



FULLY EXECUTED
Purchase Order No: 4300477176
Original PO Effective Date: 10/15/2015
PO Issue Date: 10/16/2015
Valid From: 10/05/2015 To 10/04/2016

Your SAP Vendor #: 390013

Please Deliver To:
SERS
30 N 3rd Street Ste 150
Harrisburg PA 17101-1716 US

Supplier Name/Address:
FREDERICK FUNSTON
DBA FUNSTON ADVISORY SERVICES LLC
6632 TELEGRAPH RD # 225
BLOOMFIELD HILLS MI 48301-3012 US

Please Bill To:
For the preferred Email Invoice option, visit
www.budget.state.pa.gov
Click Programs and select E-Invoicing.

Or mail paper invoice to:
Commonwealth of Pennsylvania - PO Invoice
PO Box 69180, Harrisburg, PA 17106

Supplier Phone Number: 2482501111
Supplier Fax Number: 2485930595

Purchasing Agent

Name: Joshua Smith
Phone: 717-237-0327
Fax: 717-237-0346

Purchase Order Description:
SERS Board Governance Review

This Purchase Order is issued pursuant to the referenced Contract and constitutes the Suppliers authority to deliver the item(s) referenced below at the prices stated below to the location(s) identified above in accordance with the Contract terms and conditions.

Suppliers must provide four mandatory elements on PO invoices: PO Number, Invoice Date, Invoice Number, and Invoice Gross Amount. Failure to comply will result in the return of the invoice. Additional optional information such as supplier name, address, remit to information and PO Line Item information will improve invoice processing.

| Item | Material/Service Desc | Qty | UOM | Delivery Date | Net Price | Price Unit | Total |
|---|--|-------|------|---------------|-----------|------------|-----------|
| 1 | Engagement of Project >>> Rel. ord. against contract 4400014743 Item 20 | 1.000 | Each | 10/05/2015 | 28,420.00 | 1 | 28,420.00 |
| Material PO Text For acceptance and engagement for the initial planning activities of the project. | | | | | | | |
| 2 | Phase 1 Completion >>> Rel. ord. against contract 4400014743 Item 20 | 1.000 | Each | 11/16/2015 | 85,260.00 | 1 | 85,260.00 |
| Material PO Text For successful completion of Phase 1 requirements as stated in Exhibit A, page 19. | | | | | | | |

| | |
|---------------------|--|
| Information: | Total Amount: SEE LAST PAGE FOR TOTAL OF ALL ITEMS |
| | Currency: USD |

| | |
|----------------------------|-------------|
| Supplier's Signature _____ | Title _____ |
| Printed Name _____ | Date _____ |



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DBA FUNSTON ADVISORY SERVICES LLC

| Item | Material/Service Desc | Qty | UOM | Delivery Date | Net Price | Price Unit | Total |
|------|---|-------|------|---------------|-----------|------------|-----------|
| 3 | Phase 2 Completion | 1.000 | Each | 12/21/2015 | 85,260.00 | 1 | 85,260.00 |
| | >>> Rel. ord. against contract 4400014743 Item 20 | | | | | | |

Material PO Text

For successful completion of Phase 2 requirements as stated in Exhibit A, page 19.

| | | | | | | | |
|---|---|-------|------|------------|-----------|---|-----------|
| 4 | Phase 3 Completion | 1.000 | Each | 02/15/2016 | 85,260.00 | 1 | 85,260.00 |
| | >>> Rel. ord. against contract 4400014743 Item 20 | | | | | | |

Material PO Text

For successful completion of Phase 3 requirements as stated in Exhibit A, page 19.

General Requirements for all Items:

Header Text

The following attached documents are incorporated within this Purchase Order:

- Exhibit A - Technical Submittal
- Exhibit B - BAFO Cost Submittal
- Exhibit C - SERS RFQ 2015-001 Review of SERS Board and Organizational Structure
- Exhibit D - Addendum #1 - SERS RFQ 2015-001 Review of SERS Board and Organizational Structure
- Exhibit E - Terms and Conditions of Consulting Services ITQ Contract #4400007410
- Exhibit F - CRP Check Certification Form
- Exhibit G - Recommendation for Best Value Selection
- Exhibit H - September 16, 2015 Board Resolution

Payment will be made contingent upon the successful completion of the three (3) phases as stated in Exhibit A and must be approved by the SERS Contracting Officer for this project in order for invoices to be authorized for payment. Invoices must follow the structure of the Purchase Order in order to avoid delays in payment.

No further information for this PO.

| | |
|---------------------|------------------------------------|
| Information: | Total Amount: 284,200.00 |
| | Currency: USD |

EXHIBIT A

**CONSULTING SERVICES ITQ CONTRACT 4400007410
REQUEST FOR QUOTES
APPENDIX A**

**PROPOSAL COVER SHEET
COMMONWEALTH OF PENNSYLVANIA
STATE EMPLOYEES' RETIREMENT SYSTEM
RFQ # SERS 2015-001**

Enclosed in three separately sealed submittals is the proposal of the Contractor identified below for the above-referenced RFQ:

| Contractor Information: | |
|-----------------------------------|--|
| Contractor Name | Funston Advisory Services LLC |
| Contractor Mailing Address | 6632 Telegraph Road, #225 Bloomfield Hills, MI 48301-3012 |
| Contractor Website | www.funstonadv.com |
| Contractor Contact Person | Randy Miller |
| Contact Person's Phone Number | 248-250-1111 |
| Contact Person's Facsimile Number | 248-593-0595 |
| Contact Person's E-Mail Address | rmiller@funstonadv.com |
| Contractor Federal ID Number | ██████████ |

| Submittals Enclosed and Separately Sealed: | |
|---|--|
| X | Technical Submittal |
| X | Small Diverse Business Participation Submittal |
| X | Cost Submittal |

| <i>Signature</i> | |
|--|---|
| Signature of an official authorized to bind the Contractor to the provisions contained in the Contractor's proposal: |  |
| Printed Name | Frederick Funston |
| Title | Managing Partner |

Response to Request for Quotations
from the Pennsylvania
State Employees' Retirement System (SERS)
for a Review of
SERS Board and Organizational Structure

Technical Submittal

Submitted by:

Funston Advisory Services LLC

6632 Telegraph Road #225

Bloomfield Hills, MI 48301

Fax: (248) 502-0991

Contact Information:

Rick Funston, Managing Partner, (313) 919-3014, rfunston@funstonadv.com

Randy Miller, Principal, (248) 250-1111, rmiller@funstonadv.com

July 29, 2015



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A. Statement of the Problem

Purpose of the Project

The SERS Board, through its Audit Committee, has asked for consulting services from a firm with an established expertise in reviewing, assessing and developing the governance structure and practices of large state pension funds.

SERS existing board and committee structure as well as its policies are to be benchmarked against best practices of comparable large state pension funds. This analysis shall in turn result in the preparation of a comprehensive set of governance policies, based on public pension fund best practices and tailored to SERS. The goal of the final document is to ensure better organizational performance and adherence to sound fiduciary principles.

The review is to include development of policies and procedures that are considered industry best practices and that are tailored to SERS' needs and shall include a compliance process to ensure that governance policies are being followed. Recommended changes must be within SERS board of trustees ability and authority to adopt, and do not require enactment of legislation or action by other elected officials. A supplementary list of actions which require legislative enactment may be submitted for consideration but are not the primary focus of this effort.

Our Understanding of the Public Retirement System Ecosystem

The public retirement policy ecosystem of the 21st century has shifted dramatically. It is highly complex, polarized and rapidly changing. Pension reform is a hot topic in Harrisburg and across the country. The past fifteen years have seen major shifts in areas such as plan design, funding status, contribution rates, public and political support amidst rising expectations of fiduciaries' duties and responsibilities and program services.

As a result, like PA SERS, a growing number of public system trustees and officials are looking for practical ways to help them better understand and fulfill their fiduciary duties and improve the quality, timeliness and dynamics of their decision-making. Trustees are increasingly concerned about what and how much to delegate to board committees and executives consistent with their fiduciary duties. This presents challenges in achieving the best balance between the board's responsibility for strategic policy and oversight of operations and management's responsibility for running the operation effectively and efficiently and providing policy advice to the Board.

While public retirement systems have much in common, they also face some unique challenges based on factors such as their legal framework, their political and economic environment and their stage of development. We understand that the primary focus of this review will need to address the most important factors within the control of PA SERS.

Governance is fundamentally about decision-making

Who has fiduciary responsibility? What are the key decisions? Who has the authority to make those key decisions? Do authorities match responsibilities or are they misaligned? What powers are reserved for the board? What can be delegated to its committees and executives? How can the Board exercise appropriate oversight?

Do decision-makers have timely information and insights needed to make the best decisions under the circumstances? Are those decisions risk intelligent including the risk of action and inaction? To what extent is the consideration of risk built into the decision-making process?

Based on our first-hand knowledge of leading practices across multiple large public pension funds – and, most importantly, why those practices were adopted -- we propose to customize a Governance Policy Framework (Structure, Policy and Process) with supporting documentation to meet the unique needs of PA SERS as defined in the Work Statement.

We recognize that “perfect” policy may be un-implementable. The policy needs to be practical and enjoy a common understanding, acceptance and commitment by those who must use it or risk having it become just another policy manual that sits on a shelf.

B. Management Summary

We understand that the SERS Board of Trustees, through its Audit Committee, is interested in receiving consulting services from an experienced advisory firm with established expertise in reviewing, assessing and developing the governance structure and practices of large state pension funds. This review is to include development of policies and procedures that are considered industry best practices and that are tailored to SERS' needs. The scope should also include a compliance process to ensure that governance policies are being followed. Recommended changes must be within the SERS Board of Trustees' ability and authority to adopt, and do not require enactment of legislation or action by other elected officials. A supplementary list of actions which require legislative enactment may be submitted for consideration but are not the primary focus.

The SERS Audit Committee, acting on behalf of and at the direction of the SERS Board of Trustees, will manage this project. SERS Internal Audit Director will facilitate the project on behalf of the Audit Committee. The anticipated timeline for the project's completion is estimated at four months.

Why Choose Funston Advisory Services LLC?

We believe Funston Advisory Services LLC (FAS) is the best firm to help PA SERS achieve its goals for the following reasons:

1. Our Practical Experience
2. Our Extensive Leading Practices Knowledgebase
3. Our Team to Serve the PA SERS Board
4. Our Proposed Approach
5. FAS Will Deliver the Best Value for Money

1. Our Practical Experience

FAS is recognized as one of the nation's preeminent advisors to public retirement systems in the areas of governance, operations and risk intelligence. We are distinguished by the caliber and experience of our team and the quality and pragmatism of our advice. Our approach is based on leading practices and tempered with decades of practical experience based upon what actually works in specific circumstances.

Increasingly, we are the team that public retirement systems are turning to for help in governance matters. We bring the PA SERS Board a track record of success and an outstanding team dedicated to this project and its success.

Over the past five years, FAS has assisted a growing number of major state public retirement systems and sovereign wealth funds in evaluating their fiduciary performance and identifying governance, regulatory, policy, and operational process improvement opportunities. These funds include the California Public Employees Retirement System, the Oregon Investment Council, the New York State Common Retirement Fund, the School Employees Retirement System of Ohio, both the South Carolina Retirement System Investment Commission and Public Employee Benefit Authority, the Trust Fund for the People of the Federated States of Micronesia and, most recently, the New York City Comptroller's Bureau of Asset Management (in process).

We have also provided board and executive education to organizations such as CalPERS, Fairfax County Retirement System, California Association of Public Retirement Systems, Indiana Public Retirement System, Maryland State Retirement and Pension System, Ohio Police & Fire Pension Fund, State of Wisconsin Investment Board, State University Retirement Systems of Illinois, State of Wisconsin Investment Board, the Washington State Investment Board and the National Council on Teacher Retirement. In addition, we have published numerous articles on the topics of governance, fiduciary responsibility and risk intelligence and our team members are frequent presenters at national and international industry conferences.

2. Our Extensive Leading Practices Knowledgebase

The Request for Quotation cites 15 specific tasks to be addressed. Our extensive knowledgebase garnered from over 50 public retirement systems contains data on each of these structures, policies, practices and many more. The FAS knowledgebase is described in more detail in the body of our proposal.

We can readily assess how PA SERS compares to its peers regarding leading, prevailing and lagging practices. However, we strongly believe that what will work best for PA SERS needs to be part of a dialogue with the Board and the Executive over the course of this project that results in a deep understanding of the specific circumstances, needs and constraints under which PA SERS must operate. We expect it will take four months to build such a consensus.

“One Size Fits One”

We understand the general needs of trustees, the challenges they face, and the context in which they operate. Our approach will enable us to gain a deep understanding of the specific needs of PA SERS. The ability to customize our approach and to develop consensus is a hallmark of our firm and we encourage you to speak to our clients about the effectiveness of our approach in pragmatically customizing our recommendations to their specific needs.

3. Our Team to Serve the PA SERS Board

Our team to serve the PA SERS Board has worked both within and with public retirement systems. The team will be led by nationally-known governance experts and authors Rick Funston and Randy Miller, formerly of Deloitte. They have conducted numerous public retirement system benchmarking and governance reviews.

Tony Oliveira is a former CalPERS trustee, who among other things, drove the board's interest in risk and compliance following the "pay to play" scandal. Tony brings valuable perspectives as a former trustee and committee chair. He is a remarkable and multi-talented individual who is also a decorated Vietnam Era veteran.

Keith Johnson of Reinhart Law (a leading fiduciary law firm) was formerly the General Counsel for the State of Wisconsin Investment Board. Keith enables us to craft effective policy frameworks with a clear understanding of the legal environment.

This is the team that will serve on this engagement and will do the work. For more information, please see the Team Bios in the main body of the report.

4. Our Proposed Approach

In approaching this project, we aim to fully understand and appreciate the framework and ecosystem in which PA SERS operates and the challenges it has faced and will likely continue to face. For these reasons, we have developed an approach and workplan for completing this project within a four month timeframe. We will use a collaborative approach, working closely with SERS executives and the Audit Committee, to engage the Board in reviewing preliminary findings and recommendations, obtaining feedback, and developing consensus on a practical decision-making and policy-setting framework.

We have found that this approach ensures new policies are appropriate for the organization and that both the Board and Executive understand and support the new policies. Although there are many leading policies and practices, what is "best" policy and practice for a specific organization depends upon its particular circumstances and needs. We believe that "one size fits one" and that the resulting framework must be tailored to the unique needs and circumstances of the PA SERS Board.

Our track record proves that such a process results in a high percentage of implemented recommendations and improved governance as a result. As one example, please see the attachment from the South Carolina Retirement System Investment Commission regarding the status of its implementation of our recommendations.

Our approach will utilize a series of iterative reviews with the Executive, Audit Committee, and the Board to review options and develop a governance organization structure and policy framework to meet the unique needs of PA SERS.

Phase 1: Review Current Policies and Identify Issues

We will compare SERS' current structure and policies to our extensive knowledgebase of leading practices and identify strengths and gaps.

We propose conducting an anonymous, 360° survey of the Board and Executive concerning the strengths and weaknesses of PA SERS' current governance organization and structure, and identify options and priorities for practical improvement of each dimension of the scope of work. This will allow every board member to participate and provide their input while the project is overseen by the Audit Committee.

We will then conduct follow-up interviews with selected Board members and Executives to discuss survey results. This will help corroborate findings, better understand what works and why, and identify the best ways to improve the fiduciary functioning of the Board.

Phase 2: Identify Policy Options

After discussing the issues, we will identify potential policy options for each area. These will be based upon our team's knowledge of leading practices and will include a discussion of pros and cons associated with each option. We will develop preliminary recommendations for each policy area for discussion with the Executive and further refinement.

Over the course of most of our engagements, we conducted extensive benchmarking studies of governance leading policies and practices. We will leverage the results of these studies to assist PA SERS in developing its own governance policies with a strong understanding of current leading and prevailing practices among peer organizations.

Phase 3: Develop Governance Policy

At the beginning of Phase 3 we will review our policy recommendations with the SERS Audit Committee (and Board, if desired) to review and discuss each policy. After receiving this feedback, we will draft a new Governance Policy Manual, with appropriate collaboration with the Internal Audit Director, General Counsel, and Executive Director, which will be brought back to the Audit Committee and Board for review and approval.

We believe it is leading practice for public retirement systems to have a comprehensive set of articulated governance policies which are consolidated into a single Governance Policy which is readily available to Board members, staff and other key stakeholders. Having all governance policies in one place helps avoid the potential lack of clarity or conflicts which can occur when there are multiple documents containing various policies and/or the policies are simply referenced in statutory code. An integrated policy also facilitates periodic review and updates, as appropriate.

We also believe that decision-making processes and dynamics are an important element of an effective governance policy. A number of these dynamics are already identified in the Work Statement and include:

1. The timeliness and utility of information for board decision-making including the options available and related pros and cons and risks;
2. The strategic policy identification and priority setting process;
3. The board's confidence in the reliability of such information and management's recommendations;
4. Sources of independent reassurance about the reliability of management's reports such as internal and external audit, risk management, and compliance;
5. The use of third parties as independent advisors to the board;
6. The board's level of preparedness to assess such information including its own self-assessment and development processes; and,
7. The dynamics of engaging the trustees and their candor in the decision-making process in an open meeting environment; this includes the use of committees, both standing and ad hoc, and the appointment of committee chairs and members.

5. FAS Will Deliver the Best Value for Money

We have significant experience in working with public retirement system boards and staff and understand what it takes to effectively reach consensus on needed changes and prepare the system to implement those changes. We don't just deliver a report or policy manual, we work with you to assess the needs, identify the priorities, consider the options, and agree on a way forward.

Out track record is one of helping our clients achieve lasting improvements. We believe this is the value you are looking for.

C. Workplan

Scope of Work

The Contractor will be engaged by the SERS Board to perform a comprehensive governance study that identifies and analyzes key considerations in formulating an effective governance structure. The development of policies and procedures should be based on industry best practices in general, as well as specific to SERS structure. A comprehensive governance policy manual is to be drafted that provides a framework with a specific focus on the role of SERS board and its committees, to include recommendations regarding the role of the Chairman, the establishment of a Vice-Chairman and committee chairs, as well as board powers and responsibilities.

The selected consultant will meet with several of SERS executive and senior staff as well as Board members. The consultant will review existing policies specific to the Board, the bylaws and committee charters, the Board's current structure, and examples of Board and Committee minutes to acquire an understanding of the existing framework of the SERS Board. The consultant will benchmark SERS existing Board and Committee structure as well as its policies against best practices of comparable large state pension funds and prepare a comprehensive set of governance policies, based on public pension fund best practices and tailored to SERS. The goal of the final document is to ensure better organizational performance and adherence to sound fiduciary principles.

The detailed tasks identified in the RFQ include the following:

- Evaluate and make recommendations as to the board structure including the need for a vice chairman or other governing board member in the absence or disability of the Chairman.
- Evaluate the existing committee structure and make recommendations for additional standing and ad hoc committees as well as the composition of members on those committees, their role and authority.
- Address how committee issues and discussion gets deliberated, are brought to the full board's attention and action, while avoiding a verbatim replay of the committee discussion.
- Evaluate and make recommendations as to the length of term and rotation of committee members.
- Evaluate and make recommendations to retention or modification of existing bylaws and committee charters.
- Evaluate and recommend policy that addresses trustee communication with external parties.
- Evaluate and recommend policy regarding the search process for key service providers.
- Evaluate and recommend board expectations concerning the types and frequency of routine reports it is to receive from various sources.

Proposal to Review the SERS Board and Organizational Structure

- Evaluate and establish policies that ensure actions taken by the board are consistent with applicable laws and fiduciary duties of the board and staff, including gifts, travel, insider trading and code of conduct.
- Review the process by which the executive director will be evaluated.
- Review the process by which the chief investment officer will be evaluated.
- Establish a process whereby the trustees may conduct self-analysis to ensure continuous improvement of the board's effectiveness.
- Consider the need for a periodic, independent evaluation and/or assessment of its performance.
- Consider the issue and make recommendations regarding a minimum requirement of each trustee's attendance at board meetings and key board committee meetings, absent extraordinary circumstances.
- Additional recommendations to policy as identified by the Contractor as deemed necessary and as approved by SERS Audit Committee.

Based upon our experience in similar reviews with public retirement systems, many project work steps will address multiple tasks included in the list above as many of the topics are interrelated. For example, we would obtain information relevant to most of the activities through the 360° governance self-assessment survey, interviews with Board members and staff, and issues and preliminary recommendations would be reviewed with staff and the Board collectively.

We propose to address the entire scope articulated in the RFQ utilizing an approach we have developed through numerous similar reviews with other public retirement systems.

FAS Methodology

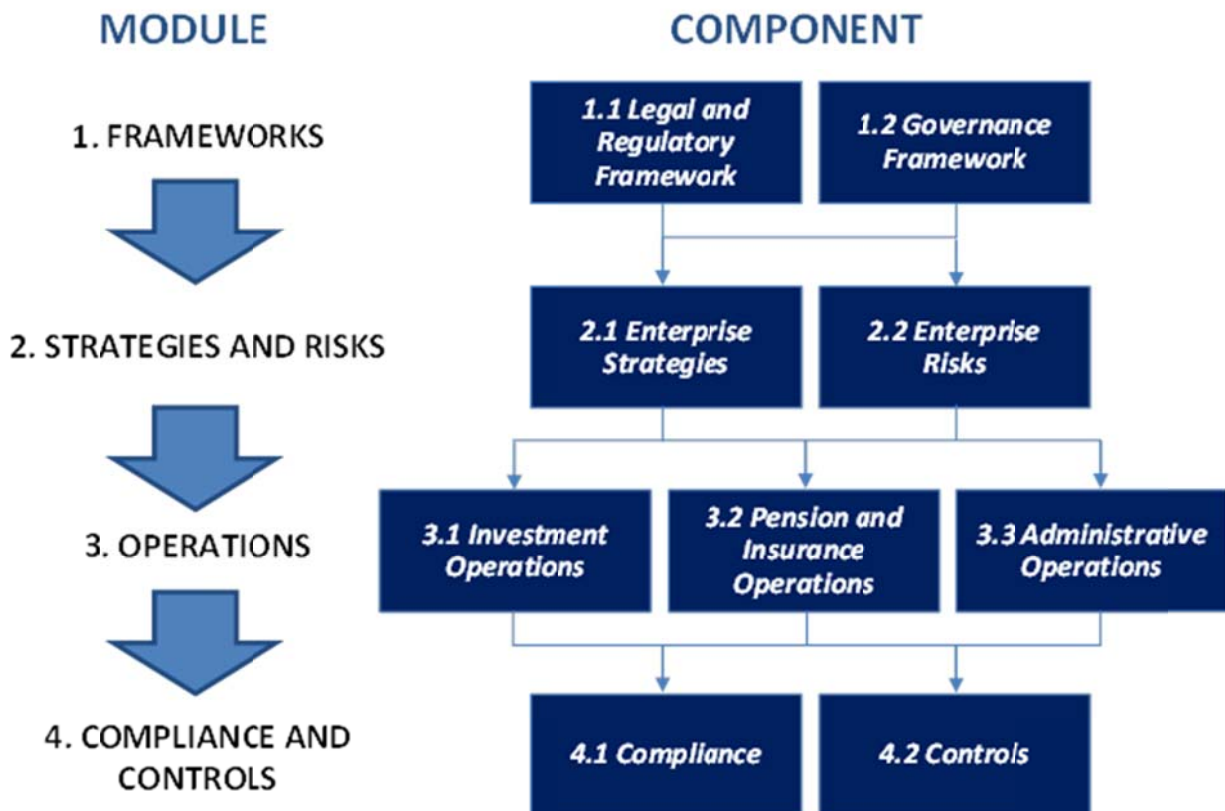
Funston Advisory Services LLC has developed a proprietary fiduciary and governance review framework and methodology which we have used in similar assignments with other public retirement system clients (see graphic below). The methodology ensures a comprehensive approach to the review and facilitates utilizing our knowledgebase of leading policies and practices.

Based upon the scope described in the Work Statement in the RFQ, which states:

"...reviewing, assessing and developing the governance structure and practices of large state pension funds. This review is to include development of policies and procedures that are considered industry best practices and that are tailored to SERS' needs and shall include a compliance process to ensure that governance policies are being followed."

We propose to utilize the first two components of our methodology in the Frameworks module, Legal and Regulatory Framework and Governance Framework, and the Compliance component included in the Compliance and Controls module. The full scope of the FAS methodology is shown on the next page.

The FAS Fiduciary Review Methodology



The topics which are included in these three components of our methodology are shown below. Those highlighted with bold italic font are included in the *RFP Section IV-4. Tasks* as we interpret the requirements.

Module 1: FRAMEWORKS

1.1 Legal and Regulatory Framework

- Governance structure (trustee board, sole fiduciary, other)
- Funding policies and mechanisms
- **Fiduciary responsibilities and authorities**
- **Oversight authorities**
- **Statutory authority/limitations**
- Trustee qualifications and selection criteria
- Investment limitations (prudent expert, prudent person, legal list)
- Non-economic investment requirements (in-state managers, minority and women-owned programs)
- Resource authorities (budget, staffing and compensation)
- **Custodian and selection of custodial bank**
- **Selection of external auditor**
- **Selection of external actuary**
- **Selection of outside counsel**
- **Transparency requirements (freedom of information and open meetings laws, contracting, reporting)**
- **Ethics, code of conduct and conflict of interest policies**
- Trustee indemnification
- Plan participation requirements
- Member eligibility and benefit calculation requirements

1.2 Governance Framework

- **Powers reserved for the board/fiduciary**
- **Direct reports to the board/sole fiduciary**
- **Delegations to staff and third parties**
- **Role of board officers**
- **Board committee structure**
- **Board and committee charters**
- Use of advisory boards

- Board/fiduciary focus on strategy
- **External communication from the Board**
- **Access to information and reporting to the board/fiduciary**
- **Board/fiduciary performance**
- **Board/fiduciary self-assessment**
- Board/fiduciary self-development
- **Trustee time commitments**
- Management of/response to litigation
- Enterprise risk oversight
- **Independent reassurance**

4.1 Enterprise Risk and Compliance

- Enterprise risk management and reporting
- Internal audit effectiveness
- **Ethics compliance**
- **Compliance with laws and regulations**
- **Policy compliance**
- **Compliance with delegations**
- **Board and/or committee operations compliance to charters and policies**
- Contractual compliance
- **Trust and custody compliance**
- Compliance with compensation policies
- **Compliance with open meeting laws**
- **Disclosure and FOIA compliance**
- Compliance with federal statutes and regulations – e.g., OFAC (Office of Foreign Asset Control), NACHA (National Automated Clearing House Association)
- Compliance with documentation management policies

Based upon our experience, we recommend selectively including additional key topics listed above in the scope for this review, in particular the Board’s focus on strategy, the approach to enterprise risk oversight and reporting, trustee indemnification, and board self-development. We would be pleased to discuss additional topics of interest to SERS if desired.

Technical Approach

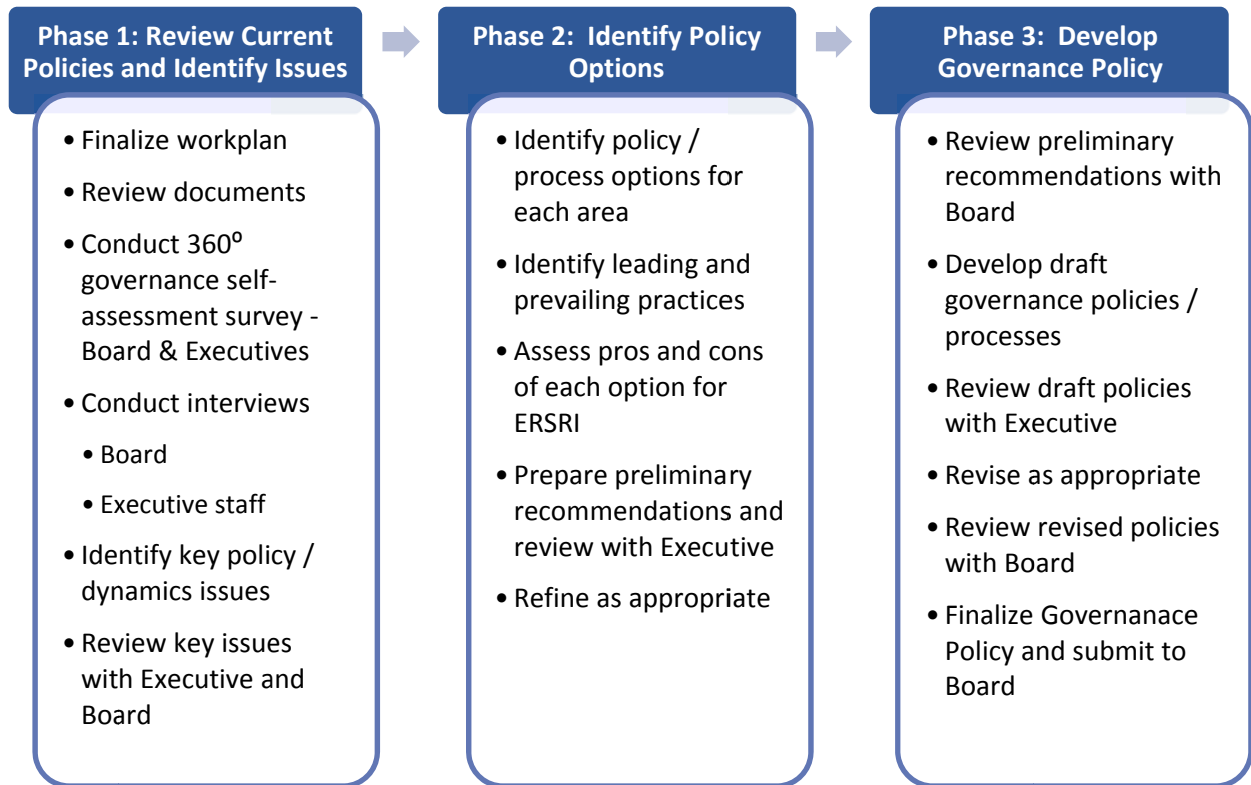
The major work steps identified are:

Phase 1: Review Current Policies and Identify Issues – Finalize Workplan, Review Documents, Conduct Self-Assessment, Kick-off Meeting Interviews, and Issue Identification

Phase 2: Identify Policy Options – Identify Policy Options and Leading Practices, Analyze Pros and Cons, Prepare Preliminary Recommendations

Phase 3: Develop Governance Policy – Review Recommendations with Board, Develop Draft Policies, Refine, Review and Submit Final Governance Policies

We have organized the work steps into three sequential phases of effort as shown in the graphic below:



4-6 weeks

4-6 weeks

6-8 weeks

The three phases of work are described below.

Phase 1: Review Current Policies and Identify Issues

We propose to use a four- to six-week period to gather information and identify issues with current governance policies and practices in the following areas:

- Statutes governing the SERS Board's fiduciary responsibilities;
- Board and committee structure, including role of the Chair;
- Committee charters and bylaws, including role and authority of committees and committee leadership;
- Committee practices and protocols for issue discussion and development of recommendations;
- Practices and protocols for Committee presentations to the full Board;
- Practices for preparing the Board for decision-making, including Board Briefings by staff;
- Timing and format of meetings;
- Existing Board policies, including:
 - Board and committee member terms
 - Leadership roles and selection process
 - External communications
 - Service provider selection
 - Ethics, code of conduct and conflict of interest
 - Gifts and honorariums
 - Insider trading and use of restricted information
 - Board member meeting attendance
 - Whistleblower
- Board calendar and agenda-setting process;
- Board member time commitments;
- Board self-assessment policy and process;
- Board self-development policy and process;
- Board fiduciary and governance process training;
- Board and Committee charters and review and update practices;
- Delegated authority to staff (including delegation bylaw);
- Evaluation and compensation-setting policies and practices for executive director and CIO;
- Reporting to the Board by staff and external providers; and
- Independent reassurance (e.g., external audit, internal audit, independent reviews, independent benchmarking, etc.).

We will use three primary methods of gathering this information:

1. Document reviews and comparison to our knowledgebase of leading practices;
2. 360° Governance Self-assessment Survey; and,
3. Interviews with Trustees and Executives.

1. Document reviews and comparison to our knowledgebase of leading practices

We will provide SERS with a list of documents we would like to review. A preliminary list is included as *Appendix A* (to be modified when the workplan is reviewed and finalized). Once the contracting process is complete, we can begin to receive and review the documents. Prior to any interviews, we will review and assess the documents. We will compare SERS's policies and procedures to our knowledgebase of leading policies and practices and identify SERS's strengths and opportunities for improvement.

2. 360° Governance Self-assessment Survey

We also propose to conduct an anonymous 360° governance self-assessment survey. The online survey will solicit responses from all Trustees and selected executives to get their assessment regarding what is working well and where things can be improved. This will help to ensure everyone has an opportunity to provide their perspectives. We have found this approach to be both highly effective and efficient use of everyone's time.

3. Interviews with Trustees and Executives

Based on the results of document reviews and the self-assessment survey, we will have better insight into strengths and potential opportunities for improvement and will be able to focus our interviews in order to make the best use of everyone's time. The results of the self-assessment survey and a list of topics will be provided to the interviewees in advance.

We will provide a list of requested interviewees of the Board and executives so these can be scheduled well in advance at a mutually convenient time. We would expect to conduct these initial interviews individually and by phone. A preliminary proposed interview list is included as *Appendix B*.

Preliminary List of Governance Policy and Process Issues

The activities of Phase 1 will result in a preliminary policy and process issues document which will be reviewed and discussed with the SERS Executive and Board. This initial set of policy and process issues will be the basis for discussion and eliciting feedback, refining our understanding of the issues, and for the development of policy alternatives during Phase 2. This document will identify current strengths and gaps compared to leading policies and practices and recommended priorities for improvement.

Based upon our experience, we anticipate there will be other potential governance issues to be addressed in this project and expect these will be identified during the document review, self-assessment survey and interview processes. Examples of policy and process areas typically addressed in governance policy manuals at other public retirement systems include:

- Board charter (roles and responsibilities, fiduciary responsibilities and authorities)
- Open meeting requirements (existence and policy exceptions)
- Information for decision-making (timeliness, utility, reliability)
- Decision dynamics (engagement, candor, attendance)

- Board oversight (risk management, reporting, use of outside advice)
- Board self-assessment (approach, process, administration, feedback)
- Board self-development (expertise, onboarding, training plans, delivery)
- Policies governing board conduct (ethics, compliance, discipline)
- Independent reassurance (external audit, internal audit, benchmarking, other outside reviews)
- Trustee liability (indemnification, use of insurance)
- Financial policies (funding, valuation, liquidity)
- Staff policies (compensation, training, succession planning, conduct, whistleblower)
- Customer service policies (services offered, performance standards)
- Operating standards (security, data protection, business resumption)
- Communications policies including Freedom of Information Act implications (designated roles, crisis communications, stakeholders)
- Policy development and frequency of review and updating

We would first review the preliminary policy and process issues list with the executive team. Based on their input, we would review the original and the refined list with the Board during their next meeting.

Phase 2: Identify Policy Options

After discussing the governance issues to be addressed with the SERS Board and Executive at the conclusion of Phase 1, the FAS team will identify policy options to be considered for each area. The policy options will describe:

- Issue
- Background
- Options
- Pros and cons of each option
- Risks of action and inaction
- Recommended option

We will structure our analysis around two groups of issues:

1. Issues where SERS currently has policies which may or may not be consistent with leading practices; and,
2. Issues where SERS currently does not have an articulated policy but could consider developing one.

The policy options will be identified based upon our experience with other retirement systems, research on specific issues, and our database of leading and prevailing practices (see *Exhibit C – FAS Public Retirement System Leading Practices Database*).

One Size Fits One

We understand that each public retirement system is unique and that what might be considered leading governance practices for others may not always be the best choice at a particular point in time for a particular system such as SERS. As a result, for each policy option identified, we will analyze the pros and cons associated with each one with respect to SERS' current situation. In our experience, a leading practice is only leading if it fits a specific organization with its unique environment and needs. The pros and cons analysis will include input from SERS aimed at helping to identify the best fit for SERS in each case. It will also include the identification of potential performance measures.

Upon completion of the policy analysis, we will prepare a discussion document which includes preliminary policy recommendations for review with the Executive. We will schedule a review of the analysis and policy recommendations and related measurements with the Executive and incorporate refinements based upon their feedback for presentation to the Audit Committee and, if desired, the entire Board.

Phase 3: Develop Governance Policy

We plan to begin the final phase, the development of a new SERS Governance Policy Framework and Manual, including Board and committee charters, staff reporting and oversight, and delegations, with a review of the policy recommendations by the Board. Upon receiving the Board's feedback, we will develop the recommendations into draft policy statements over the following several weeks in consultation with the SERS General Counsel.

The draft governance policy statements and related performance metrics will be reviewed with the Executive. After incorporating their feedback, we will plan to review all of the policy statements with the SERS Board. Following the Board review, we will incorporate any feedback and consolidate all of the policies into a new Governance Policy Framework and Manual for submission to the Board for approval.

Deliverables

As we do in all projects, FAS uses a secure cloud-based system to house and organize client documents and working papers. The SERS executive will have access to the work papers to enable real time tracking of progress and identify and address any emerging issues and responses. In addition, we will hold a weekly coordinating call with the SERS executive designed to guarantee that there are "no surprises" as the project moves forward.

The Work Statement in the RFQ describes four deliverables for this project: Task Plan; Status Report; Problem Identification Report; and Final Report.

We describe our approach to the Task Plan, including a Gantt chart, in the next subsection on Timing. Our task plan is organized around our review methodology and reflects the organization of our work activities. We would show progress against these activities during our status reviews.

We would expect to have weekly status discussions with the Internal Audit Director and would provide formal updated status report covering progress, issues and recommendations on a bi-weekly basis.

Regarding the Problem Identification Report and the Final Report, we recommend that we organize the content into six primary deliverables:

1. Governance Self-assessment Report
2. Preliminary Policy and Process key issues list
3. Preliminary Policy Analysis and Recommendations
4. Governance Policy Manual
5. Time-phased implementation plan
6. Executive summary of the results designed for public distribution

These six deliverables will contain all the requirements included in the Work Statement. Each will be reviewed with the SERS Board prior to finalization.

Timing

We believe this final project can be completed within four to five months from the time of project commencement. We are proposing this time frame to allow review and engagement by the Board and the Executive at each step in the process of policy development. We believe this iterative approach is very important to developing a common understanding, acceptance and commitment to the proposed policy and process framework.

This timeframe for completion should be reasonable under the assumptions that:

- Documents can be made available to FAS on a timely basis;
- SERS board members and staff are available for interviews on a timely basis; and,
- We are able to meet with the Executive and Board at the times specified to review each of the deliverables, including meeting with the Board at its scheduled meetings.

As mentioned above, we have provided a draft document request in *Exhibit A* and would expect to receive some of the requested documents as soon as possible after the award of the contract. This will allow the FAS team to review documents in advance, prepare the self-assessment survey, and be prepared for the Kick-off Meeting and on-site interviews. We propose finalizing the workplan and holding the Kick-off Meeting within one month of the award. While the FAS team is on-site for the Kick-off Meeting, we would also propose to schedule as many interviews as possible with SERS Executive and Board members.

Proposal to Review the SERS Board and Organizational Structure

We have prepared a Gantt chart format workplan below which indicates the sequence and duration of each of the review activities.

Proposal to Review the SERS Board and Organizational Structure

| | Project Week | | | | | | | | | | | | | | | | |
|--|--------------|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| Phase 1: Review Current Policies and Identify Issues | | | | | | | | | | | | | | | | | |
| 1. Finalize the workplan | | | | | | | | | | | | | | | | | |
| 2. Collect and review documents and understand current structure and policies | | | | | | | | | | | | | | | | | |
| 3. Utilize FAS knowledgebase to compare SERS structure and policies to leading practices | | | | | | | | | | | | | | | | | |
| 4. Prepare and conduct Governance Self-assessment Survey of Board and executives | | | | | | | | | | | | | | | | | |
| 5. Conduct interviews with SERS staff | | | | | | | | | | | | | | | | | |
| 6. Conduct interviews with Audit Committee/Board members | | | | | | | | | | | | | | | | | |
| 7. Identify key policy/dynamics issues and prepare discussion document | | | | | | | | | | | | | | | | | |
| 8. Review policy issues with Executive and refine | | | | | | | | | | | | | | | | | |
| 9. Review policy issues with the Audit Committee/Board | | | | | | | | | | | | | | | | | |
| Phase 2: Identify Policy Options | | | | | | | | | | | | | | | | | |
| 1. Identify policy / process options for each area | | | | | | | | | | | | | | | | | |
| 2. Identify leading and prevailing practices in each policy area | | | | | | | | | | | | | | | | | |
| 3. Identify pros and cons of each alternative | | | | | | | | | | | | | | | | | |
| 4. Prepare discussion document with preliminary recommendations | | | | | | | | | | | | | | | | | |
| 5. Review preliminary recommendations with Executive | | | | | | | | | | | | | | | | | |
| 6. Refine recommendations, as appropriate | | | | | | | | | | | | | | | | | |
| Phase 3: Develop Governance Policy | | | | | | | | | | | | | | | | | |
| 1. Review policy recommendations with the Audit Committee/Board | | | | | | | | | | | | | | | | | |
| 2. Develop draft governance policies / processes | | | | | | | | | | | | | | | | | |
| 3. Review draft policies with Executive | | | | | | | | | | | | | | | | | |
| 4. Revise draft policies, as appropriate | | | | | | | | | | | | | | | | | |
| 5. Review revised policies with the Audit Committee/Board | | | | | | | | | | | | | | | | | |
| 6. Finalize Governance Policy and submit to Audit Committee/Board | | | | | | | | | | | | | | | | | |

D. Prior Experience

FAS History, Experience and Clients

Funston Advisory Services LLC (FAS) was formed in 2010. The principals have been providing governance, strategy and risk advisory services since at least 1980. Since 2011, our team of public retirement system experts has worked together on a series of high-profile public pension fund governance assignments. Each team member is a highly-experienced professional, with decades of consulting, legal and/or pension industry experience.

Rick Funston and Randy Miller have led all the engagements performed by FAS over the past five years, including fiduciary reviews with CalPERS, the New York State CRF, SERS of Ohio, the Oregon Investment Council, the South Carolina Retirement System Investment Commission (RSIC) and Public Employee Benefit Authority (PEBA), and our current review of the New York City Bureau of Asset Management (NYC BAM). They are also currently assisting the Oregon State Treasurer in developing a new Oregon Investment Council Member Orientation and Reference Manual.

