pearson may restrict the sale of certain test materials within specific geographic regions because of various contractual arrangements or governmental restrictions. If the Product(s) have been rightfully obtained within the United States, Customer warrants and represents that neither the products nor any technical data received by the Customer from Pearson will be exported outside of the United States, except as authorized by the laws and regulations of the United States.

4. Risk of loss and returns

Shipping within the USA is FOB Destination with freight from Pearson's warehouse charged to Customer. Returns are to be made in accordance with the [Returns Policy](#), as mentioned in Exhibit A.

Initial: [Redacted]

Date: 7/14/21
6/24/2021

Arthur Valentinie, Managing Director, Clinical Assessment

5. Limitation of liability and limitation on claims

In no event will either party be liable for any indirect, incidental, consequential, exemplary, or special damages arising out of these t's & c's, purchase, or use of Pearson products or services.

Notwithstanding any other provision or agreement between customer and Pearson, Pearson's total liability to any party, arising out of these t's & c's, purchase, or use of products, except as it relates to Pearson's willful misconduct, gross negligence or a breach of its warranty against indemnification as set out in these Ts & Cs, will not exceed the amount paid by customer for the products or services. Notwithstanding the foregoing, Pearson remains liable, without monetary limitation, for direct damages for personal injury, death or damage to real property or tangible personal property attributable to the negligence or other tort of Pearson, its officers, employees or agents; or damages attributable to any infringement of intellectual property as set out in Section 10 of the Appendix B (Standard Clauses for all Department Contracts).

6. Copyright and trade secrets

Pearson Products are protected by various intellectual property laws, including trade secrets, copyright, and trademark. Printing or reproducing copyright-protected materials or content, whether the reproductions are sold or furnished free for use, including reproduction of test items, scales, scoring algorithms, scored directions, or other content, is strictly prohibited by law and by these Ts & Cs. Pearson software outputs, including but not limited to reports, are protected as trade secrets. Trade secrets are exempt from disclosure in response to requests made pursuant to HIPAA or to any other data disclosure law that exempts disclosure of information or documents protected as trade secrets.

Customer acknowledges and agrees that the use or disclosure of Pearson trade secrets or confidential information may cause Pearson irreparable harm for which remedies other than injunctive relief may be inadequate. If Customer is required to disclose secure test materials pursuant to a subpoena or court order, please refer to Pearson's Legal Policies, as mentioned in **Exhibit B**.

7. Test security

Customer agrees to comply with the following basic principles of minimum test security:

- Test takers must not be coached using the test or receive test answers before beginning the test
- Test materials (text, graphic images, or the oral reading of items) may not be displayed, reproduced, or performed (for example, filming an administration) in any manner, electronically or otherwise, including posting on any mass media or social media site, without the prior written permission of Pearson
- Access to test materials must be limited to qualified persons with a responsible, professional interest who agree to safeguard their use
- Test materials and scores may be released only to persons qualified to interpret and use them properly
- If a test taker or the parent of a minor child who has taken a test wishes to examine test responses or results, the parent or test taker may be permitted to review the test and the test

- answers in the presence of a representative of the school, college, or institution that administered the test
- Test materials must not be resold, re-licensed, transferred, or otherwise redistributed for any purpose without prior written permission from Pearson

8. Indemnification

Intentionally deleted.

9. Requests for permission to license Pearson intellectual property

Requests to reproduce, translate, modify, or adapt any Pearson Product must be submitted in writing and directed to: Intellectual Property Licensing by e-mail at pas.licensing@pearson.com.

10. Payment

Pearson will invoice institutional Customers if orders are received on official purchase orders with tax exempt certificate on file at Pearson (if applicable). All invoices are payable net 30 days or within such longer period to the extent mandated or otherwise permitted by applicable law. Payment must accompany other orders. Pearson accepts payment by check or money order; Credit cards (Visa, MasterCard, American Express, or Discover) are accepted for online or phone orders only. Credit cards are not accepted with email, fax, or mail orders in order to protect customer privacy. Prepayment is required for all new accounts. Timeliness of payment and any interest to be paid to the Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law. Customer is responsible for any reasonable attorney or collection fees incurred by Pearson in collecting charges not paid when due if awarded by a court of competent jurisdiction. Payment must be made in US dollars. Customer is responsible for all taxes and tariffs related to intercountry shipments.