FAS works with a network of public retirement system experts. The network currently consists of more than twenty highly-experienced members (see *Appendix D – FAS Governance Expert Network*). Depending upon the specific needs of any given assignment FAS is engaged to perform, appropriate members of the network join with the FAS principals to form the core project team who performs the day-to-day project work. Industry association involvement and publications by FAS team members are included in *Appendix E*.

Typically, several other members of the network serve in the role of Senior Project Advisors. The senior project advisors provide counsel and oversight in their respective areas throughout a project. They provide input into the approach and workplan, review interim work products, and provide counsel and guidance for the final report. We have found that this role is very helpful in challenging the status quo and ensuring the highest quality results.

FAS Organization

Funston Advisory Services LLC is a limited liability corporation with Rick Funston as the principal owner. We utilize a consistent network of highly experienced subcontractors to deliver client engagements. Reinhart Boerner Van Deuren s.c. (Reinhart Law) is an independent law firm based in Madison, Wisconsin, which specializes in representation of public pension funds on investment, fiduciary and governance matters and frequently works with FAS on this type of review on a subcontractor basis.

The primary Funston Advisory Services (FAS) office is located in Bloomfield Hills, Michigan. We utilize a virtual office model. Team members proposed for this assignment are based in Bloomfield Hills, Michigan; Lemoore, California; and Madison, Wisconsin.

Depending upon the requirements of client assignments, FAS has also engaged other subcontractors for specific needs. For example, we have worked several times with CEM Benchmarking Inc., a firm which

has been working with pension funds for over 20 years and has compiled a unique global benchmarking database which includes over 350 public and private sector funds. When an assignment requires extensive investment information technology expertise, we have partnered with Cutter Associates, a 50-person consulting firm based in Rockland, Massachusetts, with an exclusive focus on working with asset management firms to enhance the investment process. Our approach is to find the best expertise and resources available for an assignment, and we understand how to work effectively and efficiently and coordinate the work efforts of an expert team.

Each team member makes a specific commitment for each engagement. In the event of a team member's unexpected unavailability for factors such as illness, the remaining team members would maintain continuity, evaluate the work which remains to be completed, determine whether additional resources are required, and consult with SERS on the best course of action. If additional resources are deemed to be required, we would reach into the FAS expert network to find the appropriate experience and skill sets to best fit the project's need.

Description of Similar Services to Other State Retirement Systems

Funston Advisory Services has completed independent, in-depth reviews of the governance, decision-making processes, management, and/or operations at six major public retirement systems over the past five years and are currently performing a management and operations best practices review at a seventh. These engagements were unique assignments which each required a customized approach and involved an in-depth understanding and review of governance structures and fiduciary responsibilities, critical decision-making processes, delegations of authority, and accountabilities. All of the reviews involved extensive benchmarking and original research to identify and describe leading and prevailing practices in a range of governance and operational areas. All of them resulted in material, implemented improvements to the governance and operations of the systems.

Through these engagements, FAS has developed an extensive database containing information on leading, lagging, and prevailing practices in major public retirement systems based upon our research and six benchmarking studies completed over the past four years. A general description of the database contents is included in *Appendix C – FAS Public Retirement System Leading Practices Database*.

In the RFQ it is requested to indicate work completed by individuals who will be assigned to this project. Each project description indicates which proposed FAS team member was involved with that specific assignment.

California Public Employees' Retirement System (CalPERS) – Board Governance and Effectiveness Project

The California Public Employees' Retirement System (CalPERS), headquartered in Sacramento, is the nation's largest public pension fund. CalPERS provides retirement and health benefit services to more than 1.6 million people and 3,103 school and public employers. The CalPERS Board of Administration is

the fiduciary body responsible for oversight of both the investment operations and pension and health care administration.

In March 2011 the CalPERS Board President commissioned Funston Advisory Services LLC to perform a Board Governance project to examine significant areas of Board oversight, governance practices, accountability and decision-making, with the purpose of improving the effectiveness of the CalPERS Board of Administration in meeting its fiduciary duties.

The project identified leading practices in six areas:

1. Principles for Effective Governance of Public Pension Funds
2. Board Powers Reserved and Delegation of Authority
3. Board Governance (Charters, Risk Oversight)
4. Board Self-Assessment
5. Board Self-Development
6. Selected Policies Governing Board Conduct

Options were identified and prepared in each area for consideration by the Board and customized to CalPERS specific requirements. Interim reports were submitted to the CalPERS Board Governance Committee and full Board for discussion in July, August and September 2011. All approved recommendations were included in the final report which was completed in September 2011. We also developed an executive summary of the recommendations which CalPERS used to inform the public about the governance improvements they were implementing. The executive summary is included as *Appendix F*.

Funston Advisory Services LLC (FAS), with the assistance of CalPERS fiduciary counsel, Keith Johnson of Reinhart Boerner Van Deuren s.c., collaborated with the CalPERS Board and executive staff over the time period March-September 2011 to develop a set of recommendations based upon an extensive set of activities and analyses.

The development of new governance principles and validation of leading governance practices for public pension funds were assisted by a notable panel of independent governance experts which included Keith Ambachtsheer, Marco Becht, Peter Clapman, Stephen Davis, Keith Johnson, Jon Lukomnik, Ira Millstein, David Nierenberg, James Shinn, Theresa Whitmarsh and Christianna Wood.

At the conclusion of the seven-month project, the Board of Administration approved a series of sweeping governance reforms in an effort to further strengthen accountability, efficiency, transparency and ethics at the nation's largest public pension fund. The changes provided a framework for supporting new policies and practices to improve the effectiveness of the 13-member Board, its committees and governance processes.

Rick Funston and Randy Miller from FAS and Keith Johnson from Reinhart Boerner Van Deuren s.c. led and conducted this engagement.

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Sacramento, CA 94209-0001
Grant Boyken, Deputy Treasurer
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Grant.Boyken@treasurer.ca.gov

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Oregon Investment Council – Fiduciary Governance Review

The Oregon Investment Council (OIC) oversees the investment of most funds managed by the Office of the Oregon State Treasurer (OST), including the Oregon Public Employees Retirement Fund (OPERF). The Oregon State Treasurer Investment Division manages a portfolio with a market value of over \$72 billion; the portfolio includes the OPERF, the State Accident Insurance Fund (SAIF), the Oregon Short Term Fund (OSTF), and numerous smaller funds such as the Common School Fund and the Oregon Growth Account. With assets exceeding \$55 billion, OPERF was recently ranked the 20th largest pension fund in the U.S.

In December 2011, Funston Advisory Services LLC was retained by the OIC, through the OST, to identify and evaluate alternatives to improve the effectiveness and efficiency of investment operations and thereby better fulfill their respective fiduciary responsibilities. Options to be considered included optimizing within the existing structure as well as consideration of potential new structural and governance models.

FAS, with the assistance of Reinhart Boerner Van Deuren s.c., performed an analysis of governance structured around nine relevant powers, including 66 discrete authorities, and where those authorities resided organizationally. We sought to answer the questions: What are the key decisions? Who gets to make them? What do they need to make the best decision under the circumstances? How are we doing?

Although this project was completed in a very short time frame, the approach included an internal analysis as well as an external benchmark analysis. In addition, preliminary results were reviewed by an expert panel drawn from the FAS Governance Expert Network which included Peter Clapman, Jon Lukomnik, Michael Musuraca and Christianna Wood.

The results of the FAS study were discussed in an OIC workshop session and were well received. The OIC subsequently formed a committee to further evaluate the options which were identified in the FAS study and develop a path forward. As a result of the efforts of the Oregon Treasurer and the OIC, a bill

was introduced in the Oregon state legislature to establish Treasury's Investment Division as a public corporation. The Deputy Treasurer stated that the FAS study was “foundational” in the Treasurer seeking this legislation. Although the bill did not pass in the past three legislative sessions, the Treasurer is pursuing other alternatives at this time to improve fund governance within the existing legal framework. FAS, with assistance from Reinhart Law, is currently supporting the Treasurer’s Office in developing a Member Orientation and Reference Manual for the Oregon Investment Council.

Rick Funston and Randy Miller from FAS and Keith Johnson from Reinhart Boerner Van Deuren s.c. led and conducted this engagement.

Client reference:

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Salem, OR 97301
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New York State Common Retirement Fund – Fiduciary and Conflict of Interest Review

In the summer of 2012, Funston Advisory Services LLC was selected by the Office of the State Comptroller of New York to conduct a fiduciary and conflict of interest review of the New York State Common Retirement Fund (CRF). The review was initiated during August 2012 and completed in January 2013.

The final report independently determined the extent to which:

1. The Comptroller is effectively fulfilling his fiduciary obligations;
2. There is a strong framework of governance in place to manage the fund;
3. The highest standards are employed with regards to ethics, professionalism, and conflicts of interest;
4. The fund is managed in an efficient and effective manner; and
5. There is a high level of operational transparency.

Prospectively, the policies, procedures and practices of the CRF were evaluated with respect to leading, prevailing, and lagging practices in use at comparable public pension funds in the U.S. and internationally.

The review included eight work streams conducted in parallel over duration of the review:

1. An overall benchmarking process
2. A review of fiduciary responsibilities and decision-making processes
3. A review of ethical, professional, and conflict of interest standards

4. An analysis of operational transparency
5. Review of investment-related operations
6. Review of use of external managers and consultants
7. Review of investment accounting processes
8. Review of due diligence practices

The FAS team reviewed over 1700 documents, interviewed CRF executives, advisory board members, external managers and consultants, and conducted a comprehensive benchmarking process. The customized benchmarking approach for the CRF included utilizing the existing FAS database of leading and prevailing practices in major public pension funds, completing a new CEM Benchmarking investment benchmarking report, and an extensive, custom benchmarking process to address review areas not included in the existing FAS or CEM databases, including fiduciary responsibilities, ethical, professional and conflict of interest standards, transparency, investment operations, use of external managers and consultants, investment accounting, and due diligence.

The team which conducted this review included Rick Funston, Randy Miller, and Keith Johnson.

Client reference:

New York State Office of the State Comptroller
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Kevin Murray, Executive Deputy Comptroller
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KMurray@osc.state.ny.us

School Employees Retirement System (SERS) of Ohio – Fiduciary Audit

Funston Advisory Services was engaged by SERS of Ohio to perform a fiduciary audit of its investment operations. Project work was initiated in January 2013 and was completed in May 2013. The scope of our engagement included:

- Alignment of fiduciary duties and responsibilities with authorities
- Investment policy framework and policy implementation
- Investment operations compliance, performance, and controls
- Identify relevant leading practices and improvement opportunities

We accomplished the fiduciary audit through the following workstreams:

1. Review the process through which the asset/liability study and discount rate were developed
2. Review the legal and regulatory framework which governs SERS
3. Review the Statement of Investment Policy (SIP) and related investment policies
4. Review compliance with investment-related laws and policies and identify any potential gaps
5. Review practices and performance of investment operations
6. Review and assess the control environment and internal controls for key processes

This review included a targeted benchmarking process with twelve other state public pension funds with AUM ranging from \$7 billion to \$15 billion. Topics addressed included staffing profile, internal asset management, asset/liability study policies and responsibilities, Board Audit Committee profile, internal auditor reporting relationship, board education plans and venues, internal investment committee profile, and custodial relationship profile.

The final report was presented to the SERS Board of Trustees during their May 2013 meeting and was well received. The Board and staff have implemented all of the FAS improvement recommendations which could be completed by the Board and staff.

The team which conducted this review included Rick Funston, Randy Miller, Keith Johnson, and Tony Oliveira.

Client reference:

School Employees Retirement System of Ohio
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South Carolina Retirement System Investment Commission – Fiduciary Performance Audit

In December 2013, the South Carolina Office of the State Inspector General (SIG) engaged Funston Advisory Services LLC (FAS) to conduct a fiduciary performance audit of the Retirement System Investment Commission (RSIC). The purpose of this audit was to critically evaluate the fiduciary roles and responsibilities of the RSIC Commissioners and staff, the relationship with other fiduciaries of the Retirement System, and the operational policies and practices of RSIC. The goal of the review was to identify areas of strengths and weaknesses, provide comparison with leading practices of other public pension plans, and make improvement recommendations.

Because RSIC is a relatively new state agency, the review was designed to be broad in nature, spanning all key functions. The review of these functions was organized into six categories, including Governance; Policy Review and Development; Organizational Structure; Investment Administration; Legal Compliance; and Information Technology.

The fiduciary performance audit began in early December 2013. We reviewed nearly 800 documents and interviewed over 50 people. We also contracted with CEM Benchmarking Inc. to perform an independent investment cost effectiveness study.

In developing our report, we addressed six fundamental questions:

- Who are the RSIC fiduciaries?
- What are their duties?

- What are their authorities?
- Do their authorities match their duties? Are these duties in conflict with other roles played by the various fiduciaries?
- How is the RSIC performing?
- Where and how can the RSIC improve?

In total, 124 recommendations were identified, of which 108 could be addressed directly by the RSIC; of these 108, 38 required the direct involvement of the Commissioners. We also identified 12 recommendations which require action by the Legislature and 4 which require action by the State Treasurer's Office. The FAS team presented our recommendations to a Senate Finance Subcommittee which was chartered to review the investment of state retirement funds. We continue to consult with the Subcommittee as its members deliberate proposals for the 2015 legislative session.

Although our review and recommendations were structured around the six areas defined in the RFP, we also organized our recommendations into five key themes which cut across all areas of scope:

1. Improve assurance and independent reassurance to build trust and confidence.
2. Build capabilities across the organization (including HR, IT, Accounting, etc.).
3. Reset Commissioners' focus on strategy and oversight.
4. Align fiduciary duties and responsibilities.
5. Improve the custodian relationships.

Upon submission of our final report, and with input from RSIC, we prepared a matrix which described for each recommendation the criticality, degree of difficulty, whether Commission involvement was needed, and whether outside entities needed to be involved or if their support was needed.

RSIC recently published an updated two-page stakeholder *Issue Brief* on their progress in implementing the recommendations of this study. For your convenience, it is included on the following two pages.

The team which conducted this review included Rick Funston, Randy Miller, and Keith Johnson.

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March 2015

ISSUE BRIEF

▶ RSIC Makes Progress on Key Fiduciary Audit Recommendations

RSIC has made significant progress since the issuance of the Funston Advisory Services (FAS) fiduciary performance audit last April. The audit evaluated the fiduciary roles and responsibilities of the RSIC Commissioners and staff, the relationship with other fiduciaries of the Retirement System, and the operational policies and practices of the RSIC. RSIC staff has worked diligently since the release of the report to implement their recommendations in a timely fashion.

The FAS team is experienced and competent in the issues of governance, strategy, risk, investment operations, investment accounting, and stakeholder engagement. As part of their evaluation, FAS experts spent months in an exhaustive effort reviewing documents, interviewing Commissioners, staff, stakeholders, managers and others, and conducting peer surveys.

Two critical findings are:

- 1 There are no indications of malfeasance or misfeasance regarding the Commission's current policies and practices.
- 2 RSIC is a leader among public pension systems in disclosing external management fees.

After concluding its comprehensive evaluation from January 2014 to March 2014, FAS recommended 126 areas for improvement at RSIC. RSIC began addressing several of these critical items before the audit report was published, and continues to make progress with the implementation of the remaining recommendations.

Critical recommendations RSIC has recently completed:

- Developed a set of investment beliefs to provide a basis for strategic management of the investment portfolio.
- Included the investment beliefs into the Statement of Investment Objectives and Policies.
- Streamlined due diligence practices to reduce cycle time without compromising accuracy or efficiency.
- Established an organization-wide project management process to monitor progress on agency initiatives and ensure proper use of internal resources.

Key Facts

- As of March 1, 2015, 52 of the FAS recommendations have been completed. The remaining recommendations have been prioritized and assigned target completion dates.
- FAS will continue to partner with RSIC through its transformational process, providing expertise and benchmarking as appropriate.
- Of the 126 recommendations in the FAS report, 110 can be addressed by RSIC, 12 require action by the General Assembly, and 4 are tasked to the State Treasurer's Office.
- The full audit report can be found at www.ic.sc.gov.

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March 2015

ISSUE BRIEF

▶ RSIC Makes Progress on Key Fiduciary Audit Recommendations

The Funston report noted a number of leadership opportunities the General Assembly should assume to improve RSIC operations. RSIC looks forward to collaborating with the General Assembly and stakeholders to implement these recommendations:

- ☾ Clarify any fiduciary responsibilities that remain with the Budget and Control Board, Department of Administration, and State Fiscal Accountability Authority.
- ☾ Establish a five-year cycle for legislators to review the statutorily-set actuarial assumed rate of return.
- ☾ Delegate authority to RSIC to control operational budget, establish appropriate staffing levels, and determine staff compensation and performance incentives.
- ☾ Develop a modified procurement process for obtaining investment management systems and tools.
- ☾ Expand qualification criteria for selection of Commissioners to allow for more diverse experience and expertise in managing investment operations.
- ☾ Add additional voting members to the Commission to increase diversity, increase beneficiary representation, and reduce the potential for tie votes - this could be satisfied by allowing the PEBA representative to become a voting member.

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South Carolina Public Employee Benefit Authority (PEBA) – Fiduciary Performance Audit

The South Carolina Public Employee Benefit Authority (PEBA) is an organization responsible for administering pension benefits for retirees and insurance for active and retired public employees across South Carolina. In October 2014, the South Carolina Office of the State Inspector General (SIG) engaged Funston Advisory Services LLC (FAS) to conduct a fiduciary performance audit of the Public Employee Benefit Authority (PEBA). The purpose of this audit was to:

- Critically evaluate the fiduciary roles and responsibilities of PEBA and staff; the relationship with each other and other fiduciaries of the Retirement System; and the operational policies and practices of each.
- Identify areas of strength and weakness, along with improvement recommendations and conformance with best practices of other public pension and employee benefit plans.
- Articulate and prioritize recommendations according to their significance and urgency, and, where feasible, include an analysis of potential costs or benefits associated with implementation.

In addition to multiple interviews and extensive document reviews, FAS also designed, conducted and analyzed a custom survey with six peer retirement administration agencies. We relied upon the 2013 CEM Pension Administration Benchmarking Report conducted by the independent firm, CEM Benchmarking Inc. (CEM), as part of this fiduciary performance audit for retirement administration cost and customer service analysis.

The FAS team provided testimony to the South Carolina Senate Finance Subcommittee to Review the investment of Retirement Funds and discussed the eleven recommended changes in the statutes to improve retirement fund governance. The Subcommittee voted to include all of the FAS recommendations in its draft bill for 2015.

The team which conducted this review included Rick Funston, Randy Miller, and Keith Johnson.

Client reference:

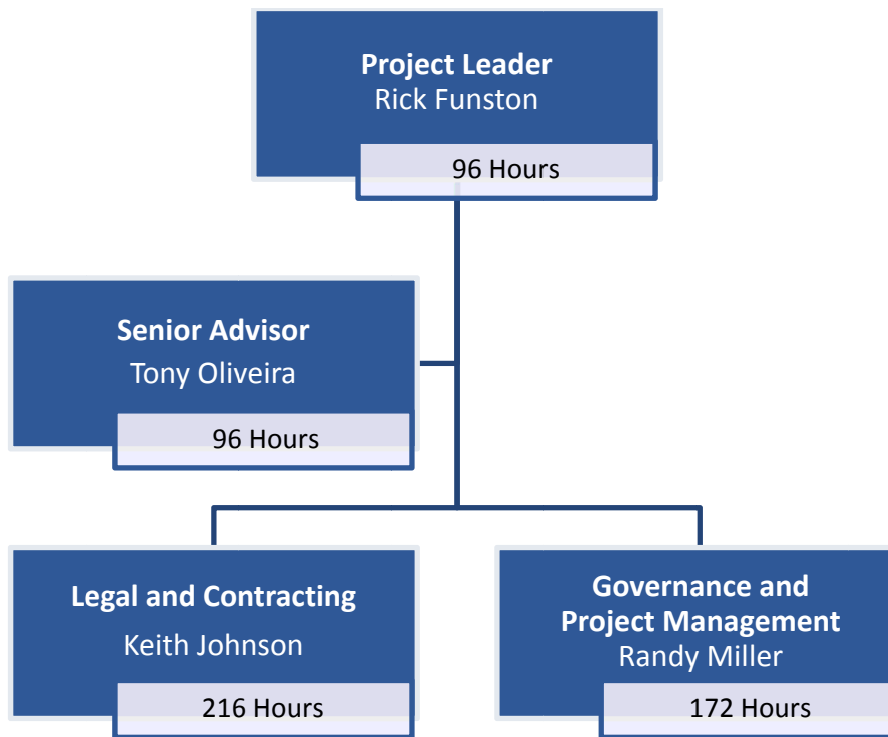
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E. Personnel

How FAS Proposes to Work with SERS

We believe it is important to have clear accountability for consultant results and defined protocols for client-consultant communications. As such, Rick Funston will have overall responsibility for the project and its results. On a day-to-day basis, Randy Miller will be the primary contact person and project manager. We have utilized this approach with consistent success in all the FAS engagements cited in this proposal.

The proposed FAS team and project organization, including role and projected hours, is shown in the organization chart below.



During project initiation, we propose working with the SERS Internal Audit Director to develop clear communications protocols regarding interview requests and scheduling, document requests, self-assessment survey administration, follow-up discussions, and scheduling of meetings. This should help ensure effective and efficient use of SERS Board and staff time and avoid redundant or confusing requests.

Prior to conducting the on-site kick-off meeting, the FAS team will prepare a document request (a preliminary draft is included in *Appendix A*, as previously mentioned) and allow some time for the SERS staff to respond. We assume that most documents will be available electronically. FAS has a secure tool

we propose using for uploading of files. We will also work with the SERS Internal Audit Director to schedule interviews.

The self-assessment survey will be made available to SERS board members and staff electronically to allow each person to provide their responses anonymously from their own computer.

We would envision having the project team visit Harrisburg four times during the review for interviews, reviewing preliminary observations with SERS Internal Audit Director, and reviewing deliverables with the Audit Committee and Board. Many of the follow-up discussions and interviews can be conducted as telephone conversations. Our experience is that this is an efficient and cost-effective working style for this type of review.

In addition to the kick-off meeting and interviews, when the FAS team would be on-site for about three days, we would expect to be in Harrisburg for three Board and/or Audit Committee meetings, and would include preparation time with the Internal Audit Director and other SERS staff. Any site visits beyond these four would be on an as-needed basis to potentially address specific issues.

FAS Team Members and Their Roles

Rick Funston, FAS Managing Partner, Project Leader

Frederick (Rick) Funston is the Managing Partner of Funston Advisory Services LLC, focusing on governance, strategy, operations and risk intelligence. In 2001, he created the concept of risk intelligence for both value creation and value protection. He is a frequent public speaker both domestically and internationally and he is the principal author of *Surviving and Thriving in Uncertainty: Creating The Risk Intelligent Enterprise™*, published by John Wiley & Sons in April, 2010. This book is specifically targeted at the governance and risk oversight needs of boards and executives in both public and private sectors.

Rick led the recent Fiduciary Performance Audit of the South Carolina Public Employee Benefit Authority for the Office of the Inspector General. He also led Fiduciary Audits for the South Carolina Retirement System Investment Commission (RSIC) and the School Employees Retirement System (SERS) of Ohio, where the emphasis was on governance, policies and procedures in the investment operations and identifying improvement opportunities. He led a Fiduciary and Conflict of Interest Review for the New York State Common Retirement Fund (NYS CRF), a review of governance structure alternatives for the Oregon Investment Council, and Board Governance Improvement, Enterprise Risk Management, and Stakeholder Relations projects at CalPERS. He has provided board and executive education for the Washington State and the State of Wisconsin Investment Boards. He is currently leading a Management and Operations Study and Best Practice Review of the New York City Bureau of Asset Management for the New York City Comptroller's Office.

Rick left Deloitte & Touche LLP in May 2010 and formed Funston Advisory Services LLC. Prior to his departure, he was the National Practice leader for Deloitte's Governance and Risk Oversight Services. In

that capacity, he served many of Deloitte's largest domestic and global clients and was responsible for the thought leadership that currently underpins Deloitte's globally pre-eminent position in risk intelligence.

He has over forty years' experience in both not-for-profit and for-profit sectors. Before joining Deloitte, Rick was the CEO of Continuous Improvement Services Inc. He began his career in the public sector consulting on strategy and operations, organization and leadership development, performance management, program evaluation and survey research.

Rick has been a guest lecturer at the Yale School of Management and Princeton University. He also served on the Board of Visitors for the Oakland University School of Business Administration from 2009-2011 and is an Adjunct Professor for the executive MBA program. He was awarded a B.A. from York University in Ontario and an M.S.W. from Tulane University.

Tony Oliveira, Contractor (Oliveira Advisory Services LLC), Senior Advisor

Anthony (Tony) Oliveira is a former retirement system board member who will serve as a senior advisor to the project team. He served for seven years as an appointed member of the CalPERS Board of Administration. Tony initially served as chair of the Finance Committee at CalPERS. When the Board decided to initiate a new risk management program and established a new Risk Management Committee, Tony was the first chair. As Risk Committee chair he led the development of the new Office of Enterprise Risk Management and was instrumental in creation of a new Chief Financial Officer (CFO) position to insure risk and policy compliance.

Tony has four years of study towards his Ph.D. in public policy, with his dissertation work in the field of sustainability based on formula selection, volatility indexing, risk analysis, asset class mixes, and assumed rates of return. He is an economist and professor of economics who understands assumed rates of returns and the implication of the decision process.

In addition to a distinguished business career, Tony served for 20 years as a local government elected official in Kings County, California. During that time, he also served as president of the nation's largest state county organization, the California State Association of Counties (CSAC), and worked both at the state and national level on pension issues including the significance in the asset allocation and assumed rates of return process and selection.

Upon his appointment to the CalPERS Board of Administration by Gov. Schwarzenegger as the only local government representative, Tony represented cities, counties, school classified, and special districts throughout California and worked directly with hundreds of agencies assisting in the understanding of volatility indexes (annual payroll divided into market assets), formulas, asset allocation and assumed rates of return implications. He has since taken that background to apply governance and fiduciary overlay metrics and interpretation of CSR and ESG implications to the decision process.

Oliveira Advisory Services LLC. (OAS) is a California certified SB micro business managed wholly by Tony who is the majority owner of the company. Tony is a Vietnam Era Veteran and as such is currently in the process of certifying OAS as a nationally recognized Vets First certified business.

Randy Miller, FAS Principal, Project Manager and Governance Lead

Randall (Randy) W. Miller, a Principal with Funston Advisory Services LLC, was day-to-day project manager and leader of the benchmarking process for our South Carolina PEBA and RSIC, New York State CRF and SERS of Ohio engagements. He was also recently the lead consultant on an engagement for the Office of the Oregon State Treasurer examining Oregon's pension investment governance structure, and also was actively involved in three projects at CalPERS which: 1) developed Board governance reforms; 2) developed their enterprise risk management program; and 3) assessed and developed strategies for improving stakeholder relations. He led the CalPERS governance benchmarking, a critical part of the governance reforms review, and co-led the governance structure benchmarking for the Oregon project. He has extensive experience in operations analysis and planning, developing and directing large-scale improvement programs. He is currently project manager on the Management and Operations Study and Best Practice Review of the New York City Bureau of Asset Management for the New York City Comptroller's Office and is also supporting the Oregon Treasurer's Office in developing a Member Orientation and Reference Manual for the Oregon Investment Council.

Randy retired from Deloitte Consulting LLP in February 2010 after 27 years of service, where he most recently led Mergers & Acquisitions Integration Services to Manufacturing industry clients. He has significant international consulting experience, led Deloitte's global automotive industry consulting practice, and was based in Germany with Deloitte from 1997-2003, where he led Deloitte Consulting DACH (Germany, Austria, Switzerland) for two years. He specialized in planning and implementation of mergers, acquisitions and divestitures; market and supply chain strategy; and cost reduction/ operations improvements.

Randy has led a variety of benchmarking studies, including board governance, investment operations, overhead cost structure, information technology strategies, and business transformation strategies. Randy received an A.B. degree from Dartmouth College with a major in Engineering Sciences. He also received a B.E. from the Thayer School of Engineering and an M.B.A. from the Amos Tuck School of Business, both also at Dartmouth. Prior to Deloitte, Randy was a car product planner at Ford Motor Company.

Keith Johnson, Contractor (Chair of Institutional Investor Legal Services team at Reinhart Law), Consultant

Keith L. Johnson is an attorney who heads the Institutional Investor Legal Services team at Reinhart Boerner Van Deuren s.c. (Reinhart Law). Keith represents pension funds and institutional investors on fiduciary, investment, securities litigation and corporate governance program matters. He was program director of the Wisconsin International Corporate Governance Initiative at the University of Wisconsin Law School, while serving as an adjunct professor of law.

Keith and his team from Reinhart Law were teamed with FAS in performing the CalPERS governance review, the governance structure review for the Office of the Oregon State Treasurer, the fiduciary and

conflict of interest review with the CRF, the SERS of Ohio fiduciary audit, and the South Carolina RSIC and PEBA fiduciary performance audits. The Reinhart Law team is currently assisting the Oregon Treasurer's Office in developing a Member Orientation and Reference Manual for the Oregon Investment Council.

Keith was formerly legal counsel to the State of Wisconsin Investment Board (SWIB), the ninth largest public pension fund in the United States, for more than 21 years, including almost seven as chief legal officer. In that capacity, he headed SWIB's fiduciary duty compliance, corporate governance, investment, legal services and securities litigation programs and was a member of SWIB's Risk Committee. He also served as a Board Member and President of the National Association of Public Pension Attorneys (NAPPA).

Keith regularly represents institutional investors in negotiation of investment manager and private market investment agreements and provides counsel on corporate governance, securities litigation and fiduciary duty to many of the world's largest pension funds and institutional investors. He and the Institutional Investor Legal Services team at Reinhart Law have provided investment, benefits, insurance, tax and fiduciary counsel services to a number of public pension funds, including CalPERS, the State of Wisconsin Investment Board, New York City Pension Funds, Texas Teachers Retirement System, North Carolina State Treasurer, Connecticut State Treasurer, Kentucky Retirement Systems, Employees Retirement System of the State of Hawaii and Milwaukee City and County pension boards. He is co-editor of the Cambridge University Press Handbook of Institutional Investment and Fiduciary Duty.

Keith is a member of the State Bar of Wisconsin and the State Bar of Texas. He earned a J.D. degree from the University of Wisconsin Law School and a B.A. from the University of Wisconsin-Madison.

F. Training

If appropriate, indicate recommended training of agency personnel. Include the agency personnel to be trained, the number to be trained, duration of the program, place of training, curricula, training materials to be used, number and frequency of sessions, and number and level of instructors.

FAS has provided board and executive education to organizations such as CalPERS, Fairfax County Retirement System, California Association of Public Retirement Systems, Indiana Public Retirement System, Maryland State Retirement and Pension System, Ohio Police & Fire Pension Fund, State of Wisconsin Investment Board, State University Retirement Systems of Illinois, State of Wisconsin Investment Board, the Washington State Investment Board and the National Council on Teacher Retirement.

In addition, we have published numerous articles on the topics of governance, fiduciary responsibility and risk intelligence and our team members are frequent presenters at national and international industry conferences.

At this time we are not recommending any specific training for SERS staff as part of this project. If a need for training is identified during the project, and FAS is qualified to conduct the training, we would be pleased to provide a separate proposal to provide the appropriate services. If FAS is not qualified to provide the services, we would be pleased to assist in developing a specification to be used to obtain quotes from other qualified parties.

G. Emergency Preparedness

To support continuity of operations during an emergency, including a pandemic, the Commonwealth needs a strategy for maintaining operations for an extended period of time. One part of this strategy is to ensure that essential contracts that provide critical business services to the Commonwealth have planned for such an emergency and put contingencies in place to provide needed goods and services.

a. Describe how you anticipate such a crisis will impact your operations.

Because Funston Advisory Services utilizes a virtual operating model, our team will be working remotely for much of the duration of the project when the team is not at the SERS site in Harrisburg. As a result, the team members are much less likely to all be exposed to the same emergency situation simultaneously. The most significant dependency for the FAS team which could be disrupted is likely to be loss of telephone and internet access.

In any case, a temporary disruption for the FAS team is unlikely to result in a significant risk for SERS because this project will not be integral to day-to-day SERS operations.

b. Describe your emergency response continuity of operations plan. Please attach a copy of your plan, or at a minimum, summarize how your plan addresses the following aspects of pandemic preparedness:

i) Employee training (describe your organization's training plan, and how frequently your plan will be shared with employees)

Because we have a project-based organizational structure and utilize a virtual office model, our employee training regarding emergency response is conducted on a project-by-project basis. For this project, after the contract with SERS is finalized, the team will discuss how we will respond if faced with a pandemic and agree upon team assignments.

ii) Identified essential business functions and key employees (within your organization) necessary to carry them out

As the Project Manager, Randy Miller is the primary person responsible for communicating with other employees and identifying the need to undertake emergency measures. In the event that he is impacted by a pandemic, Rick Funston is the alternate for taking the leadership role in responding.

iii) Contingency plans for:

- How your organization will handle staffing issues when a portion of key employees are incapacitated due to illness.***

FAS has a large network of experts with complementary yet different capabilities, experiences and skill sets. In the event that multiple project team members are incapacitated for any length of time, we would consult with the SERS project

leadership regarding replacing those team members with alternative resources, if appropriate, and on alternative courses of action such as revising the timing of project completion.

- ***How employees in your organization will carry out the essential functions if contagion control measures prevent them from coming to the primary workplace.***

Because we utilize a virtual office model, the FAS team is typically working in and collaborating from different locations. As long as we can continue to have access to telephone lines and the internet, team members will be able to effectively communicate with each other and collaborate with our cloud-based tools. For this project, the major potential impact of travel restrictions would likely be on the ability to spend time on-site at SERS at the planned times. Even in this scenario, however, as long as the SERS Board and staff were available, we would likely propose continuing the project remotely and conducting reviews via teleconference and/or web conference.

- iv) ***How your organization will communicate with staff and suppliers when primary communications systems are overloaded or otherwise fail, including key contacts, chain of communications (including suppliers), etc.***

Because of our virtual operating model we do rely heavily on telecommunications and internet services. While we cannot eliminate this dependency, we do have redundant networks including terrestrial telephone lines, cellular telephones, cable internet service, and cellular internet service.

In the event of communications system failures, the Project Manager, Randy Miller, will be responsible for contacting all team members and ensuring everyone can continue their work.

In any case, a temporary disruption of communications for the FAS team is unlikely to result in a significant risk for SERS because this project will not be integral to day-to-day SERS operations.

- v) ***How and when your emergency plan will be tested, and if the plan will be tested by a third-party.***

As we develop an emergency plan tailored to each project, and our projects are not integral to day-to-day operations at our clients, we do not employ third-party testing. However, we do discuss the plan and ensure all elements of our communications network are functioning properly at the initiation of each project.

Appendix A – Preliminary Data Request

Documents to be reviewed (to be revised in consultation with Internal Audit Director)

1. *Standard Reports, Contracts and Organization/Staff Information - to the extent they exist (also some items maybe duplicative or already contained in other documents):*
 - Financial reports for the three most recent fiscal years
 - Last fiduciary audit report
 - Compliance and risk statements and reports, including:
 - Use of investment managers, consultants and advisors, including conflict of interest policies or financial disclosure policies
 - Insider trading and misuse of material nonpublic and confidential information
 - Conflicts of interest, ethics code, personal trading and related reports/disclosures and related records
 - Risk reports if different from above (for either internal or external asset management
 - All periodic reports to the Board of Trustees for the past two years (Including routine performance or risk reports)
 - Reports or memoranda of compliance outages
 - Current organization chart including headcounts
 - Succession plan
 - Description of decision-making authorities, delegation of authority, policies and organizational responsibilities and procedures
 - Most recent strategic planning document
 - Stakeholder communications plan
2. *Policies and Procedures - to the extent they exist (also some items maybe duplicative or already contained in other documents):*
 - Applicable state laws pertaining to Pennsylvania SERS
 - Policies and procedures manual (or the equivalent) for the pension investment, risk management, benchmarking and cash management function and any other governing documents (Board policies, etc.) not covered by the policies and procedures manual, including:
 - Investment documentation
 - Placement agent policy and compliance documents
 - Any policies and procedures (such as ethics policies) for investment managers, consultants and advisors, including conflict of interest policies or financial disclosure policies
 - Policies and procedures for selecting, evaluating, monitoring and terminating investment managers, consultants and advisors
 - Any policies establishing criteria for identifying the need and specifics for external manager mandates
 - Policies which include contractual requirements on investment advisors and other third parties for responding to requests from the Board of Trustees

- Audit policies applied to external managers
- Policies and procedures to prevent insider trading and misuse of material nonpublic and confidential information
- Policies and procedures governing investment manager use of third parties
- Procedure for curing investment compliance outages

3. *Additional Documents to Address Board of Directors Operations - to the extent they exist (also some items maybe duplicative or already contained in other documents):*

- Board charter
- Committee charters
- Any written ethical standards, including the Board's ethics policy and any other conflicts of interest, gift, insider trading, or financial disclosure policies
- Documentation provided to board members detailing duties and fiduciary responsibility
- Qualifications and other criteria applicable to board members
- Documents establishing Board Committees and committee procedures and authority
- Documentation provided to board members detailing ethical responsibilities; board member compliance reports/filings
- Minutes or records of all Board meetings and actions for past three years
- Board training materials and attendance records on duties and fiduciary responsibility
- Board member training materials and attendance records regarding ethics
- Current policies regarding fiduciary liability and insurance
- Policy and procedures for evaluation of direct reports to the Board (e.g., Executive Director)
- Claims and appeal procedures
- Procurement policy for key service providers
- Board policy on enterprise risk management
- Board self-assessment and independent performance evaluation policy
- Board attendance and attendance reporting policy
- Board education policy
- Communications policy
- Board's policy with respect to Environmental, Social and Governance (ESG) investing

Appendix B – Preliminary Interview List

FAS would hope to interview each of the individuals in the following positions or functions (if they exist). Some interviews may be conducted as group interviews, where appropriate.

Board of Trustees:

- Audit Committee members, starting with the Chair
- Other trustees, as appropriate

SERS Staff (or functions):

- Executive Director
- Director Internal Audit
- Chief Investment Officer
- Senior Investment Officers
- Operational Due Diligence
- Chief Counsel
- Chief Financial Officer
- Director of Member Services
- Director of Communications and Policy
- Chief Information Officer
- Director of Human Resources

Appendix C – FAS Public Retirement System Leading Practices Database

The FAS Public Pension Fund Leading Practices database includes information collected from over 50 domestic and international pension funds on the following topical areas:

- Fiduciary profile (responsibility (single or board), board member terms, elected or appointed, requirements, types of committees, time commitment)
- Key decision authorities and fiduciary alignment (66 specific authorities):
 - Governance
 - Strategy and resourcing
 - Oversight
- Ability to establish independent investment holding companies
- Open meeting requirements (existence and policy exceptions)
- Board practices (risk management, reporting, outside advice)
- Board self-assessment (approach, process, administration, feedback)
- Board self-development (expertise, training plans, delivery)
- Policies governing board conduct (policies, compliance, discipline)
- Fund policies and frequency of review and updating
- Executive staff profile (executive positions, board reporting, succession planning)
- Executive management hiring and compensation decision responsibilities
- Investment operations profile (legal list restrictions (allowable investments, allocation limits, exposure limits), internally vs. externally managed funds, internal and external investment costs, internal investment management resources, decision-making processes)
- Training type and frequency
 - Ethics
 - Asset classes
- Legal operations
 - Staffing level
 - External counsel (spending, fee structure)
 - Use of outside fiduciary counsel
- Operational transparency and disclosures
- Investment operations management
 - Cost management strategies
 - Cost monitoring
- Use of external managers
 - Hiring process
 - Number and size of mandates and trends
- Use of consultants
 - Type and number
 - Spending by type
 - Value
- Due diligence and external manager monitoring
 - Frequency

- Participation
- Contracting and use of custodial services
- Securities lending trends
- Foreign exchange oversight
- Internal and external audit approval responsibility
- Investment accounting operations
 - Segregation of duties
 - Staff certifications
 - Software and documentation flow
 - Asset accounting approvals

We also have conducted a specific benchmarking study with U.S. state retirement systems which are governed by a fiduciary Board of Trustees and where the defined benefit pension funds are invested and managed by a separate investment board or sole fiduciary. Topics include:

- Board of trustees and policies
 - Composition
 - Qualifications
 - Terms
 - Meeting frequency and duration
 - Time spent on agency business
 - Defined policies and source
 - Ethics/standards of conduct compliance
 - Board discipline
 - Engagement of outside legal counsel
 - Trustee indemnification
- Board self-assessment
 - Process
 - Frequency
 - Use of upward and/or peer-to-peer assessments
 - Feedback process
- Board education
 - Mandated topics
 - Training plans
 - New member orientation
 - External training
- Retirement system authorities
 - Budget approvals
 - Staffing authorities
 - Compensation
 - Rate of return assumption
- Co-fiduciary responsibilities
 - Fund valuations
 - Selection of external auditor

- Custodian and role of State Treasurer
- Organization
 - Executive positions and reporting relationships
 - Employer training responsibilities
- Stakeholder relations and communications
 - Communications plans
 - Communications responsibilities
- Risk management
 - Risk programs
 - Risk in decision-making processes
- Strategic planning
 - Planning process
 - Responsibilities
 - Frequency of updates
- Business continuity plans
- Staff training and education
 - Types of functional training
 - New employee orientation
- Use of outside counsel
 - Type of issues
 - Annual spending

Appendix D – FAS Governance Expert Network

Keith Ambachtsheer – President and Founder, KPA Advisory Services, Ltd. and Director of the Rotman International Centre for Pension Management, University of Toronto.

Keith Bozarth – recently retired Executive Director of the State of Wisconsin Investment Board (SWIB), previously CEO of the Orange County (California) Employees Retirement System.

Virginia Brizendine – formerly Chief Financial Officer of Missouri PSRS/PEERS for five years and the School Employees Retirement System of Ohio for eleven years.

Peter Clapman – former Senior Vice President & Chief Investment Counsel for TIAA-CREF, co-chair of Stanford University Fiduciary College.