11. Orders on hold

Please note that Pearson may place your order on hold for issues relating to credit, insufficient customer information for processing the order, lack of or incomplete qualifications or other issues that would restrict the sale of an assessment. Our team is dedicated to clearing these issues as fast as possible so that you can receive your order.

12. Modifications of terms and conditions

Pearson, without any penalty or liability, reserves the right to (a) publish or replace current products with new, revised, or updated products at any time; and (b) place any product "out of print" or discontinue offering the product for purchase. The most current Ts & Cs will be posted at Pearson's Website^f. However, the Parties agree that revised terms will be binding on the Customer only pursuant to a contract amendment in accordance with section 2.2 of the Agreement.

13. Qualifications

Customer agrees that it is Customer's responsibility to use any Products in accordance with Pearson's Qualification Policies and applicable professional guidelines^g. Customer understands and agrees that the Products are intended to be used as tools in the overall assessment process, are

not to be used for self-guidance, and are not designed to be used alone or to replace Customer's professional judgment. Pearson is not responsible for any claims or damages incurred in connection with Customer's or any third party's misuse of the Products. Customer agrees to guard against the improper use of the Products in order to retain the right to purchase those Products.

To protect their security and value, Products may not be resold, re-licensed, transferred or otherwise further distributed without prior written permission from Pearson. Reselling on any online site or by any other method is strictly prohibited and will disqualify Customer from future purchases of Pearson Products or services. Customer's purchase of Pearson Products does not grant Customer a right to reproduce additional copies of materials or content or enter any content into a computer medium, such as non-Pearson scoring system or software. However, if Customer licenses and uses Pearson software, Customer may excerpt portions of output reports, limited to the minimum text necessary to accurately describe the qualified User's significant core conclusions, for incorporation into a written evaluation of the individual, in accordance with Customer's profession's citation standards, if any. No adaptations, translations, modifications, or special versions may be made without prior permission in writing from Pearson (see Section 10). Violation of these Ts & Cs may result in the revocation of a Customer's right to purchase as a qualified Customer.

14. Organizational accounts

Pearson's website and business systems include both individual and organizational level accounts. Users may purchase on behalf of themselves as an individual or be connected to one or several organizations. Being linked to an organization account and making purchases on the organization's behalf requires that a user either work for or at the behest of that organization and has prior authorization from the organization. If a user finds that they were added to an incorrect account they must contact customer support to request being removed from that account.

By being part of an organizational account, qualified users agree to allow others within that organization to purchase on their behalf. Purchases made within an organizational account may be viewed by organizational administrators. Administrators may also view any users (including their name, email address, and qualification level) that are connected to their organization's account.

If a user does not agree to these terms they must request to be removed from an organizational account by contacting Customer Support.

15. Definitions and notes

a "Ts & Cs" means Pearson Terms and Conditions of Sale and Use and the Qualifications and return policies referenced in these Ts & Cs. A printed copy of the Ts & Cs, including the referenced policies, is available by calling 800-627-7271. These terms may be viewed in 12 point type at our Website.

b "Pearson Product(s)" means assessment instruments (including those formerly published by AGS Publishing and Harcourt Assessment, Inc.) and/or materials (including but not limited to software, administration and user reference materials, manipulatives, reports and services) published by Pearson.

c "Other Publisher's Products" means assessment instrument(s) and/or material(s) (including but not limited to software, administration and user reference materials, manipulatives, reports, and

services not published by Pearson.

d "Pearson" means the Clinical Assessment business unit of NCS Pearson, Inc.

e "Customer" means the purchaser and qualified User of a Product.

f "Website" means PearsonAssessments.com, PearsonClinical.com, and/or Pearsonassess.com

g "applicable professional guidelines" include but are not limited to the Standards for Educational and Psychological Testing, published by the American Educational Research Association (AERA), American Psychological Association (APA), and the National Council on Measurement in Education (NCME), Pearson software license (if applicable) and all federal, state, and local laws and regulations, including, but not limited to HIPAA and FERPA. Use of psychological tests in employment-related situations may be subject to certain laws including Title VII of the Civil Rights Act of 1964, as amended; the Americans with Disabilities Act of 1990, as amended; and other federal, state, and local laws and regulations.