Debra Cope – President of Cope Financial PR, Inc. a strategic and crisis communications advisory firm for financial companies; previous experience includes Group Director of Communications for Promontory Financial Group LLC, news reporter for Bloomberg, and editor, bureau chief and writer.

Marv Damsma – formerly Director of Trust Investments at BP America Inc. and current Chair of the International Electrical and Electronics Engineers (IEEE) Pension and Endowment Fund.

Stephen Davis – senior fellow at the Brookings Institution and senior fellow in the corporate governance program at Harvard law School, formerly Executive Director, Yale University School of Management’s Millstein Center for Corporate Governance and Performance.

Rick Funston – Managing Partner, Funston Advisory Services LLC, former national practice leader for Governance and Risk Oversight at Deloitte & Touche LLP, principal author of “Surviving and Thriving in Uncertainty: Creating the Risk Intelligent Enterprise” and creator of the concept of risk intelligence.

Michael Gardner – Former Chief Audit Executive from Indiana University and three fortune 500 companies, Mike is a Certified Public Accountant, Certified Internal Auditor, Certified Information Systems Auditor, and Certified Fraud Examiner.

Keith Johnson – Institutional Investor Services Chairman at Reinhart, Boerner Van Duren s.c. and program director of the Wisconsin International Corporate Governance Initiative at the University of Wisconsin Law School.

Ken Johnson – formerly Chief Operating Officer, Chief Financial Officer, and Chief Administrative Officer at the State of Wisconsin Investment Board for over ten years.

Kelly Kenneally – President of Kenneally Company LLC, a strategic communications consulting firm; she has more than 20 years of public affairs and communications experience, with specialized expertise in finance and public policy communications.

Jon Lukomnik – Managing Partner, Sinclair Capital LLC, formerly Deputy Controller for Pensions for the City of New York, co-founder of the International Corporate Governance Network, and co-founder Governance Metrics International.

Susan Mangiero, Ph.D. – Managing Director, Fiduciary Leadership, LLC, author of *Risk Management for Pensions, Endowments and Foundations* and formerly CEO of Investment Governance, Inc.

Todd McGowan – Former Chief Risk Officer of a regional bank and a partner at Deloitte & Touche, Todd has diverse industry experience in manufacturing, financial services, energy and healthcare insurance; he is a Certified Public Accountant (CPA) and Certified Information Systems Auditor (CISA).

Randy Miller – Principal, Funston Advisory Services, project manager and leader of benchmarking services for fiduciary and governance reviews and former global practice leader for Deloitte Consulting's automotive practice.

Dave Mills – Trustee for Casey Family Programs private operating foundation and former Executive Director of the State of Wisconsin Investment Board, with expertise in governance, organizational development and compensation design within both public and not for profit investment organizations.

Anthony Oliveira – brings a unique and diverse set of experiences to his role, most recently as a board member and chair of several committees at the California Public Employees' Retirement System (CalPERS).

Brian Perlman – Senior Vice President and Financial Services Practice Lead with Greenwald & Associates, a full-service market research firm with unique industry expertise in financial services, employee benefits and healthcare.

Dave Stella – formerly Secretary of the Wisconsin Department of Employee Trust Funds for six years, and Executive Director of the Denver Public Schools Retirement System.

Simon Wong – internationally recognized independent adviser on corporate governance, institutional investment, and capital markets, and has served international organizations, regulatory bodies, consulting firms, and other institutions.

Christy Wood – formerly Chairman of the International Corporate Governance Network (ICGN), CEO of Capital Z Asset Management and CalPERS Global Equities Senior Investment Officer.

Appendix E – FAS Industry Participation, Research and Publications

Governance and Retirement System Organizations

Funston Advisory Services LLC is an associate member of the National Association of State Retirement Administrators (NASRA).

David Stella and Dave Mills are Past Presidents of the National Council on Teacher Retirement (NCTR), a non-profit organization that represents over fifty public pension funds with assets exceeding two trillion dollars.

Keith Johnson is a member of the Council of Institutional Investors. He is a Fellow in the American College of Investment Counsel and has been active in the National Association of Public Pension Attorneys (NAPPA). Keith is also a member of the Stanford Institutional Investor's Forum Committee on Fund Governance that developed Best Practice Principles in 2007 and supporting Model Governance Provisions in 2013.

Jon Lukomnik is program director for the IRRIC Institute. He co-founded and served as a Governor for the International Corporate Governance Network (ICGN), chaired the Executive Committee of the Council of Institutional Investors, and co-chaired the Conference Board's Working Group on Hedge Fund Activism. He serves on the Standing Advisory Group to the Public Company Accounting Oversight Board (PCAOB).

Public Retirement System Knowledgebase

FAS has completed five leading practices benchmarking studies over the past four years. These studies were all completed by FAS team members and include development of surveys and collection of data from selected pension fund peer groups, data validation and analysis, preparation of final reports, and follow-up discussions and webinars with participants.

- ***Public Pension Fund Governance Benchmarking Survey and Leading Practices, 2011***

The benchmarking study was very useful in helping the CalPERS Board understand governance leading practices and to move forward to implement substantive changes. Sixteen major pension funds in the U.S., Netherlands, South Africa and the U.K participated.

- ***Public Fund Investment Management Governance Survey, 2012***

This study was completed at the request of the Office of the Oregon State Treasurer (OST). It included a review of fund governance with seven peer funds utilizing a detailed analysis of 66 authorities under 9 broad "Powers Reserved" categories. The "treasurer model" and "investment board model" governance structures were compared and contrasted.

- ***Public Pension Fund Fiduciary and Governance Leading Practices Survey, 2012***

Completed at the request of the New York State Comptroller's Office, this study evaluated and identified leading and prevailing practices in eleven different areas. The study included 15 public pensions funds with AUM of \$50 billion or greater. The results were also used to highlight differences found among sole fiduciary, investment board, and integrated board governance models.

- ***Public Pension Fund Governance Leading Practices Survey, 2013***

At the request of the School Employees Retirement System of Ohio, FAS conducted a targeted benchmarking process covering five topical areas with twelve peer public pension funds with AUM ranging from \$7 billion to \$14 billion.

- ***Public Pension Investment Board Benchmarking Survey, 2014***

As part of our fiduciary performance audit of the South Carolina Retirement System Investment Commission, FAS conducted a benchmarking survey of a peer group of seven U.S. state public pension investment boards with AUM of \$10 billion or greater. Topics included various board policies and practices, decision-making processes, the custodian relationship, and personnel and sourcing strategies.

- ***Retirement Administration Agency Benchmarking Survey, 2015***

As part of our fiduciary performance audit of the South Carolina Public Employee Benefit Authority, FAS conducted a benchmarking survey of a peer group of seven public retirement systems which administer retirement benefits and are separate from the agencies which manage fund investments. Leading practice topics included board policies, practices and compliance, legal and other authorities, and organization and operations.

Publications

FAS team members have also published numerous articles and books and made presentations relating to public pension fund fiduciary responsibilities and governance. The most recent examples include:

- ***"Part 1: Bringing Home the Investment: Building the Case for Internal Investment Management,"*** article written by Rick Funston, Lance Ihinger, Randy Miller, Keith Bozarth and Keith Johnson, June 2015, available at <http://www.nasra.org/investment> .
- ***"Part 2: Bringing Home the Investment: What Does it Take to Make Internal Management Work?,"*** article written by Rick Funston, Lance Ihinger, Randy Miller, Keith Bozarth and Keith Johnson, June 2015, available at <http://www.nasra.org/investment> .

- ***“How Can Trustees Learn to Trust? – Achieving the Right Balance in Decision-Making between the Board and Executive Management,”*** article written by Rick Funston and Randy Miller, March 2015, available at www.nasra.org/governance .
- ***“Kick-starting an Internal Risk Management Dialogue,”*** article written by Rick Funston and Randy Miller, *Pensions & Investments*, September 29, 2014, p. 12.
- ***“New and Developing Approaches in Governance and Risk Management,”*** presentation and participation in a panel discussion by Rick Funston, NASRA 60th Annual Conference, Asheville, NC, August 5, 2014.
- ***“ERM 101 for Public Retirement Systems,”*** a series of five white papers written by Rick Funston and Randy Miller, May 2014, available at www.nasra.org/governance .
- ***“Public Pension Governance That Works,”*** white paper by Randy Miller and Rick Funston, March 2014, available at www.nasra.org/governance .
- ***“Shift Happens: Pension Funds under Pressure,”*** keynote presentation by Rick Funston to the Public Pension Financial Forum (P2F2) 10th Annual Conference, Scottsdale, Arizona, October 28, 2013.
- ***“Leading Practices in Fund Governance”*** keynote presentation by Rick Funston to the National Association of Public Pension Attorneys, Santa Fe, New Mexico, June 26, 2013.
- ***“Leading Practices in Governance and Risk Oversight”*** presentation by Rick Funston, The Conference Board, New York May 8, 2013.
- ***“Leading Practices in Fund Governance”*** presentation by Rick Funston, Institutional Investors Institute, Los Angeles, April 26, 2013.
- ***Leading Practices in Fund Governance”*** presentation by Rick Funston to the Fairfax County Retirement System Trustee Seminar, April 8, 2013.
- ***“Misadventures of an Irresponsible Investor,”*** Jane Ambachtsheer, Stephen Davis, Jack Gray and Keith Johnson, *Rotman International Journal of Pension Management*, Vol. 5, No. 2/2012, Page 8 (Fall 2012).
- ***“Public pension fund governance: alignment of responsibility with authority,”*** authored by Rick Funston, Keith Johnson, Randy Miller and Mark Barrott, published in the August 1, 2012 *P&I Plan Sponsor Digest*.
- ***“What Every Trustee Needs to Know About Risk,”*** presentation by Rick Funston to the Stanford Fiduciary College/National Council on Teacher Retirement Trustee Workshop, Palo Alto, July 25, 2012.
- ***“Our inability to judge time frames,”*** Jon Lukomnik, *Journal of Risk Management in Financial Institutions* (March 2012).

- **"Say-on-Pay Lawsuits—Is This Time Different?"** Kenneth B. Davis and Keith Johnson, Harvard Law School Forum on Corporate Governance and Financial Regulation Blog (February 5, 2012).
- **"Reclaiming Fiduciary Duty Balance,"** James Hawley, Keith Johnson and Edward Waitzer, *Rotman International Journal of Pension Management*, Vol. 4, No. 2, Page 4 (Fall 2011).
- **"Auditors at the Crossroads,"** Keith Johnson, *Corporate Compliance Insights* (July 25, 2011).
- **"Corporate Governance in the Wake of the Financial Crisis,"** Chapter 6, Jon Lukomnik, United Nations (2011).
- **"Institutional Fund Managers and Portfolio Churn,"** Danielle Guyatt and Jon Lukomnik, *International Journal of Pension Management* (Fall 2010).
- **"Active Shareholder Stewardship: A New Paradigm for Capitalism,"** Stephen Davis, Jon Lukomnik and David Pitt-Watson, *International Journal of Pension Management* (Fall 2009).
- **"Modernizing Pension Fund Legal Standards for the Twenty-First Century,"** Frank Jan de Graaf and Keith Johnson, *International Journal of Pension Management*, Vol. 2, Page 44 (Spring 2009).

Appendix F – CalPERS Governance Project Executive Summary

ACHIEVING THE RIGHT BALANCE



CalPERS Board Governance Project
Summary Results
September 2011



CalPERS Board Governance Project – Summary Results

The California Public Employees' Retirement System (CalPERS) is the nation's largest public pension fund with total net assets of \$237.5 billion as of June 30, 2011. Headquartered in Sacramento, CalPERS provides retirement and health benefit services to more than 1.6 million people and 3,033 school and public employers. The CalPERS System also operates eight Regional Offices located in Fresno, Glendale, Orange County, Sacramento, San Diego, San Bernardino, San Jose, and Walnut Creek.

Led by a 13-member Board of Administration, consisting of member-elected, appointed, and ex officio members, CalPERS membership consists of 1,116,044 active and inactive members and 513,623 retirees, beneficiaries, and survivors from State, school, and public agencies.

Established by legislation in 1931, the System became operational in 1932 for the purpose of providing a secure retirement to State employees. In 1939, new legislation allowed public agency and classified school employees to join the System for retirement benefits. CalPERS began administering health benefits for State employees in 1962, and five years later, public agencies joined the Health Program on a contract basis.

As a defined benefit retirement plan, CalPERS provides benefits based on a member's years of service, age, and highest compensation. In addition, benefits are provided for disability and death. Today CalPERS offers additional programs, including long-term care insurance, a deferred compensation retirement savings plan, and member education services.

Introduction

The overall role of the President of the Board of Administration¹ is to lead the Board in the conduct of Board business by managing the affairs of the Board and ensuring the integrity of the Board's processes. Consistent with this mandate, the Board President, on behalf of the Board, commissioned a Board Governance

project to examine significant areas of Board oversight, governance practices, accountability and decision-making, with the purpose of improving the effectiveness of the CalPERS Board of Administration. Each of these was addressed within the scope of the project.

Purpose of the Project

The purpose of this project was to improve the effectiveness of the CalPERS Board of Administration by improving oversight, clarifying accountability and improving decision-making. The project identified leading practices in six areas:

1. Principles for Effective Governance of Public Pension Funds
2. Board Powers Reserved and Delegation of Authority
3. Board Governance (Charters, Risk Oversight)
4. Board Self-Assessment
5. Board Self-Development
6. Selected Policies Governing Board Conduct

Options were then prepared for consideration by the Board and customized to CalPERS specific requirements. Interim reports were submitted to the CalPERS Board Governance Committee and full Board for discussion in July, August and September 2011. All approved recommendations are included in this final report which was completed in September 2011.

Project Process

Funston Advisory Services LLC (FAS), with the assistance of CalPERS fiduciary counsel, Reinhart Boerner Van Deuren s.c., collaborated with the CalPERS Board and executive staff over the time period March-September 2011 to develop a set of recommendations based upon an extensive set of activities and analyses, including:

- Review of numerous CalPERS and external documents;

CalPERS Board Governance Project – Summary Results

- Review of the websites of the 50 largest U.S. public pension funds and 12 selected international pension funds, including an analysis of their governance structures;
- Completion of a governance benchmark survey and analysis with 16 leading large pension funds (domestic and international), including identification of leading practices in public pension fund governance;
- Extensive interviews with CalPERS Board members, executives, and others;
- Development of a survey of leading practices regarding independent reassurance (both public and private sector);
- Identification of leading practices in Board self-assessment and Board self-development; and,
- Development of governance principles for public pension funds based upon leading practices.

The development of new governance principles and validation of leading governance practices for public pension funds were graciously assisted by a notable panel of independent governance experts (including Keith Ambachtsheer, Marco Becht, Peter Clapman, Stephen Davis, Keith Johnson, Jon Lukomnik, Ira Millstein, David Nierenberg, James Shinn, Therese Whitmarsh and Christianna Wood).ⁱⁱ

Actions Taken by the CalPERS Board of Administration

At the conclusion of the seven-month project, the Board of Administration approved a series of sweeping governance reforms in an effort to further strengthen accountability, efficiency, transparency and ethics at the nation's largest public pension fund. The changes provide a framework for supporting new policies and practices to improve the effectiveness of the 13-member Board, its committees and governance processes. The extensive reforms

adopted by the Board are described below and organized into ten topical areas.

1. Principles for Effective Governance of Public Pension Funds

Six new CalPERS governance principles were approved by the Board to provide a framework for the development of supporting policies and practices. These policies and practices should, in turn, help drive the achievement of goals, such as financial soundness. The principles also provide a framework for evaluating the effectiveness of the Board and enabling CalPERS to determine its current capabilities. The CalPERS Principles for Effective Public Pension Fund Governance are:

- Effective and Capable Fiduciaries.** Effectiveness is the super-ordinate principle for fund trustees to fulfill their fiduciary responsibilities to the plan's beneficiaries and participants. These fiduciary responsibilities and the nature of CalPERS business must be thoroughly understood. In turn, the Board must understand its role in successfully conducting that business and have passion for such success.
Capability, the corollary of effectiveness, requires competent Board members and executives who are able to balance short- and long-term objectives and develop and oversee the implementation of strategies for achieving intended outcomes.
- Ethical Leaders.** As ethical leaders, the Board and executive team share values about what is important and work together with mutual respect in a constructive partnership. Together, the Board and executives set the tone at the top that permeates the organization.
- Open and Accountable to Our Stakeholders.** The Board and executives are appropriately open in the way key decisions are made and publicly disclosed. Governance rules are clear and disclosed. The Board has access to the right expertise

CalPERS Board Governance Project – Summary Results

- and data free from undue influence. The Board and executives are both accountable to stakeholders for their performance.
- iv. **Risk Intelligent and Insightful in Decisions.** The Board approves the risk preferences and tolerances of the fund, and ensures the enterprise is prepared for low-probability, high impact risks and long-term sustainability. An effective enterprise risk management framework is used to consistently monitor and report aggregated risk exposures and the effectiveness of mitigation and control. The organization is willing to innovate and take calculated risks and innovate in the long-term best interests of the beneficiaries and participants.
- v. **Long-Term View of the Needs of Beneficiaries and System Participants.** The Board is actively engaged in establishing the long-term direction of the organization. It adopts a long-term, sustainable view toward, for example, financial soundness and effective retirement and health care solutions for members and employers. The Board integrates short-term and long-term perspectives on both assets and liabilities. Strategic choices are consciously made based upon strategic analysis and long-term thinking, not just a planning and budgeting process.
- vi. **Continuous Learning and Adaptation to Changing Conditions.** The Board conducts a regular assessment of its performance and capabilities. It identifies the skills and capabilities required to fulfill its fiduciary roles and responsibilities and maintains an inventory of existing trustee skills and capabilities, as well as strengths, weaknesses, gaps and priority development needs.

Detailed descriptions of each principle are available and include guidance for Board members to consider in their day-to-day activities on behalf of CalPERS and its stakeholders.ⁱⁱⁱ

2. Role of the Board and Committees

Four actions were taken to emphasize the fiduciary responsibility of Board members, their commitment to governance improvements, and the value of a long-term perspective:

- Each Board member will sign a statement acknowledging fiduciary responsibilities in conjunction with fiduciary training and self-assessment processes;
- The Board President will present an annual report which reviews progress in implementing governance reforms and improvements to Board effectiveness;
- Every two years, an independent third party will assess Board performance; and,
- The Board will develop a long-term CEO succession planning process.

The Board will continue to further improve the effectiveness and efficiency of its governance processes by increasing their focus on important strategic issues and reducing the number and length of committee meetings and the amount of time devoted to Board matters. This will help minimize unnecessary Board involvement in operational matters.

3. Role of President and Vice President / Chairs and Vice-Chairs

CalPERS already has policies^{iv} defining the role of the Board President, Vice President, Committee Chairs and Committee Vice Chairs. These policies and guidelines were found to be appropriate, but were not being followed, either in part or in full. As a result, the Board reaffirmed their commitment to implementing them as part of its governance reforms. In addition to the above-mentioned roles, the Board approved three additional actions in this area:

- Evaluate policies and processes related to Board travel to promote improved compliance, controls and value received;

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- Evaluate the best means to improve the Board committee briefing process; and,
- Develop a framework to hold all executives accountable for performance linked to the agreed organization strategy, performance metrics and compensation system.

4. Powers Reserved for the Board

The Board recognized the need to improve its strategic focus, its overall governance processes, and its oversight effectiveness. With these objectives, the governance project reviewed the fundamental responsibilities of the Board, including an analysis of existing powers reserved for the Board at CalPERS and at other public pension funds. As a result, eighty powers were identified to be reserved for the Board.^v Approximately 70 percent of these were included in existing CalPERS governance documents, and the others were newly-identified during the project.

The eighty powers reserved are characterized as one of four types of Board responsibility and authority:

- *Conduct*: the Board performs the tasks described. This includes, for example, “Conduct setting of the Board and committee agendas, linked to an annual planning calendar, by identifying, articulating, prioritizing and scheduling matters and reports the Board will regularly address.”
- *Set*: the Board is actively engaged in developing the strategies and plans for the delegated activities and has final approval authority including, for example, the mission and vision of CalPERS, legislative priorities, and health care strategy.
- *Approve*: the Board has final decision authority on delegated activities. The Board retains approval authority for a wide range of decisions where the CalPERS staff develops recommendations, including, for example, strategic asset allocation,

organization performance metrics, contracting policies, and actuarial policies.

- *Oversee*: the Board requires adequate information to watch over, scrutinize, and provide direction and support, as appropriate (as distinct from close supervision and day-to-day management), on delegated activities. Although the Board of Administration has oversight for the entire organization, the powers reserved identify those oversight activities which are critical to the success of the organization and as such require that the Board be sufficiently informed to oversee. Examples include stakeholder relations, operations and cost effectiveness, cost and quality of the health care program and financial soundness.

Fifteen powers reserved will remain the responsibility of the full Board and the other sixty-five were aligned with the Board committees for initial consideration.

5. Board Committee Structure

Two actions were approved to improve how Board committees operate:

- Ensure the process for nominating and electing committee chairs and vice chairs is transparent and well understood; and,
- Adopt a policy to review committee delegations annually and update as needed.

In addition, the Board approved a restructuring of the committees to further improve operational effectiveness and interaction with the full Board and with the CalPERS executive:

- Governance items were moved out of the Benefits and Program Administration Committee (BPAC) into the Board Governance Committee and administrative items were moved out of BPAC and into the Finance Committee (renamed Finance and Administration Committee);

CalPERS Board Governance Project – Summary Results

- The number of committees was reduced by consolidating the Health Benefits Committee and the remaining elements of BPAC into a new Pension and Health Benefits Committee; and,
- The Finance Committee and Risk Management Committee responsibilities were reconfigured to improve independent reassurance by consolidating all reassurance activities into a renamed Risk and Audit Committee.

6. Delegations to Executives and Board Reporting Relationships

The CalPERS Board made a fundamental change in the executive reporting structure to the Board in order to improve executive accountability and clarify leadership authority:

- The Board approved a motion to adopt a reporting structure with two direct reports to the Board, the CEO and the CIO (versus the previous four direct reports).

In addition, a series of other actions and policies were adopted to improve the effectiveness of Board-executive interaction and executive accountability, increase the level of mutual trust, improve independent reassurance and risk intelligence, and minimize the likelihood of undue influence:

- The Board will evaluate direct report performance and compensation based on the agreed-upon strategy, performance outcomes and metrics, not just activities;
- If the Board is not satisfied with the performance of its direct report(s), it will discipline or replace the executive(s) but will not get involved in day-to-day operations;
- The direct report(s) are responsible for providing reasonable assurance to the Board that there are capable people, processes and systems in place to achieve agreed-upon outcomes while managing

related risks so that they are within CalPERS established risk appetite;

- The Board will have ready access to all executives, such access to be coordinated by the CEO;
- The Board direct reports will have the primary authority and responsibility for the hiring, evaluation, compensation and termination of their direct reports;
- The Chief Investment Officer will retain investment autonomy and decision authority over hiring, evaluation, compensation and firing of Investment Office personnel;
- Executives (to the level of senior portfolio managers) will be required to certify in writing, at least annually, that they have been free from undue influence (i.e., when a person of higher authority exerts an influence that deprives another of his/her independent judgment) by any individual Board member, executive or third party; and,
- The Board and/or its committees will establish a schedule of closed session meetings with selected executives, i.e., those making frequent reports to the Board or significant investment decisions.

7. Setting the Board Agenda and Improving Reporting to the Board

Opportunities were identified to significantly improve control of the Board and committee agendas and meetings, with a focus on making the highest and best use of the Board's time and improving outcomes for CalPERS. The actions taken by the Board to improve the setting of the Board agenda include:

- Setting the Board agenda will be tied directly to the annual CalPERS planning calendar;
- The Board agenda will be tied directly to the Board's approval and oversight

CalPERS Board Governance Project – Summary Results

responsibilities and related outcomes (this is linked directly to the newly-defined powers reserved for the Board and the new committee structure);

- The Board President and the CEO, in consultation with the Board Committee Chairs, will actively engage the Board in setting the strategic agenda, and review and make adjustments quarterly;
- The CEO will engage the Board in collaboratively developing CalPERS strategy; and,
- The Board, working with the executive staff, will develop and adopt a concise, consistent framework for agenda decision items which includes, for example, the recommendation, description and analysis of alternatives considered, pros and cons of the recommendation, risks of action and inaction, long-term implications, and costs and benefits. This framework will be used by the Board and committees for all agenda decision items.

In addition to improving the setting of the Board agenda, the project also identified extensive opportunities to significantly improve the information reporting process from the executive to the Board. The following actions have been approved by the Board to improve the efficiency, effectiveness and insightfulness of Board decision-making, thereby leading to better outcomes and increasing the likelihood of CalPERS reaching its goals:

- The Board will maintain a list of significant topics/issues which are of interest to the full Board but are delegated for deliberation and recommendation to one of the Board committees (e.g., pension soundness, organization strategy). Each committee will report on its discussions and deliberations of significant issues and present its recommendations to the full Board to ensure that each member is adequately informed. At the same time, each Board member has a responsibility to stay

apprised of key issues being addressed by the various committees;

- The Board and each committee will review all current information reports to determine those which are statutorily required and those which may be streamlined or removed;
- The Board will define its information requirements, the thresholds that trigger Board attention for each topic, and the frequency of standard reports;
- The CEO will be responsible for keeping the Board appropriately informed and escalating issues on a timely basis;
- The Board will make use of consent agendas to bundle items which do not require debate into a single voting package to expedite approval of routine matters;
- The President and CEO will be responsible for managing the effective and efficient flow of information to the Board without being overly detailed;
- The CEO will assign a specific senior executive to coordinate with each committee and collaboratively develop the annual agenda proposals, and the effective and efficient flow of pertinent information will be a compensable performance goal for the responsible executive;
- Each committee will maintain a standing set of questions pertinent to recurring decisions or oversight for that committee. This will typically include questions related to the potential outcomes of a decision and their impact on the goals of CalPERS (e.g., what is the long-term impact of this decision on our members? How does this decision mitigate risk?);
- The Board will adopt a policy whereby committee chairs are responsible for receiving and prioritizing (based upon established policies) ad hoc requests for new reports and analyses, taking into account the effect on staff time and

CalPERS Board Governance Project – Summary Results

resources required to produce such reports and analyses;

- A sunset review of all reports will be conducted at appropriate intervals to determine their continuing utility; and,
- A Board portal will be implemented to facilitate effective decision making and best use of Board member time.

8. Board Self-Assessment Process

Although CalPERS has had a self-assessment policy and has performed annual self-assessments, the project confirmed that the existing process did not include a number of leading practices and did not meet the needs of the Board. In order to significantly improve the effectiveness of the self-assessment process, the Board adopted the following new policies:

- The Board will implement a new self-assessment process which assesses the whole Board, the president and vice president, individual members, committees, and committee chairs and vice chairs, and includes multiple bases for evaluation:
 - Principles;
 - Responsibility and authority;
 - Process; and,
 - Outcomes.
- One or more techniques will be utilized for obtaining self-assessment feedback:
 - Expert third party facilitator to lead or co-lead (with the Board President) the self-assessment process;
 - Get feedback from external key stakeholders on Board performance;
 - Obtain a third party evaluation of the Board's performance; and,
 - Include peer-to-peer and upward evaluations (360°) from staff.

9. Board Self-Development Process

The goal of a Board self-development program is to improve the effectiveness and efficiency of the Board. The traditional CalPERS education program has focused primarily on the legal process and structure, which is necessary, but not sufficient, for improved Board effectiveness.

The project identified opportunities for programs which focus on team dynamics, Board culture and soft skills such as collaboration and group problem solving, as well as additional education in select technical areas such as investing, insurance, actuarial standards, and technology.

The Board approved the following new policies to improve the effectiveness of its self-development efforts:

- An annual continuing education plan and budget will be established;
- Leadership education will be provided to all Board members on the role of the Board vis-à-vis management and the role of the chairs and vice-chairs in the effective management of Board and staff time;
- A profile of the skills and attributes desired for the Board overall and for each committee chair and member will be developed, and Board development programs will be designed consistent with the desired attributes and skills;
- Certain Board self-development activities will be tied directly to topics contained in the decision-making agenda;
- An educational element will be built into each Board meeting, or if not each meeting, in a regular cadence; and,
- The Board will evaluate public disclosure of the annual development activities completed by each member.

CalPERS Board Governance Project – Summary Results

10. Selected Policies Governing Board Conduct

Benchmarking identified a confidentiality policy as a leading practice to help preserve the integrity of the Board’s decision-making process and protect confidential information. Consequently, the Board has adopted the following:

- For matters which legitimately should be kept confidential (personnel matters, contract negotiations, sensitive investment information), the Board will adopt a confidentiality policy which:
 - Provides for disciplinary action if violated;
 - Applies to Board members, staff, and external service providers; and,
 - Prohibits use of confidential information for personal gain or for the benefit of outside interests.

The Board Governance Project

Many of the improvements contained in this landmark governance project are already underway. Some will take significant time and effort to fully implement. However, the CalPERS Board of Administration believes this program, in its entirety, represents a critical step in helping to ensure the public’s trust in its decisions, actions and operations.

As indicated previously, the Board President will report annually on the Board’s progress in improving its governance and on the results of this reform program. In addition, an expert, independent third party will be asked to review CalPERS governance biannually to ensure objective, informed feedback, support for continuing improvement, and full transparency with all stakeholders.

Endnotes

ⁱ See CalPERS Board of Administration Statement of Governance Principles, December 2009

ⁱⁱ See Appendix M for biographies of all Expert Panel members

ⁱⁱⁱ See Appendix A for a full definition of each principle

^{iv} See CalPERS Board of Administration Statement of Governance Principles, December 2009

^v See Appendix D for a full listing of Powers Reserved for the Board

APPENDIX E
DOMESTIC WORKFORCE UTILIZATION CERTIFICATION

To the extent permitted by the laws and treaties of the United States, each proposal will be scored for its commitment to use the domestic workforce in the fulfillment of the contract. Maximum consideration will be given to those Contractors who will perform the contracted direct labor exclusively within the geographical boundaries of the United States or within the geographical boundaries of a country that is a party to the World Trade Organization Government Procurement Agreement. Those who propose to perform a portion of the direct labor outside of the United States and not within the geographical boundaries of a party to the World Trade Organization Government Procurement Agreement will receive a correspondingly smaller score for this criterion. In order to be eligible for any consideration for this criterion, Contractors must complete and sign the following certification. This certification will be included as a contractual obligation when the contract is executed. Failure to complete and sign this certification will result in no consideration being given to the Contractor for this criterion.

I, Managing Director of Funston Advisory Services LLC, a Michigan corporation, ("Contractor") located at 6632 Telegraph Road, #225, Bloomfield Hills, Michigan 48301, having a Federal Identification Number of 27-2425494, do hereby certify and represent to the Commonwealth of Pennsylvania ("Commonwealth") (Check **one** of the boxes below):

All of the direct labor performed within the scope of services under the contract will be performed exclusively within the geographical boundaries of the United States or one of the following countries that is a party to the World Trade Organization Government Procurement Agreement: Aruba, Austria, Belgium, Bulgaria, Canada, Chinese Taipei, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom
OR

_____ percent (____%) [**Contractor must specify the percentage**] of the direct labor performed within the scope of services under the contract will be performed within the geographical boundaries of the United States or within the geographical boundaries of one of the countries listed above that is a party to the World Trade Organization Government Procurement Agreement. Please identify the direct labor performed under the contract that will be performed outside the United States and not within the geographical boundaries of a party to the World Trade Organization Government Procurement Agreement and identify the country where the direct labor will be performed: _____

[Use additional sheets if necessary]

The State Employees' Retirement System shall treat any misstatement as fraudulent concealment of the true facts punishable under Section 4904 of the *Pennsylvania Crimes Code*, Title 18, of Pa. Consolidated Statutes.

Attest or Witness:

Funston Advisory Services LLC
Corporate or Legal Entity's Name

 7/27/2015

Signature/Date
Randall Miller, Principal
Printed Name/Title

 7/27/2015

Signature/Date
Frederick Funston, Managing Partner
Printed Name/Title

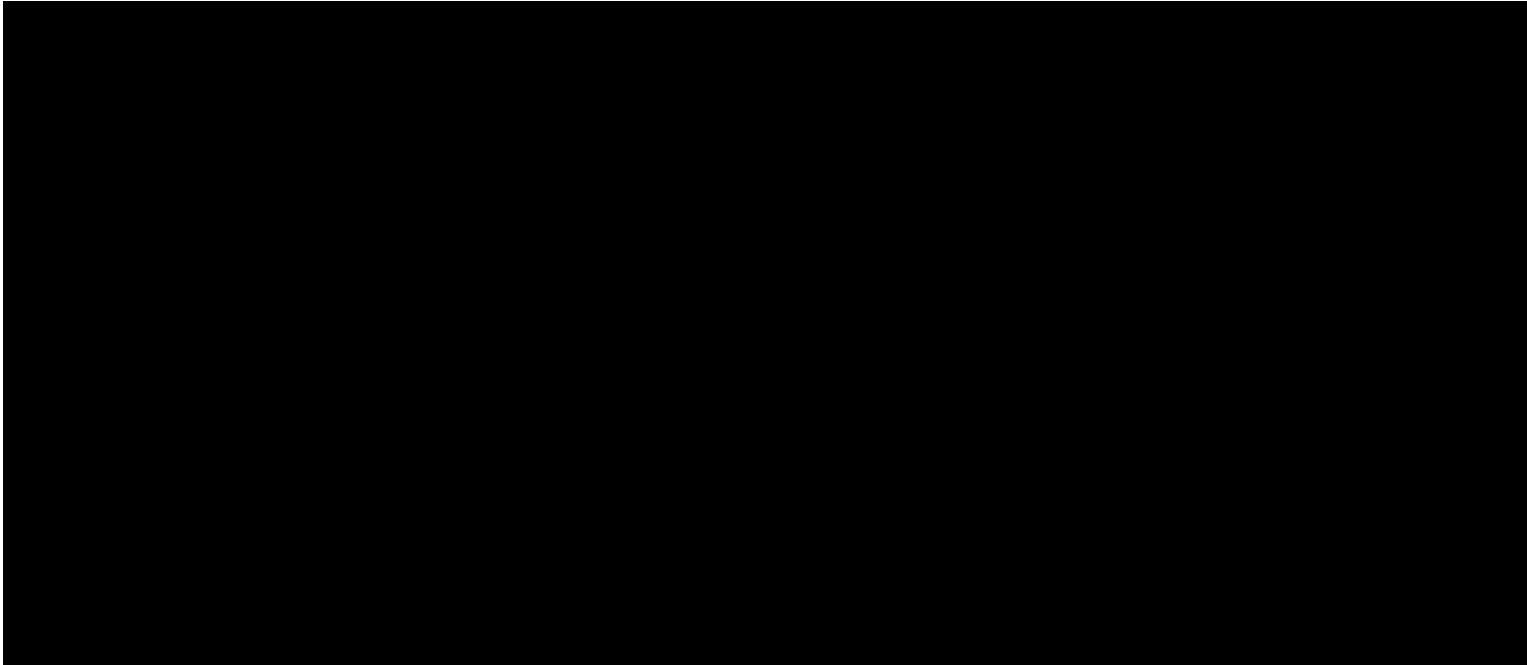


EXHIBIT C

**CONSULTING SERVICES ITQ
CONTRACT 4400007410**

REQUEST FOR QUOTATIONS FOR

REVIEW OF SERS BOARD AND ORGANIZATIONAL STRUCTURE

ISSUING OFFICE

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE EMPLOYEES' RETIREMENT SYSTEM ("PA SERS")**

RFQ NUMBER

SERS 2015-001

DATE OF ISSUANCE

JUNE 29, 2015

This is a restricted solicitation under the Commonwealth's Consulting Services, Invitation to Qualify (ITQ), - Contract #4400007410. For responses to be considered, all interested consultants must be registered as a Pennsylvania supplier and only those contractors qualified in the following service category under Contract #4400007410 may submit a proposal in response to this RFQ:

- **Management General Government Operations – Best Practice Analysis**

For more information about the Consulting Services ITQ, please click on the following link:

http://www.portal.state.pa.us/portal/server.pt/community/invitation_to_qualify/4641/where_to_start/495422

All consultants that wish to be considered for this RFQ will need to provide documents as specified in Part II, Proposal Requirements.

REQUEST FOR QUOTATIONS

FOR

SERS 2015-001 - REVIEW OF SERS BOARD AND ORGANIZATIONAL STRUCTURE

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APPENDIX D, COST MATRIX

APPENDIX E, DOMESTIC WORKFORCE UTILIZATION CERTIFICATION

CALENDAR OF EVENTS

The Commonwealth will make every effort to adhere to the following schedule:

| Activity | Responsibility | Date |
|--|--------------------------------|------------------------------|
| Deadline to submit Questions via email to: Joshua D. Smith, smjoshua@pa.gov | Contractors | July 15, 2015 |
| Preproposal Conference – N/A | Issuing Office/ Contractors | N/A |
| Answers to Potential Contractor questions posted to PA eMarketplace (http://www.emarketplace.state.pa.us) no later than this date. | Issuing Office | July 22, 2015 |
| Please monitor the PA eMarketplace website for all communications regarding the RFQ. | Contractors | |
| Sealed proposal must be received by the Issuing Office at: State Employees' Retirement System Attn: Joshua D. Smith 30 North Third Street, Suite 150 Harrisburg, PA 17101-1716 | Contractors | July 29, 2015 4:30 PM EST |

PART I
GENERAL INFORMATION

I-1. Purpose

This Request for Quotes ("RFQ") provides sufficient information to qualified Contractors to enable them to prepare and submit proposals for the State Employees' Retirement System's consideration on behalf of the Commonwealth of Pennsylvania ("Commonwealth") to satisfy a need for the Review of SERS Board and Organizational Structure ("Project").

I-2. Issuing Office

The State Employees' Retirement System (SERS) ("Issuing Office") has issued this RFQ on behalf of the Commonwealth. The sole point of contact in the Commonwealth for this RFQ shall be **Joshua D. Smith, 30 North Third Street, Suite 150, Harrisburg, PA 17101, smjoshua@pa.gov**, the Issuing Officer for this RFQ. Please refer all inquiries to the Issuing Officer.

I-3. Scope

This RFQ contains instructions governing the requested proposals, including the requirements for the information and material to be included; a description of the service to be provided; requirements which Contractors must meet to be eligible for consideration; general evaluation criteria; and other requirements specific to this RFQ.

I-4. Problem Statement

The SERS Board, through its Audit Committee, is interested in receiving consulting services of a Contractor with an established expertise in reviewing, assessing and developing the governance structure and practices of large state pension funds. Additional detail is provided in **Part IV** of this RFQ.

I-5. Preproposal Conference.

There will be no preproposal conference for this RFQ. If there are any questions, please forward them to the Issuing Officer in accordance with Section I-6.

I-6. Questions and Answers

If a Contractor has any questions regarding this RFQ, the Contractor must submit the questions by email (with the subject line "Consulting Services ITQ RFQ SERS 2015-001 Question") to the Issuing Officer. If the Contractor has questions, they must be submitted via email no later than the date and time specified in the Calendar of Events. The Contractor shall not attempt to contact the Issuing Officer by any other means. The Issuing Officer shall post the answers to the DGS website.

A Contractor who submits a question *after* the deadline date for receipt of questions indicated on the Calendar of Events assumes the risk that its proposal will not be responsive or competitive because the Commonwealth is not able to respond before the

proposal receipt date or in sufficient time for the Contractor to prepare a responsive or competitive proposal. When submitted after the deadline date for receipt of questions indicated on the Calendar of Events, the Issuing Officer *may* respond to questions of an administrative nature by directing the questioning Contractor to specific provisions in the RFQ. To the extent that the Issuing Office decides to respond to a non-administrative question *after* the deadline date for receipt of questions indicated on the Calendar of Events, the answer will be provided to all Contractors through an addendum.

All questions and responses as posted on the DGS website are considered as an addendum to, and part of, this RFQ in accordance with RFQ **Part I, Section I-7**. Each Contractor shall be responsible to monitor the DGS website for new or revised RFQ information. The Issuing Office shall not be bound by any verbal information nor shall it be bound by any written information that is not either contained within the RFQ or formally issued as an addendum by the Issuing Office.

I-7. Addenda to RFQ

If the Issuing Office deems it necessary to revise any part of this RFQ before the proposal response date, the Issuing Office will post an addendum to the DGS website at <http://www.emarketplace.state.pa.us>. Answers to the questions asked during the Questions & Answers period also will be posted to the DGS website as an addendum to the RFQ.

I-8. Electronic Version of RFQ

This RFQ is being made available by electronic means. The Contractor acknowledges and accepts full responsibility to insure that no changes are made to the RFQ. In the event of a conflict between a version of the RFQ in the Contractor's possession and the Issuing Office's version of the RFQ, the Issuing Office's version shall govern.

I-9. Response Date

To be considered, proposals must arrive at the Issuing Office on or before the time and date specified in the RFQ Calendar of Events. Contractors who mail proposals should allow sufficient mail delivery time to ensure timely receipt of their proposals. If, due to inclement weather, natural disaster, or any other cause, the Issuing Office location to which proposals are to be returned is closed on the proposal response date, the deadline for submission shall be automatically extended until the next Commonwealth business day on which the office is open, unless the Contractors are otherwise notified by the Commonwealth. The time for submission of proposals shall remain the same. Late proposals shall not be considered.

I-10. Incurring Costs

The Issuing Office is not liable for any costs the Contractor incurs in preparation and submission of its proposal, in participating in the RFQ process or in anticipation of receipt of the purchase order.

I-11. Economy Of Preparation

Contractors should prepare proposals simply and economically, providing a straightforward, concise description of the Contractor's ability to meet the requirements of the RFQ.

I-12. Small Diverse Business Information. The Issuing Office encourages participation by small diverse businesses as prime contractors, and encourages all prime contractors to make a significant commitment to use small diverse businesses as subcontractors and suppliers.

A Small Diverse Business is a DGS-verified minority-owned business, woman-owned business, veteran-owned business or service-disabled veteran-owned business.

A small business is a business in the United States which is independently owned, not dominant in its field of operation, employs no more than 100 full-time or full-time equivalent employees, and earns less than \$7 million in gross annual revenues for building design, \$20 million in gross annual revenues for sales and services and \$25 million in gross annual revenues for those businesses in the information technology sales or service business.

Questions regarding this Program can be directed to:

Department of General Services
Bureau of Small Business Opportunities
Room 611, North Office Building
Harrisburg, PA 17125
Phone: (717) 783-3119
Fax: (717) 787-7052
Email: gs-bsbo@pa.gov
Website: www.dgs.pa.gov

The Department's directory of BSBO-verified minority, women, veteran and service disabled veteran-owned businesses can be accessed from: [Searching for Small Diverse Businesses](#).

I-13. Proposals

To be considered, Contractors must submit a complete proposal to this RFQ, using the format provided in PART II, providing **10 (ten) paper copies [one marked "ORIGINAL"] of the Technical Submittal and two (2) paper copies of the Cost Submittal and two (2) paper copies of the Small Diverse Business Submittal.** In addition to the paper copies of the proposal, Contractors shall submit **two (2) complete and exact copies of the entire proposal** (Technical, Cost and Small Diverse Business Submittals, along with all requested documents) on CD-ROM or Flash drive in Microsoft Office or Microsoft Office-compatible format. The electronic copy must be a mirror image of the paper copy and any spreadsheets must be in Microsoft Excel. The Contractors may not lock or protect any cells or tabs. Contractors should ensure that there is no costing information in the technical submittal. Contractors should not reiterate technical information in the cost submittal. The CD or Flash drive should clearly identify the Contractor and include the name and version number of the virus scanning software that was used to scan the CD or Flash drive before it

was submitted. The Contractor shall make no other distribution of its proposal to any other Contractor or Commonwealth official or Commonwealth consultant. Each proposal page should be numbered for ease of reference. An official authorized to bind the Contractor to its provisions must affix a legible original signature to the original proposal. If the official affixes a legible original signature to the original Proposal Cover Sheet (**Appendix A, Proposal Cover Sheet** to this RFQ) and the Proposal Cover Sheet is attached to the Contractor's proposal, the requirement will be met. For this RFQ, the proposal must remain valid for one hundred and twenty (120) days or until a purchase order is executed. If the Issuing Office selects the Contractor's proposal as the best value, the contents of the selected Contractor's proposal will become, except to the extent the contents are changed through Best and Final Offers or negotiations, contractual obligations.

Each Contractor submitting a proposal specifically waives any right to withdraw or modify it, except that the Contractor may withdraw its proposal by written notice received at the Issuing Office's address for proposal delivery prior to the exact hour and date specified for proposal receipt. A Contractor or its authorized representative may withdraw its proposal in person prior to the exact hour and date set for proposal receipt, provided the withdrawing person provides appropriate identification and signs a receipt for the proposal. A Contractor may modify its submitted proposal prior to the exact hour and date set for proposal receipt only by submitting a new sealed proposal or sealed modification which complies with the RFQ requirements.

I-14. Alternate Proposals.

The Issuing Office has identified the basic approach to meeting its requirements, allowing Contractors to be creative and propose their best solution to meeting these requirements. The Issuing Office will not accept alternate proposals.

I-15. Proposal Contents

- a. Confidential Information. The Commonwealth is not requesting, and does not require, confidential proprietary information or trade secrets to be included as part of Contractors' submissions in order to evaluate proposals submitted in response to this RFQ. Accordingly, except as provided herein, Contractors should not label proposal submissions as confidential or proprietary or trade secret protected. Any Contractor who determines that it must divulge such information as part of its proposal must submit the signed written statement described in subsection c. below and must additionally provide a redacted version of its proposal, which removes only the confidential proprietary information and trade secrets, for required public disclosure purposes.
- b. Commonwealth Use. All material submitted with the proposal shall be considered the property of the Commonwealth of Pennsylvania and may be returned only at the Issuing Office's option. The Commonwealth has the right to use any or all ideas not protected by intellectual property rights that are presented in any proposal regardless of whether the proposal becomes part of a contract. Notwithstanding any Contractor copyright designations contained on proposals, the Commonwealth shall

have the right to make copies and distribute proposals internally and to comply with public record or other disclosure requirements under the provisions of any Commonwealth or United States statute or regulation, or rule or order of any court of competent jurisdiction.

- c. Public Disclosure. After the issuance of a purchase order pursuant to this RFQ, all proposal submissions are subject to disclosure in response to a request for public records made under the Pennsylvania Right-to-Know-Law, 65 P.S. § 67.101, et seq. If a proposal submission contains confidential proprietary information or trade secrets, a signed written statement to this effect must be provided with the submission in accordance with 65 P.S. § 67.707(b) for the information to be considered exempt under 65 P.S. § 67.708(b)(11) from public records requests (*See Appendix B, Trade Secret/Confidential Proprietary Information Notice*). Financial capability information submitted in response to Part II, Section II-8 of this RFQ is exempt from public records disclosure under 65 P.S. § 67.708(b)(26).

I-16. Contractor's Representations and Authorizations

By submitting its proposal, each Contractor understands, represents, and acknowledges that:

- a. All of the Contractor's information and representations in the proposal are material and important, and the Issuing Office may rely upon the contents of the proposal in making a best value selection. The Commonwealth shall treat any misstatement, omission or misrepresentation as fraudulent concealment of the true facts relating to the proposal submission, punishable pursuant to 18 Pa. C.S. § 4904.
- b. The Contractor has arrived at the price(s) and amounts in its proposal independently and without consultation, communication, or agreement with any other Contractor or potential Contractor.
- c. The Contractor has not disclosed the price(s), the amount of the proposal, nor the approximate price(s) or amount(s) of its proposal to any other firm or person who is a Contractor or potential Contractor for this RFQ, and the Contractor shall not disclose any of these items on or before the proposal submission deadline specified in the Calendar of Events of this RFQ.
- d. The Contractor has not attempted, nor will it attempt, to induce any firm or person to refrain from submitting a proposal on this contract, or to submit a proposal higher than this proposal, or to submit any intentionally high or noncompetitive proposal or other form of complementary proposal.
- e. The Contractor makes its proposal in good faith and not pursuant to any agreement or discussion with, or inducement from, any firm or person to submit a complementary or other noncompetitive proposal.

- f. To the best knowledge of the person signing the proposal for the Contractor, the Contractor, its affiliates, subsidiaries, officers, directors, and employees are not currently under investigation by any governmental agency and have not in the last **four** years been convicted or found liable for any act prohibited by State or Federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding or proposing on any public contract, except as the Contractor has disclosed in its proposal.
- g. To the best of the knowledge of the person signing the proposal for the Contractor and except as the Contractor has otherwise disclosed in its proposal, the Contractor has no outstanding, delinquent obligations to the Commonwealth including, but not limited to, any state tax liability not being contested on appeal or other obligation of the Contractor that is owed to the Commonwealth.
- h. The Contractor is not currently under suspension or debarment by the Commonwealth, any other state or the federal government, and if the Contractor cannot so certify, then it shall submit along with its proposal a written explanation of why it cannot make such certification.
- i. The Contractor has not made, under separate contract with the Issuing Office, any recommendations to the Issuing Office concerning the need for the services described in its proposal or the specifications for the services described in the proposal.
- j. Each Contractor, by submitting its proposal, authorizes Commonwealth agencies to release to the Commonwealth information concerning the Contractor's Pennsylvania taxes, unemployment compensation and workers' compensation liabilities.
- k. Until the selected Contractor receives a fully executed purchase order from the Issuing Office, there is no legal and valid contract, in law or in equity, and the Contractor shall not begin to perform work, for the Project.

I-17. Restriction Of Contact

From the issue date of this RFQ until the Issuing Office selects a proposal as the best value, the Issuing Officer is the sole point of contact concerning this RFQ. Any violation of this condition may be cause for the Issuing Office to reject the offending Contractor's proposal. If the Issuing Office later discovers that the Contractor has engaged in any violations of this condition, the Issuing Office may reject the offending Contractor's proposal or rescind its purchase order. Contractors must agree not to distribute any part of their proposals beyond the Issuing Office. A Contractor who shares information contained in its proposal with other Commonwealth personnel and/or competing Contractor personnel may be disqualified.

I-18. Prime Contractor Responsibilities

The selected Contractor will be required to assume responsibility for all services offered in the proposal whether it produces them itself or by subcontract. The Issuing Office and

Project Manager will consider the selected Contractor to be the sole point of contact with regard to contractual and purchase order matters.

I-19. Resources

Contractors shall provide all services, supplies, facilities, and other support necessary to complete the identified work, except as otherwise provided in this Section I-19. The Issuing Office will provide oversight to ensure that all aspects of any agreement entered into are satisfactorily performed. The Contractor is responsible for identifying, in its proposal, all personnel and other needs the Contractor anticipates will be provided by the Commonwealth. Needs not specified will be assumed to be the responsibility of the Contractor. The Issuing Office will provide office space and equipment that will be necessary during the period of the contract performance.

I-20. Rejection Of Proposals

The Issuing Office reserves the right, in its sole and complete discretion, to reject any proposal received in response to this RFQ, or to negotiate separately with competing Contractors.

I-21. Discussions for Clarification

Contractors may be required to make an oral or written clarification of their proposals to the Issuing Office to ensure thorough mutual understanding and contractor responsiveness to the RFQ requirements. The Issuing Office will initiate requests for clarification.

I-22. Best and Final Offer (BAFO)

- a. While not required, the Issuing Office reserves the right to conduct discussions with Contractors for the purpose of obtaining “Best and Final Offers.” To obtain Best and Final Offers from Contractors, the Issuing Office may do one or more of the following, in combination and in any order:
 - 1. Schedule oral presentations;
 - 2. Request revised proposals;
 - 3. Conduct a reverse online auction; and
 - 4. Enter into pre-selection negotiations.
- b. The following Contractors will **not** be invited by the Issuing Office to submit a Best and Final Offer:
 - 1. Those Contractors which the Issuing Office has determined to be not responsible or whose proposals the Issuing Office has determined to be not responsive.
 - 2. Those Contractors, which the Issuing Office has determined in accordance with **Part III, Section III-4**, from the submitted and gathered financial and other information,

do not possess the financial capability, experience or qualifications to assure good faith performance of the Project.

3. Those Contractors whose score for their technical submittal of the proposal is less than 70% of the total amount of technical points allotted to the technical criterion.

The Issuing Office may further limit participation in the Best and Final Offers process to those remaining responsible Contractors which the Issuing Office has, within its discretion, determined to be within the top competitive range of responsive proposals.

- c. Evaluation Criteria found in **Part III, Section III-3**, shall also be used to evaluate the Best and Final Offers.
- d. Price reductions offered through any reverse online auction shall have no effect upon the Contractor's Technical Submittal. Dollar commitments to Small Diverse Businesses can be reduced only in the same percentage as the percent reduction in the total price offered through any reverse online auction or negotiations.

I-23. Notification of Selection

The Issuing Office will notify the selected Contractor in writing of its selection as the best value contractor after the Issuing Office has determined, taking into consideration all of the evaluation factors, the proposal that is the most advantageous to the Issuing Office.

I-24. Purchase Order

The successful Contractor will be issued a purchase order with reference to Consulting Services ITQ Contract 4400007410. The term of the purchase order will commence on the Effective Date and will end in 1 (one) year. No work may begin or be reimbursed prior to the date of issuance of the purchase order. The selected Contractor will be paid after submitting invoices, provided it is in accordance with the work plan and approved by the Commonwealth Project Manager. Final payment will not be made until all Project work has been successfully completed.

I-25. Debriefing Conferences

Contractors whose proposals are not selected will be notified of the name of the selected contractor and given the opportunity to be debriefed. The Issuing Office will schedule the time and location of the debriefing. The debriefing will not compare the contractor with other contractors, other than the position of the Contractor's proposal in relation to all other contractor proposals.

I-26. News Releases

Contractors shall not issue news releases, internet postings, advertisements or any other public communications pertaining to this Project without prior written approval of the Issuing Office, and then only in coordination with the Issuing Office.

I-27. Terms and Conditions

The requirements and terms and conditions of Consulting Services ITQ #4400007410 shall govern all work conducted as a result of this RFQ.

PART II

PROPOSAL REQUIREMENTS

II-1. General Requirements

Contractors must submit their proposals in the format, including heading descriptions, outlined below. To be considered, the proposal must respond to all requirements in this part of the RFQ. Contractors should provide any other information thought to be relevant, but not applicable to the enumerated categories, as an appendix to the Proposal. All cost data relating to this proposal and all Small Diverse Business cost data should be kept separate from and not included in the Technical Submittal. Each Proposal shall consist of the following **three** separately sealed submittals:

- a. Technical Submittal, which shall be a response to RFQ **Part II, Sections II-1 through II-8**;
- b. Small Diverse Business Submittal, in response to RFQ **Part II, Section II-9**; and
- c. Cost Submittal, in response to RFQ **Part II, Section II-10**.

The Issuing Office reserves the right to request additional information which, in the Issuing Office's opinion, is necessary to assure that the Contractor's competence, number of qualified employees, business organization, and financial resources are adequate to perform according to the RFQ.

The Issuing Office may make investigations as deemed necessary to determine the ability of the Contractor to perform the Project, and the Contractor shall furnish to the Issuing Office all requested information and data. The Issuing Office reserves the right to reject any proposal if the evidence submitted by, or investigation of, such Contractor fails to satisfy the Issuing Office that such Contractor is properly qualified to carry out the obligations of the RFQ and to complete the Project as specified.

II-2. Statement of the Problem

State in succinct terms your understanding of the problem presented or the service required by this RFQ.

II-3. Management Summary

Include a narrative description of the proposed effort and a list of the items to be delivered or services to be provided.

II-4. Work Plan

Describe in narrative form your technical plan for accomplishing the work. Use the task descriptions in **Part IV** of this RFQ as your reference point. Modifications of the task descriptions are permitted; however, reasons for changes should be fully explained. Indicate the number of person hours allocated to each task. Include a Program Evaluation

and Review Technique (PERT) or similar type display, time related, showing each event. If more than one approach is apparent, comment on why you chose this approach.

II-5. Prior Experience

Include experience in reviewing of board and organizational structures for large pension funds. Experience shown should be work done by individuals who will be assigned to this project as well as that of your company. Studies or projects referred to must be identified and the name of the customer shown, including the name, address, and telephone number of the responsible official of the customer, company, or agency who may be contacted.

II-6. Personnel

Include the number of executive and professional personnel, analysts, auditors, researchers, programmers, consultants, etc., who will be engaged in the work. Show where these personnel will be physically located during the time they are engaged in the Project. For key personnel, include the employee's name and, through a resume or similar document, the employee's education and experience. Indicate the responsibilities each individual will have in this Project and how long each has been with your company. Identify by name any subcontractors you intend to use and the services they will perform.

Resumes are not to include personal information that will, or will be likely to, require redaction prior to release of the proposal under the Right to Know Law. This includes home addresses and phone numbers, Social Security Numbers, Drivers' License numbers or numbers from state ID cards issued in lieu of a Drivers' License, financial account numbers, etc. If the Commonwealth requires any of this information for security verification or other purposes, the information will be requested separately and as necessary.

II-7. Training

If appropriate, indicate recommended training of agency personnel. Include the agency personnel to be trained, the number to be trained, duration of the program, place of training, curricula, training materials to be used, number and frequency of sessions, and number and level of instructors.

II-8. Emergency Preparedness.

To support continuity of operations during an emergency, including a pandemic, the Commonwealth needs a strategy for maintaining operations for an extended period of time. One part of this strategy is to ensure that essential contracts that provide critical business services to the Commonwealth have planned for such an emergency and put contingencies in place to provide needed goods and services.

- a. Describe how you anticipate such a crisis will impact your operations.
- b. Describe your emergency response continuity of operations plan. Please attach a copy of your plan, or at a minimum, summarize how your plan addresses the following aspects of pandemic preparedness:
 - i) Employee training (describe your organization's training plan, and how frequently your plan will be shared with employees)

- ii) Identified essential business functions and key employees (within your organization) necessary to carry them out
- iii) Contingency plans for:
 - How your organization will handle staffing issues when a portion of key employees are incapacitated due to illness.
 - How employees in your organization will carry out the essential functions if contagion control measures prevent them from coming to the primary workplace.
- iv) How your organization will communicate with staff and suppliers when primary communications systems are overloaded or otherwise fail, including key contacts, chain of communications (including suppliers), etc.
- v) How and when your emergency plan will be tested, and if the plan will be tested by a third-party.

II-9. Small Diverse Business Submittal

- A.** To receive credit for being a Small Diverse Business or for subcontracting with a Small Diverse Business (including purchasing supplies and/or services through a purchase agreement), a Contractor must include proof of Small Diverse Business qualification in the Small Diverse Business Submittal of the proposal, as indicated below:

A Small Diverse Business verified by BSBO as a Small Diverse Business must provide a photocopy of their verification letter.

- B.** In addition to the above verification letter, the Contractor must include in the Small Diverse Business participation Submittal of the proposal the following information:

- 1) All Contractors, must include a numerical percentage which represents the total percentage of the work (as a percentage of the total cost in the Cost Submittal) to be performed by the Contractor and not by subcontractors and suppliers.
- 2) **All** Contractors must include a numerical percentage which represents the total percentage of the total cost in the Cost Submittal that the Contractor commits to paying to Small Diverse Businesses as subcontractors. To support its total percentage SDB subcontractor commitment, Contractor must also include:
 - a) The percentage and the dollar amount of each subcontract commitment to a Small Diverse Business.

- b) The name of each Small Diverse Business. The Contractor will not receive credit for stating that after the purchase order is issued it will find a Small Diverse Business.
 - c) The services or supplies each Small Diverse Business will provide, including the timeframe for providing the services or supplies.
 - d) The location where each Small Diverse Business will perform services.
 - e) The timeframe for each Small Diverse Business to provide or deliver the goods or services.
 - f) A subcontract or letter of intent signed by the Offeror and the Small Diverse Business (SDB) for each SDB identified in the SDB Submittal. The subcontract or letter of intent must identify the specific work, goods or services the SDB will perform, how the work, goods or services relates to the project, and the specific timeframe during the term of the contract and any option/renewal periods when the work, goods or services will be performed or provided. In addition, the subcontract or letter of intent must identify the fixed percentage commitment and associated estimated dollar value that each SDB will receive based on the total value of the initial term of the contract as provided in the Offeror's Cost Submittal. Attached is **Appendix C, Small Diverse Business Letter of Intent**, containing a letter of intent template which may be used to satisfy these requirements.
 - g) The name, address and telephone number of the primary contact person for each Small Diverse Business.
- 3) The total percentages and each subcontractor commitment will become contractual obligations once the Purchase Order is issued.
 - 4) The name and telephone number of the Contractor's project (contact) person for the Small Diverse Business information.
- C. The Contractor is required to submit two (2) copies of its Small Business participation Business Submittal. The submittal shall be clearly identified as Small Diverse Business information and sealed in its own envelope, separate from the remainder of the proposal.

- D. A Small Diverse Business can be included as a subcontractor with as many prime contractors as it chooses in separate proposals.
- E. A Contractor that qualifies as a Small Diverse Business and submits a proposal as a prime contractor is not prohibited from being included as a subcontractor in separate proposals submitted by other Contractors.

II-10. Cost Submittal

The information requested in this **Section II-10** and **Appendix D**, Cost Matrix shall constitute the Cost Submittal. The Cost Submittal shall be placed in a separate sealed envelope within the sealed proposal and kept separate from the technical submittal. The total cost you are proposing must be broken down into the components listed on **Appendix D**.

Contractors should **not** include any assumptions in their cost submittals. If the Contractor includes assumptions in its cost submittal, the Issuing Office may reject the proposal. Contractors should direct in writing to the Issuing Office pursuant to **Part I, Section I-6** of this RFQ, any questions about whether a cost or other component is included or applies. All Contractors will then have the benefit of the Issuing Office's written answer so that all proposals are submitted on the same basis.

II-11. Domestic Workforce Utilization

Contractors must complete and sign the Domestic Workforce Utilization Certification attached to and made a part of this RFQ as **Appendix D, Domestic Workforce Utilization Certification**. Contractors who seek consideration for the Domestic Workforce Utilization Certification criterion must complete, sign and submit the Domestic Workforce Utilization Certification Form in the same sealed envelope with the Technical Submittal.

PART III

CRITERIA FOR SELECTION

III-1. Mandatory Responsiveness Requirements. To be eligible for selection, a proposal must be:

- A. Timely received from an Contractor;
- B. Properly signed by the Contractor.

III-2. Technical Nonconforming Proposals. The two (2) Mandatory Responsiveness Requirements set forth in **Section III-1** above (A-B) are the only RFQ requirements that the Commonwealth will consider to be *non-waivable*. The Issuing Office reserves the right, in its sole discretion, to (1) waive any other technical or immaterial nonconformities in an Contractor's proposal, (2) allow the Contractor to cure the nonconformity, or (3) consider the nonconformity in the scoring of the Contractor's proposal.

III-3. Evaluation. The Issuing Office has selected a committee of qualified personnel to review and evaluate timely submitted proposals. Independent of the committee, BSBO will evaluate the Small Diverse Business participation submittal and provide the Issuing Office with a rating for this component of each proposal. The Issuing Office will notify in writing the responsible Contractor whose proposal is determined to offer the best value to the Commonwealth as determined by the Issuing Office after taking into consideration all of the evaluation factors.

III-4. Evaluation Criteria. The following criteria will be used in evaluating each proposal:

- A. **Technical:** The Issuing Office has established the weight for the Technical criterion for this RFQ as **50%** of the total points. Evaluation will be based upon the following in order of importance: **Understanding the Problem, Contractor Qualifications, Soundness of Approach, Personnel Qualifications.** The final Technical scores are determined by giving the maximum number of technical points available to the proposal with the highest raw technical score. The remaining proposals are rated by applying the Technical Scoring Formula set forth at the following webpage: http://www.portal.state.pa.us/portal/server.pt/community/RFQ_scoring_formulas_overview/20124.
- B. **Cost:** The Issuing Office has established the weight for the Cost criterion for this RFQ as **30%** of the total points. The cost criterion is rated by giving the proposal with the lowest total cost the maximum number of Cost points available. The remaining proposals are rated by applying the Cost Formula set forth at the following webpage: http://www.portal.state.pa.us/portal/server.pt/community/RFQ_scoring_formulas_overview/20124

C. Small Diverse Business Participation

BSBO has established the weight for the Small Diverse Business (SDB) participation criterion for this RFQ as **20%** of the total points. Each SDB participation submittal will be rated for its approach to enhancing the utilization of SDBs in accordance with the below-listed priority ranking and subject to the following requirements:

1. A business submitting a proposal as a prime contractor must perform 60% of the total contract value to receive points for this criterion under any priority ranking.
2. To receive credit for an SDB subcontracting commitment, the SDB subcontractor must perform at least fifty percent (50%) of the work subcontracted to it.
3. A significant subcontracting commitment is a minimum of five percent (5%) of the total contract value.
4. A subcontracting commitment less than five percent (5%) of the total contract value is considered nominal and will receive reduced or no additional SDB points depending on the priority ranking.

Priority Rank 1: Proposals submitted by SDBs as prime Contractors will receive 150 points. In addition, SDB prime Contractors that have significant subcontracting commitments to additional SDBs may receive up to an additional 50 points (200 points total available).

Subcontracting commitments to additional SDBs are evaluated based on the proposal offering the highest total percentage SDB subcontracting commitment. All other Contractors will be scored in proportion to the highest total percentage SDB subcontracting commitment within this ranking. *See formula below.*

Priority Rank 2: Proposals submitted by SDBs as prime contractors, with no or nominal subcontracting commitments to additional SDBs, will receive 150 points.

Priority Rank 3: Proposals submitted by non-small diverse businesses as prime contractors, with significant subcontracting commitments to SDBs, will receive up to 100 points. Proposals submitted with nominal subcontracting commitments to SDBs will receive points equal to the percentage level of their total SDB subcontracting commitment.

SDB subcontracting commitments are evaluated based on the proposal offering the highest total percentage SDB subcontracting commitment. All other Contractors will be scored in proportion to the highest total percentage SDB subcontracting commitment within this ranking. *See formula below.*

Priority Rank 4: Proposals by non-small diverse businesses as prime contractors with no SDB subcontracting commitments shall receive no points under this criterion.

To the extent that there are multiple SDB Participation submittals in Priority Rank 1 and/or Priority Rank 3 that offer significant subcontracting commitments to SDBs, the proposal offering the highest total percentage SDB subcontracting commitment shall receive the highest score (or additional points) available in that Priority Rank category and the other proposal(s) in that category shall be scored in proportion to the highest total percentage SDB subcontracting commitment. Proportional scoring is determined by applying the following formula:

$$\frac{\text{SDB \% Being Scored}}{\text{Highest \% SDB Commitment}} \times \frac{\text{Points/Additional}}{\text{Points Available}^*} = \frac{\text{Awarded/Additional}}{\text{SDB Points}}$$

Priority Rank 1 = 50 Additional Points Available

Priority Rank 3 = 100 Total Points Available

Please refer to the following webpage for an illustrative chart which shows SDB scoring based on a hypothetical situation in which the Commonwealth receives proposals for each Priority Rank:

<http://www.dgs.pa.gov/Businesses/Materials%20and%20Services%20Procurement/Procurement-Resources/Pages/default.aspx>.

- D. Domestic Workforce Utilization:** Any points received for the Domestic Workforce Utilization criterion are bonus points in addition to the total points for this RFQ. The maximum amount of bonus points available for this criterion is 3% of the total points for this RFQ.

To the extent permitted by the laws and treaties of the United States, each proposal will be scored for its commitment to use domestic workforce in the fulfillment of the project. Maximum consideration will be given to those Contractors who will perform the contracted direct labor exclusively within the geographical boundaries of the United States or within the geographical boundaries of a country that is a party to the World Trade Organization Government Procurement Agreement. Those who propose to perform a portion of the direct labor outside of the United States and not within the geographical boundaries of a party to the World Trade Organization Government Procurement Agreement will receive a correspondingly smaller score for this criterion. See the following webpage for the Domestic Workforce Utilization Formula:

http://www.portal.state.pa.us/portal/server.pt/community/rfp_scoring_formulas_overview/20124. Contractors who seek consideration for this criterion must submit in hardcopy the signed Domestic Workforce Utilization Certification Form in the same sealed envelope with the Technical Submittal. The certification will be included as a contractual obligation when the Purchase Order is executed.

III-5. Contractor Responsibility. To be responsible, a Contractor must submit a responsive proposal and possess the capability to fully perform the project requirements in all respects and the integrity and reliability to assure good faith performance of the project.

In order for an Contractor to be considered responsible for this RFQ and therefore eligible for selection for best and final offers or selection for contract negotiations:

- A. The total score for the technical submittal of the Contractor's proposal must be greater than or equal to **70%** of the **available technical points**; and
- B. The Contractor's financial information must demonstrate that the Contractor possesses the financial capability to assure good faith performance of the project. The Issuing Office will review the Contractor's previous three financial statements, any additional information received from the Contractor, and any other publicly-available financial information concerning the Contractor, and assess each Contractor's financial capacity based on calculating and analyzing various financial ratios, and comparison with industry standards and trends.

A Contractor which fails to demonstrate sufficient financial capability to assure good faith performance of the project as specified herein may be considered by the Issuing Office, in its sole discretion, for Best and Final Offers or project negotiation contingent upon such Contractor providing project performance security for the first project year cost proposed by the Contractor in a form acceptable to the Issuing Office. Based on the financial condition of the Contractor, the Issuing Office may require a certified or bank (cashier's) check, letter of credit, or a performance bond conditioned upon the faithful performance of the project by the Contractor. The required performance security must be issued or executed by a bank or surety company authorized to do business in the Commonwealth. The cost of the required performance security will be the sole responsibility of the Contractor and cannot increase the Contractor's cost proposal or the project cost to the Commonwealth.

Further, the Issuing Office will award a project only to a Contractor determined to be responsible in accordance with the most current version of Commonwealth Management Directive 215.9, Contractor Responsibility Program.

III-6. Final Ranking and Award.

- A. After any best and final offer process conducted, the Issuing Office will combine the evaluation committee's final technical scores, BSBO's final small diverse business participation scores, the final cost scores, and (when applicable) the domestic workforce utilization scores, in accordance with the relative weights assigned to these areas as set forth in this Part.
- B. The Issuing Office will rank responsible Contractors according to the total overall score assigned to each, in descending order.
- C. The Issuing Office must select as the Best Value Contractor the Contractor with the highest overall score; **PROVIDED, HOWEVER, THAT A PURCHASE ORDER WILL NOT BE ISSUED TO A CONTRACTOR WHOSE PROPOSAL RECEIVED THE LOWEST TECHNICAL SCORE AND HAD THE LOWEST COST SCORE OF THE**

RESPONSIVE PROPOSALS RECEIVED FROM RESPONSIBLE CONTRACTORS. IN THE EVENT SUCH A PROPOSAL ACHIEVES THE HIGHEST OVERALL SCORE, IT SHALL BE ELIMINATED FROM CONSIDERATION AND A PURCHASE ORDER MAY BE ISSUED TO THE CONTRACTOR WITH THE NEXT HIGHEST OVERALL SCORE.

- D. The Issuing Office has the discretion to reject all proposals or cancel the request for quotes, at any time prior to the time a purchase order is issued, when it is in the best interests of the Commonwealth. The reasons for the rejection or cancellation shall be made part of the contract file.

PART IV

WORK STATEMENT

IV-1. Objectives.

- a. **General.** SERS board, through its Audit Committee, is interested in receiving consulting services of a vendor (“Contractor”) with an experienced firm with established expertise in reviewing, assessing and developing the governance structure and practices of large state pension funds. This review is to include development of policies and procedures that are considered industry best practices and that are tailored to SERS’ needs and shall include a compliance process to ensure that governance policies are being followed. Recommended changes must be within SERS board of trustees ability and authority to adopt, and do not require enactment of legislation or action by other elected officials. A supplementary list of actions which require legislative enactment may be submitted for consideration but are not the primary focus of this effort.

- b. **Specific.** The Contractor will be engaged by the SERS Board to perform a comprehensive governance study that identifies and analyzes key considerations in formulating an effective governance structure. The development of policies and procedures should be based on industry best practices in general, as well as specific to SERS structure. A comprehensive governance policy manual is to be drafted that provides a framework with a specific focus on the role of SERS board and its committees, to include recommendations regarding the role of the Chairman, the establishment of a Vice-Chairman and committee chairs, as well as board powers and responsibilities.

IV-2. Nature and Scope of the Project.

SERS Audit Committee, acting on behalf of and at the direction of the SERS Board of trustees, will manage this project. SERS Internal Audit Director will facilitate the project on behalf of the Audit Committee. The anticipated timeline for the project’s completion is estimated at four months.

IV-3. Requirements.

It will be necessary for the Contractor to meet with several of SERS executive and senior staff as well as select board members. Existing policies specific to the board along with the bylaws and committee charters will be provided to the Contractor. The board’s structure and sample board and committee minutes will be provided for review. The above information will allow the Contractor to acquire an understanding of the existing framework of SERS board.

SERS existing board and committee structure as well as its policies are to be benchmarked against best practices of comparable large state pension funds. This analysis shall in turn result in the preparation of a comprehensive set of governance policies, based on public pension fund best practices and tailored to SERS. The goal of the final document is to ensure better organizational performance and adherence to sound fiduciary principles. A more detailed level of the review is provided below.

IV-4. Tasks.

- Evaluate and make recommendations as to the board structure including the need for a vice chairman or other governing board member in the absence or disability of the Chairman.
- Evaluate the existing committee structure and make recommendations for additional standing and ad hoc committees as well as the composition of members on those committees, their role and authority.
- Address how committee issues and discussion gets deliberated, are brought to the full board's attention and action, while avoiding a verbatim replay of the committee discussion.
- Evaluate and make recommendations as to the length of term and rotation of committee members.
- Evaluate and make recommendations to retention or modification of existing bylaws and committee charters.
- Evaluate and recommend policy that addresses trustee communication with external parties.
- Evaluate and recommend policy regarding the search process for key service providers.
- Evaluate and recommend board expectations concerning the types and frequency of routine reports it is to receive from various sources.
- Evaluate and establish policies that ensure actions taken by the board are consistent with applicable laws and fiduciary duties of the board and staff, including gifts, travel, insider trading and code of conduct.
- Review the process by which the executive director will be evaluated.
- Review the process by which the chief investment officer will be evaluated.
- Establish a process whereby the trustees may conduct self-analysis to ensure continuous improvement of the board's effectiveness.
- Consider the need for a periodic, independent evaluation and/or assessment of its performance.
- Consider the issue and make recommendations regarding a minimum requirement of each trustee's attendance at board meetings and key board committee meetings, absent extraordinary circumstances.
- Additional recommendations to policy as identified by the Contractor as deemed necessary and as approved by SERS Audit Committee.

IV-5. Reports and Project Control.

The response should include the Contractor's understanding of the project, information on the project team to be assigned, and a detailed timeline. Specific and periodic reports

required from the Contractor throughout the project are identified below. A total of 10 copies of each of the following reports will be required.

- a. **Task Plan.** A work plan for each task that identifies the work elements of each task, the resources assigned to the task, and the time allotted to each element and the deliverable items to be produced. Where appropriate, a PERT or Gantt chart display should be used to show project, task, and time relationship.
- b. **Status Report.** A twice monthly progress report covering activities, problems and recommendations. This report should be keyed to the work plan the Contractor developed in its proposal, as amended or approved by the Issuing Office.
- c. **Problem Identification Report.** An “as required” report, identifying problem areas. The report should describe the problem and its impact on the overall project and on each affected task. It should list possible courses of action with advantages and disadvantages of each, and include Contractor recommendations with supporting rationale.
- d. **Final Report.** At the conclusion of the project, the Contractor is to provide a board governance manual that contains policies and procedures that establish the manner in which SERS board and its committees shall be conducted. The manual will serve to assist the board in carrying out its fiduciary responsibilities as effectively and efficiently as possible, and in accordance with applicable laws, including state ethics laws. Additionally, the report shall include the following:
 - i) Recommendations derived from a review of SERS bylaws and existing committee charters.
 - ii) Recommendations for establishing additional committees as well as corresponding charters.
 - iii) Summarized findings, conclusions and recommendations developed for each task.
 - iv) Include any supporting documentation; e.g., flow-charts of recommended revisions to the board structure which includes additional directors such as a vice chairman, etc.
 - v) Recommend a time-phased work plan for implementing the recommendations.
 - vi) Preparation of an executive summary of the project’s efforts prepared for the purpose of being made available to the general public.

IV-6. Contract Requirements—Small Diverse Business Participation

All contracts containing Small Diverse Business participation must also include a provision requiring the selected contractor to meet and maintain those commitments made to Small Diverse Businesses at the time of proposal submittal or contract negotiation, unless a change in the commitment is approved by the BSBO. All contracts containing Small Diverse Business participation must include a provision requiring Small Diverse Business subcontractors to perform at least **50%** of the subcontract.

The selected contractor's commitments to Small Diverse Businesses made at the time of proposal submittal or contract negotiation shall, to the extent so provided in the commitment, be maintained throughout the term of the contract and through any renewal or extension of the contract. Any proposed change must be submitted to BSBO, which will make a recommendation to the Contracting Officer regarding a course of action.

If a contract is assigned to another contractor, the new contractor must maintain the Small Diverse Business participation of the original contract.

The selected contractor shall complete the Prime Contractor's Quarterly Utilization Report (or similar type document containing the same information) and submit it to the contracting officer of the Issuing Office and BSBO within **10** workdays at the end of each quarter the contract is in force. This information will be used to determine the actual dollar amount paid to Small Diverse Business subcontractors and suppliers. Also, this information will serve as a record of fulfillment of the commitment the selected contractor made and for which it received Small Diverse Business participation points. If there was no activity during the quarter then the form must be completed by stating "No activity in this quarter."

NOTE: EQUAL EMPLOYMENT OPPORTUNITY AND CONTRACT COMPLIANCE STATEMENTS REFERRING TO COMPANY EQUAL EMPLOYMENT OPPORTUNITY POLICIES OR PAST CONTRACT COMPLIANCE PRACTICES DO NOT CONSTITUTE PROOF OF SMALL DIVERSE BUSINESSES STATUS OR ENTITLE A CONTRACTOR TO RECEIVE CREDIT FOR SMALL DIVERSE BUSINESSES UTILIZATION.



Commonwealth of Pennsylvania

Date: **7/22/2015**
Subject: **Responses to Questions**
Solicitation Number: **2015-001 Review of SERS Board and Organizational Structure**
Opening Date/Time: **July 29, 2015 4:30 PM EST**
Addendum Number: **1**

To All Suppliers:

The Commonwealth of Pennsylvania defines a solicitation "Addendum" as an addition to or amendment of the original terms, conditions, specifications, or instructions of a procurement solicitation (e.g., Invitation for Bids or Request for Proposals).

List any and all changes:

Please see the attached file containing all questions and responses received that were submitted on or before the July 15, 2015 deadline.

For electronic solicitation responses via the SRM portal:

- Attach this Addendum to your solicitation response. Failure to do so may result in disqualification.
- To attach the Addendum, download the Addendum and save to your computer. Move to "My Notes", use the "Browse" button to find the document you just saved and press "Add" to upload the document.
- Review the Attributes section of your solicitation response to ensure you have responded, as required, to any questions relevant to solicitation addenda issued subsequent to the initial advertisement of the solicitation opportunity.

For solicitations where a "hard copy" (vs. electronic) response is requested:

- Attach this Addendum to your solicitation response. Failure to do so may result in disqualification.
- If you have already submitted a response to the original solicitation, you may either submit a new response, or return this Addendum with a statement that your original response remains firm, by the due date to the following address:

Attn: Joshua D. Smith
30 North Third Street, Suite 150
Harrisburg, PA 17101

Except as clarified and amended by this Addendum, the terms, conditions, specifications, and instructions of the solicitation and any previous solicitation addenda, remain as originally written.