Exhibit A
Return Policy

General Returns:

1. Pearson provides product credit on qualifying returns for:
2. Unused (unopened packages) paper materials received within 90 days of the invoice date.
3. Software materials and usage credits/electronic assessment units (see Digital Product Returns below).
4. Scorable Assessments (see Scorable Assessments Returns below).
5. Materials must be in saleable condition, clean, and unused. If the product is no longer sold, returns are not accepted.
6. Materials returned after 30 days but prior to 90 days of invoice date are subject to a 10% return fee per returned parcel.
7. Materials or software damaged in transit must be returned within 30 days of invoice date. No other software returns will be accepted.

*Specific requirements for Q Local™, Q-global®, Q-interactive® and Rehacom® follow under Digital Product Returns.

Exhibit B Legal Policies

1. General policy for reproduction and dissemination of Pearson's test materials

Pearson asserts that strong measures are necessary to protect the validity of its valuable testing instruments. Pearson believes that any reproduction of its tests without the prior written permission from Pearson may constitute copyright infringement and is a violation of the Terms and Conditions of Sale and Use of Pearson Products. Furthermore, disclosure of the assessments may threaten the ongoing security, reliability, and/or validity of the test and the test's results, and therefore, the value and usefulness of the test.

2. Trade secrets

Outside of the protection granted by United States copyright law, Pearson considers its secured tests to be trade secrets. The test questions and answers, manuals and other materials constitute highly confidential, proprietary testing information that Pearson takes every precaution to protect from disclosure beyond what is absolutely necessary for the purpose of administering a test. Even in the development stage, the assessment materials are treated confidentially by Pearson employees, agents and consultants.

Pearson continues to guard the secrecy of its test materials once they become finished products. They are sold only to qualified individuals who are bound by the ethical standards of their profession to protect the integrity of the materials by maintaining the confidentiality of the test materials. Pearson has Qualification Policies that are strictly enforced and each purchaser of a Qualification Level B or C product is required to fill out a User Acceptance Form that verifies their qualifications. The User Acceptance Form contains a statement signed by the qualified purchaser indicating that the purchaser is so qualified, that the purchaser will abide by the Terms and Conditions of Sale and Use and that all ethical rules will be observed by the purchaser. Therefore, Pearson strongly opposes the release of any test materials to non-qualified individuals.

3. Copyright/fair use

It is the position of Pearson that any reproduction of its test or other published materials, whether reproduced on paper or electronically (this includes use intake forms, research, video or audio taping administrations, photos, or any image capturing system), constitutes an infringement of the copyright and other proprietary rights in the tests or other published materials. For your reference, the copyright law pertaining to our test materials can be found in Section 107 (Fair Use) of Public Law 94-553, Title 17 – Copyrights. With respect to the matter of copyright protection for Pearson's test materials, House Report 94-1476, (p. 69) states: "(B) There shall be no copying of or from works intended to be 'consumable' in the course of study or of teaching. *These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.*"

In Pearson's view, reproduction of its test materials without prior written consent **DOES NOT** fall within the "fair use" exception of the copyright law. Section 107 of the copyright law states four factors as being among those that should be considered in determining whether unauthorized copying of copyrighted material is a "fair use." These factors are:

- The nature of the use (e.g. commercial vs non-profit educational use);
- The nature of the copyrighted work (e.g. special consideration such as security issues);
- The amount of the copyrighted work which is used; and
- The effect of the use in a potential market for the copyrighted work.

Although reproductions of test materials might, in very limited cases, fall on the "fair use" side of point 1), most reproductions almost certainly fall on the "non-fair use" side of the other three factors, particularly points 2) and 4). Therefore, please contact Pearson's Clinical Assessment group at pas.licensing@pearson.com for any permission request to make reproductions of any of the Pearson tests or other Pearson materials.

4. FERPA (Family Education Rights and Privacy Act)

In a school setting, some Pearson customers receive requests to release copies of test questions or protocols. It is our position that release of our tests or test protocols in any form is not required under federal law (except in very limited situations and in limited jurisdictions). If you are in California, please check with an attorney regarding your responsibilities. The applicable U.S. statute is the Family Education Rights and Privacy Act (FERPA), and it establishes the right of parents "to inspect and review the education records of their children" (20 U.S.C §1232G(a)(1)(A)). FERPA requires schools to establish procedures that will enable parents to review their children's records within a reasonable time after a request is made. The regulations implementing this section define "the right to inspect and review education records" as including:

"(1) the right to a response from the [school] to reasonable requests for explanations and interpretations of the records; and

(2) the right to obtain copies of the records from the [school] where failure of the [school] to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records" (34 C.F.R. § 99.11(b)).

The import of this section is that only where failure to provide copies would deny the exercise of this right will schools be obliged to provide copies. In all other cases, inspection alone would presumably suffice. If a parent requests an inspection of a child's record, once the school agrees to review the content of the child's test record with the parent, it is most unlikely that a court would find that exercise of the right to review educational records has been denied.

Pearson's Clinical Assessment group encourages professionals who conduct testing to review student's test results with their parents or guardians. If the testing professional deems it appropriate, this review could include showing the parent or guardian the test materials and their child's responses in order to permit a more useful discussion of test results. Test scores may be summarized in writing. However, our Terms and Conditions of Sale and Use of Pearson Products do not permit the making and giving of copies of test materials to students or their parents or guardians.

Pearson's tests are sensitive copyrighted instruments and widely used throughout the world. In order to protect their validity and reliability for further use with the test taker and other students, Pearson **does not** waive its copyright and trade secret protection to permit copying of test protocols for the student's parent or guardian. Impairment of their security could threaten the validity and reliability of the tests and, therefore, their value as a measurement tool.

5. HIPAA (Health Insurance Portability and Accountability Act) compliance

Pearson offers several platforms (together, the System) that collect Personal Health Information (PHI) as it is defined under the Health Insurance Portability and Accountability Act (HIPAA). Pursuant to HIPAA, Pearson may act as a Business Associate for those Covered Entities. PHI data on the System is protected using physical, security, and administrative safeguards including encryption during use, in

transit and at rest. The PHI data is stored on secure servers located in a secured data center in a database that is encrypted with industry standard high-security encryption. When the data is transmitted, the data is encrypted using industry-standard Secure Socket Layer (SSL) technology. The System uses a secured database that separates and segregates a customer's records so that they cannot be seen by other - customers. This separation and segregation is confirmed through testing and external auditing.

If you are a Covered Entity and require a Business Associates Agreement, the platform you are accessing should have a Business Associates Agreement accessible within the System and available for your use. Please note that the rules regarding disclosure of Test Record Forms are still applicable to the assessments accessed through these platforms.

6. HIPAA disclosure of test record forms

Many of our customers have inquired regarding Pearson's position on whether test record forms must be disclosed to patients in order to comply with the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA Privacy Rule provides that individuals have a qualified right of access to individually identifiable health information maintained by health care providers covered by HIPAA. However, Pearson's test materials are protected by copyright and trade secret law, and the widespread dissemination of test record forms (which may disclose test questions and answers) would violate restrictions on the use of Pearson's test materials and would cause great harm to Pearson, the test materials, the clinical community, and to the public at large.

The US Department of Health and Human Services (HHS), which is responsible for HIPAA, provided clarification related to this matter as stated below:

"Any requirement for disclosure of protected health information pursuant to the Privacy Rule is subject to Section 1172(e) of HIPAA, 'protection of trade secrets'. As such, we confirm that it would not be a violation of the Privacy Rule for a covered entity to refrain from providing access to an individual's protected health information, to the extent that doing so would result in a disclosure of trade secrets."