Very truly yours,

Name: Joshua D. Smith
Title: Management Analyst 2
Phone: 717-237-0327
Email: smjoshua@pa.gov

QUESTIONS / ANSWERS
REVIEW OF SERS BOARD AND ORGANIZATIONAL STRUCTURE
SERS 2015-001

| Question # | RFQ Page # | RFQ Section Reference | Question | Answer |
|------------|------------|-----------------------|---|---|
| (If Known) | (If Known) | (If Known) | (Required) | (Required) |
| 1 | 23 | IV-2 | Would you please confirm who the governance consultant will report to? Is it the Board? The Executive Director? A subcommittee of the Board? | The Contractor will report to SERS Board through the Audit Committee, which is a subcommittee of the Board. |
| 2 | 23 | IV-1 | The SERS Board has authority over the SERS Defined Benefit plan and the Deferred Compensation plan. Do they have authority over any other assets? | As of 5/31/2015, SERS Board oversees \$27.6 billion in assets in the defined benefit plan and \$3.0 billion in assets in the deferred compensation plan. The SERS Board currently does not have authority over any other assets. |
| 3 | N/A | N/A | Does the SERS staff manage any investments in-house? | All investments are managed through contracted investment consultants. |
| 4 | N/A | N/A | Have you ever conducted a governance review before? If so, when? Is it possible to get a copy of the past report? Who conducted the previous governance review? | A special performance audit report was issued 7/19/2006 by the Department of the Auditor General for the period 1/1/2001 through 12/31/2004. In addition, an investment performance audit report was issued 9/18/2006 by Independent Fiduciary Services, Inc. Copies of the reports will be shared with the Contractor awarded the contract. |
| 5 | N/A | N/A | What is the reason for the current governance review project? | For SERS to develop and utilize a comprehensive governance manual that is based on industry best practices and tailored to SERS' requirements. |
| 6 | N/A | N/A | What are the top three governance challenges facing the Board? Are there specific goals the Board would like to achieve that you can share? | 1. An assessment of the effectiveness of the Board's structure including the potential need for a vice chairman. 2. An evaluation of the existing Board committee structure including standing and ad hoc committees, composition of members, their roles and authority. 3. Compilation of a comprehensive governance manual that is based on industry best practices and specific to SERS structure and needs. |
| 7 | 23 | IV-3 | Are there current written processes and procedures and/or a governance manual? Are you willing to share it? | A governance manual does not exist. Numerous written policies and procedures exist for the agency and will be shared with the Contractor awarded the contract. |

QUESTIONS / ANSWERS
REVIEW OF SERS BOARD AND ORGANIZATIONAL STRUCTURE
SERS 2015-001

| Question # | RFQ Page # | RFQ Section Reference | Question | Answer |
|------------|------------|-----------------------|--|--|
| 8 | 23 | IV-2 | It appears that the Audit Committee as a subcommittee of the Board performs the internal audits. How frequently are they done? When was the last one? May we obtain a copy? Were there any recommendations adopted as a result of the report? Were there any recommendations that were not adopted as a result of the last audit report? | An Internal Audit Division (IA) exists within the SERS organization. The director and staff of the division report up to the Audit Committee to maintain independence. IA tests SERS business processes and internal controls to confirm that they are adequate and operating properly to ensure vigilant stewardship of SERS funds. All observations and recommendations made by IA are documented in reports that are reviewed by and discussed with the Audit Committee. The audit reports are outside of the scope of this governance project. |
| 9 | 23 | IV-2 | The director of internal audit reports to the Audit Committee, a subcommittee of the Board, but has audit review over the SERS Board and staff operations? Is there a concern with independence? | Refer to the response to question #8. |
| 10 | N/A | N/A | Is there a designated compliance officer? Who is that and to whom does he/she report to? | A compliance officer function does not currently exist in SERS structure. However, if the Contractor awarded this contract should determine this function is needed, that should be a recommendation in their report. |
| 11 | 18-20 | III-4 | What is the maximum point score? | Please refer to the following link which provides information on the scoring of proposals and points availability: http://www.dgs.pa.gov/Businesses/Materials%20and%20Services%20Procurement/Procurement-Resources/Pages/RFP_SCORING_FORMULA.aspx#.Va4w-6HD-mQ . |
| 12 | N/A | N/A | Is there an approved list of SDB vendors? | Please refer to the following link providing a search page listing approved Small Diverse Businesses ("SDBs"): https://www.dgs.internet.state.pa.us/SBPI/AlphaResults.aspx . |
| 13 | N/A | N/A | Is a mutually agreed upon limit of liability acceptable for the selected vendor engagement? | The Consulting Services ITQ - Contract #4400007410 includes a provision pertaining to Limitation of Liability. |
| 14 | N/A | N/A | Why is SERS, on the behalf of the Commonwealth of Pennsylvania ("Commonwealth"), seeking a review of its governance structure and practices at this time? | Refer to the response to question #5. |

QUESTIONS / ANSWERS
REVIEW OF SERS BOARD AND ORGANIZATIONAL STRUCTURE
SERS 2015-001

| Question # | RFQ Page # | RFQ Section Reference | Question | Answer |
|------------|------------|-----------------------|---|---|
| 15 | N/A | N/A | Are there any policies currently under review by the Audit Committee or Board that would impact this review? | No. |
| 16 | N/A | N/A | Has SERS had a governance review conducted previously? If so, is it expected that this review will examine any of the governance related recommendations? | Refer to the response to question #4. |
| 17 | N/A | N/A | What period of time (e.g. years) does the requested review encompass? | The review encompasses the current state of SERS Board and committee composition, by-laws, staffing, policies and procedures. |
| 18 | N/A | N/A | What is the anticipated start date and desired end date for the final product (e.g. presentation of final report)? | Anticipated start date of early to mid-October 2015 with a project duration of 4 months. |
| 19 | 23 | IV-3 | In evaluating SERS' System is it expected that the executives, senior staff and board members will be interviewed as part of the review process? Please provide an estimate of the number of executives, senior staff, and board members the successful bidder will be expected to meet with. | Interviews with a representative sample of Board, executive and senior staff are expected to be a required element of this project. SERS complement includes 11 Board members, 4 Audit Committee members, and potentially 10-15 executive and senior staff. |
| 20 | 23 & 24 | IV-1; IV-3 | Please confirm that the comprehensive governance policy manual that you mention in the RFQ will be drafted following the consideration by SERS of the final report findings and recommendations. | The desired objective of this project includes a draft comprehensive governance manual inclusive of best practice policies and procedures adhering to sound fiduciary principles. The draft manual will be subject to Board approval and modification. |
| 21 | N/A | N/A | Can you please provide a list of your governance policies/manual? | Refer to the response to question #7. |
| 22 | N/A | N/A | Is the current SERS governance manual available? Do you anticipate a complete rewrite or merely revisions to current governance policies where needed? | Refer to the response to question #7. |

QUESTIONS / ANSWERS
REVIEW OF SERS BOARD AND ORGANIZATIONAL STRUCTURE
SERS 2015-001

| Question # | RFQ Page # | RFQ Section Reference | Question | Answer |
|------------|------------|-----------------------|---|--|
| 23 | N/A | N/A | Is the process used for this project expected to be iterative, with Board and senior staff interaction around draft policies? Are any post-report services relating to integration of new policies into agency and Board procedures contemplated? | Refer to the response to question #19 for the first question. The response to the second question is at this time, it is not anticipated that post-report services will be required. |
| 24 | N/A | N/A | In regard to evaluating the search process for key service providers, do you contemplate including selection of external investment managers, legal counsel and investment consultants or only service providers engaged directly by and reporting to the Board? | SERS does have policies and procedures addressing the search process for service providers in general and investment consultants specifically. The specific task as it pertains to the governance project is to establish and document guidelines specific to the roles and responsibilities of the Board on these matters. It is anticipated that these guidelines will also include a high-level discussion of the Executive Director's and Chief Investment Officer's responsibilities and function in these matters. |
| 25 | N/A | N/A | Do you want a customized benchmarking survey of peers or is reliance on existing best practices data available to the contractor acceptable? | A customized benchmark survey with peers is not necessary. Industry best practices customized to SERS needs is preferred. |
| 26 | N/A | N/A | Do you contemplate interviews of key stakeholders in regard to development of external communication policies? | Refer to the response to question #19. |
| 27 | N/A | N/A | Are there particular problems which have arisen which you want the review to specifically address? | As stated in the response to #7, a comprehensive governance manual does not currently exist at SERS. Accordingly, the Board has directed that such a manual be drafted and is intended to establish the manner in which the Board and its committees shall conduct themselves to carry out its responsibilities as effectively and efficiently as possible, in accordance with applicable laws. |
| 28 | N/A | N/A | Several areas are not explicitly stated as in scope but could be implied. Could you please clarify if the following policies should be addressed by the review: a) Enterprise risk oversight and policy; b) Environmental, social and governance (ESG) investment policies; c) Board self-development policy? | Enterprise risk oversight, and environmental and social investment policies exist and should be included in the overall review of existing policies by the consultant. A Board self-development policy would be specific to the governance manual and would be in the primary scope of the project. |

QUESTIONS / ANSWERS
REVIEW OF SERS BOARD AND ORGANIZATIONAL STRUCTURE
SERS 2015-001

| Question # | RFQ Page # | RFQ Section Reference | Question | Answer |
|------------|------------|-----------------------|--|---|
| 29 | N/A | N/A | Do you desire a review of external management contracts from a governance perspective to evaluate compliance with mandates, alignment of interest, ESG, and other fiduciary policies specified in the existing or new governance manual? | A review of existing external management contracts is not within the scope of this project. |
| 30 | 24 | IV-4 | The RFQ in Section IV-4. Tasks. states a required task "Evaluate and establish policies that ensure actions taken by the board are consistent with applicable laws and fiduciary duties of the board and staff, including gifts, travel, insider trading and code of conduct." In completing this, are you requesting a backward-looking assessment of compliance? | Compliance with existing and/or newly established policies is not within the scope of this project. |

**CONTRACT FOR
CONSULTING SERVICES**

BETWEEN

COMMONWEALTH OF PENNSYLVANIA,

**Acting by and through the
DEPARTMENT OF GENERAL SERVICES**

AND

**FREDERICK FUNSTON
dba FUNSTON ADVISORY
SERVICES LLC.**

**CONTRACT NO.
4400007410**

THIS CONTRACT, made at Harrisburg, Pennsylvania, in the county of Dauphin, Commonwealth of Pennsylvania, by and between the COMMONWEALTH OF PENNSYLVANIA, acting by and through the Department of General Services, with offices at Harrisburg, Pennsylvania, hereinafter called the Commonwealth and FREDERICK FUNSTON dba FUNSTON ADVISORY SERVICES LLC, hereinafter called the Contractor, acting through its proper officials;

WITNESSETH THAT:

WHEREAS, the Commonwealth has need for Consulting Services (the “Services”); and

WHEREAS, the Commonwealth issued an Invitation to Qualify (ITQ) for the Consulting Services ITQ through an Invitation for Bids (IFB) and the Contractor submitted a bid in response to the ITQ; and

WHEREAS, the Commonwealth has the authority to enter into this Contract for the Services on a multiple award basis according to Section 517 of the Commonwealth Procurement Code, 62 Pa.C.S. §517; and

WHEREAS, the Commonwealth has evaluated the Contractor’s Proposal and determined that the Contractor has met the qualification requirements of the ITQ.

NOW, THEREFORE, for and in consideration of the foregoing premises and mutual promises hereinafter set forth, the parties hereto agree, with the intention of being legally bound, as follows:

1. GENERAL

- a. Upon determination that the Contractor meets the ITQ requirements, the Commonwealth will issue a contract to the Contractor in accordance with Section 55 hereof.
- b. Upon receipt of a Purchase Order (PO) issued under this Contract, the Contractor agrees to furnish the requested services to the Commonwealth agency issuing the PO.

2. COST

The total cost for Services provided for each PO under this Contract shall be the amount stated in each PO. The Issuing Agency will establish a payment schedule with the Contractor and the Contractor agrees that payment shall be made in accordance with such payment schedule. No separate reimbursement will be made for travel, lodging or subsistence. All costs for travel, lodging or subsistence must be included in the costs provided to the Issuing Agency and incorporated into the PO.

3. OVERVIEW

The purpose of this multiple award Contract is to provide agencies of the Commonwealth with the Services that are within the scope of this Contract.

4. DEFINITIONS

- a. Contact Person. The individual designated by the Issuing Agency to administer and monitor POs issued by the Issuing Agency under this Contract. The Contact Person is authorized to issue POs and amendments to POs and to terminate POs.

- b. Contracting Officer. The person authorized to administer this Contract for the Commonwealth and to make written determinations with respect to the Contract (as opposed to individual POs, which shall be administered and monitored by the Issuing Agency) is the DGS Chief Procurement Officer. The Contracting Officer is NOT authorized to sign this Contract or any amendment, but is authorized to terminate this Contract.
- c. Days. Unless specifically indicated otherwise, days mean Commonwealth business days.
- d. Developed Materials or Developed Works. Except for Contractor's work papers and internal communications related to the Services of this Contract and that are not delivered to the Commonwealth, which shall remain the exclusive property of the Contractor, all documents, data, records, software, samples or any other literary works or other works of authorship produced by Contractor in carrying out the obligations and Services under this Contract, without limitation, and delivered by the Contractor as the work product for the Project ("Deliverables" or "Delivered Materials"). All Project Deliverables shall be explicitly identified in the Statement of Work (SOW) for each Purchase Order (PO).
- e. Documentation. A term used to refer to all materials required to support and convey information about the services required by this Contract. It includes, but is not necessarily restricted to, written reports and analyses, diagrams, maps, logical and physical designs, system designs, computer programs, flow charts, disks, and/or other machine-readable storage media.
- f. Contract Effective Date. The date that the Contract has been fully executed by the Contractor and by the Commonwealth and all approvals required by Commonwealth contracting procedures have been obtained.
- g. Issuing Agency. The Commonwealth agency issuing the PO under the terms and conditions of this Contract.
- h. Proposal. Contractor's response to a Request for Quotations (RFQ) issued by the Issuing Agency.
- i. Services. All Contractor activity necessary to satisfy the PO as defined by the Issuing Agency in the Statement of Work (SOW) incorporated into the PO.

5. CONTRACT SCOPE

- a. This Contract will include various Consulting service categories. All of the categories are described more fully via the ITQ web site at www.itqrp.state.pa.us/ITQ/ITQ/Default.aspx.
- b. The ITQ web site is the place that shows the specific service categories for which the Contractor has been found qualified.
- c. If the Contractor must perform work outside of the daily operational hours set forth by the Issuing Agency, it must make arrangements with the Issuing Agency to assure access to the facility and equipment has been arranged. The Contractor must take such access into consideration when it is putting together its Proposal. No additional payment will be made on the basis of lack of access unless the Issuing Agency fails to provide access as agreed to between the Issuing Agency and the Contractor.

- d. Unless specifically provided for in the PO, the Contractor shall not offer for sale or provide Commonwealth agencies with any hardware or software (i.e., personal computers, file servers, laptops, personal computer packaged software, etc.). If the PO does not specifically include the provision of software, Contractors may recommend the use of hardware and software, without requiring agencies to purchase the recommended hardware and software. Software and hardware that is NOT on statewide contract will be acquired through separately procured purchase agreements, and the Contractor shall not be considered for award of such agreements.
- e. Contractor shall comply with the IT standards and policies issued by the Governor's Office of Administration, Office for Information Technology (OA/OIT) (located at: <http://www.portal.state.pa.us/portal/server.pt?open=512&objID=416&PageID=210791&mode=2>), including the accessibility standards set out in IT Bulletin ACC001, IT Accessibility Policy. The Contractor shall ensure that Services procured under this Contract comply with the applicable standards. In the event such standards change during Contractor's performance of a PO, and the Issuing Agency requests that Contractor comply with the changed standard, then any incremental costs incurred by Contractor to comply with such changes shall be paid for pursuant to a change order to the PO.

6. ORDER OF PRECEDENCE

- a. If any conflicts or discrepancies should arise in the terms and conditions of this Contract, or the interpretation thereof, the order of precedence shall be:
 - i. This Contract;
 - ii. The data resident on the ITQ web site at www.itqrp.state.pa.us/ITQ/ITQ/Default.aspx and incorporated herein by reference at the date of execution of the Contract or issuance of an RFQ off of this Contract, whichever is later, including but not limited to the promises and certifications the Contractor made in qualifying for the Contract;
- b. If any conflicts or discrepancies should arise in the interpretation of a PO, the order of precedence shall be:
 - i. The consulting service category definitions, descriptions, qualification requirements, and contract terms and conditions set forth in the RFQ;
 - ii. This Contract;
 - iii. The PO and any attachment thereto, including: (1) the Contractor's Proposal, as accepted by the Commonwealth; (2) the RFQ.

7. CONTRACT INTEGRATION

- a. This Contract, including the Contract signature pages, together with the data resident on the ITQ web site at www.itqrp.state.pa.us/ITQ/ITQ/Default.aspx, as described in Section 6, constitutes the final, complete, and exclusive Contract between the parties containing all the terms and conditions agreed to by the parties. The Contract itself contemplates the issuance of RFQs and POs, and Technical and Cost proposal responses by the Contractor, the content of which will augment the Contract when issued and executed as anticipated under this Contract.

- b. All representations, understandings, promises, and agreements pertaining to the subject matter of this Contract made prior to or at the time this Contract is executed are superseded by this Contract.
- c. There are no conditions precedent to the performance of this Contract except as expressly set forth herein.

8. PURCHASE ORDERS (POs)

- a. Prior to issuing a PO against this Contract, Issuing Agencies must follow the solicitation requirements and evaluation process established for this Contract and available at <http://www.itqrp.state.pa.us/ITQ/ITQ/Default.aspx>. DGS may modify these procedures by posting revised procedures at the website specified above and which will become effective for subsequent projects not already in the solicitation process.
- b. All documents issued by the Issuing Agency and all responses submitted by the Contractors must be in electronic format and that format must be compatible with Microsoft™ Office. Documents may be read only, but may not be in .pdf format. The Issuing Agency may, at its option, also require that all documents be submitted in paper format.
- c. Issuing agencies may issue POs against this Contract. A PO constitutes the Contractor's authority to perform Services. Each PO will be deemed to incorporate the terms and conditions set forth in this Contract. In no event will the performance time period specified in a Purchase Order extend longer than ninety (90) days after the expiration date of the Contract term. The Contractor will be required to adhere to the requirements and/or specifications of the PO.
- d. Purchase Orders under five thousand dollars (\$5,000) in total amount may also be made in person or by telephone using a Commonwealth Procurement VISA Card. When an order is placed by telephone, the Commonwealth agency shall provide the agency name, employee name, credit card number, and expiration date of the card. The Contractor agrees to accept payment through the use of the Commonwealth Procurement VISA card.

9. PERIOD OF PERFORMANCE

The Contractor, for the life of this Contract, shall complete all services as specified under the terms of this Contract and any PO resulting from this Contract. In no event shall the Commonwealth be responsible or liable to pay for any services provided by the Contractor prior to the Effective Date, and the Contractor hereby waives any claim or cause of action for any such services.

10. TERM OF CONTRACT

The term of the Contract shall commence on the Effective Date and shall end on March 31, 2016.

11. OPTION TO EXTEND

The Commonwealth reserves the right to extend this Contract or any part of this Contract up to three (3) months, or as necessary to prevent a lapse in Contract coverage.

12. SPECIAL REQUIREMENTS

Within the general scope of this ITQ, Issuing Agencies may modify the consulting service category definitions, descriptions, qualification requirements, and contract terms and conditions for particular POs if set forth in the RFQ. Such modifications shall take precedence over differing provisions of the ITQ/Contract.

The Commonwealth reserves the right to purchase Services within the scope of this Contract through other procurement methods whenever the Commonwealth deems it to be in its best interest.

13. SUBCONTRACTS

The Contractor may subcontract any portion of the Services described in this Contract to third parties selected by Contractor and approved in writing by the Issuing Agency, whose approval shall not be unreasonably withheld. Notwithstanding the above, if Contractor has disclosed the identity of subcontractor(s) together with the scope of work to be subcontracted in its Proposal, the Issuing Agency's issuance of a PO is deemed to be approval of all named subcontractors and a separate approval is not required. The existence of any subcontract shall not change the obligations of Contractor to the Issuing Agency under this Contract. Upon request of the Issuing Agency, the Contractor must provide the Issuing Agency with a copy of the subcontract agreement(s) between the Contractor and the subcontractor(s). Contractor will require all of its subcontractors to adhere to the terms and conditions of this Contract.

14. OTHER CONTRACTORS

The Commonwealth may undertake or award other contracts or PO's for additional or related work, and the Contractor shall fully cooperate with other Contractors and Commonwealth employees, and coordinate its Services with such additional work as may be required. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other Contractor or by Commonwealth employees. This Section shall be included in the Contracts of all Contractors with which this Contractor will be required to cooperate. The Commonwealth shall equitably enforce this Section as to all Contractors to prevent the imposition of unreasonable burdens on any Contractor.

15. PRIME CONTRACTOR RESPONSIBILITIES

The Contractor will be responsible for all services required under a PO issued under this Contract whether or not it provides them directly. The Contractor is the sole point of contact with regard to all contractual matters, including payment of any and all charges resulting from the PO.

16. INVOICES

- a. Unless otherwise specified in a PO, subject to Issuing Agency review and acceptance, the Contractor shall invoice the Issuing Agency for Services performed only after acceptance of the Services in accordance with the PO. Invoices will be submitted as specified in the PO.

For services provided on a time-and-materials basis, the Contractor shall invoice the Commonwealth on a monthly basis as services are provided.

For services provided on a fixed-price basis, and subject to Commonwealth review and acceptance, the Contractor shall invoice the Commonwealth for services performed only

after acceptance of the services in accordance with Section 18 (INSPECTION AND ACCEPTANCE).

- b. At a minimum, the following information shall be furnished on all invoices, as applicable:
- (1) A unique invoice number;
 - (2) The Contract number;
 - (3) PO number;
 - (4) The Contractor's SAP/SRM Vendor Number;
 - (5) The period covered;
 - (6) For expenditure of manpower resources, including that of subcontractors (solely related to Time and Materials invoices only; not required for Deliverables invoices):
 - (i) Position;
 - (ii) Rate per hour; and
 - (iii) Hours and cost thereof, itemized by tasks.
 - (7) Tasks completed by the Contractor during the billing period and approved by the Issuing Agency to the date of the invoice, and percentage of the phase represented thereby;
 - (8) Amounts invoiced to date and approved to date;
 - (9) Location, including address to which payment is to be made; and
 - (10) Invoices received by the Contractor from any subcontractor.
- c. The Issuing Agency shall use its best efforts to pay all properly prepared and submitted invoices within forty five (45) calendar days from the date of receipt of such invoice by the Issuing Agency. Interest on late payments may only be paid if the contractor qualifies for such payment pursuant to the provisions of 4 Pa. Code § 2.31, *et seq.*
- d. The Commonwealth or Issuing Agency may deduct from amounts due under an invoice any amounts owed to the Commonwealth under Section 29, Offset Provision for Commonwealth Contracts and Section 52, Liquidated Damages.
- e. Electronic Payments
- (1) The Commonwealth will make contract payments through the Automated Clearing House (ACH). Within 10 days of award of the Contract or PO, the Contractor must submit or must have already

submitted its ACH information within its user profile in the Commonwealth's procurement system (SRM).

- (2) The Contractor must submit a unique invoice number with each invoice submitted. The unique invoice number will be listed on the Commonwealth of Pennsylvania's ACH remittance advice to enable the Contractor to properly apply the state agency's payment to the invoice submitted.
- (3) It is the responsibility of the Contractor to ensure that the ACH information contained in SRM is accurate and complete. Failure to maintain accurate and complete information may result in delays in payments.

17. ASSIGNABILITY

- a. Subject to the terms and conditions of this Section, the Contract is binding upon the parties and their respective successors and assigns.
- b. The Contractor may not assign, in whole or in part, the Contract or its rights, duties, obligations, or responsibilities hereunder without the prior written consent of the Commonwealth, which consent may be withheld at the sole and absolute discretion of the Commonwealth.
- c. Notwithstanding the foregoing, the Contractor may, without the consent of the Commonwealth, assign its rights to payment to be received under the Contract or a PO, provided that the Contractor provides written notice of such assignment to the Issuing Agency together with a written acknowledgement from the assignee that any such payments are subject to all of the terms and conditions of the Contract.
- d. For the purposes of the Contract, the term "assign" shall include, but shall not be limited to, the sale, gift, assignment, pledge, or other transfer of any ownership interest in the Contractor provided, however, that the term shall not apply to the sale or other transfer of stock of a publicly traded company.
- e. Any assignment consented to by the Commonwealth shall be evidenced by a written assignment agreement executed by the Contractor and its assignee in which the assignee agrees to be legally bound by all of the terms and conditions of the Contract and to assume the duties, obligations, and responsibilities being assigned. The assignment form is provided via the ITQ web site at <http://www.itqrp.state.pa.us/ITQ/ITQ/Default.aspx>.
- f. A change of name by the Contractor, following which the Contractor's federal identification number remains unchanged, is not considered to be an assignment. The Contractor shall give the Issuing Agency and the Contracting Officer written notice of any such change of name.

18. INSPECTION AND ACCEPTANCE

- a. Acceptance of Developed Materials will occur in accordance with the Deliverable Approval Plan and/or criteria set forth in the SOW. For PO's where the development of software, the configuration of software, or the modification of software is the deliverable,

the Deliverable Approval Plan must include an Acceptance Test Plan. The Acceptance Test Plan will provide for a Final Acceptance Test, and may provide for Interim Milestone Acceptance Tests. Each Acceptance Test will be designed to demonstrate that the Developed Materials conform with the functional specifications for the Developed Materials, if any, and/or the requirements of the SOW. Contractor shall notify the Issuing Agency when the deliverable is completed and ready for acceptance testing. The Issuing Agency will not unreasonably delay commencement of acceptance testing.

- (1) For Projects that require software integration at the end of the Project, as set out in the PO, the Commonwealth's acceptance of a deliverable or milestone shall be final unless at the time of Final Acceptance, the Developed Materials do not meet the acceptance criteria set forth in the SOW.
 - (2) For Projects that do not require software integration at the end of the Project as set out in the PO, the Commonwealth's acceptance of a deliverable or milestone shall be complete and final.
- b. Contractor shall certify, in writing, to the Issuing Agency when a particular milestone, interim or final, is completed and ready for acceptance (hereinafter Acceptance). Unless otherwise set out in a SOW or PO, the Acceptance period shall be ten (10) days for interim milestones and thirty (30) days for final milestones. On or before the 10th day for interim milestones or 30th day for the final milestone, following receipt by the Issuing Agency of Contractor's certification of completion of a particular milestone, the Issuing Agency shall, subject to Section 18(a) either: (1) provide the Contractor with its written acceptance of the Developed Materials in the completed milestone; or (2) identify to Contractor, in writing, the failure of the Developed Materials to comply with the specifications, listing all such errors and omissions with reasonable detail.
- c. If the Issuing Agency fails to notify the Contractor in writing of any failures in the Developed Materials within the applicable Acceptance period, the Developed Materials shall be deemed accepted.
- d. If the Developed Materials do not meet an accessibility standard as set out in Section 5(e), the Contractor must provide written justification for its failure to meet the standard. The justification must provide specific details as to why the standard has not been met. The Issuing Agency may either waive the requirement as not applicable to the Issuing Agency's business requirements or require that the Contractor provide an acceptable alternative. Any waiver of the requirement must be in writing.
- e. Upon Contractor's receipt of the Issuing Agency's written notice of rejection, which must identify the reasons for the failure of the Developed Materials in a completed milestone to comply with the specifications, the Contractor shall have fifteen (15) days, or such other time as the Issuing Agency and Contractor may agree is reasonable, within which to correct all such failures, and resubmit the corrected Developed Materials, certifying to the Issuing Agency, in writing, that the failures have been corrected, and that the Developed Materials have been brought in compliance with the specifications. Upon receipt of such corrected and resubmitted Developed Materials and certification, the Issuing Agency shall have thirty (30) days to test the corrected Developed Materials to confirm that they are in compliance with the specifications. If the corrected Developed Materials are in

compliance with the specifications, then the Issuing Agency shall provide the Contractor with its acceptance of the Developed Materials in the completed milestone.

- f. If, in the opinion of the Issuing Agency, the corrected Developed Materials still contain material failures, the Issuing Agency shall have the option either to:
 - (1) Repeat the procedure set forth above; or
 - (2) Proceed with its rights under Section 25 (DISPUTES).

19. NOTICE OF DELAYS

Whenever the Contractor encounters any difficulty which is delaying or threatens to delay the timely performance of this Contract or any PO issued under this Contract (including actual or potential labor disputes), the Contractor shall promptly give notice thereof in writing to the Contact Person stating all relevant information with respect thereto. Such notice shall not in any way constitute a basis for an extension of the delivery schedule or be construed as a waiver by the Commonwealth or the Issuing Agency of any rights or remedies to which it is entitled by law or pursuant to provisions of this Contract. Failure to give such notice, however, may be grounds for denial of any request for an extension of the delivery schedule because of such delay.

20. CONDUCT OF SERVICES

- a. Following the acceptance of Contractor's Proposal and the issuance of a PO, Contractor shall proceed diligently with all Services and shall perform such Services with qualified personnel, in accordance with the completion criteria set forth in the PO.
- b. In determining whether or not the Contractor has performed with due diligence hereunder, it is agreed and understood that the Issuing Agency may measure the amount and quality of the Contractor's effort against the representations made in any Contractor Proposal accepted by way of a PO resulting from this Contract. The Contractor's Services hereunder shall be monitored by the Issuing Agency and designated representatives. If the Issuing Agency determines that the Contractor has not performed with due diligence, the Issuing Agency and the Contractor will attempt to reach agreement with respect to such matter. Failure of the Issuing Agency or the Contractor to arrive at such mutual determinations shall be a dispute concerning a question of fact within the meaning of Section 25 (DISPUTES) of this Contract.

21. CHANGES

- a. At any time during the performance of a PO, the Issuing Agency or the Contractor may request a change to the PO, including the SOW, within the scope of the PO. Contractor will make reasonable efforts to investigate the impact of the change request on the price, timetable, specifications, and other terms and conditions of the PO. If the Issuing Agency is the requestor of the change, the Contractor will inform the Issuing Agency if there will be any charges for the Contractor's services in investigating the change request prior to incurring such charges. If the Issuing Agency and the Contractor agree on the results of the investigation and any necessary amendments to the PO, the parties must complete and execute the Change Notice Form, which is attached hereto as Appendix B,

to modify the PO and implement the change. The Issuing Agency and Contractor will only request changes to the PO by way of the Change Notice Form. If the parties cannot agree upon the results of the investigation or the necessary amendments to the PO, the change request will not be implemented and, if the Contractor initiated the change request it may elect to handle the matter in accordance with Section 25 (DISPUTES) of this Contract.

- b. Changes outside the scope of a PO shall be accomplished through the Commonwealth's normal procurement procedures, and may result in an amended PO or a new PO (if the additional services are awarded to the Contractor).

22. DEFAULT

- a. The Commonwealth may, subject to the provisions of Section 53, Force Majeure, and in addition to its other rights under the Contract, declare the Contractor in default by written notice thereof to the Contractor, and terminate (as provided in Section 23, Termination Provisions) the whole or any part of this Contract or any PO for any of the following reasons:

- (1) Failure to begin Services within the time specified in the Contract or Purchase Order or as otherwise specified;
- (2) Failure to perform the Services with sufficient labor, equipment, or material to cause the completion of the specified Services in material accordance with the Contract or Purchase Order terms;
- (3) Unsatisfactory performance of the Services;
- (4) Failure to deliver the awarded item(s) within the time specified in the Contract or PO or as otherwise specified;
- (5) Failure to provide an item(s) which is in conformance with the specifications referenced in the Contract or PO;
- (6) Failure or refusal to remove material, or remove, replace or perform any Services rejected as defective or noncompliant;
- (7) Discontinuance of Services without approval or as otherwise allowed pursuant to the Contract or PO;
- (8) Failure to resume work, which has been discontinued, within a reasonable time after notice to do so (unless the failure to resume is pursuant to the Contract or PO);
- (9) Insolvency;
- (10) Assignment made for the benefit of creditors;
- (11) Failure or refusal within 10 days after written notice by the Contracting Officer, to make payment or show cause why payment should not be made, of any amounts due subcontractors for materials furnished, labor

supplied or performed, for equipment rentals, or for utility services rendered;

- (12) Failure to protect, to repair, or to make good any damage or injury to property;
- (13) Material breach of any provision of the Contract;
- (14) Failure to comply with representations made in the Contractor's bid/Proposal; or
- (15) Failure to comply with applicable industry standards, customs, and practice.

23. TERMINATION

a. For Convenience

- (1) The Commonwealth may terminate this Contract and any or all POs issued under it without cause by giving Contractor thirty (30) days prior written notice (Notice of Termination) whenever the Commonwealth shall determine that such termination is in the best interest of the Commonwealth (Termination for Convenience). The Notice of Termination shall specify which, if any, POs will terminate with termination of the Contract. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance under this Contract is terminated either in whole or in part and the date on which such termination becomes effective. Any PO not so specified in the Notice of Termination shall continue in effect for the term stated in the PO.

Any Issuing Agency may terminate any PO issued by that agency, without cause, by giving Contractor Notice of Termination prior to the effective date of termination.

In the event of termination hereunder, Contractor shall receive payment for:

- (i) All Services performed consistent with the terms of the PO prior to the effective date of termination;
- (ii) All actual and reasonable costs incurred by Contractor in terminating the PO; and

In no event shall the Contractor be paid for any loss of anticipated profit (by the Contractor or any subcontractor), loss of use of money, or administrative or overhead costs.

Failure to agree on any termination costs shall be a dispute handled in accordance with Section 25 (DISPUTES) of this Contract.

- (2) The Contractor shall cease Services as of the date set forth in the Notice of Termination, and shall be paid only for such Services as have already been satisfactorily rendered up to and including the termination date set forth in said notice, or as may be otherwise provided for in said Notice of Termination, and for such services performed during the thirty (30) day notice period, if such services are requested by the Issuing Agency under any POs being terminated, for the collection, assembling, and transmitting to the Commonwealth of at least all materials, manuals, magnetic media, studies, drawings, computations, maps, supplies, and survey notes including field books, which were obtained, prepared, or developed as part of the Services required under the terminating POs.
- (3) The above shall not be deemed to limit the Commonwealth's right to terminate this Contract for any reason as permitted by the other provisions of this Contract, or under applicable statutory law or regulations.

b. Non-Appropriation

Any payment obligation or portion thereof of the Commonwealth created by this Contract or any PO issued pursuant to this Contract is conditioned upon the availability and appropriation of funds. When funds (state or federal) are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal year period, the Commonwealth shall have the right to terminate the PO. The Contractor shall be reimbursed in the same manner as that described in this section related to Termination for Convenience to the extent that appropriated funds are available.

c. Default

The Commonwealth may, in addition to its other rights under this Contract, terminate this Contract or any PO in whole or in part by providing written notice of default to the Contractor if the Contractor materially fails to perform its obligations under a PO and does not cure such failure within the time specified in the PO or, if no time is specified in the PO, within thirty (30) days or, if a cure within such period is not practical, commence a good faith effort to cure such failure to perform within the specified period or such longer period as the Commonwealth may specify in the written notice specifying such failure, and diligently and continuously proceed to complete the cure. For POs, the Contact Person shall provide any notice of default or written cure notice for the Issuing Agency. The Issuing Agency is authorized to terminate only a PO issued by the agency pursuant to this Contract. Termination of a PO for default shall not affect work on other POs under which the Contractor is not in default. The Contracting Officer shall provide any notice of default or written cure notice for Contract terminations.

- (1) Subject to the Limitation of Liability in Section 31 of this Contract, in the event the Commonwealth terminates this Contract in whole or in part as provided in this Subsection (c), the Commonwealth may procure services similar to those so terminated, and the Contractor, in addition to liability for any liquidated damages, shall be liable to the Commonwealth for the difference between the Contract price for the terminated portion of the services and the actual and reasonable cost (but in no event greater than the fair market value) of producing

substitute equivalent services for the terminated services, provided that the Contractor shall continue the performance of this Contract to the extent not terminated under the provisions of this Section.

- (2) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the Contract arises out of causes beyond the control of the Contractor. Such causes may include, but are not limited to, acts of God or of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, work stoppages, freight embargoes, acts of terrorism, and unusually severe weather. The Contractor shall notify the Contracting Officer and the Issuing Agency promptly in writing of its inability to perform because of a cause beyond the control of the Contractor.
 - (3) Nothing in this Subsection (c) shall abridge the Commonwealth's right to suspend, debar, or take other administrative action against the Contractor.
 - (4) If it is later determined that the Commonwealth erred in terminating the Contract for default, then, at the Commonwealth's discretion, the Contract shall be deemed to have been terminated for convenience under Subsection (a).
- d. If this Contract or a PO is terminated as provided by this Subsection (c), the Commonwealth may, in addition to any other rights provided in this Subsection, and subject to Section 37 (OWNERSHIP RIGHTS) of this Contract, require the Contractor to deliver to each Issuing Agency in the manner and to the extent directed by the Contract Person, such reports and other documentation as the Contractor has specifically produced or specifically acquired for the performance of such part of the Contract or PO as has been terminated. Payment for such reports and documentation will be made consistent with the Contract or PO.
 - e. The rights and remedies of the Commonwealth provided in this Section shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.
 - f. The Commonwealth's failure to exercise any rights or remedies provided in this Section shall not be construed to be a waiver by the Commonwealth of its rights and remedies in regard to the event of default or any succeeding event of default.
 - g. Following exhaustion of the Contractor's administrative remedies as set forth in Section 25, the Contractor's exclusive remedy shall be to seek damages in the Board of Claims.

24. BACKGROUND CHECKS

The Contractor is to, at its expense, arrange for a background check for each of its employees, as well as for the employees of its subcontractors, who will have access to Commonwealth facilities, either through on site or remote access. Background checks are to be conducted via the Request for Criminal Record Check form and procedure found at

<http://www.portal.state.pa.us/portal/server.pt?open=512&objID=4451&&PageID=458621&level=2&css=L2&mode=2> The background check is to be conducted prior to initial access by Contractor and annually thereafter.

Before the Commonwealth will permit Contractor access to Commonwealth facilities, the Contractor is to provide written confirmation to the office designated by the agency that the background check has been conducted. If, at any time, it is discovered that an employee of the Contractor or an employee of a subcontractor of the Contractor has a criminal record that includes a felony or misdemeanor involving terrorist threats, violence, use of a lethal weapon, or breach of trust/fiduciary responsibility; or which raises concerns about building, system, or personal security, or is otherwise job-related, the Contractor is not to assign that employee to any Commonwealth facilities, is to remove any access privileges already given to the employee, and is not to permit that employee remote access to Commonwealth facilities or systems, unless the agency consents, in writing, prior to the access being provided. The agency may withhold its consent at its sole discretion. Failure of the Contractor to comply with the terms of this paragraph may result in default of the Contractor under its contract with the Commonwealth.

The Commonwealth specifically reserves the right to conduct or require background checks over and above that described herein.

25. DISPUTES

a. Contract Disputes

- (1) In the event of a controversy or claim arising from the Contract, the Contractor must, within six months after the cause of action accrues, file a written claim with the Contracting Officer for a determination. The claim shall state all grounds upon which the Contractor asserts a controversy exists. If the Contractor fails to file a claim or files an untimely claim, the Contractor is deemed to have waived its right to assert a claim in any forum.
- (2) The contracting officer shall review timely-filed claims and issue a final determination, in writing, regarding the claim. The final determination shall be issued within 120 days of the receipt of the claim, unless extended by consent of the contracting officer and the Contractor. The Contracting Officer shall send his/her written determination to the Contractor. If the contracting officer fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The Contracting Officer's determination shall be the final order of the Commonwealth.
- (3) Within fifteen (15) days of the mailing date of the determination denying a claim, or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the Contractor may file a statement of claim with the Commonwealth Board of Claims. Pending a final judicial resolution of a controversy or claim, the Contractor shall proceed diligently with performance under the Contract in a manner consistent with the determination of the Contracting Officer and the Commonwealth shall compensate the Contractor pursuant to the terms of the Contract.

b. PO Disputes

- (1) In the event of a controversy or claim arising from a PO, the Contractor must, within six months after the cause of action accrues, file a written claim with the Issuing Agency for a determination. The claim shall state all grounds upon which the Contractor asserts a controversy exists. If the Contractor fails to file a claim or files an untimely claim, the Contractor is deemed to have waived its right to assert a claim in any forum.
- (2) The Issuing Agency shall review timely-filed claims and issue a final determination, in writing, regarding the claim. The final determination shall be issued within 120 days of the receipt of the claim, unless extended by consent of the Issuing Agency and the Contractor. The Issuing Agency shall send his/her written determination to the Contractor. If the Issuing Agency fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The Issuing Agency's determination shall be the final order of the Issuing Agency.
- (3) Within fifteen (15) days of the mailing date of the determination denying a claim or within 135 days of filing a claim if, no extension is agreed to by the parties, whichever occurs first, the Contractor may file a statement of claim with the Commonwealth Board of Claims. Pending a final judicial resolution of a controversy or claim, the Contractor shall proceed diligently with the performance of the Contract in a manner consistent with the determination of the Issuing Agency and the Issuing Agency shall compensate the Contractor pursuant to the terms of the PO.

- c. The Issuing Agency will provide the Contracting Officer with a copy of all determinations made by the Issuing Agency. The Contractor will provide the Contracting Officer with a copy of any appeal of an Issuing Agency decision that is filed by the Contractor.

26. CONFIDENTIALITY

The Contractor agrees to protect the confidentiality of the Commonwealth's confidential information. The Commonwealth agrees to protect the confidentiality of Contractor's confidential information. In order for information to be deemed confidential, the party claiming confidentiality must designate the information as "confidential" in such a way as to give notice to the other party (notice may be communicated by describing the information, and the specifications around its use or disclosure, in the SOW). Neither party may assert that information owned by the other party is such party's confidential information. The parties agree that such confidential information shall not be copied, in whole or in part, or used or disclosed except when essential for authorized activities under this Contract and, in the case of disclosure, where the recipient of the confidential information has agreed to be bound by confidentiality requirements no less restrictive than those set forth herein. Each copy of such confidential information shall be marked by the party making the copy with any notices appearing in the original. Upon termination or cancellation of this Contract or any license granted hereunder, the receiving party will return to the disclosing party all copies of the confidential information in the

receiving party's possession, other than one copy, which may be maintained for archival purposes only. Both parties agree that a material breach of these requirements may, after failure to cure within the time frame specified in this Contract, and at the discretion of the non-breaching party, result in termination for default pursuant to Section 23.c (DEFAULT), in addition to other remedies available to the non-breaching party.

Insofar as information is not otherwise protected by law or regulation, the obligations stated in this Section do not apply to information:

- a. Already known to the recipient at the time of disclosure;
- b. Independently generated by the recipient and not derived from the information supplied by the disclosing party;
- c. Known or available to the public, except where such knowledge or availability is the result of unauthorized disclosure by the recipient of the proprietary information;
- d. Disclosed to the recipient without a similar restriction by a third party who has the right to make such disclosure; or
- e. Required to be disclosed by the recipient by law, regulation, court order, or other legal process.

There shall be no restriction with respect to the use or disclosure of any ideas, concepts, know-how, or data processing techniques developed alone or jointly with the Commonwealth in connection with services provided to the Commonwealth under this Contract.

27. INSURANCE

- a. The Contractor shall procure and maintain at its expense and/or require its subcontractors to procure and maintain, as appropriate, the following types of insurance, issued by companies acceptable to the Commonwealth and authorized to conduct such business under the laws of the Commonwealth of Pennsylvania:
 - (1) Worker's Compensation Insurance for all of the Contractor's employees and those of any subcontractor engaged in performing Services in accordance with the *Worker's Compensation Act of 1915* and any supplements or amendments thereof.
 - (2) Public liability and property damage insurance to protect the Commonwealth, the Contractor, and any and all subcontractors from claims for damages for personal injury (including bodily injury), sickness or disease, accidental death, and damage to property, including loss of use resulting from any property damage which may arise from its operations under this Contract, whether such operation be by the Contractor, by any subcontractor, or by anyone directly or indirectly employed by either. The limits of such insurance shall be in an amount not less than \$500,000 each person and \$2,000,000 each occurrence, personal injury and property damage combined. Such policies shall be occurrence based rather than claims-made policies and shall name the Commonwealth of Pennsylvania as an additional insured, as its interests

may appear. The insurance shall not contain any endorsements or any other form designed to limit and restrict any action by the Commonwealth as an additional insured against the insurance coverages in regard to the Services performed for the Commonwealth.

- b. Prior to commencing Services under any PO, the Contractor shall provide the Issuing Agency with a copy of each current certificate of insurance. These certificates shall contain a provision that coverages afforded under the policies will not be canceled or changed until at least thirty (30) days prior written notice has been given to the Commonwealth.
- c. The Contractor agrees to maintain such insurance for the life of any PO under which it is working.
- d. Contractor's self-insurance of the types and amounts of insurance set for the above shall satisfy the requirements of this Section 27 (INSURANCE).

28. CONTRACTOR RESPONSIBILITY PROGRAM AND PROVISIONS

As indicated in Management Directive 215.9, *Contractor Responsibility Program*, the Commonwealth of Pennsylvania has established a system to monitor Contractor performance. If a Contractor has not performed as required by the Contract or PO, the Issuing Agency will notify the Contracting Officer. The information provided will be reviewed, and if deemed to be appropriate, will be entered in the central Contractor Responsibility File. This information will be used by the Commonwealth to assist in determining if a Contractor is responsible. If it is determined a Contractor is not responsible, it will be ineligible for contract awards.

For the purpose of these provisions, the term contractor is defined as any person, including, but not limited to, a bidder, offeror, loan recipient, grantee or lessor, who has furnished or performed or seeks to furnish or perform, goods, supplies, services, leased space, construction or other activity, under a contract, grant, lease, purchase order or reimbursement agreement with the Commonwealth of Pennsylvania (Commonwealth). The term contractor includes a permittee, licensee, or any agency, political subdivision, instrumentality, public authority, or other public entity in the Commonwealth.

- a. The Contractor certifies, in writing, for itself and its subcontractors required to be disclosed or approved by the Commonwealth, that as of the date of its execution of this Bid/Contract, that neither the Contractor, nor any such subcontractors, are under suspension or debarment by the Commonwealth or any governmental entity, instrumentality, or authority and, if the Contractor cannot so certify, then it agrees to submit, along with its Bid/Contract, a written explanation of why such certification cannot be made.
- b. The Contractor also certifies, in writing, that as of the date of its execution of this Bid/Contract it has no tax liabilities or other Commonwealth obligations, or has filed a timely administrative or judicial appeal if such liabilities or obligations exist, or is subject to a duly approved deferred payment plan if such liabilities exist.