Accordingly, we will continue to advise our customers that Pearson's test materials are trade secrets and their usefulness and value would be compromised if they were generally made available to the public. We have stated this position in correspondence, court cases, news articles and on our website for many years. This position is also consistent with our longstanding practice of ensuring, through our terms and conditions of use, that all purchasers have the appropriate qualifications to administer and interpret the test materials being purchased and that such purchasers agree to maintain the confidentiality of the test materials.

Given the above-quoted support from HHS, Pearson reiterates that customers may not disseminate copies of test record forms or protocols to persons who erroneously claim that they are entitled to copies under HIPAA. As the HHS has now confirmed, HIPAA does not require any person to disclose any trade secret materials, and all restrictions on the dissemination of test record forms and protocols remain in effect.

7. Second opinions

Pearson recognizes that, in some cases, a parent or guardian may wish to consult a second professional regarding a minor's test scores. In these situations, we have no objection to a reproduction of the completed test protocol being provided to another qualified professional for the purpose of review;

however, the materials should pass directly from professional to professional and not through the hands of a parent, guardian or their attorney.

8. Ethical issues

The original dissemination of Pearson's test materials are carefully restricted to individuals with a professional background in psychology, and only individuals with appropriate training in psychological assessment should interpret the tests. Under the *Standards for Educational and Psychological Testing*, published by the American Educational Research Association (AERA), American Psychological Association, and the National Council on Measurement in Education (NCME), psychologists have an ethical duty to protect the integrity of secure tests by maintaining the confidentiality of the test materials and scores by releasing such test materials and scores only to professionals who have the same ethical duty.

The confidentiality of test questions, responses, and scores are paramount to maintaining the integrity, reliability, and validity of the tests. Unlike many other types of tests, our Qualification B and C level tests do not consist of a large collection of test items that are rotated. Rather, these tests have one expensive and highly researched version and should remain intact for 10 to 15 years. Millions of dollars have been spent on the research and "norming" (compiling of statistical data regarding results) of the tests. Any leakage of test items will severely compromise the value and usefulness of the tests.

9. Electronic storage of assessments

The question of electronic storage is a complicated one. The assessment materials being considered for electronic storage are copyright protected (and in some cases trade secret protected). Copying is not permitted without permission from the publisher. However, we understand that electronic storage is often replacing physical storage for record-keeping purposes. Recognizing that reality, please note that our concern is not so much the storage format, as access and disclosure to our assessments that is a problem.

First, please note that Section 8 of our Terms and Conditions of Sale and Use require purchasers of our assessment instruments to protect the security of the instruments they purchase.

Second, we have also developed the following guidelines to assist you with maintaining the security of the assessment instrument and to address the need to store the information electronically. When Pearson grants permission to make electronic file copies of the tests it publishes, we require those who would do electronic storage to comply with the following guidelines. If you are unable to comply with these guidelines, we cannot grant permission to make copies of our assessment materials.

Permission to make electronic file copies of the tests is predicated on the following conditions:

1. Ensure that the test items not be included whenever possible;
2. That the tests are kept separate from other file material so that they are not inadvertently disclosed in response to a general HIPAA request. Of course, there are situations that require disclosure of test material, but these are rare and are addressed with legal protective orders; and
3. That the file containing the tests be password protected and secure from unqualified (per the Pearson qualification policy) users.

When permission to scan has been received and the three safeguards above are in place, electronic storage can work fine for psychological tests. The responsibility for test security remains with the qualified purchaser.

10. Posting reproductions or an administration of a test on-line

Agreement to Pearson's Terms and Conditions of Sale and Use of Pearson Products are part of the purchase process for any of its assessments. For a variety of reasons, it is critical that all our customers (including students, as part of their graduate program) adhere to ethical and professional policies for the appropriate protection of secure assessment content. In contrast to the past where videotapes of assessments were relegated to the media lab at the graduate program, technology now makes it very easy for anyone to record themselves administering an assessment and post that recording to a mass media site. While recording an assessment administration remains an important part of the teaching and supervision process, students should be reminded that:

- Test materials (text, graphic images, or the oral reading of items) may not be displayed, reproduced, or performed (e.g., filming an administration) in any manner, electronically or otherwise, including posting on any mass media site, such as YouTube or any other similar site, without the prior written permission of Pearson.

This means that posting a video on a mass media site, such as YouTube or any other site, of an administration of a secure, copyrighted assessment should never occur without the prior written consent of Pearson. When a video of this nature becomes public on any forum, it is considered an unauthorized reproduction or performance of the copyrighted material (whether the materials are viewable or not). In addition to the legal concern, all clinicians should be aware that the availability of secure test content to unqualified users is damaging to the test's reliability and validity.

11. Variant testing conditions

Audio/video recording of test administration

It is Pearson's opinion that audio or video recording or other non-standard conditions may invalidate the use of norm-referenced scores. As you may know, norms for standardized tests are developed under strict conditions. If such conditions are not met, the scaled scores obtained by application of the test norms may not be statistically defensible. Although it is the position of Pearson that the validity of any scaled score that results from a non-standard administration should be interpreted with caution, it is the responsibility of the individual psychologist administering the test to determine if the results of the assessment are an accurate reflection of the examinee's abilities. In rare high stakes legal evaluations with a valid court order mandating the audio or video recording of an evaluation for review only by other qualified examiners, the examiner and reviewers have the responsibility to determine if this variant testing condition has or had a material impact on the examinees test performance considering issues such as distractions, rapport, and effort. We request that any such recordings should be made the subject of a protective order to ensure the security of the test items and content. Please refer to the section herein titled **Litigation** which describes what should be included in a protective order. Additionally, recordings should not be allowed in any setting where the security of the recording cannot be adequately protected. Additionally, an audio or video recording of an administration where any test materials are recorded is a reproduction under federal copyright law. If done without our written permission, such acts may be an infringement of the assessment's copyright.

Telepractice test delivery administration

Telepractice is the use of telecommunications technology for the delivery of professional services at a distance. There is initial, but not conclusive evidence supporting test validity when administering the test via a telepractice method for a selective group of assessments. Norms for standardized tests are developed under strict testing conditions. If such conditions are not met, the scaled scores obtained by application of the test norms may not result in statistically accurate scores. Although it is the position of Pearson that the validity of any scaled score obtained as a result from a non-standard administration should be interpreted with caution, it is the responsibility of the individual administering the test to ensure that the results of the assessment are an accurate reflection of the examinee's abilities. Please refer to the specific product pages for further information related to telepractice test administration. Delivering our assessments via a teleconference or other similar method is a reproduction of our assessments under federal copyright law that requires the written permission from the copyright owner. If done without our written permission, such acts may be an infringement of the assessment's copyright.

12. Litigation

Pearson understands that from time to time you may receive demands from third parties to reproduce, produce or disclose copyright-protected and/or trade secret protected psychological test materials in connection with litigation. If such demands were to be fully complied with, the material disclosed might include test booklets, answer sheets, record forms, manuals, user's guides, scoring software, computer-generated output reports, or other published and unpublished material protected by Pearson under intellectual property law.

Pearson does not wish to impede the progress of legal proceedings; however, we are equally unwilling to jeopardize the security and integrity of our test instruments by consenting to the release of copyrighted and confidential material to those not professionally qualified to obtain them. Should litigation in which a psychologist is involved reach the stage where a court considers ordering the release of proprietary test materials to non-professionals such as counsel, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceeding; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all.

In addition, testimony regarding the items, particularly that which makes clear the content of the items, should be sealed and again not be included in the record. Pleadings and other documents filed by the parties should not, unless absolutely necessary, make specific reference to the content of or responses to any item, and any portion of any document that does should be sealed. Finally, we ask that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the items or responses. We think this is the minimum requirement to protect our copyright and other proprietary rights to the test, as well as the security and integrity of the test.

To the extent that you have not already done so, you may wish to consult with your local psychological association as well as the American Psychological Association on this particular issue. The Committee on Legal Issues for the American Psychological Association and/or the Office of General Counsel for the American Psychological Association in Washington, D.C., in particular, may have some additional thoughts on how to deal with this matter.

We very much appreciate your sensitivity to the issues surrounding appropriate use of and access to psychological testing materials. If you have other questions, please contact Pearson's Customer Support via our online form.