- c. The Contractor's obligations pursuant to these provisions are ongoing from and after the effective date of the Contract through the termination date thereof. Accordingly, the Contractor shall have an obligation to inform the Commonwealth if, at any time during the term of the Contract, it becomes delinquent in the payment of taxes, or other Commonwealth obligations, or if it or, to the best knowledge of the Contractor, any of its subcontractors are suspended or debarred by the Commonwealth, the federal government, or any other state or governmental entity. Such notification shall be made within 15 days of the date of suspension or debarment.
- d. The failure of the Contractor to notify the Commonwealth of its suspension or debarment by the Commonwealth, any other state, or the federal government shall constitute an event of default of the Contract with the Commonwealth.
- e. The Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between the Contractor and the Commonwealth that results in the suspension or debarment of the contractor. Such costs shall include, but shall not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. The Contractor shall not be responsible for investigative costs for investigations that do not result in the Contractor's suspension or debarment.
- f. The Contractor may obtain a current list of suspended and debarred Commonwealth contractors by either searching the Internet at <http://www.dgs.state.pa.us/> or contacting the:

Department of General Services
Office of Chief Counsel
603 North Office Building
Harrisburg, PA 17125
Telephone No: (717) 783-6472
FAX No: (717) 787-9138

29. OFFSET PROVISION FOR COMMONWEALTH CONTRACTS

The Contractor agrees that the Commonwealth may set off the amount of any state tax liability or other obligation of the Contractor or its subsidiaries to the Commonwealth against any payments due the Contractor under any contract with the Commonwealth.

30. TAXES-FEDERAL, STATE, AND LOCAL

The Commonwealth is exempt from all excise taxes imposed by the Internal Revenue Service and has accordingly registered with the Internal Revenue Service to make tax-free purchases under registration No. 23740001-K. With the exception of purchases of the following items, no exemption certificates are required and none will be issued: undyed diesel fuel, tires, trucks, gas-guzzler emergency vehicles, and sports fishing equipment. The Commonwealth is also exempt from Pennsylvania sales tax, local sales tax, public transportation assistance taxes, and fees and vehicle rental tax. The Department of Revenue regulations provide that exemption certificates are not required for sales made to governmental entities and none will be issued. Nothing in this Section is meant to exempt a construction contractor from the payment of any of these taxes or fees which are required to be paid with respect to the purchase, use, rental or lease of tangible personal property or taxable services used or transferred in connection with the performance of a construction contract.

31. LIMITATION OF LIABILITY

The Contractor's liability to the Commonwealth under any PO issued under this Contract shall be limited to the greater of \$250,000 or the value of the PO (including any amendments), unless a limitation between \$250,000 and the value of the PO is otherwise specified in the PO. This limitation will apply, except as otherwise stated in this Section, regardless of the form of action, whether in contract or in tort, including negligence. This limitation does not, however, apply to damages for:

- a. Bodily injury or death;
- b. Damage to real property or tangible personal property for which the Contractor is legally liable; or
- c. The Contractor's indemnity of the Commonwealth for patent, copyright, trade secret or trademark protection.

In no event will the Contractor be liable for consequential and indirect damages unless otherwise stated and agreed to by the Commonwealth and the Contractor in the Statement of Work attached to the PO. Except as set out in Section 33 (VIRUS, MALICIOUS, MISCHIEVOUS OR DESTRUCTIVE PROGRAMMING) in no event will the Contractor be liable for damages due to lost records or data, unless otherwise specified in the PO. Notwithstanding the foregoing, the

Contractor shall provide reasonable assistance to the Commonwealth in restoring such lost records or data to their most recent backup copy.

32. COMMONWEALTH HELD HARMLESS

The Contractor shall hold the Commonwealth harmless from and indemnify the Commonwealth against any and all claims, demands and actions based upon or arising out of any activities performed by the Contractor and its employees and agents under this Contract, provided the Commonwealth gives Contractor prompt notice of any such claim of which it learns. Pursuant to the *Commonwealth Attorneys Act* 71 P.S. § 732-101, *et. seq.*, the Office of Attorney General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG may, however, in its sole discretion and under such terms as it deems appropriate, delegate its right of defense. If OAG delegates the defense to the Contractor, the Commonwealth will cooperate with all reasonable requests of Contractor made in the defense of such suits.

Notwithstanding the above, the Contractor shall not enter into any settlement without the Commonwealth's written consent, which shall not be unreasonably withheld. The Commonwealth may, in its sole discretion, allow the Contractor to control the defense and any related settlement negotiations.

33. VIRUS, MALICIOUS, MISCHIEVOUS OR DESTRUCTIVE PROGRAMMING

- a. Notwithstanding any other provision in this Contract to the contrary, if the Contractor or any of its employees, subcontractors or consultants introduces a virus or malicious, mischievous or destructive programming into the Commonwealth's software or computer networks and has failed to comply with the Commonwealth software security standards, and provided further that the Commonwealth can demonstrate that the virus or malicious, mischievous or destructive programming was introduced by the Contractor or any of its

employees, subcontractors or consultants, the Contractor shall be liable for any damage to any data and/or software owned or licensed by the Commonwealth. The Contractor shall be liable for any damages incurred by the Commonwealth including, but not limited to, the expenditure of Commonwealth funds to eliminate or remove a computer virus or malicious, mischievous or destructive programming that result from the Contractor's failure to take proactive measures to keep virus or malicious, mischievous or destructive programming from originating from the Contractor, its servants, agents or employees through appropriate firewalls and maintenance of anti-virus software and software security updates (such as operating systems security patches, etc.). In the event of destruction or modification of software, the Contractor shall eliminate the virus, malicious, mischievous or destructive programming, restore the Commonwealth's software, and be liable to the Commonwealth for any resulting damages. The Contractor shall be responsible for reviewing Commonwealth software security standards in effect at the commencement of a PO and complying with those standards. The Contractor's liability shall cease if the Commonwealth has not fully complied with its own software security standards.

- b. The Commonwealth may, at any time, audit, by a means deemed appropriate by the Commonwealth, any computing devices being used by representatives of the Contractor to provide services to the Commonwealth that will be connected to a Commonwealth network for the sole purpose of determining whether those devices have anti-virus software with current virus signature files and the current minimum operating system patches or workarounds have been installed. Devices found to be out of compliance will immediately be disconnected and will not be permitted to connect or reconnect to the Commonwealth network until the proper installations have been made. The Commonwealth shall not install any software or monitoring tools on the Contractor's equipment without the Contractor's written consent to do so.
- c. The Contractor may use the anti-virus software used by the Commonwealth to protect Contractor's computing devices used in the course of providing services to the Commonwealth. It is understood that the Contractor may not install the software on any computing device not being used to provide services to the Commonwealth, and that all copies of the software will be removed from all devices upon termination of this Contractor or the PO under which services are being provided.
- d. Neither the Commonwealth nor the Issuing Agency will be responsible for any damages to the Contractor's computers, data, software, etc. caused as a result of the installation of the Commonwealth's anti-virus software or monitoring software on the Contractor's computers.

34. PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET PROTECTION

- a. The Contractor shall hold the Commonwealth harmless for any suit or proceeding which may be brought against the Commonwealth for the alleged infringement of any United States or foreign patents, copyrights, or trademarks, or for a misappropriation of trade secrets arising out of performance of this Contract, including all work, services, materials, reports, studies, and computer programs provided by the Contractor, and in any such suit or proceeding will satisfy any final award for such infringement, including costs. The Commonwealth agrees to give Contractor prompt notice of any such claim of which it learns. Pursuant to the *Commonwealth Attorneys Act* 71 P.S. § 732-101, *et. seq.*, the Office of Attorney General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG may, however,

in its sole discretion and under the terms it deems appropriate, delegate its right of defense. If OAG delegates the defense to the Contractor, the Commonwealth will cooperate with all reasonable requests of Contractor made in the defense of such suits. If OAG does not delegate its right of defense, OAG will request that OAG seek to join the Contractor as a third party. If OAG does not agree to seek to join the Contractor as a third party, the Contractor shall seek to intervene in the matter. If the Contractor is not joined as a third party either through the OAG's joinder or through the Contractor's intervention, there will be no contractual obligation on the part of the Contractor to indemnify. No settlement which prevents the Commonwealth from continuing to use the Developed Materials as provided herein shall be made without the Commonwealth's prior written consent. In all events, the Commonwealth shall have the right to participate in the defense of any such suit or proceeding through counsel of its own choosing. It is expressly agreed by the Contractor that, in the event it requests that the Commonwealth provide support to the Contractor in defending any such claim, the Contractor shall reimburse the Commonwealth for all expenses (including attorneys' fees, if such are made necessary by the Contractor's request) incurred by the Commonwealth for such support.

- b. The Contractor shall pay all damages and costs awarded therein against the Commonwealth. If information and assistance are furnished by the Commonwealth at the Contractor's written request, it shall be at the Contractor's expense, but the responsibility for such expense shall be only that within the Contractor's written authorization.
- c. If, in the Contractor's opinion, the products, materials, reports, studies, or computer programs furnished hereunder are likely to or do become subject to a claim of infringement of a United States or foreign patent, copyright, or trademark, or for a misappropriation of trade secret, then without diminishing the Contractor's obligation to satisfy any final award, the Contractor may, at its option, substitute functional equivalents for the alleged infringing products, materials, reports, studies, or computer programs or, at the Contractor's option and expense, obtain the rights for the Commonwealth to continue the use of such products, materials, reports, studies, or computer programs.
- d. If any of the products, materials, reports, studies, or computer programs provided by the Contractor are in such suit or proceeding held to constitute infringement and the use or publication thereof is enjoined, the Contractor shall, at its own expense and at its option, either procure the right to publish or continue use of such infringing products, materials, reports, studies, or computer programs, replace them with non-infringing items, or modify them so that they are no longer infringing.
- e. If the Contractor is unable to do any of the preceding, the Contractor agrees to pay the Commonwealth:
 - (1) Any amounts paid by the Commonwealth less a reasonable amount based on the acceptance and use of the deliverable;
 - (2) Any license fee less an amount for the period of usage of any software; and
 - (3) The prorated portion of any service fees representing the time remaining in any period of service for which payment was made.
- f. The obligations of the Contractor under this Section continue without time limit and survive the termination of this contract.

- g. Notwithstanding the above, the Contractor shall have no obligation for:
- (1) Modification of the product, service, or deliverable provided by the Commonwealth;
 - (2) Any material provided by the Commonwealth to the Contractor and incorporated into, or used to prepare, a product, service, or deliverable;
 - (3) Use of the product, service, or deliverable in other than its specified operating environment;
 - (4) The combination, operation, or use of the product, service, or deliverable with other products, services, or deliverables not provided by the Contractor as a system or the combination, operation, or use of the product, service, or deliverable, with any products, data, or apparatus that the Contractor did not provide;
 - (5) Infringement of a non-Contractor product alone;
 - (6) The Commonwealth's distribution, marketing or use beyond the scope contemplated by the SOW or PO; or
 - (7) The Commonwealth's failure to use corrections or enhancements made available to the Commonwealth by the Contractor at no charge.
- h. The obligation to indemnify the Commonwealth, under the terms of this Section, shall be the Contractor's sole and exclusive obligation for the infringement or misappropriation of intellectual property.

35. SENSITIVE INFORMATION

- a. The Contractor shall not publish or otherwise disclose, except to the Commonwealth or the Contractor's subcontractors, any information or data obtained hereunder from private individuals, organizations, or public agencies, in a way that allows the information or data furnished by or about any particular person or establishment to be identified,.
- b. The parties shall not use or disclose any information about a recipient receiving services from, or otherwise enrolled in, a Commonwealth program affected by or benefiting from services under this Contract for any purpose not connected with the parties' Contract responsibilities, or as outlined in the Issuing Agency SOW.
- c. Contractor, as directed, shall comply with all federal or state laws and regulations related to the use of information that constitutes protected health information (PHI) as defined by the regulations promulgated pursuant to the *Health Insurance Portability and Accountability Act* (HIPAA). By signing this Contract, the Contractor agrees to the terms of the Business Associates Agreement, which is incorporated into this Contract as Appendix A. If the Issuing Agency, or relevant portion thereof, is a Covered Entity as defined in HIPAA, and the Contractor is performing the work of a Business Associate (which determination will be made solely in the discretion of the Issuing Agency), the Issuing Agency it will fill in the blanks in the attached Appendix as part of the PO. It is understood that Appendix A is only applicable if the Issuing Agency so indicates, and, if not applicable to the entire Issuing Agency, is only applicable with respect to the internal entities indicated by the Issuing Agency expressly in the PO.

36. CONTRACT CONSTRUCTION

The provisions of this Contract shall be construed in accordance with the provisions of all applicable laws and regulations of the Commonwealth of Pennsylvania.

37. OWNERSHIP RIGHTS

a. Ownership of Properties

- (1) All “Developed Works” shall be owned according to the provisions set forth in this Section 37.
- (2) All software owned by the Commonwealth or its licensors (“Commonwealth Software”) as of the Effective Date, or by the effective date of a PO, whichever is later, shall be and shall remain the exclusive property of the Commonwealth or its licensors, and Contractor shall acquire no rights or interests in the Commonwealth Software or Tools or that of its licensors by virtue of this Contract or any PO or SOW except as described in this paragraph or elsewhere in this Contract or any PO or SOW. The Contractor shall not use any Commonwealth Software, Commonwealth Tools or software or tools of its licensors for any purpose other than to complete work under a PO. In the use of Commonwealth Software, Commonwealth Tools or software or tools of its licensors, Contractor will be bound by the confidentiality provisions of this Contract.

b. Definitions

- (1) Software: For purposes of this Contract, the term “software” means a collection of one or more programs, databases or microprograms fixed in any tangible medium of expression that comprises a sequence of instructions (source code) to carry out a process in, or convertible into, a form executable by an electronic computer (object code).
- (2) Data: For purposes of this Contract, the term “data” means any recorded information, regardless of form, the media on which it may be recorded, or the method of recording.
- (3) Technical Data: For purposes of this Contract, the term “technical data” means any specific information necessary for the development, production or use of the Commonwealth Software.

c. Commonwealth Property—Non-Exclusive, License Grant and Restrictions

During the term of this Contract, Commonwealth grants to Contractor for the limited purpose of providing the Services covered under this Contract, a limited, nonexclusive, nontransferable, royalty-free right (subject to the terms of any third party agreement to which the Commonwealth is a party) to do the following:

- (1) Obtain access to and use of the Commonwealth Software in accordance with the terms of this Contract.
- (2) Reproduce the Commonwealth Software for archival purposes or for other purposes expressly provided for under this Contract.

- (3) Modify the Commonwealth Software consistent with the terms and conditions of this Contract provided that Contractor agrees to assign to the Commonwealth, its rights, if any, in any derivative works resulting from Contractor's modification of the Commonwealth Software. Contractor agrees to execute any documents required to evidence this assignment and to waive any moral rights and rights of attribution provided for in Section 106A of Title 17 of the United States Code, the *Copyright Act of 1976*.
- (4) Allow the Contractor's subcontractors approved by the Commonwealth to obtain access to the Commonwealth Software for the purposes of complying with the terms and conditions of this Contract; provided, however, that neither Contractor nor any of its subcontractors may decompile or reverse engineer, or attempt to decompile or reverse engineer, any of the Commonwealth Software. Commonwealth hereby represents that it has the authority to provide the license grant and rights set forth in this Section.
- (5) To the extent that Contractor uses Commonwealth Software, Commonwealth Tools or software or tools of its licensor, Contractor agrees to protect the confidentiality of these works and maintain these proprietary works with the strictest confidence.

d. Impact of Third Party Agreements

Subject to the terms of any third party agreement to which the Commonwealth is a party: (i) the Commonwealth shall, at no cost to Contractor, provide Contractor with access to the Commonwealth Software in the form in use by Commonwealth as of the Contract Effective Date or the effective date of a PO, whichever is later, and (ii) Contractor, as part of the Services to be rendered under this Contract, shall compile and, as changes are made, update a list of all of the Commonwealth Software then in use by Contractor or any of its subcontractors in connection with Contractor's performance of the Services.

e. Reservation of Rights

All rights, not expressly granted here to Contractor on a nonexclusive basis, including the right to grant non-exclusive licenses and other rights are reserved by the Commonwealth.

f. Termination of Commonwealth License Grant

Upon the expiration or termination for any reason of Contractor's obligation to provide the Services under this Contract or under a PO, all rights granted to Contractor in this Section 37 (OWNERSHIP RIGHTS) shall immediately cease. Contractor shall, at no cost to Commonwealth, deliver to Commonwealth all of the Commonwealth Software and Tools (including any related source code then in Contractor's possession or under its control) in the form in use as of the Effective Date of such expiration or termination. Within fifteen (15) calendar days after termination, Contractor shall provide the Commonwealth with a current copy of the list of Commonwealth Software in use as of the date of such expiration or termination. Concurrently therewith, Contractor shall destroy or erase all other copies of any of the Commonwealth Software then in Contractor's possession or under its control unless otherwise instructed by Commonwealth, in writing; provided, however, that Contractor may retain one archival copy of such Commonwealth Software and Tools, until final resolution of any actively asserted pending disputes between the Parties, such retention being for the sole purpose of resolving such disputes.

g. Effect of License Grant Termination

Consistent with the provisions of this Section, Contractor shall refrain from manufacturing, copying, marketing, distributing, or use of any Commonwealth Software or any other work which incorporates the Commonwealth Software. The obligations of this Section 37 (OWNERSHIP RIGHTS) shall survive any termination of this Contract.

h. Use of Contractor-Owned Software

All software owned by Contractor (Contractor Software) and tools owned by Contractor (Contractor Tools) prior to the Effective Date of this Contract or the effective date of a PO, whichever is later, shall be and shall remain the exclusive property of Contractor. The Commonwealth shall acquire no rights or interests in the Contractor Software or the Contractor Tools by virtue of this Contract or any PO or SOW except as set forth in this paragraph or in the PO or SOW.

i. Definition of Contractor Tools

Contractor Tools is defined as any tools, both in object code and source code form, which Contractor has previously developed, or which Contractor independently develops or licenses from a third party, excluding any tools that Contractor creates pursuant to this Contract. Contractor Tools includes but is not limited to, methodologies, information, concepts, toolbars for maneuvering between pages, search engines, JAVA applets, and ActiveX controls.

j. Required Reports, Records and Inventory of Contractor Tools and Contractor Software

- (1) Contractor must provide a list of all Contractor Tools and Contractor Software to be delivered in connection with the deliverables or Developed Materials prior to starting work on a PO. Contractor must also provide a list of all other Contractor Tools and Contractor Software intended to be used by Contractor to provide the services under the PO but will not become part of or necessary for the use of the Developed Materials. All Contractor Tools and Contractor Software necessary to use deliverables or Developed Materials shall be delivered to the Commonwealth along with the license set forth in Section 37k. Contractor may amend these lists from time to time while the PO is being carried out or upon its completion. In the event that the Contractor fails to list a Contractor Tool, but can demonstrate that such tool was independently developed by Contractor prior to the PO on which it was used, Contractor shall nevertheless retain complete ownership of such Contractor Tool that is necessary to use the deliverables or Developed Materials, provided that notice is given to the Issuing Agency prior to its use on the PO. Any Contractor Tools or Contractor Software not included on the lists will be deemed to have been created under this Contract.
- (2) As part of its response to a SOW, the Contractor will provide a list of all software and tools that are commercially available and which are required to support the deliverables or Developed Materials.
- (3) During the term of this Contract, Contractor shall maintain at its principal office books of account and records showing its actions under

this Contract. Upon reasonable notice by Commonwealth, Contractor shall allow Commonwealth to inspect these records and accounts for purposes of verifying the accuracy of such accounts and records.

- (4) In the event that Contractor fails to list a Contractor Tool or Contractor Software, but is able to demonstrate that such tool or software was independently developed by Contractor prior to the Effective Date of this Contract, Contractor shall retain complete ownership of such Contractor Tool or Contractor Software that is necessary to use the deliverables or Developed Works, provided that notice is given to the Commonwealth prior to use on the Contract.

k. Expiration or Termination NonExclusive License Grant—Non-Commercial Contractor Tools and Software

Upon the expiration or termination for any reason of Contractor's obligation to provide the Services under this Contract, and at the request of Commonwealth, Contractor hereby (i) grants to Commonwealth a paid-up, nonexclusive, nontransferable license to use, modify, prepare derivative works and unless Commonwealth terminates this Contract without cause, grant to third parties engaged by Commonwealth the right to use, modify, and prepare derivative works based upon all or any portion of the non-commercially available Contractor Software and the non-commercially available Contractor Tools owned by Contractor and used by Contractor in connection with the Services, the foregoing rights being granted to the extent reasonably necessary to facilitate Commonwealth's or such third party's completion of and maintenance of the Services to be provided by Contractor under this Contract immediately prior to such expiration or termination and (ii) will deliver to Commonwealth the object code version of such non-commercially available Contractor Software and such non-commercially available Contractor Tools in the form used by Contractor in connection with the Services immediately prior to such expiration or termination to allow the Commonwealth to complete and maintain such work. If Commonwealth enters into a contract that allows for the use of the Contractor Software or Contractor Tools for which a license is granted under this Section 37 (OWNERSHIP RIGHTS), the Commonwealth will include a provision in that contract that limits the use of the Contractor Software or Contractor Tools as delineated in this Section.

l. Rules of Usage for Developed Works

- (1) If Developed Works modify, improve, or enhance application software programs or other materials generally licensed by the Contractor, then such Developed Works shall be the property of the Contractor, and Contractor hereby grants Commonwealth an irrevocable, nonexclusive, worldwide, fully paid-up license (to include source code and relevant documentation) in perpetuity to use, modify, execute, reproduce, display, perform, prepare derivative works from and distribute, within the Commonwealth, of such Developed Works. For purposes of distribution under the license grant created by this section, Commonwealth includes any government agency, department, instrumentality, division, unit or other office that is part of the

Commonwealth of Pennsylvania, together with the State System of Higher Education (including any of its universities), any county, borough, commonwealth, city, municipality, town, township special purpose district, or other similar type of governmental instrumentality located within the geographical boundaries of the Commonwealth of Pennsylvania. If federal funds are used in creation of the Developed Works, the Commonwealth also includes any other state government as well as the federal government.

- (2) If Developed Works modify, improve, or enhance application software or other materials not licensed to the Commonwealth by the Contractor, then such modifications, improvements and enhancements shall be the property of the Commonwealth or its licensor. To the extent Commonwealth owns the software or other materials, it hereby grants to Contractor an irrevocable, nonexclusive, worldwide, fully paid-up license to use, modify, execute, reproduce, display, perform, prepare derivative works from, and distribute copies of such Developed Works. To the extent Commonwealth has a license to the software or other materials, and to the extent that it, in its sole discretion determines it is able to do so the Commonwealth will grant to Contractor an irrevocable, nonexclusive, worldwide, fully paid-up license to use, modify, execute, reproduce, display, perform and distribute copies of such Developed Works.
- (3) If Developed Works have been funded by Commonwealth, to any extent, with either Commonwealth or federal funds, and the Developed Works do not include pre-existing materials generally licensed by the Contractor, then the Commonwealth shall have all right, title, and interest (including ownership of copyright and trademark) to such Developed Works and the Commonwealth hereby grants to Contractor an irrevocable, nonexclusive, worldwide, fully paid-up license to use, modify, execute, reproduce, display, perform, prepare derivative works from, and distribute copies of such Developed Works. The Commonwealth shall exclusively own all software products first developed under the terms of this contract by the Contractor, its subcontractors or other third party vendors that are specifically developed for, engineered and integrated into the Developed Works.
- (4) When the Developed Work is a report provided by a research company that was provided under this contract or a PO, but which was not developed specifically for the Commonwealth or Issuing Agency under this contract or a PO, the ownership of the Developed Work will remain with the contractor, provided, however, that the Commonwealth or Issuing Agency has the right to copy and distribute the Developed Work within the Commonwealth.

m. **Copyright Ownership.** Works Developed as Part of the Scope of Work for the Project, including Developed Works developed by subcontractors, are the sole and exclusive property of the Commonwealth and shall be considered “works made for hire” under the *United States Copyright Act of 1976*, as amended, 17 United States Code. In the event that the Developed Works do not fall within the specifically enumerated works that

constitute works made for hire under the United States copyright laws, Contractor agrees to assign and, upon their authorship or creation, expressly and automatically assigns all copyright interests, proprietary rights, trade secrets, and other right, title, and interest in and to such Developed Works to Commonwealth. Contractor further agrees that it will have its subcontractors assign, and upon their authorship or creation, expressly and automatically assign all copyright interest, proprietary rights, trade secrets, and other right, title, and interest in and to the Developed Works to the Commonwealth. Commonwealth shall have all rights accorded an owner of copyright under the United States copyright laws including, but not limited to, the exclusive right to reproduce the Developed Works in multiple copies, the right to distribute, copies by sales or other transfers, the right to register all copyrights in its own name as author in the United States and in foreign countries, the right to prepare derivative works based upon the Creative Works and the right to display the Developed Works. The Contractor further agrees that it will include this requirement in any subcontractor or other agreement with third parties who in any way participate in the creation or development of Developed Works. Upon completion or termination of this Contract, all working papers, files and other documentation shall immediately be delivered by Contractor to the Commonwealth. Contractor warrants that the Developed Works are original and do not infringe any copyright, patent, trademark, or other intellectual property right of any third party and are in conformance with the intellectual property laws of the United States.

n. Patent Ownership

- (1) Contractor and its subcontractors shall retain ownership to patentable items, patents, processes, inventions or discoveries (collectively, the Patentable Items) made by the Contractor during the performance of this Contract. Notwithstanding the foregoing, the Commonwealth shall be granted a nonexclusive, nontransferable, royalty free license to use or practice the Patentable Items. Commonwealth may disclose to third parties any such Patentable Items made by Contractor or any of its subcontractors under the scope of work for the Project that have been previously publicly disclosed. Commonwealth understands and agrees that any third party disclosure will not confer any license to such Patentable Items.
- (2) Contractor shall not use any computer program, code, or any works developed by or for Contractor independently of this Contract (“Pre-Existing Materials”) in the performance of the Services under this Contract, without the express written consent of the Commonwealth. Any Pre-Existing Materials used by Contractor for performance of Services under this Contract without Commonwealth consent shall be deemed to be Developed Works as that term is used in this Section. In the event that Commonwealth provides such consent, Contractor shall retain any and all rights in such Pre-Existing Materials.

o. Federal Government Interests

It is understood that certain funding under this Contract may be provided by the federal government. Accordingly, the rights to Developed Works or Patentable Items of Contractors or subcontractors hereunder will be further subject to government rights as set forth in 37 C.F.R. § 401, and other applicable statutes.

p. Usage Rights for Know-How and Technical Information

Either Party, in the ordinary course of conducting business, may use any ideas, concepts, know-how, methodologies, processes, components, technologies, algorithms, designs, modules or techniques not otherwise covered by this Section relating to the Services which Contractor or Commonwealth (alone or jointly with the Commonwealth) develops or learns in connection with Contractor's provision of Services to Commonwealth under this Contract.

q. Commonwealth Intellectual Property Protection

Contractor acknowledges Commonwealth's exclusive right, title and interest, including without limitation copyright and trademark rights, in and to Commonwealth Software, Commonwealth Tools and the Developed Works developed under the provisions of this Section, shall not in any way, at any time, directly or indirectly, do or cause to be done any act or thing contesting or in any way impairing or tending to impair any part of said right, title, and interest, and shall not use or disclose the Commonwealth Software, Commonwealth Tools, or the Developed Works without Commonwealth's written consent, which consent may be withheld by the Commonwealth for any reason. Further, Contractor shall not in any manner represent that Contractor has any ownership interest in the Commonwealth Software, Commonwealth Tools, or the Developed Works. This provision is a material part of this Section.

r. Contractor Intellectual Property Protection

Commonwealth acknowledges that it has no ownership rights in the Contractor Software or Contractor Tools other than those set forth in this Contract, any PO or SOW, or as may be otherwise granted in writing.

s. Source Code and Escrow Items Obligations

Simultaneously with delivery of the Developed Works to Commonwealth, Contractor shall deliver a true, accurate and complete copy of all source codes relating to the Developed Works. To the extent that the Developed Works include application software or other materials generally licensed by the Contractor, then the source code shall be placed in escrow, subject to the terms and conditions of an Escrow Agreement to be executed by the Parties and an Escrow Agent that is acceptable to the Commonwealth.

t. Contractor's Copyright Notice Obligations

Contractor will affix the following Copyright Notice to the Developed Works developed under this Section and all accompanying documentation: "Copyright © [year] by the Commonwealth of Pennsylvania. All Rights Reserved." This notice shall appear on all tangible versions of the Developed Works delivered under this Contract and any associated documentation. It shall also be programmed into any all Developed Works delivered hereunder so that it appears at the beginning of all visual displays of such Developed Works.

u. Commercial Software

If a deliverable under this Contract is commercially available software, the Contractor hereby agrees that, before it incorporates such software into a deliverable it will inform the licensor of the software, if the Contractor is not the licensor of the software, that it will be required to enter into a license with the Commonwealth which is acceptable to the Commonwealth. The license agreement in the form attached hereto as Appendix "C" is in a form that is acceptable to the Commonwealth. The Issuing Agency may negotiate the terms of the license agreement as appropriate to the Issuing Agency's use of the software.

38. PUBLICATION RIGHTS AND/OR COPYRIGHTS

- a. Except as otherwise provided in Section 37 (OWNERSHIP RIGHTS), the Contractor shall not publish any of the results of the work without the written permission of the Issuing Agency. The publication shall include the following statement: "The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the Commonwealth of Pennsylvania." The Contractor shall not include in the documentation any copyrighted matter, unless the Contractor provides the Commonwealth with written permission of the copyright owner.
- b. Subject to Section 37 (OWNERSHIP RIGHTS) and the confidentiality provisions of Section 26 (CONFIDENTIALITY), the Commonwealth shall have unrestricted authority to reproduce, distribute, and use any submitted report or data designed or developed and delivered to the Commonwealth as part of the performance of a PO.
- c. Rights and obligations of the parties under this Section 38 survive the termination of this Contract or any PO issued under it.

39. CHANGE OF OWNERSHIP

In the event that the Contractor should change ownership for any reason whatsoever, the Commonwealth shall have the exclusive option of continuing under the terms and conditions of this Contract with the Contractor or its successors or assigns for the full remaining term of this Contract, or continuing under the terms and conditions of this Contract with the Contractor or its successors or assigns for such period of time as is necessary to replace the products, materials, reports, studies, or computer programs, or immediately terminating this Contract.

40. OFFICIALS NOT TO BENEFIT

No official or employee of the Commonwealth and no member of its General Assembly who exercises any functions or responsibilities under this Contract shall participate in any decision relating to this Contract which affects their personal interest or the interest of any corporation, partnership, or association in which they are, directly or indirectly, interested; nor shall any such official or employee of the Commonwealth or member of its General Assembly have any interest, direct or indirect, in this Contract or the proceeds thereof.

41. INDEPENDENT CAPACITY OF CONTRACTOR

- a. The parties to this Contract agree that the Services performed by the Contractor under the terms of this Contract are performed as an independent Contractor. The Services performed by the Contractor are performed neither as an employee of the Commonwealth

of Pennsylvania nor as a partnership or joint venture between the Commonwealth and the Contractor.

- b. Except as otherwise provided by the terms of this Contract, the Commonwealth shall have no control over the manner in which the contractual Services are performed by the Contractor, or any subcontractor. Any job specifications or standards of work attached to or incorporated into this Contract or any subcontracting restrictions contained in this Contract shall not be construed as the Commonwealth's direction or control over the manner of the performance of Services provided by the Contractor.

42. COMPLIANCE WITH LAWS

The Contractor shall comply with all federal, state, and local laws applicable to its Services, including, but not limited to, all statutes, regulations and rules that are in effect as of the date of the issuance of the PO and shall procure at its expense all licenses and all permits necessary for the fulfillment of its obligation.

43. THE AMERICANS WITH DISABILITIES ACT

During the term of this Contract, the Contractor agrees as follows:

- a. Pursuant to federal regulations promulgated under the authority of *The Americans With Disabilities Act*, 28 C.F.R. § 35.101, *et seq.*, the Contractor understands and agrees that no individual with a disability shall, on the basis of the disability, be excluded from participation in this Contract or from activities provided for under this Contract. As a condition of accepting and executing this Contract, the Contractor agrees to comply with the *General Prohibitions Against Discrimination*, 28 C.F.R. § 35.130, and all other regulations promulgated under Title II of *The Americans With Disabilities Act* which are applicable to the benefits, services, programs, and activities provided by the Commonwealth of Pennsylvania through Contracts with outside Contractors.
- b. The Contractor shall be responsible for and agrees to indemnify and hold harmless the Commonwealth of Pennsylvania from losses, damages, expenses claims, demands, suits, and actions brought by any party against the Commonwealth of Pennsylvania as a result of the Contractor's failure to comply with the provisions of Subsection a. above.

44. EXAMINATION OF RECORDS

- a. Unless otherwise specified in a PO, the Contractor agrees to maintain, using its standard procedures, and in accordance with Generally Accepted Accounting Principles, books, records, documents, and other evidence pertaining to the charges under any PO to the extent and in such detail as will properly reflect all charges for which reimbursement is claimed under the provisions of this Contract.
- b. The Contractor agrees to make available at the office of the Contractor at all reasonable times, and upon reasonable written notice, during the term of this Contract and the period set forth in Subsection c. below, any of the records for inspection, audit, or reproduction by any authorized Commonwealth representative. To the extent allowed by law, the Commonwealth agrees to maintain any documents so provided in accordance with the confidentiality provisions in Section 26 (CONFIDENTIALITY).

- c. Except as otherwise provided below or specified in a PO, the Contractor shall preserve and make available its records for a period of three (3) years from the date of final payment under this Contract:
 - (1) If this Contract is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of three (3) years from the date of any resulting final settlement.
 - (2) Non-privileged records which relate to litigation or the settlement of claims arising out of the performance of this Contract, or charges under this Contract as to which exception has been taken by the auditors, shall be retained by the Contractor until such litigation, claims, or exceptions have been finally resolved.
- d. Except for documentary evidence retained pursuant to Subsection c.(2) above, the Contractor may in fulfillment of its obligation to retain its records as required by this Section substitute photographs, microphotographs, or other authentic reproductions of such records, after the expiration of two (2) years following the last day of the month of reimbursement to the Contractor of the invoice or voucher to which such records relate, unless a shorter period is authorized by the Commonwealth with the concurrence of its auditors.
- e. The provisions of this Section shall be applicable to and included in each subcontract hereunder. The term "subcontract" as used in this contract only, excludes POs not exceeding \$1,000 and subcontracts or POs for public utility services at rates established for uniform applicability to the general public.

45. SINGLE AUDIT ACT OF 1984

In compliance with the *Single Audit Act of 1984*, the Contractor agrees to the following:

- a. This Contract is subject to audit by federal and state agencies or their authorized representative in accordance with the auditing standards promulgated by the Comptroller General of the United States and specified in *Government Auditing Standards, 1994 Revisions (Yellow Book)*.
- b. The audit requirement of this Contract will be satisfied if a single audit is performed under the provisions of the *Single Audit Act of 1984, 31 U.S.C. § 7501, et seq.*, and all rules and regulations promulgated pursuant to the Act.
- c. The Commonwealth reserves the right for federal and state agencies or their authorized representatives to perform additional audits of a financial/compliance, economy/efficiency, or program results nature, if deemed necessary.
- d. The Contractor further agrees to comply with requirements that may be issued by the state agency upon receipt of additional guidance received from the federal government regarding the *Single Audit Act of 1984*.

46. ENVIRONMENTAL PROTECTION

In carrying out this Contract, the Contractor shall minimize pollution and shall strictly comply with all applicable environmental laws and regulations, including the *Clean Streams Law*, Act of June 22, 1937, as amended; the *Pennsylvania Solid Waste Management Act*, Act of July 7, 1980 (P.L. 380, No. 97), as amended; and the *Dam Safety and Encroachment Act*, Act of November 26, 1978 (P.L. 1375, No. 325), as amended.

47. NONDISCRIMINATION CLAUSE/SEXUAL HARASSMENT CLAUSE

Each contract entered into by a governmental agency shall contain the following provisions by which the contractor agrees:

- a. In the hiring of any employee(s) for the manufacture of supplies, performance of work, or any other activity required under the contract or any subcontract, the Contractor, each subcontractor, or any person acting on behalf of the Contractor or subcontractor shall not, by reason of gender, race, creed, or color, discriminate against any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates.
- b. Neither the Contractor nor any subcontractor nor any person on their behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work, or any other activity required under the contract on account of gender, race, creed, or color.
- c. The Contractor and each subcontractor shall establish and maintain a written sexual harassment policy and shall inform their employees of the policy. The policy must contain a notice that sexual harassment will not be tolerated and employees who practice it will be disciplined.
- d. The Contractor and each subcontractor shall not discriminate by reason of gender, race, creed, or color against any subcontractor or supplier who is qualified to perform the work to which the contract relates.
- e. The Contractor and each subcontractor shall, within the time periods requested by the Commonwealth, furnish all necessary employment documents and records and permit access to their books, records, and accounts by the contracting agency and the Bureau of Minority and Women Business Opportunities (BMWBO), for purpose of ascertaining compliance with provisions of this Nondiscrimination/Sexual Harassment Clause. Within fifteen (15) days after award of any contract, the Contractor shall be required to complete, sign and submit Form STD-21, the "Initial Contract Compliance Data" form. If the contract is a construction contract, then the Contractor shall be required to complete, sign and submit Form STD-28, the "Monthly Contract Compliance Report for Construction Contractors", each month no later than the 15th of the month following the reporting period beginning with the initial job conference and continuing through the completion of the project. Those contractors who have fewer than five employees or whose employees are all from the same family or who have completed the Form STD-21 within the past 12 months may, within the 15 days, request an exemption from the Form STD-21 submission requirement from the contracting agency.
- f. The Contractor shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that those provisions applicable to subcontractors will be binding upon each subcontractor.

- g. The Commonwealth may cancel or terminate the contract and all money due or to become due under the contract may be forfeited for a violation of the terms and conditions of this Nondiscrimination/Sexual Harassment Clause. In addition, the agency may proceed with debarment or suspension and may place the Contractor in the Contractor Responsibility File.

48. CONTRACTOR INTEGRITY PROVISIONS

It is essential that those who seek to contract with the Commonwealth of Pennsylvania (“Commonwealth”) observe high standards of honesty and integrity. They must conduct themselves in a manner that fosters public confidence in the integrity of the Commonwealth procurement process.

In furtherance of this policy, Contractor agrees to the following:

- a. Contractor shall maintain the highest standards of honesty and integrity during the performance of this contract and shall take no action in violation of state or federal laws or regulations or any other applicable laws or regulations, or other requirements applicable to Contractor or that govern contracting with the Commonwealth.
- b. Contractor shall establish and implement a written business integrity policy, which includes, at a minimum, the requirements of these provisions as they relate to Contractor employee activity with the Commonwealth and Commonwealth employees, and which is distributed and made known to all Contractor employees.
- c. Contractor, its affiliates, agents and employees shall not influence, or attempt to influence, any Commonwealth employee to breach the standards of ethical conduct for Commonwealth employees set forth in the *Public Official and Employees Ethics Act, 65 Pa.C.S. §§1101 et seq.*; the *State Adverse Interest Act, 71 P.S. §776.1 et seq.*; and the [Governor’s Code of Conduct, Executive Order 1980-18, 4 Pa. Code §7.151 et seq.](#), or to breach any other state or federal law or regulation.
- d. Contractor, its affiliates, agents and employees shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any other person at the direction or request of any Commonwealth official or employee.
- e. Contractor, its affiliates, agents and employees shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any other person, the acceptance of which would violate the [Governor’s Code of Conduct, Executive Order 1980-18, 4 Pa. Code §7.151 et seq.](#) or any statute, regulation, statement of policy, management directive or any other published standard of the Commonwealth.
- f. Contractor, its affiliates, agents and employees shall not, directly or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any Commonwealth official or employee.
- g. Contractor, its affiliates, agents, employees, or anyone in privity with him or her shall not accept or agree to accept from any person, any gratuity in connection with the performance of work under the contract, except as provided in the contract.

- h. Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on this project, unless the financial interest is disclosed to the Commonwealth in writing and the Commonwealth consents to Contractor's financial interest prior to Commonwealth execution of the contract. Contractor shall disclose the financial interest to the Commonwealth at the time of bid or proposal submission, or if no bids or proposals are solicited, no later than Contractor's submission of the contract signed by Contractor.

- i. Contractor, its affiliates, agents and employees shall not disclose to others any information, documents, reports, data, or records provided to, or prepared by, Contractor under this contract without the prior written approval of the Commonwealth, except as required by the *Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104*, or other applicable law or as otherwise provided in this contract. Any information, documents, reports, data, or records secured by Contractor from the Commonwealth or a third party in connection with the performance of this contract shall be kept confidential unless disclosure of such information is:
 - 1) Approved in writing by the Commonwealth prior to its disclosure; or
 - 2) Directed by a court or other tribunal of competent jurisdiction unless the contract requires prior Commonwealth approval; or
 - 3) Required for compliance with federal or state securities laws or the requirements of national securities exchanges; or
 - 4) Necessary for purposes of Contractor's internal assessment and review; or
 - 5) Deemed necessary by Contractor in any action to enforce the provisions of this contract or to defend or prosecute claims by or against parties other than the Commonwealth; or
 - 6) Permitted by the valid authorization of a third party to whom the information, documents, reports, data, or records pertain: or
 - 7) Otherwise required by law.

- j. Contractor certifies that neither it nor any of its officers, directors, associates, partners, limited partners or individual owners has not been officially notified of, charged with, or convicted of any of the following and agrees to immediately notify the Commonwealth agency contracting officer in writing if and when it or any officer, director, associate, partner, limited partner or individual owner has been officially notified of, charged with, convicted of, or officially notified of a governmental determination of any of the following:
 - 1) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property.
 - 2) Commission of fraud or a criminal offense or other improper conduct or knowledge of, approval of or acquiescence in such activities by Contractor or any affiliate, officer, director, associate, partner, limited partner, individual owner, or employee or other individual or entity associated with:
 - a) obtaining;
 - b) attempting to obtain; or
 - c) performing a public contract or subcontract.

Contractor's acceptance of the benefits derived from the conduct shall be deemed evidence of such knowledge, approval or acquiescence.

- 3) Violation of federal or state antitrust statutes.
- 4) Violation of any federal or state law regulating campaign contributions.
- 5) Violation of any federal or state environmental law.
- 6) Violation of any federal or state law regulating hours of labor, minimum wage standards or prevailing wage standards; discrimination in wages; or child labor violations.
- 7) Violation of the *Act of June 2, 1915 (P.L.736, No. 338)*, known as the *Workers' Compensation Act*, 77 P.S. 1 *et seq.*
- 8) Violation of any federal or state law prohibiting discrimination in employment.
- 9) Debarment by any agency or department of the federal government or by any other state.
- 10) Any other crime involving moral turpitude or business honesty or integrity.

Contractor acknowledges that the Commonwealth may, in its sole discretion, terminate the contract for cause upon such notification or when the Commonwealth otherwise learns that Contractor has been officially notified, charged, or convicted.

- k. If this contract was awarded to Contractor on a non-bid basis, Contractor must, (as required by *Section 1641* of the *Pennsylvania Election Code*) file a report of political contributions with the Secretary of the Commonwealth on or before February 15 of the next calendar year. The report must include an itemized list of all political contributions known to Contractor by virtue of the knowledge possessed by every officer, director, associate, partner, limited partner, or individual owner that has been made by:
 - 1) Any officer, director, associate, partner, limited partner, individual owner or members of the immediate family when the contributions exceed an aggregate of one thousand dollars (\$1,000) by any individual during the preceding year; or
 - 2) Any employee or members of his immediate family whose political contribution exceeded one thousand dollars (\$1,000) during the preceding year.

To obtain a copy of the reporting form, Contractor shall contact the Bureau of Commissions, Elections and Legislation, Division of Campaign Finance and Lobbying Disclosure, Room 210, North Office Building, Harrisburg, PA 17120.

- l. Contractor shall comply with requirements of the *Lobbying Disclosure Act, 65 Pa.C.S. § 13A01 et seq.*, and the regulations promulgated pursuant to that law. Contractor employee activities prior to or outside of formal Commonwealth procurement communication protocol are considered lobbying and subjects the Contractor employees to the registration and reporting requirements of the law. Actions by outside lobbyists on Contractor's behalf, no matter the procurement stage, are not exempt and must be reported.
- m. When Contractor has reason to believe that any breach of ethical standards as set forth in law, the Governor's Code of Conduct, or in these provisions has occurred or may occur, including but not limited to contact by a Commonwealth officer or employee which, if acted upon, would

violate such ethical standards, Contractor shall immediately notify the Commonwealth contracting officer or Commonwealth Inspector General in writing.

- n. Contractor, by submission of its bid or proposal and/or execution of this contract and by the submission of any bills, invoices or requests for payment pursuant to the contract, certifies and represents that it has not violated any of these contractor integrity provisions in connection with the submission of the bid or proposal, during any contract negotiations or during the term of the contract.
- o. Contractor shall cooperate with the Office of Inspector General in its investigation of any alleged Commonwealth employee breach of ethical standards and any alleged Contractor non-compliance with these provisions. Contractor agrees to make identified Contractor employees available for interviews at reasonable times and places. Contractor, upon the inquiry or request of the Office of Inspector General, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Inspector General to Contractor's integrity and compliance with these provisions. Such information may include, but shall not be limited to, Contractor's business or financial records, documents or files of any type or form that refers to or concern this contract.
- p. For violation of any of these Contractor Integrity Provisions, the Commonwealth may terminate this and any other contract with Contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all additional costs and expenses incurred in obtaining another contractor to complete performance under this contract, and debar and suspend Contractor from doing business with the Commonwealth. These rights and remedies are cumulative, and the use or non-use of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Commonwealth may have under law, statute, regulation, or otherwise.
- q. For purposes of these Contractor Integrity Provisions, the following terms shall have the meanings found in this Paragraph.
 - 1) "Confidential information" means information that a) is not already in the public domain; b) is not available to the public upon request; c) is not or does not become generally known to Contractor from a third party without an obligation to maintain its confidentiality; d) has not become generally known to the public through a act or omission of Contractor; or e) has not been independently developed by Contractor without the use of confidential information of the Commonwealth.
 - 2) "Consent" means written permission signed by a duly authorized officer or employee of the Commonwealth, provided that where the material facts have been disclosed, in writing, by pre-qualification, bid, proposal, or contractual terms, the Commonwealth shall be deemed to have consented by virtue of execution of this contract.
 - 3) "Contractor" means the individual or entity that has entered into this contract with the Commonwealth, including those directors, officers, partners, managers, and owners having more than a five percent interest in Contractor.
 - 4) "Financial interest" means:
 - a) Ownership of more than a five percent interest in any business; or
 - b) Holding a position as an officer, director, trustee, partner, employee, or holding any position of management.

- 5) "Gratuity" means tendering, giving or providing anything of more than nominal monetary value including, but not limited to, cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind. The exceptions set forth in the [Governor's Code of Conduct, Executive Order 1980-18](#), the *4 Pa. Code §7.153(b)*, shall apply.
- 6) "Immediate family" means a spouse and any unemancipated child.
- 7) "Non-bid basis" means a contract awarded or executed by the Commonwealth with Contractor without seeking bids or proposals from any other potential bidder or offeror.
- 8) "Political contribution" means any payment, gift, subscription, assessment, contract, payment for services, dues, loan, forbearance, advance or deposit of money or any valuable thing, to a candidate for public office or to a political committee, including but not limited to a political action committee, made for the purpose of influencing any election in the Commonwealth of Pennsylvania or for paying debts incurred by or for a candidate or committee before or after any election.

49. ASSIGNMENT OF RIGHTS UNDER THE ANTITRUST LAWS

The Contractor and the Commonwealth recognize that in actual economic practice, overcharges by Contractor's suppliers resulting from violations of state and federal antitrust laws are in fact borne by the Commonwealth. As part of the consideration for the award of this Contract, and intending to be legally bound, the Contractor assigns to the Commonwealth all rights, title, and interest in and to any claims Contractor now has or may hereafter acquire under state and federal antitrust laws relating to the goods and services which are subject to this Contract.

50. DB OR DBE COMPLIANCE

The Contractor must comply with the current Disadvantaged Business Program (DB) or Disadvantaged Business Enterprise (DBE) requirements as stated at <http://www.itqrp.state.pa.us/ITQ/ITQ/Default.aspx> or included in the SOW by the Issuing Agency. DGS may modify these procedures by posting revised procedures at the website specified above and which will become effective for subsequent projects not already in the solicitation process.

The Contractor must meet and maintain any DB or DBE commitment it makes in its Proposal throughout the term of the contract unless a change is approved by the Issuing Agency upon recommendation by BWMB0. If the Contract is assigned to another contractor, the new contractor must maintain the DB or DBE participation of the original contract.

51. WARRANTIES

If the PO or SOW does not set out warranty requirements, this Section governs any questions related to warranties. The Contractor warrants that the Services and Delivered Materials will conform in all material respects to the functional specifications for the Delivered Materials and/or the requirements of the PO or SOW. If the PO or SOW does not set forth a warranty period, the warranty period for the Services and Delivered Materials shall be ninety (90) days from final acceptance. The Contractor shall correct any non-conformity within the warranty period specified herein or in the PO or SOW. The agency may include additional warranty requirements in the SOW.

- a. The Contractor hereby represents and warrants to the Commonwealth that it shall not cause, or take any action that may directly or indirectly cause a disruption of the Commonwealth's operations.
- b. In the event of any nonconformity with the foregoing warranties or any warranty set out in a PO or SOW, the Commonwealth or the Issuing Agency will provide written notification of such nonconformity to the Contractor and the Contractor, at no cost to the Commonwealth, shall within ten days notice of the nonconformity, commence work to remedy the nonconformity and shall work diligently, at no charge to the Commonwealth of the Issuing Agency, until such time as the deliverable conforms, in all material respects, to the functional specifications of the Developed materials set forth in the PO. The Contractor shall have no obligation with respect to nonconformities arising out of: (a) modifications to Developed Materials made by the Issuing Agency, (b) use of the Developed Materials not in accordance with the documentation or specifications applicable thereto, (c) failure by the Issuing Agency to implement any corrections or enhancements made available by the Contractor, (d) combination of the Developed Materials with any items not supplied or approved by the Contractor, or (e) the failure of any software licensed under a separate license agreement to conform to its specifications or documentation.
- c. Contractor warrants that it has the necessary legal rights, including licenses to third party products, tools or materials, to perform the Services and deliver the Developed Materials under this Contract.
- d. THE FOREGOING EXPRESS WARRANTIES ARE THE CONTRACTOR'S SOLE AND EXCLUSIVE WARRANTIES AND NO OTHER WARRANTIES, EXPRESS OR IMPLIED, SHALL APPLY, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
- e. All warranties shall survive final acceptance.
- f. In the event of an action or complaint by Commonwealth against Contractor pertaining to these warranties, Contractor may raise any defenses that it may have.

52. LIQUIDATED DAMAGES

- a. Each PO under this Contract has its own performance standards and requirements. By accepting the PO, the Contractor agrees to the performance standards and requirements of that particular project. If performance standards and requirements under an individual PO are not met, the failure will interfere with the Commonwealth's program. In the event of any such failure, it would be impractical and extremely difficult to establish the actual damage for which the Contractor is the material cause. The Commonwealth and the Contractor therefore agree that, in the event of failures as outlined in the PO, the amount of damage shall be the amount set forth in this Section and agree that the Contractor shall pay such amount as liquidated damages, not as a penalty. Such liquidated damages are in lieu of all other damages arising from such delay.
- b. Major Deliverables shall be identified by Contractor in its Proposal to the Commonwealth. The Commonwealth and Contractor shall agree on Major Deliverables for which liquidated damages shall be applicable in the event of delay and identify the Major Deliverables in the PO. If Major Deliverables are not identified in the PO, liquidated damages shall apply to the total cost of the PO.

- c. The amount of liquidated damages shall be as set out in the PO. If no amount is set out in the PO, the amount of liquidated damages for work not completed by the deliverable schedule set out in the PO shall be three-tenths of a percent (.3%) of the price of the specifically identified Major Deliverable for each calendar day following the scheduled completion date of such Major Deliverable. Liquidated damages shall be assessed each calendar day until the date on which the Contractor satisfactorily completes all required work for such Major Deliverable, up to a maximum of thirty (30) calendar days. Contractor shall recoup the amount of liquidated damages assessed against previous deliverables if the Contractor accelerates progress towards future deliverables and meets the final project completion date set out in the PO.
- d. If, at the end of the thirty (30) day period specified in Subsection b. above, the Contractor has not met the schedule for completion of the PO, then the Commonwealth, at no additional expense and at its option, may either:
 - (1) Immediately terminate the PO and all software, documentation, reports, Developed Materials and any other materials provided for or created for the Commonwealth as a result of the PO shall be given to the Commonwealth, and the Commonwealth shall be entitled to its remedies under Section 23.c (TERMINATION) of this Contract; or
 - (2) Order the Contractor to continue with no decrease in effort until the work is completed in a manner acceptable to the Issuing Agency or until the Commonwealth terminates the PO. If the PO is continued, the liquidated damages will also continue until the work is completed.
- e. At the conclusion of the project, liquidated damages shall be paid by the Contractor and collected by the Commonwealth by deducting them from the final invoices submitted under the PO, by collecting them through the performance security, if any, or by billing the Contractor as a separate item.
- f. To the extent that the delay is caused by the Commonwealth, no liquidated damages will be applied.
- g. If the delays are caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without their fault or negligence, the Contractor shall not be liable for liquidated damages for delays, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required performance schedule.

53. FORCE MAJEURE

Neither party will incur any liability to the other if its performance of any obligation under this Contract is prevented or delayed by causes beyond its control and without the fault or negligence of either party. Causes beyond a party's control may include, but aren't limited to, acts of God or war, changes in controlling law, regulations, orders or the requirements of any governmental entity, severe weather conditions, civil disorders, natural disasters, fire, epidemics and quarantines, general strikes throughout the trade, and freight embargoes.

The Contractor shall notify the Commonwealth orally within five (5) days and in writing within ten (10) days of the date on which the Contractor becomes aware, or should have reasonably become aware, that such cause would prevent or delay its performance. Such notification shall (i) describe fully such cause(s) and its effect on performance, (ii) state whether performance under

the contract is prevented or delayed and (iii) if performance is delayed, state a reasonable estimate of the duration of the delay. The Contractor shall have the burden of proving that such cause(s) delayed or prevented its performance despite its diligent efforts to perform and shall produce such supporting documentation as the Commonwealth may reasonably request. After receipt of such notification, the Commonwealth may elect to cancel the Contract, cancel the PO, or to extend the time for performance as reasonably necessary to compensate for the Contractor's delay.

In the event of a declared emergency by competent governmental authorities, the Commonwealth by notice to the Contractor, may suspend all or a portion of the Contract or PO.

54. NOTICE

Any written notice to any party under this Agreement shall be deemed sufficient if delivered personally, or by facsimile, telecopy, electronic or digital transmission (provided such delivery is confirmed), or by a recognized overnight courier service (e.g., DHL, Federal Express, etc.), with confirmed receipt, or by certified or registered United States mail, postage prepaid, return receipt requested, sent to the address set forth below or to such other address as such party may designate by notice given pursuant to this section:

Commonwealth: Chief Procurement Officer
Bureau of Procurement, Department of General Services
555 Walnut Street
Forum Place 6th Floor
Harrisburg, PA 17125

Contractor:

55. ELECTRONIC SIGNATURES

The Commonwealth may issue this Contract and any subsequent change, and Commonwealth agencies may issue Purchase Orders against this Contract, electronically in accordance with the following terms:

- a. The Contract may not include "ink" signatures by the Commonwealth. The electronically-printed name of the purchaser represents the signature of that individual who has the authority, on behalf of DGS to legally bind the Commonwealth to this Contract.
- b. Purchase Orders against this contract may not include "ink" signatures by the Issuing Agency. The electronically printed name of the purchaser represents the signature of the individual who has the authority on behalf of the Issuing Agency to authorize the Contractor to perform the Services specified in the Purchase Order.
- c. Purchase Orders may be issued electronically or through facsimile equipment. Receipt of the electronic or facsimile transmission of the Purchase Order shall constitute receipt of an order. The electronic transmission or facsimile of a Purchase Order shall require acknowledgement of receipt of the transmission by the Contractor.

- d. The Commonwealth and the Contractor specifically agree as follow:
- (1) No handwritten signature shall be required in order for the Contract and Purchase Order to be legally enforceable.
 - (2) Upon receipt of a Purchase Order, the Contractor shall promptly and properly acknowledge its receipt. Any order which is issued electronically or via facsimile shall not give rise to any obligation to deliver on the part of the Contractor, or any obligation to receive and pay for delivered products on the part of the Commonwealth, unless and until the Issuing Agency has properly received an acknowledgment.
 - (3) The parties agree that no writing shall be required in order to make the Contract or Purchase Order legally binding, notwithstanding contrary requirements in any law. The parties hereby agree not to contest the validity or enforceability of a Contract or Purchase Order or acknowledgment issued electronically under the provisions of a statute of frauds or any other applicable law relating to whether certain agreements must be in writing and signed by the party bound thereby. The Contract and any Purchase Order or acknowledgment issued electronically, if introduced as evidence on paper in any judicial, arbitration, mediation, or administrative proceeding, will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither party shall contest the admissibility of copies of the Contract or Purchase Orders or acknowledgements under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Contract or Purchase Order or acknowledgment were not in writing or signed by the parties.

56. RIGHT-TO-KNOW LAW

- a. The Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104, applies to this Contract.
- b. Unless the Contractor provides the Commonwealth, in writing, with the name and contact information of another person, the agency shall notify the Contractor using the Contractor information provided by the Contractor in SRM if the agency needs the Contractor's assistance in any matter arising out of the Right to Know Law ("RTKL"). The Contractor shall notify the agency in writing of any change in the name or the contact information within a reasonable time prior to the change.
- c. Upon notification from the Commonwealth that the Commonwealth requires the Contractor's assistance in responding to a RTKL request for records in the Contractor's possession, the Contractor shall provide the Commonwealth, within fourteen (14) calendar days after receipt of such notification, access to, and copies of, any document or information in the Contractor's possession which arises out of the Contract that the Commonwealth requests ("Requested Information") and provide such other assistance as the Commonwealth may request in order to comply with the RTKL. If the Contractor fails to provide the Requested Information within fourteen (14) calendar days after receipt of such request, the Contractor shall indemnify and hold the Commonwealth harmless for any damages, penalties, detriment or harm that the Commonwealth may incur as a result of the Contractor's failure, including any statutory damages assessed against the Commonwealth.

- d. The Commonwealth's determination as to whether the Requested Information is a public record is dispositive of the question as between the parties. Contractor agrees not to challenge the Commonwealth's decision to deem the Requested Information a Public Record. If the Contractor considers the Requested Information to include a request for a Trade Secret or Confidential Proprietary Information, as those terms are defined by the RTKL, the Contractor will immediately notify the Commonwealth, and will provide a written statement signed by a representative of the Contractor explaining why the requested material is exempt from public disclosure under the RTKL within seven (7) calendar days of receiving the request. If, upon review of the Contractor's written statement, the Commonwealth still decides to provide the Requested Information, Contractor will not challenge or in any way hold the Commonwealth liable for such a decision.
- e. The Commonwealth will reimburse the Contractor for any costs associated with complying with this provision only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable.
- f. Contractor agrees to abide by any decision to release a record to the public made by the Office of Open Records, or by the Pennsylvania Courts. The Contractor agrees to waive all rights or remedies that may be available to it as a result of the Commonwealth's disclosure of Requested Information pursuant to the RTKL. Contractor's duties relating to the RTKL are continuing duties that survive the expiration of this Contract and shall continue as long as the Contractor has Requested Information in its possession.

57. COSTARS PROGRAM (If elected by Contractor)

Section 1902 of the Commonwealth Procurement Code, 62 Pa.C.S. § 1902 ("Section 1902"), authorizes local public procurement units and state-affiliated entities (together, "COSTARS Purchasers") to participate in Commonwealth procurement contracts that DGS may choose to make available to COSTARS Purchasers. DGS has identified this Contract as one suitable for COSTARS Purchaser participation.

- a. Only those COSTARS Purchasers registered with DGS may participate as COSTARS Purchasers in a Commonwealth contract. Several thousand COSTARS Purchasers are currently registered with DGS; therefore, the Contractor agrees to permit **only** to DGS-registered COSTARS members to make COSTARS purchases from this Contract.
 - (1) A "local public procurement unit" is:
 - Any political subdivision;
 - Any public authority;
 - Any tax exempt, nonprofit educational or public health institution or organization;
 - Any nonprofit fire, rescue, or ambulance company; and
 - To the extent provided by law, any other entity, including a council of governments or an area government that expends public funds for the procurement of supplies, services, and construction.

- (2) A state-affiliated entity is a Commonwealth authority or other Commonwealth entity that is not a Commonwealth agency. The term includes the Pennsylvania Turnpike Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement System, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Higher Educational Facilities Authority and the State System of Higher Education.
- b. COSTARS Purchasers have the option to purchase from a Contract awarded under this procurement, from any DGS contract established exclusively for COSTARS Purchasers in accordance with the requirements of Section 1902, from any other cooperative procurement contracts, or from their own procurement contracts established in accordance with the applicable laws governing such procurements. The Contractor understands and acknowledges that there is no guarantee that any prospective COSTARS Purchaser will place an order under this Contract, and that it is within the sole discretion of the registered COSTARS Purchaser whether to procure from this Contract or to use another procurement vehicle.
- c. DGS is acting as a facilitator for COSTARS Purchasers who may wish to purchase under this Contract. Registered COSTARS Purchasers who participate in this Contract and issue purchase orders (“POs”) to Contractors are third party beneficiaries who have the right to sue and be sued for breach of this contract without joining the Commonwealth or DGS as a party. The Commonwealth will not intervene in any action between a Contractor and a Purchaser unless substantial interests of the Commonwealth are involved.
- d. Registered COSTARS Purchasers electing to participate in this Contract will order items directly from the Contractor and be responsible for payment directly to the Contractor.
- e. The Contractor shall furnish to the DGS COSTARS Program Office a quarterly electronic Contract sales report detailing the previous quarter’s Contract purchasing activity, using the form and in the format prescribed by DGS. The Contractor shall submit its completed quarterly report no later than the fifteenth calendar day of the succeeding Contract quarter.
 - (1) Until such time as DGS may provide the Contractor written notice of automated report filing, the Contractor shall either e-mail the reports to GS- PACostars@state.pa.us or send the reports on compact disc via US Postal Service to the DGS COSTARS Program Office, Bureau of Procurement, 6th Floor Forum Place, 555 Walnut Street, Harrisburg, PA 17101. When DGS has instituted automated reporting, the Contractor shall comply with DGS’s written notice and instructions on automated Contract reports. DGS will provide these instructions with sufficient advance time to permit the Contractor to undertake automated reporting.
 - (2) The Contractor shall include on each report the Contractor’s name and address, the Contract number, and the period covered by the report. For each PO received, the Contractor shall include on the report the name of each COSTARS- Registered Purchaser that has used the Contract along with the total dollar volume of sales to the specific Purchaser for the reporting period.
 - (3) DGS may suspend the Contractor’s participation in the COSTARS Program for failure to provide the Quarterly Sales Report within the specified time.

- f. Additional information regarding the COSTARS Program is available on the DGS COSTARS Website at <http://www.dgsweb.state.pa.us/COSTARSReg/RegForm.aspx>.
- (1) If the Contractor is aware of any qualified entity not currently registered and wishing to participate in the COSTARS Program, please refer the potential purchaser to the DGS COSTARS Website at <http://www.dgsweb.state.pa.us/COSTARSReg/RegForm.aspx>, where it may register by completing the online registration form and receiving DGS confirmation of its registration. To view a list of currently registered COSTARS member entities, please visit the COSTARS website.
- (2) Direct all questions concerning the COSTARS Program to:

Department of General Services
COSTARS Program
555 Walnut Street, 6th Floor
Harrisburg, PA 17101
Telephone: 1-866-768-7827
E-mail GS-PACostars@state.pa.us

58. ARRA ADDENDUM

Contractor agrees that in consideration of receipt of Federal American Recovery and Reinvestment Act of 2009, Pub.L.111-5 (“ARRA”) funds, it shall comply with all the terms, conditions, requirements and limitations set forth in Appendix D (ARRA Addendum), which is incorporated herein as a material part of the Contract; provided, however, the requirements of Appendix D shall only apply to those products and/or services purchased in whole or in part with ARRA funds.

APPENDIX A

COMMONWEALTH OF PENNSYLVANIA BUSINESS ASSOCIATE APPENDIX

WHEREAS, [name of program and/or department] (hereinafter the “Covered Entity”) will make available and/or transfer to **Contractor (hereinafter the “Business Associate”)** certain Protected Health Information (PHI), in conjunction with goods or services that are being provided by Business Associate to or on behalf of [name of program and department], that is confidential and must be afforded special treatment and protection in accordance with the *Health Insurance Portability and Accountability Act* (“HIPAA”) Privacy Regulations at 45 CFR Parts 160—164.

WHEREAS, Business Associate will have access to and/or receive from Covered Entity, PHI that can be used or disclosed only in accordance with this Appendix and the HIPAA Privacy Regulations at 45 CFR Parts 160—164.

NOW, THEREFORE, Covered Entity and Business Associate agree as follows:

1. Definitions.

- a. “Business Associate” shall have the meaning given to such term under the HIPAA Regulations, including but not limited to, 45 CFR § 160.103.
- b. “Covered Entity” shall have the meaning given to such term under HIPAA and the HIPAA Privacy Regulations, including, but not limited to, 45 CFR § 160.103.
- c. “Protected Health Information” or “PHI” means any information, whether oral or recorded in any form or medium; (i) that relates to the past, present or future physical or mental condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual, and (ii) that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual, and shall have the meaning given to such term under HIPAA and the HIPAA Privacy Regulations, including, but not limited to 45 CFR § 164.501.
- d. Terms used, but not otherwise defined, in this Agreement shall have the same meaning as those terms in 45 CFR Parts 160—164.

2. Limits on Use and Disclosure Established By Terms of Appendix. Business Associate hereby agrees that it shall be prohibited from using or disclosing the PHI provided or made available by Covered Entity for any purpose other than as expressly permitted or required by this Appendix, in accordance with 45 CFR § 164.504(e)(2)(i).

3. Stated Purposes For Which Business Associate May Use Or Disclose PHI. The Parties hereby agree that Business Associate shall be permitted to use and/or disclose PHI provided or made available from Covered Entity to perform those functions, activities, or services for, or on behalf of, Covered Entity which are specified in the PO and RFQ to which this Appendix applies, provided that such use or disclosure would not violate the Privacy Rule if done by Covered Entity or the minimum necessary policies and procedures of the Covered Entity..

4. **Additional Purposes For Which Business Associate May Use Or Disclose Information.** In addition to the Stated Purposes, Business Associate may use or disclose PHI provided or made available from Covered Entity for the following additional purposes(s), unless the Covered Entity indicates otherwise:

- a. **Disclosure of Information for Management, Administration and Legal Responsibilities.** Business Associate is permitted to disclose PHI received from Covered Entity for the proper management and administration of Business Associate or to carry out legal responsibilities of Business Associate, provided the disclosure is required by law.
- b. **Data Aggregation Services.** Business Associate is also permitted to use or disclose PHI to provide data aggregation services, as that term is defined by 45 CFR § 164.501, relating to the health care operations of Covered Entity, if such services are included in the Scope of Work..

5. **BUSINESS ASSOCIATE OBLIGATIONS:**

- a. **Limits on Use and Further Disclosure Established By Appendix and Law.** Business Associate hereby agrees that the PHI provided or made available by Covered Entity shall not be further used or disclosed other than as permitted or required by the Appendix or as required by law.
- b. **Appropriate Safeguards.** Business Associate will establish and maintain appropriate safeguards to prevent any use or disclosure of PHI other than as provided for by this Appendix.
- c. **Reports of Improper Use or Disclosure.** Business Associate hereby agrees that it shall report to Covered Entity Program Administrator **within two (2) days of discovery** any use or disclosure of PHI not provided for or allowed by this Appendix.
- d. **Subcontractors and Agents.** Business Associate hereby agrees that anytime PHI is provided or made available to any subcontractors or agents, Business Associate shall provide only the minimum necessary PHI for the purpose of the covered transaction and must enter into a subcontract or contract with the subcontractor or agent that contains the same terms, conditions and restrictions on the use and disclosure of PHI as contained in this Appendix.
- e. **Right of Access to PHI.** Business Associate hereby agrees to make available to an individual who is the subject of the PHI the right to access and copy that individual's PHI, at the request of the individual or of the Covered Entity, in the time and manner designated by the Covered Entity. This right of access shall conform with and meet all of the requirements of 45 CFR § 164.524 and 45 CFR § 164.504(e)(2)(ii)(E).
- f. **Amendment and Incorporation of Amendments.** Business Associate agrees to make any amendments to PHI that have been agreed to by the Covered Entity, at the request of Covered Entity or of the individual, in the time and manner designated by Covered Entity, in accordance with 45 CFR § 164.526 and 45 CFR § 164.504(e)(2)(ii)(F).

- g. **Provide Accounting.** Business Associate agrees to document and make available to Covered Entity or to the individual, any information necessary to provide an accounting of disclosures in accordance with 45 CFR § 164.528 and 45 CFR § 164.504 (e)(2)(ii)(G), within 30 days of receipt of a request for an accounting, in the manner designated by the Covered Entity.
- h. **Access to Books and Records.** Business Associate hereby agrees to make its internal practices, books, and records relating to the use or disclosure of PHI received from, or created or received by Business Associate on behalf of the Covered Entity, available to the Secretary of Health and Human Services or designee for purposes of determining compliance with the HIPAA Privacy Regulations. 45 CFR § 164.504(e)(2)(ii)(H).
- i. **Return or Destruction of PHI.** At termination or expiration of the PO to which this Appendix is applicable, Business Associate hereby agrees to return or destroy all PHI received from, or created or received by Business Associate on behalf of, Covered Entity. Business Associate agrees not to retain any copies of the PHI after termination or expiration of the PO to which this Appendix is applicable. If return or destruction of the PHI is not feasible, Business Associate agrees to extend the protections of this Appendix to limit any further use or disclosure until such time as the PHI may be returned or destroyed. If Business Associate elects to destroy the PHI, it shall certify to Covered Entity that the PHI has been destroyed. 45 CFR § 164.504(e)(2)(ii)(I).
- j. **Mitigation Procedures.** Business Associate agrees to establish and to provide to the Program and Department upon request, procedures for mitigating, to the maximum extent practicable, any harmful effect from the use or disclosure of PHI in a manner contrary to this Appendix or the HIPAA Privacy Regulations. 45 CFR § 164.530(f). Business Associate further agrees to mitigate any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of this Appendix.
- k. **Sanction Procedures.** Business Associate agrees that it must develop and implement a system of sanctions for any employee, subcontractor or agent who violates this Appendix or the HIPAA Privacy Regulations. 45 CFR § 164.530(e)(1).
- l. **Property Rights.** The PHI shall be and remain the property of Covered Entity. Business Associate agrees that it acquires no title or rights to the PHI, including any de-identified information, as a result of its relationship with the program or department.
- m. **Grounds for Breach.** Any non-compliance by Business Associate with this Appendix or the HIPAA Privacy Regulations will automatically be considered to be grounds for breach pursuant to the underlying agreement, if Business Associate knew or reasonably should have known of such non-compliance and failed to immediately take reasonable steps to report and cure the non-compliance.
- n. **Termination by Commonwealth.** Business Associate authorizes termination of the underlying contract by the Commonwealth if the Commonwealth determines, in its sole discretion, that the Business Associate has violated a material term of this Appendix.
- o. **Privacy Practices.** The Covered Entity shall provide and Business Associate shall immediately begin using, any form, including but not limited to, any for used for Consent, Notice of Privacy Practices, Accounting for Disclosures, or Authorization,

designated as effective by the Program or Department at any given time. The Program and Department retain the right to change the applicable privacy practices and documents. The Business Associate must implement changes as soon as practicable, but not later than 45 days from the date of notice of the change.

6. OBLIGATIONS OF COVERED ENTITY:

- a. **Provision of Notice of Privacy Practices.** Covered Entity shall provide Business Associate with the notice of privacy practices that the Covered Entity produces in accordance with 45 CFR §164.520, as well as changes to such notice.
- b. **Permissions.** Covered Entity shall provide Business Associate with any changes in, or revocation of, permission by individual to use or disclose PHI, if such change affect Business Associate's permitted or required uses and disclosures.
- c. **Restrictions.** Covered Entity shall notify Business Associate of any restriction to the use or disclosure of PHI that the Covered Entity has agreed to in accordance with 45 CFR § 164.522.

7. MISCELLANEOUS:

- a. **Regulatory References.** A reference in this Appendix to a section in the Privacy or Security Rules means the section as in effect or as amended as reasonably determined by the Covered Entity.
- b. **Amendment.** The Parties agree to take such action as is necessary to amend this Appendix from time to time as is necessary for the Covered Entity to comply with the requirements of the *Privacy and Security Rules and the Health Insurance Portability and Accountability Act of 1996*, Pub. L. No. 104-191.
- c. **Survival.** The respective rights and obligations of Business Associate under section 5(i) of this Appendix shall survive the termination of the Agreement.
- d. **Interpretation.** Any ambiguity in this Appendix shall be resolved to permit Covered Entity to comply with the Privacy and Security Rules as reasonably determined by the Covered Entity.

APPENDIX B

CHANGE NOTICE FORM

CONSULTING SERVICES CONTRACT # 4400007410

Commonwealth of PA – (Agency)

&

(Contractor)

PO Number: _____

A. Introduction

This Change Notice to Purchase Order # _____ is made this _____ day of _____, 20__ (“Effective Date”), by and between the Commonwealth of PA – _____ (“Commonwealth”) and _____ (“Contractor”).

The Commonwealth and Contractor are responsible for promptly obtaining all required consents necessary to authorize the Contractor to perform the Services set forth in this Change Notice.

B. Project Overview and Tasks

Contractor will perform the following tasks (the “Project”):

(Contractor to insert exact description of work to be performed)

Commonwealth Requirements:

(Any requirements for the agency must be inserted here)

C. Time Estimates / Delivery Schedule

The Delivery Schedule for the Project will be as follows:

(Ensure dates are provided)

D. Change Notice Cost

Change Notice Cost: \$

(Ensure an exact costing breakdown is provided)

E. SOW Acceptance

This Change Notice is acceptable to the Commonwealth and the Contractor. Intending to be legally bound, the Commonwealth and Contractor agree to modify the Statement of Work attached to the Purchase Order as outlined in this Change Notice.

Approved (date): _____
(entered by Commonwealth)

Contractor

Commonwealth of PA – “Agency”

Authorized Contractor Signature

Authorized Agency Signature

Printed Name

Printed Name

Title

Date

Title

Date

F. Project Completed and Accepted

The Project was completed in accordance with this Change Notice. The parties hereby accept as completed all work indicated in this Change Notice.

Approved (date): _____
(entered by Commonwealth)

Contractor

Commonwealth of PA – “Agency”

Authorized Contractor Signature

Authorized Agency Signature

Printed Name

Printed Name

Title

Date

Title

Date

PLEASE ATTACH HARD COPY OF PURCHASE ORDER
REFERENCING THIS CHANGE NOTICE

APPENDIX C

SOFTWARE LICENSE AGREEMENT

THIS SOFTWARE LICENSE AGREEMENT (the "**Agreement**") is made on [insert date] (the "**Execution Date**"), by and between _____, a _____ authorized to do business in _____, with its principal offices located at _____ ("**Licensor**"), and The Commonwealth of Pennsylvania, acting by and through _____ ("**Licensee**");

TERMS AND CONDITIONS

A. Definitions.

All capitalized terms used in this Agreement or in Attachments or Appendixes to this Agreement shall have the respective meanings ascribed to them in this Agreement or in the glossary set forth in Paragraph M. All capitalized terms used in this Agreement, unless indicated otherwise, include all derivative forms and variations of the terms.

B. Grant and Scope of License

1. *The parties agree that more than one agency of Licensee may license products under this Agreement, provided that any use of products by any agency must be made pursuant to one or more executed purchase orders or purchase documents submitted by each applicable agency seeking to use the Licensed Product. For purposes of this Agreement, Licensee includes any public procurement unit as defined by the Commonwealth Procurement Code, 62*

Pa.C.S. §1901. The parties agree that, if the Licensee is a "Commonwealth Agency" as defined by the Commonwealth Procurement Code, 62 Pa.C.S. §103, the terms and conditions of this Agreement apply to any purchase of products made by Licensee, when the purchase document issued by Licensee includes a reference to this Agreement, and that the terms and conditions of this Agreement become part of the purchase document without further need for execution. The parties agree that the terms of this Agreement supersedes and take precedence over the terms included in any purchase order, terms of any shrink wrap agreement included with the Licensed Product, terms of any click through agreement included with the Licensed Product, or any other terms purported to apply to the Licensed Product. If the Licensee is a public procurement unit as defined by the Commonwealth Procurement Code, 62 Pa.C.S. §1901 that is not a Commonwealth Agency, the fees set out in this Agreement apply to the purchase, but the Licensor must enter into a separate agreement with Licensee, which includes the same terms and conditions and this Agreement.

2. Subject to the terms and conditions of this Agreement, Licensor hereby grants Licensee a non-exclusive, non-transferable license to (i) Run the software product(s) identified in Appendix A, (the "**Product**") as well as any Updates provided by Licensor on Licensee's server, and (ii) use the related documentation in connection with Licensee's authorized use of the Product. (The Product, any Updates thereto, and the related documentation are collectively referred to in this Agreement as the "**Licensed Product**".)

3. **Authorized Use.** In consideration of the License Fees payable hereunder, Licensee may _____.

4. As between the parties, all rights, title and interest in and to the Licensed Product (and any derivative works thereto) and all underlying Intellectual Property Rights thereto, are and at all times will be, the sole and exclusive property of Licensor or its licensors, as the case may be. The Licensed Product may not be used for the benefit of any third parties not authorized herein, including without limitation, in an outsourcing, timesharing, or Application Service Provider (ASP) arrangement, or in the operation of a service bureau.

5. Licensee may make a reasonable number of copies of the Licensed Product for bona fide back up purposes only. All such copies are subject to the terms and conditions of this Agreement.

6. Licensee shall not (and shall not permit any other party to) translate, decompile, reverse engineer, merge, adapt or modify the Licensed Product or any Updates in any way, and no derivative work may be created therefrom, unless otherwise permitted under the terms of this Agreement. In addition, Licensee shall not (and shall not permit any other party to) avoid, circumvent, or disable any security device, procedure, protocol, or mechanism that Licensor may include, require or establish with respect to the Licensed Product.

7. Licensee shall not delete, alter, cover, or distort any copyright, trademark, or other proprietary rights notice placed by Licensor on or in the Licensed Product, and shall ensure that all such notices are reproduced on all copies of the Licensed Product.

8. All rights not expressly granted in this Agreement are reserved to Licensor.

C. Fees

1. When applicable, Licensee agrees to pay Licensor or the contractor or reseller supplying the Licensed Product the License Fees for the Licensed Product and fees for Support Services provided under **Section G**, below (the "**Support Fees**"), in the amounts and according to the schedule stated in Appendix A. All License Fees and Support Fees for the Licensed Product are due and payable within Thirty (30) days of the date of a proper invoice. Any additional and/or subsequent License Fees and Support Fees are due and payable within thirty (30) days of the date of Licensee's receipt of a proper invoice.

2. If the Licensee is making a purchase through its agent by way of a Purchase Order (PO), the PO shall control and take precedence over this Agreement in regards to payment amounts and provisions to the extent there is any conflict. The Licensee shall pay its agent in accordance with the PO and the agent will pay Licensor the amounts set forth in the PO.

3. It is hereby acknowledged that the Licensee is a government entity and thereby exempt from taxation.

D. Confidentiality

1. Each party agrees to secure and protect the Confidential Information of the other in a manner consistent with the maintenance of the other party's rights therein, using at least as great a degree of care as it uses to maintain the confidentiality of its own confidential information of a similar nature, but in no event less than reasonable efforts. Each party agrees to hold the Confidential Information of the other party in confidence, not to disclose it to others or use it in any way, commercially or otherwise, except as authorized in writing by Licensee or in performance of its obligations under this Agreement.

2. Notwithstanding **Section D(1)**, Confidential Information of a party shall not include information which: (i) is, as of the time of its disclosure or thereafter becomes part of the public domain through a source other than the receiving party; (ii) was rightfully known to the receiving party as of the time of its disclosure; (iii) is independently developed by the receiving party; (iv) is subsequently learned from a third party not under a confidentiality obligation to the disclosing party; (v) is required to be disclosed pursuant to a duly authorized subpoena, court order, or government authority, or (vi) disclosure of the information is required under the Freedom of Information Act or other right to know type law, whereupon the party subject to same

shall provide prompt written notice to the other party prior to such disclosure, so that such party may seek a protective order or other appropriate remedy.

E. Term and Termination

1. The term of this Agreement shall be deemed to have commenced on the Effective Date and shall continue from thereon until terminated by lawful means.

2. In accordance with applicable regulations, either party may terminate this Agreement with written notice if the other party fails to comply with any material term or condition of this Agreement and fails to remedy such breach within thirty (30) days of receipt of notice of such breach, provided, however, that Licensor may not terminate this agreement for reasons of nonpayment.

3. In addition to the foregoing, Licensee may terminate this Agreement if Licensor makes a general assignment for the benefit of creditors, files a voluntary petition of bankruptcy, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any proceedings under any bankruptcy law, or has liquidated its business voluntarily or otherwise, and the same has not been discharged or terminated within forty-five (45) days.

4. Notwithstanding any contrary provision in this Agreement, this Agreement may be terminated at the option of Licensee upon written notice to Licensor if Licensee determines that it is in the best interest of Licensee to terminate the Agreement. If Licensee elects to terminate this Agreement, Licensor shall be entitled to payment for satisfactory services rendered under the Agreement up to the effective date of termination

5. Any payment obligation or portion thereof of Licensee created by this Agreement is conditioned upon the availability of Commonwealth or Federal funds which are appropriated or allocated for the payment of such an obligation or portion thereof; provided, however, that Licensee will request such funds each year during the Term. If such funds are not allocated and available, this Agreement may be terminated by Licensee at the end of the period for which funds are available. No penalty shall accrue to Licensee in the event this provision is exercised, and Licensee shall not be obligated or liable for any future payments due for any damages as a result of termination under this Article.

6. Immediately upon termination of this Agreement, Licensee shall: (i) pay all amounts owed to Licensor, or; (ii) cease all use of the Licensed Product and; (iii) return to Licensor all copies of the Licensed Product and any other Confidential Information or proprietary materials of Licensor in its possession or in Escrow; and (iv) certify in writing Licensee's compliance with (ii) and (iii), above.

F. Warranties and Disclaimer; Limitation of Liability; Indemnification

1. Licensor warrants that it has the full authority to grant the rights granted to Licensee herein. EXCEPT FOR THE FOREGOING EXPRESS WARRANTY, AND EXCEPT AS MAY BE OTHERWISE SET OUT IN THIS AGREEMENT, LICENSOR DISCLAIMS ANY AND ALL WARRANTIES WITH RESPECT TO THE LICENSED PRODUCTS AND UPDATES, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE. EXCEPT FOR THE FOREGOING EXPRESS WARRANTY, THE LICENSED PRODUCTS AND UPDATES ARE PROVIDED "AS IS" AND WITH ALL FAULTS, AND LICENSEE UNDERSTANDS THAT IT ASSUMES ALL RISKS OF THEIR USE, QUALITY, AND PERFORMANCE.

2. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, PUNITIVE, RELIANCE, OR COVER DAMAGES, INCLUDING LOSS OF PROFITS, REVENUE, DATA, OR USE, INCURRED BY EITHER PARTY OR ANY THIRD PARTY, EVEN IF THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY EVENT, LICENSOR'S TOTAL LIABILITY ARISING FROM OR RELATED TO THIS AGREEMENT FOR ANY REASON SHALL BE LIMITED TO DIRECT DAMAGES UP TO THE TOTAL AMOUNT OF FEES PAID HEREUNDER DURING THE INITIAL TERM OR THE THEN-CURRENT RENEWAL TERM, AS APPLICABLE. THE FOREGOING LIMITATIONS APPLY TO ALL CAUSES OF ACTION IN THE AGGREGATE, INCLUDING BREACH OF CONTRACT, BREACH OF WARRANTY, STRICT LIABILITY, NEGLIGENCE AND OTHER TORTS.

3. Licensor agrees to indemnify and defend Licensee and its elected and appointed officers, officials, employees and agents from and against any action, claim, demand, or liability, including reasonable attorney's fees and costs, arising from or relating to a claim the Licensed Product infringes upon any United States or foreign patents, copyrights, or trademarks of a third party and in any such suit or proceeding will satisfy any final award for such infringement, including costs. Licensee agrees to

give Licensor prompt notice of any such claim of which it learns. Pursuant to the *Commonwealth Attorneys Act* 71 P.S. § 732-101, *et. seq.*, the Office of Attorney General (OAG) has the sole authority to represent Licensee in actions brought against Licensee. The OAG may, however, in its sole discretion and under the terms it deems appropriate, delegate its right of defense. If OAG delegates the defense to Licensor, Licensee will cooperate with all reasonable requests of Licensor made in the defense of such suit. If OAG does not delegate its right of defense, Licensor may request that OAG seek to join Licensor as a third party. If OAG does not agree to seek to join Licensor as a third party, then Licensor may seek to intervene in the matter. If Licensor is not joined as a third party either through the OAG's joinder or through Licensor's intervention, there will be no contractual obligation on the part of Licensor to indemnify. No settlement which imposes any liability or damages of any kind on Licensee shall be made without Licensee's prior written consent, which shall not be unreasonably withheld or delayed. In all events, Licensee shall have the right to participate in the defense of any such suit or proceeding through counsel of its own choosing. It is expressly agreed by Licensor that, in the event it requests that Licensee provide support to Licensor in defending any such claim, Licensor shall reimburse Licensee for all expenses (including attorneys' fees, if such are made necessary by Licensor's request) incurred by Licensee for such support Licensor shall pay all damages and costs awarded therein against Licensee arising from Licensor's indemnification obligation under this paragraph. If information and assistance are furnished by Licensee at Licensor's written request, it shall be at Licensor's expense, but the responsibility for such expense shall be only that within Licensor's written authorization.

If, in Licensor's opinion, the Licensed Product, is likely to or does become subject to a claim of infringement, then without diminishing Licensor's obligation to satisfy any final award, Licensor may, at its option, substitute functional equivalents for the Licensed Product or, at Licensor's option and expense, obtain the rights for Licensee to continue the use of the Licensed Product. If the Licensed Product is in such suit or proceeding held to constitute infringement and the use or publication thereof is enjoined, Licensor shall, at its own expense and at its option, either procure the right to publish or continue use of the Licensed Product, replace the Licensed Product with non-infringing items, or modify the Licensed Product so that it is no longer infringing.

If neither alternative (i) nor (ii) is reasonably available, then Licensee may terminate the license for the infringing Licensed Product and no further payment obligations shall be due from Licensee therefor, and Licensor agrees to pay Licensee: (1) any amounts paid by Licensee for any future period under this Agreement less a reasonable amount based on the acceptance and use of the Licensed Product; (2) any license fee less an amount for the period of usage of any software; and (3) the prorated portion of any prepaid service fees representing the time remaining for any future period under this Agreement.

The obligation to indemnify Licensee, under the terms of this **Section F(4)**, shall be Licensor's sole and exclusive obligation and Licensee's exclusive remedy for the infringement or misappropriation of intellectual property. The obligations of Licensor under this Section continue without time limit and survive the termination of this Agreement

4. Licensor shall have no liability or obligation under **Section F(4)** above, arising from or related to: (i) modification of the Licensed Product by Licensee; any material provided by Licensee to Licensor and incorporated into, or used to prepare, the Licensed Product; (ii) use of the Licensed Product in other than its specified operating environment; (iii) the combination, operation, or use of the Licensed Product with other products, services, or deliverables not provided by Licensor as a system or the combination, operation, or use of the Licensed Product with any products, data, or apparatus that Licensor did not provide; (iv) infringement of a non-Licensor product alone; (v) Licensee's distribution, marketing or use beyond the scope contemplated by this Agreement; (vi) Licensee's failure to use corrections or enhancements made available to Licensee by Licensor; (vii) the Running of the Licensed Product after Licensor has notified Licensee to discontinue Running due to an infringement claim (existing or prospective); or (viii) the use of a version of the Licensed Product that has been superseded by a newer version, if the infringement would have been avoided by use of a current version which Licensor has provided or made available to Licensee.

Licensee assumes all risks and liabilities for injury to or death of any person or damage to any property, in any manner arising out of possession, use, or operation of the Licensed Product by Licensee whether such injury or death be with respect to agents or employees of Licensee or of third parties, and whether such property damage be to Licensee's property or the property of others; provided, however that said damage or injury results from the negligence of Licensee, its agents or employees, and provided that judgment has been obtained against the Licensee in a court of competent jurisdiction. This provision shall not be construed to limit the sovereign immunity of the Licensee.

G. Maintenance and Support

1. During the Term of this Agreement, Licensor agrees to provide the maintenance and support services as set forth in Appendix A (collectively, the "**Support Services**") for the Licensed Product. The parties agree that Licensor shall have no obligations to provide any maintenance or support-related services under this Agreement except as expressly set forth herein.

2. Licensee will designate, in writing, no more than two persons who will be Licensee's primary support contacts for Support Services (the "**Support Contacts**") related to each PO. Licensee agrees that all Support Services inquiries from Licensee's individual users will be directed to a Support Contact and Licensee's communications with Licensor for Support Services will be through the Support Contacts.

3. **All Updates and all other deliverables and work product hereunder provided to Licensee shall be subject to the terms and conditions of this Agreement, unless otherwise expressly agreed in writing by Licensor. Support Services extend only to the Licensed Product free of any additions or modifications that have not been made or sold by Licensor or its agents.**

4. Licensee acknowledges and agrees that the Support Services, Updates, and all other results of Support Services hereunder, and all work product and deliverables thereof (collectively, the "**Licensor Materials**"), are the sole and exclusive property of Licensor, including all worldwide Intellectual Property Rights embodied in, related to, or represented by, the Licensor Materials.

H. Virus, Malicious, Mischievous or Destructive Programming

Notwithstanding any other provision in this Agreement to the contrary, Licensor shall be liable for any damage to any data and/or software owned or licensed by Licensee if Licensor or any of its employees, subcontractors or consultants introduces a virus or malicious, mischievous or destructive programming into Licensee's software or computer networks and has failed to comply with Licensee's software security standards. Licensee must demonstrate that Licensor or any of its employees, subcontractors or consultants introduced the virus or malicious, mischievous or destructive programming. Licensor's liability shall cease if Licensee has not fully complied with its own software security standards.

Licensor shall be liable for any damages incurred by Licensee including, but not limited to, the expenditure of Licensee funds to eliminate or remove a computer virus or malicious, mischievous or destructive programming that results from Licensor's failure to take proactive measures to keep virus or malicious, mischievous or destructive programming from originating from Licensor or any of its employees, subcontractors or consultants through appropriate firewalls and maintenance of anti-virus software and software security updates (such as operating systems security patches, etc.).

In the event of destruction or modification of software, Licensor shall eliminate the virus, malicious, mischievous or destructive programming, restore Licensee's software, and be liable to the Licensee for any resulting damages.

Licensor shall be responsible for reviewing Licensee software security standards and complying with those standards.

Licensee may, at any time, audit, by a means deemed appropriate by Licensee, any computing devices being used by representatives of Licensor to provide services to Licensee for the sole purpose of determining whether those devices have anti-virus software with current virus signature files and the current minimum operating system patches or workarounds have been installed. Devices found to be out of compliance will immediately be disconnected and will not be permitted to connect or reconnect to Licensee's network until the proper installations have been made.

Licensor may use the anti-virus software used by Licensee to protect Licensor's computing devices used in the course of providing services to Licensee. It is understood that Licensor may not install the software on any computing device not being used to provide services to Licensee, and that all copies of the software will be removed from all devices upon termination of this Agreement.

Licensee will not be responsible for any damages to Licensor's computers, data, software, etc. caused as a result of the installation of Licensee's anti-virus software or monitoring software on Licensor's computers.

I. Background Checks

Licensor must, at its expense, arrange for a background check for each of its employees, as well as for the employees of its subcontractors, who will have access to Licensee's IT facilities, either through on site or remote access. Background checks are to be conducted via the Request for Criminal Record Check form and procedure found at <http://www.psp.state.pa.us/psplib/psp/sp4-164.pdf>. The background check must be conducted prior to initial access by an IT employee and annually thereafter.

Before Licensee will permit an IT Employee access to Licensee's facilities, Licensor must provide written confirmation to the office designated by the agency that the background check has been conducted. If, at any time, it is discovered that an IT Employee has a criminal record that includes a felony or misdemeanor involving terrorist threats, violence, use of a lethal weapon, or breach of trust/fiduciary responsibility, or which raises concerns about building, system, or personal security, or is otherwise job-related, Licensor shall not assign that employee to any Licensee facilities, shall remove any access privileges already given to the employee, and shall not permit that employee remote access to Licensee facilities or systems, unless the agency consents, in writing, prior to the access being provided. The agency may withhold its consent at its sole discretion. Failure of Licensor to comply with the terms of this paragraph may result in default of Licensor under its contract with Licensee.

J. Incorporation of Exhibits and Appendices

The following Appendices and Exhibits are attached hereto and incorporated into this Agreement by this reference:

- Appendix A – List of Licensed Product and Fees
- Appendix B – Maintenance and Support Services
- Appendix C – Hardware Specifications
- Appendix D – Service Level Agreements
- Appendix E – Pricing Tables
- Exhibit A – Non-Discrimination/Sexual Harassment
- Exhibit B – Contractor Integrity
- Exhibit C – Contractor Responsibility
- Exhibit D – Tax Setoff Clause
- Exhibit E – Provisions Regarding *The Americans with Disabilities Act*

K. Purchase Orders

1. The Licensee will issue this Agreement, and any subsequent changes to it, including any purchase from it by a Commonwealth Agency, electronically as an Outline Agreement and/or as a Purchase Order (hereinafter Document).

2. The Document will not include an "ink" signature by the Licensee. The electronically-printed name of the purchaser represents the signature of that individual who has the authority, on behalf of the Licensee, to authorize Licensor to proceed.

3. Documents may be issued electronically or through facsimile equipment. The electronic transmission of a Document shall require acknowledgement of receipt of the transmission by Licensor.

4. Receipt of the electronic or facsimile transmission of the Document shall constitute receipt of an order.

5. The Licensee and Licensor specifically agree as follows:

- i. No handwritten signature by Licensee shall be required in order for the Document to be legally enforceable.
- ii. Upon receipt of a Document, Licensor shall promptly and properly transmit an acknowledgement in return. Any order which is issued electronically shall not be considered accepted by Licensor, nor give rise to any obligation to deliver on the part of Licensor, or give rise to any obligation to receive and pay for delivered products on the part of the Licensee, unless and until the electronic order has been acknowledged.
- iii. The parties agree that no writing shall be required in order to make the order legally binding, notwithstanding contrary requirements in any law. The parties hereby agree not to contest the validity or enforceability of a genuine Document or acknowledgement issued electronically under the

provisions of a statute of frauds or any other applicable law relating to whether certain agreements be in writing and signed by the party bound thereby. Any genuine Document or acknowledgement issued electronically, if introduced as evidence on paper in any judicial, arbitration, mediation, or administrative proceedings, will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither party shall contest the admissibility of copies of genuine Documents or acknowledgements under either the business records exception to the hearsay rule or the best evidence rule on the basis that the order or acknowledgement were not in writing or signed by the parties. A Document or acknowledgement shall be deemed to be genuine for all purposes if it is transmitted to the location designated for such documents.

L. General

The failure of either party to require performance of any part of this Agreement shall not be deemed a waiver of any present or future right. Modifications of this Agreement shall be binding only if in writing and signed by authorized representatives of both parties. This Agreement, the Licensee's PO, if any, and Licensor's Invoices contain the parties' entire agreement and understanding and they supersede all prior oral and written agreements and understandings. If any provision of this Agreement is held invalid, illegal or unenforceable, all other provisions contained in this Agreement will remain in effect. Neither party may not assign this Agreement without the other party's prior written consent. All notices required to be sent hereunder shall be in writing and shall be deemed to have been given when mailed by registered or certified mail, postage prepaid to the address set forth in this Agreement or to such other address as each party may designate from time to time. Licensor acknowledges that mail handling security procedures may delay actual delivery of such notices to the Licensee. The following Sections shall survive the termination or expiration of this Agreement: **B(4), D, E, F, and H**. This Agreement shall be governed by and construed in accordance with the substantive laws of the Commonwealth of Pennsylvania, without regard to principles of conflict of laws.

M. Glossary

1. **"Run"** means to copy, install, use, access, display, run, and otherwise interact with, in its intended manner.
2. **"Delivery Date"** shall mean the day agreed upon by the parties for Licensor to present the Licensed Product to Licensee for delivery and installation, provided Licensor makes a reasonable attempt to do so on that day.
3. **"Effective Date"** shall mean the Execution Date, whichever occurs first.
4. **"Source Code"** shall mean the human-readable version of the Licensed Product supplied to Licensee hereunder.
5. **"Intellectual Property Rights"** means, collectively, rights under patent, trademark, copyright and trade secret laws, and any other intellectual property or proprietary rights recognized in any country or jurisdiction worldwide, including, without limitation, moral rights and similar rights.
6. **"Updates"** means any update, patch, bug fix or minor modification to the Licensed Products that Licensor provides to Licensee. Once provided, each Update shall be deemed to be included within the Licensed Product.
7. **"Confidential Information"** means information that the other party considers to be confidential, business and technical information, marketing plans, research, designs, plans, methods, techniques, processes and know-how, whether tangible or intangible and whether or not stored, compiled or memorialized physically, electronically, graphically or in writing, provided that the other party has notified the party receiving the confidential information that the information is confidential.
8. **"Travel Expenses"** means any costs incurred by Licensor associated with the transportation, storage or lodging of equipment, supplies, Licensor employees and other items necessary for business use from Licensor headquarters to Licensee's facilities. Travel expenses may include, but are not limited to airfare, hotel costs, and meals if applicable. Any travel expenses paid by the Licensee shall be paid at allowable government travel rates consistent with Management Directive 230.10, unless otherwise first approved by the Licensee's authorized representative.
9. **"Travel Time"** means the hours and minutes elapsing during transportation of Licensor personnel from Licensor headquarters to Licensee's facilities. Travel time shall not include the first hour of transportation from Licensor headquarters to Licensee's facilities or from Licensee's facilities to Licensor headquarters.

Appendix A

A. Licensed Product:

The Licensed Product includes _____.

B. Installation Fees:

Licensor will assist Licensee with all installations and configurations, the costs of which are included in the License Fees and consist of Technical and Project Management support in the amount specified below. Additional hours may be purchased in accordance with Licensor's current Commercial Price List for such services.

| | |
|---|-----------------|
| Project Management/Technical Implementation Hours | [Fill in hours] |
|---|-----------------|

C. License and Other Fees:

Licensor acknowledges the License Fee will be paid to Licensor by Licensee as set forth in Table 1 or Table 2 of Appendix F of the Agreement. The License Fee includes _____ as outlined in **Section D**, below.

D. Support Fees and Services:

Support Fees for the Licensed Product are included in the License Fees are set forth in Section C of this Appendix A and consist of _____ for a period of [insert years.] years following the Effective Date ("Initial Support Term").

The Support Services shall be renewable beyond the Initial Support Term according to the provisions set forth in Section E of this Appendix.

Subject to Licensee's payment of any outstanding License Fees, Licensor will make the following Support Services available to the Licensee:

Standard Maintenance and Support Services

The Licensee shall receive [Insert Hours] hours of Licensee support by phone, email, or if necessary, site visits free-of-charge per year. Time shall be debited in quarter-hour increments. Requests due to failure of or defect in the Licensed Product shall not be charged. Except for defects in the Licensed Product, requests over the allocated hour limit shall be charged on a time and materials basis at the then current rate published in Licensor's Commercial Price List, currently a rate of [insert current rate] per hour in quarter-hour increments plus travel expenses. A request shall only be billable or count towards the allocated free-of-charge hours if Licensor is able to resolve the problem.

Standard updates are included in the Service Fee and will be delivered to the Licensee electronically, in a manner agreed upon by the parties (e.g., email attachment, web download,) or by sending a CD-Rom. Licensee may request that a Licensor technician install the Updates, either on-site, or remotely, in which case, such support shall be offered to Licensee on a time and materials basis at the then current rate published in Licensor's Commercial Price List, currently a rate of [insert current rate] per hour in quarter-hour increments plus travel expenses as described in **Attachment 1**.

Licensee may at its option allow Licensor technical staff to log into the Licensee's system remotely in order to install Updates or to resolve technical problems.

Enhanced Maintenance and Support Services

The terms of the Enhanced Maintenance and Support Services are set forth in **Appendix B** of this Agreement.

E. Renewal of Support Services

The Licensee may renew the Support Services set forth in **Section D** of this Appendix, including Standard Maintenance and Support and Enhanced Maintenance and Support (if applicable), by paying an Annual Support Services Renewal Fee each year subsequent to the Initial Support Term. The Annual Support Services Renewal Fee shall be due within thirty (30) days of the Annual Support Services Renewal Date and Licensee's receipt of a proper invoice. The Annual Support Services Renewal Date shall be the same day each year, beginning the day one (1) year following the Effective Date.

The Support Services Renewal Fee for the first year following the Initial Support Term shall be as follows:

Standard Maintenance and Support: [\$\$\$\$] Enhanced Maintenance and Support: [\$\$\$\$\$]

The cost for renewals of Standard Maintenance and Support Services and Enhanced Maintenance and Support Services, if applicable, beyond the first year following the Initial Support Term shall be at the prevailing price at the time of purchase, provided, however, that it may not exceed the previous year cost for renewal by more than 3%.

Appendix B

Enhanced Maintenance and Support Services

NOTE: Enhanced Maintenance and Support Services applicable only if elected by Licensee in accordance with **Appendix A, Section D** of the Contract.

SECTION 1: Statement of Work

The Licensee has requested additional support services related to the Licensed Product. **Appendix A, Section D** of the Contract provides for certain support fees and support services, and additional services.

As part of the Enhanced Maintenance and Support Services, Licensor shall make several contacts available to the Licensee in three ways, as follows:

Primary Technical Contact:
Primary Number:
Secondary Number:
Primary email:

Secondary Technical Contact:
Primary Number:
Secondary Number:
Primary email:

Lead Account Contact:
Primary Number:
Secondary Number:
Primary email:

Secondary Account Contact:
Primary Number:
Secondary Number (pager):
Primary email:

During normal business hours, Monday through Friday from 8:30 AM EST to 5:30 PM EST Licensee shall use the primary email address to contact an individual, and/or the primary number. For after hour, weekend and holiday support, Licensee shall call

_____ or e-mail _____

In order to deal efficiently with multiple problems reported to Licensor by the Licensee, a problem ticket will be created for each problem and one of 3 priority codes will be allocated.

- Level 1: Major Impact - Directly causing a total loss of the Licensee's ability to Use the Licensed Product
- Level 2: Significant Impact - Directly reducing a number of features of the Licensed Product
- Level 3: No Immediate Impact - causing only inconvenience to Licensee, and may include scheduled network changes to Licensee's network architecture

The target maximum times for response for each level are:

Level 1: as soon as possible, targeting a response time of 1 hour (during normal business hours) or 3 hours (during non-business hours) from initial notification to Licensor by the Licensee

Level 2: 24 hours

Level 3: 3 days

SECTION 2. Summary of Enhanced Maintenance and Support:

Licensors has used its experience and best estimates available to provide a summary of various enhanced maintenance and support services as follows:

This appendix B shall remain valid until superseded by a revised addendum mutually endorsed by both parties. It shall be reviewed every six months.

Appendix C
Hardware Specifications (if any)

Appendix D Service

Level Agreement

THE OBLIGATIONS OF LICENSOR UNDER THIS SECTION ARE MATERIAL. LICENSOR MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY CONCERNING MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE.

Service Levels

Provided Licensee maintains and supplies remote access capability to Licensor's system, Licensor will use commercially reasonable efforts to correct and/or provide a work-around for any Software error, or hardware error if Licensor-provided hardware, reported by Licensee in accordance with the priority level reasonably assigned to such error by Licensee and the associated response obligations set forth below:

Priority 1

Urgent

Defined as a product Error that renders Licensor's system inoperative or causes the system to fail. Licensor promptly initiates the following procedures: (1) initial response to Licensee within thirty (30) minutes; (2) performs escalation procedures as reasonably determined by Licensor's support team (3) provides a work-around solution and/or Error correction within twenty-four (24) hours from initial response.

Priority 2

Minor – system remains operative

Defined as a product Error that causes only minor impact on the use of Licensor's system. Licensor promptly initiates the following procedures: (1) initial response to Licensee within thirty (30) minutes; (2) performs escalation procedures as reasonably determined by Licensor's support team (3) provides a fix for the Error no later than the next scheduled major release of Licensor's products.

If Licensee experiences a Priority 1 Error and Licensor's products remain inoperative for more than the amount of time specified in the table below during a single calendar month, Supplier will credit the applicable percentage of any prepaid support fees ("SLA Credit") for that calendar month to Licensee's account.

| Unavailable Hours | SLA Credit |
|-------------------|------------|
| | 0% |
| | 25% |
| | 50% |
| | 100% |

The notification of an Error to Licensor (or by Licensor) shall represent the start time for measuring unavailable hours. Service outage end time is based on Licensor's delivery of an acceptable work-around solution and/or Error correction or by Licensor's determination and communication to Licensee that the reported Error qualifies as a Priority 2 error as defined above.

If Licensee experiences a Priority 2 error and Licensor does not resolve the error for more than the amount of time specified in the table below during a single calendar month, Supplier will credit the applicable percentage of any prepaid support fees ("SLA Credit") for that calendar month to Licensee's account.

| Unavailable Hours | SLA Credit |
|-------------------|------------|
| | 0% |
| | 25% |
| | 50% |
| | 100% |

Appendix E
Pricing Tables

Table 1 – Commonwealth Pricing for State Agencies, Boards and Commissions under the Governor's Jurisdictions

Table 2 – COSTAR's and Organizations Not Covered under Appendix E - Table 1

**Appendix G Electronic
Purchase Orders**

**Exhibit A NONDISCRIMINATION/SEXUAL
HARASSMENT CLAUSE**

The Contractor agrees:

1. In the hiring of any employee(s) for the manufacture of supplies, performance of work, or any other activity required under the contract or any subcontract, the Contractor, each subcontractor, or any person acting on behalf of the Contractor or subcontractor shall not, by reason of gender, race, creed, or color, discriminate against any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates.
2. Neither the Contractor nor any subcontractor nor any person on their behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work, or any other activity required under the contract on account of gender, race, creed, or color.
3. The Contractor and each subcontractor shall establish and maintain a written sexual harassment policy and shall inform their employees of the policy. The policy must contain a notice that sexual harassment will not be tolerated and employees who practice it will be disciplined.
4. The Contractor and each subcontractor shall not discriminate by reason of gender, race, creed, or color against any subcontractor or supplier who is qualified to perform the work to which the contract relates.
5. The Contractor and each subcontractor shall, within the time periods requested by the Commonwealth, furnish all necessary employment documents and records and permit access to their books, records, and accounts by the contracting agency and the Bureau of Minority and Women Business Opportunities (BMWBO), for purpose of ascertaining compliance with provisions of this Nondiscrimination/Sexual Harassment Clause. Within fifteen (15) days after award of any contract, the Contractor shall be required to complete, sign and submit Form STD-21, the "Initial Contract Compliance Data" form. If the contract is a construction contract, then the Contractor shall be required to complete, sign and submit Form STD-28, the "Monthly Contract Compliance Report for Construction Contractors", each month no later than the 15th of the month following the reporting period beginning with the initial job conference and continuing through the completion of the project. Those contractors who have fewer than five employees or whose employees are all from the same family or who have completed the Form STD-21 within the past 12 months may, within the 15 days, request an exemption from the Form STD-21 submission requirement from the contracting agency.
6. The Contractor shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that those provisions applicable to subcontractors will be binding upon each subcontractor.
7. The Commonwealth may cancel or terminate the contract and all money due or to become due under the contract may be forfeited for a violation of the terms and conditions of this Nondiscrimination/Sexual Harassment Clause. In addition, the agency may proceed with debarment or suspension and may place the Contractor in the Contractor Responsibility File.

Exhibit B

CONTRACTOR INTEGRITY PROVISIONS

It is essential that those who seek to contract with the Commonwealth of Pennsylvania ("Commonwealth") observe high standards of honesty and integrity. They must conduct themselves in a manner that fosters public confidence in the integrity of the Commonwealth procurement process.

In furtherance of this policy, Contractor agrees to the following:

1. Contractor shall maintain the highest standards of honesty and integrity during the performance of this contract and shall take no action in violation of state or federal laws or regulations or any other applicable laws or regulations, or other requirements applicable to Contractor or that govern contracting with the Commonwealth.
2. Contractor shall establish and implement a written business integrity policy, which includes, at a minimum, the requirements of these provisions as they relate to Contractor employee activity with the Commonwealth and Commonwealth employees, and which is distributed and made known to all Contractor employees.
3. Contractor, its affiliates, agents and employees shall not influence, or attempt to influence, any Commonwealth employee to breach the standards of ethical conduct for Commonwealth employees set forth in the Public Official and Employees Ethics Act, 65 Pa.C.S. §§1101 et seq.; the State Adverse Interest Act, 71 P.S. §776.1 et seq.; and the Governor's Code of Conduct, Executive Order 1980-18, 4 Pa. Code §7.151 et seq., or to breach any other state or federal law or regulation.
4. Contractor, its affiliates, agents and employees shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any other person at the direction or request of any Commonwealth official or employee.
5. Contractor, its affiliates, agents and employees shall not offer, give, or agree or promise to give any gratuity to a Commonwealth official or employee or to any other person, the acceptance of which would violate the Governor's Code of Conduct, Executive Order 1980-18, 4 Pa. Code §7.151 et seq. or any statute, regulation, statement of policy, management directive or any other published standard of the Commonwealth.
6. Contractor, its affiliates, agents and employees shall not, directly or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any Commonwealth official or employee.
7. Contractor, its affiliates, agents, employees, or anyone in privity with him or her shall not accept or agree to accept from any person, any gratuity in connection with the performance of work under the contract, except as provided in the contract.
8. Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on this project, unless the financial interest is disclosed to the Commonwealth in writing and the Commonwealth consents to Contractor's financial interest prior to Commonwealth execution of the contract. Contractor shall disclose the financial interest to the Commonwealth at the time of bid or proposal submission, or if no bids or proposals are solicited, no later than Contractor's submission of the contract signed by Contractor.
9. Contractor, its affiliates, agents and employees shall not disclose to others any information, documents, reports, data, or records provided to, or prepared by, Contractor under this contract without the prior written approval of the Commonwealth, except as required by the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104, or other applicable law or as otherwise provided in this contract. Any information, documents, reports, data, or records secured by Contractor from the Commonwealth or a third party in connection with the performance of this contract shall be kept confidential unless disclosure of such information is:
 - a. Approved in writing by the Commonwealth prior to its disclosure; or
 - b. Directed by a court or other tribunal of competent jurisdiction unless the contract requires prior Commonwealth approval; or
 - c. Required for compliance with federal or state securities laws or the requirements of national securities exchanges; or
 - d. Necessary for purposes of Contractor's internal assessment and review; or
 - e. Deemed necessary by Contractor in any action to enforce the provisions of this contract or to defend or prosecute claims by or against parties other than the Commonwealth; or
 - f. Permitted by the valid authorization of a third party to whom the information, documents, reports, data, or records pertain; or
 - g. Otherwise required by law.
10. Contractor certifies that neither it nor any of its officers, directors, associates, partners, limited partners or individual owners has not been officially notified of, charged with, or convicted of any of the following and agrees to immediately notify the Commonwealth agency contracting officer in writing if and when it or any officer, director, associate, partner, limited partner or individual owner has been officially notified of, charged with, convicted of, or officially notified of a governmental determination of any of the following:

- a. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property.
- b. Commission of fraud or a criminal offense or other improper conduct or knowledge of, approval of or acquiescence in such activities by Contractor or any affiliate, officer, director, associate, partner, limited partner, individual owner, or employee or other individual or entity associated with:
 - (1) obtaining;
 - (2) attempting to obtain; or
 - (3) performing a public contract or subcontract.

Contractor's acceptance of the benefits derived from the conduct shall be deemed evidence of such knowledge, approval or acquiescence.

- c. Violation of federal or state antitrust statutes.
- d. Violation of any federal or state law regulating campaign contributions.
- e. Violation of any federal or state environmental law.
- f. Violation of any federal or state law regulating hours of labor, minimum wage standards or prevailing wage standards; discrimination in wages; or child labor violations.
- g. Violation of the Act of June 2, 1915 (P.L.736, No. 338), known as the Workers' Compensation Act, 77 P.S. 1 et seq.
- h. Violation of any federal or state law prohibiting discrimination in employment.
- i. Debarment by any agency or department of the federal government or by any other state.
- j. Any other crime involving moral turpitude or business honesty or integrity.

Contractor acknowledges that the Commonwealth may, in its sole discretion, terminate the contract for cause upon such notification or when the Commonwealth otherwise learns that Contractor has been officially notified, charged, or convicted.

11. If this contract was awarded to Contractor on a non-bid basis, Contractor must, (as required by Section 1641 of the Pennsylvania Election Code) file a report of political contributions with the Secretary of the Commonwealth on or before February 15 of the next calendar year. The report must include an itemized list of all political contributions known to Contractor by virtue of the knowledge possessed by every officer, director, associate, partner, limited partner, or individual owner that has been made by:

- a. Any officer, director, associate, partner, limited partner, individual owner or members of the immediate family when the contributions exceed an aggregate of one thousand dollars (\$1,000) by any individual during the preceding year; or
- b. Any employee or members of his immediate family whose political contribution exceeded one thousand dollars (\$1,000) during the preceding year.

To obtain a copy of the reporting form, Contractor shall contact the Bureau of Commissions, Elections and Legislation, Division of Campaign Finance and Lobbying Disclosure, Room 210, North Office Building, Harrisburg, PA 17120.

12. Contractor shall comply with requirements of the Lobbying Disclosure Act, 65 Pa.C.S. § 13A01 et seq., and the regulations promulgated pursuant to that law. Contractor employee activities prior to or outside of formal Commonwealth procurement communication protocol are considered lobbying and subjects the Contractor employees to the registration and reporting requirements of the law. Actions by outside lobbyists on Contractor's behalf, no matter the procurement stage, are not exempt and must be reported.

13. When Contractor has reason to believe that any breach of ethical standards as set forth in law, the Governor's Code of Conduct, or in these provisions has occurred or may occur, including but not limited to contact by a Commonwealth officer or employee which, if acted upon, would violate such ethical standards, Contractor shall immediately notify the Commonwealth contracting officer or Commonwealth Inspector General in writing.

14. Contractor, by submission of its bid or proposal and/or execution of this contract and by the submission of any bills, invoices or requests for payment pursuant to the contract, certifies and represents that it has not violated any of these contractor integrity provisions in connection with the submission of the bid or proposal, during any contract negotiations or during the term of the contract.

15. Contractor shall cooperate with the Office of Inspector General in its investigation of any alleged Commonwealth employee breach of ethical standards and any alleged Contractor non-compliance with these provisions. Contractor agrees to make identified Contractor employees available for interviews at reasonable times and places. Contractor, upon the inquiry or request of the Office of Inspector General, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Inspector General to Contractor's integrity and compliance with these provisions. Such information may include, but shall not be limited to, Contractor's business or financial records, documents or files of any type or form that refers to or concern this contract.

16. For violation of any of these Contractor Integrity Provisions, the Commonwealth may terminate this and any other contract with Contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all additional costs and expenses incurred in obtaining another contractor to complete performance under this contract, and debar and suspend Contractor from doing business with the Commonwealth. These rights and remedies are cumulative, and the use or non-use of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Commonwealth may have under law, statute, regulation, or otherwise.

17. For purposes of these Contractor Integrity Provisions, the following terms shall have the meanings found in this Paragraph 17.

a. "Confidential information" means information that a) is not already in the public domain; b) is not available to the public upon request; c) is not or does not become generally known to Contractor from a third party without an obligation to maintain its confidentiality; d) has not become generally known to the public through a act or omission of Contractor; or e) has not been independently developed by Contractor without the use of confidential information of the Commonwealth.

b. "Consent" means written permission signed by a duly authorized officer or employee of the Commonwealth, provided that where the material facts have been disclosed, in writing, by pre-qualification, bid, proposal, or contractual terms, the Commonwealth shall be deemed to have consented by virtue of execution of this contract.

c. "Contractor" means the individual or entity that has entered into this contract with the Commonwealth, including those directors, officers, partners, managers, and owners having more than a five percent interest in Contractor.

d. "Financial interest" means:

(1) Ownership of more than a five percent interest in any business; or

(2) Holding a position as an officer, director, trustee, partner, employee, or holding any position of management.

e. "Gratuity" means tendering, giving or providing anything of more than nominal monetary value including, but not limited to, cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind. The exceptions set forth in the Governor's Code of Conduct, Executive Order 1980-18, the 4 Pa. Code §7.153(b), shall apply.

f. "Immediate family" means a spouse and any unemancipated child.

g. "Non-bid basis" means a contract awarded or executed by the Commonwealth with Contractor without seeking bids or proposals from any other potential bidder or offeror.

h. "Political contribution" means any payment, gift, subscription, assessment, contract, payment for services, dues, loan, forbearance, advance or deposit of money or any valuable thing, to a candidate for public office or to a political committee, including but not limited to a political action committee, made for the purpose of influencing any election in the Commonwealth of Pennsylvania or for paying debts incurred by or for a candidate or committee before or after any election.

Exhibit C

CONTRACTOR RESPONSIBILITY PROVISIONS

For the purpose of these provisions, the term contractor is defined as any person, including, but not limited to, a bidder, offeror, loan recipient, grantee or lessor, who has furnished or performed or seeks to furnish or perform, goods, supplies, services, leased space, construction or other activity, under a contract, grant, lease, purchase order or reimbursement agreement with the Commonwealth of Pennsylvania (Commonwealth). The term contractor includes a permittee, licensee, or any agency, political subdivision, instrumentality, public authority, or other public entity in the Commonwealth.

- a. The Contractor certifies, in writing, for itself and its subcontractors required to be disclosed or approved by the Commonwealth, that as of the date of its execution of this Bid/Contract, that neither the Contractor, nor any such subcontractors, are under suspension or debarment by the Commonwealth or any governmental entity, instrumentality, or authority and, if the Contractor cannot so certify, then it agrees to submit, along with its Bid/Contract, a written explanation of why such certification cannot be made.
- b. The Contractor also certifies, in writing, that as of the date of its execution of this Bid/Contract it has no tax liabilities or other Commonwealth obligations, or has filed a timely administrative or judicial appeal if such liabilities or obligations exist, or is subject to a duly approved deferred payment plan if such liabilities exist.
- c. The Contractor's obligations pursuant to these provisions are ongoing from and after the effective date of the Contract through the termination date thereof. Accordingly, the Contractor shall have an obligation to inform the Commonwealth if, at any time during the term of the Contract, it becomes delinquent in the payment of taxes, or other Commonwealth obligations, or if it or, to the best knowledge of the Contractor, any of its subcontractors are suspended or debarred by the Commonwealth, the federal government, or any other state or governmental entity. Such notification shall be made within 15 days of the date of suspension or debarment.
- d. The failure of the Contractor to notify the Commonwealth of its suspension or debarment by the Commonwealth, any other state, or the federal government shall constitute an event of default of the Contract with the Commonwealth.
- e. The Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between the Contractor and the Commonwealth that results in the suspension or debarment of the contractor. Such costs shall include, but shall not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. The Contractor shall not be responsible for investigative costs for investigations that do not result in the Contractor's suspension or debarment.
- f. The Contractor may obtain a current list of suspended and debarred Commonwealth contractors by either searching the Internet at <http://www.dgs.state.pa.us/> or contacting the:

Department of General Services
Office of Chief Counsel
603 North Office Building
Harrisburg, PA 17125
Telephone No: (717) 783-6472
FAX No: (717) 787-9138

Exhibit D
Tax Offset Clause

The Contractor authorizes the Commonwealth to offset any past due state and local tax liabilities of the Contractor relating to amounts other than payable in the ordinary course and other than in good faith dispute or under contest or appeal by Contractor, as well as, any other amount due to the Commonwealth from the Contractor, against any payment due to the Contractor under this or any other contract with the Commonwealth.

Exhibit E

AMERICANS WITH DISABILITIES ACT

a. Pursuant to federal regulations promulgated under the authority of The Americans with Disabilities Act, 28 C.F.R. § 35.101 et seq., the Contractor understands and agrees that, in performing its services under this Contract, it shall not cause any individual with a disability to be excluded from performance of the Contractor's services in this Contract on the basis of the disability. As a condition of accepting this Contract, the Contractor agrees to comply with the "General Prohibitions Against Discrimination," 28 C.F.R. § 35.130, and all other regulations promulgated under Title I of The Americans With Disabilities Act which are applicable to all benefits, services, programs, and activities provided by the Commonwealth of Pennsylvania through contracts with outside contractors. For purposes of clarity, the foregoing shall not be understood to the utility or functionality of any software to be provided by the Contractor under this Contract.

b. The Contractor shall be responsible for and agrees to indemnify and hold harmless the Commonwealth of Pennsylvania from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against the Commonwealth of Pennsylvania as a result of the Contractor's failure to comply with the provisions of subparagraph a above.

BOTH PARTIES HAVE READ AND AGREE TO BE LEGALLY BOUND BY ALL OF THE FOLLOWING TERMS AND CONDITIONS, ALL OF WHICH ARE INCORPORATED FULLY INTO THIS AGREEMENT.

LICENSOR

The Commonwealth of Pennsylvania

BY: _____

BY: _____

CERTIFICATION AS TO AVAILABILITY OF FUNDS

COMPTROLLER

Name:

APPROVED AS TO FORM AND LEGALITY

OFFICE OF CHIEF COUNSEL

Title:

OFFICE OF GENERAL COUNSEL

Date:

OFFICE OF ATTORNEY GENERAL

APPENDIX D ARRA ADDENDUM

Implementation of the American Recovery and Reinvestment Act of 2009

Preamble

The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, (“ARRA”) was enacted to preserve and create jobs and promote economic recovery, assist those most impacted by the recession, provide investments needed to increase economic efficiency by spurring technological advances in science and health, invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits, stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive State and local tax increases.

This agreement addendum addresses additional requirements applicable to ARRA funds. Subject to further guidance by the applicable Federal awarding agency, the following terms and conditions are consistent with the mandatory requirements for agreements funded by ARRA.

Be advised that ARRA funds can be used in conjunction with other funding as necessary to complete projects, but tracking and reporting must be separate to meet the reporting requirements of ARRA and related guidance. For projects funded by other sources in addition to ARRA funds, Contractors must keep separate records for ARRA funds and must ensure those records comply with the requirements of the ARRA.

The federal Government has not fully developed the implementing instructions of ARRA, particularly concerning specific procedural requirements for the new reporting requirements. The Contractor will be provided these details as they become available. The Contractor must comply with all requirements of ARRA. In the event there is any inconsistency between these ARRA requirements and current award terms and conditions, the ARRA requirements will take precedence.

Contractor agrees that in consideration of receipt of Federal ARRA Funds, it will comply with all of the terms, conditions, requirements and limitations set forth below:

Definitions

A. “ARRA funds” means funds expended or obligated from appropriations under the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

B. “Contractor” is defined as any person, including, but not limited to, a bidder, offeror, loan recipient, grantee, or subgrantee, who has furnished or seeks to furnish goods, supplies, services, or leased space, or who has performed or seeks to perform construction activity under contract, subcontract, grant, or subgrant with the Commonwealth, or with a person under contract, subcontract, grant, or subgrant with the Commonwealth or its state-affiliated entities, and state-related institutions. The term contractor may include a permittee, licensee, or any agency, political subdivision, instrumentality, public authority, or other entity of the Commonwealth.

ARRA Terms & Conditions

1. **Revisions to Requirements.** Contractor acknowledges that this Addendum may be revised pursuant to ongoing guidance from the relevant Federal or Commonwealth agency regarding requirements for ARRA funds. Contractor agrees to abide by any such revisions upon receipt of written notification from the Commonwealth of the revisions, which will automatically become a material part of this Addendum, without the necessity of either party executing any further instrument.

2. **Reporting Requirements.** Not later than 5 days after the end of each calendar quarter, or more frequently as directed by the Commonwealth, the Contractor shall submit a report to the Commonwealth that contains:

- (a) The total amount of ARRA funds received;
- (b) The amount of ARRA funds received that were expended or obligated to projects or activities;
- (c) A detailed list of all projects or activities for which ARRA funds were expended or obligated, including:
 - i) the name of the project or activity;
 - ii) a description of the project or activity;
 - iii) an evaluation of the completion status of the project or activity;
 - iv) an estimate of the number of jobs created and the number of jobs retained by the project or activity; and
 - v) for infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under ARRA, and name of the person to contact at the agency if there are concerns with the infrastructure investment;
- (d) Detailed information on any subcontracts or subgrants awarded by the Contractor must include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109-282), allowing aggregate reporting on awards below \$25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget;
- (e) If required by the Commonwealth, Contractor agrees to separately identify the expenditures for each award funded under ARRA on the Schedule of Expenditures of Federal Awards (SEFA) and the Data Collection Form (SF-SAC) required by Office of Management and Budget Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations." This identification on the SEFA and SF-SAC shall include the Federal award number, the Catalog of Federal Domestic Assistance (CFDA) number, and amount such that separate accountability and disclosure is provided for ARRA funds by Federal award number consistent with the Contractor reports required by ARRA;

(f) If required by the Commonwealth, Contractor shall submit backup documentation for expenditures of ARRA funds including such items as timecards and invoices. Contractor shall provide copies of backup documentation at the request of the Commonwealth.

3. Registrations and Identification Information

(a) Contractor must maintain current registrations in the Center Contractor Registration (www.ccr.gov) at all times during which they have active federal awards funded with ARRA funds. A Dun and Bradstreet Data Universal Numbering System (DUNS) Number (www.dnb.com) is one of the requirements for registration in the Central Contractor Registration.

(b) If applicable, the Contractor agrees to separately identify to each subcontractor and document at the time of award of contract or approval of application and at the time of disbursement of funds, the Federal award number, CFDA number, and amount of ARRA funds.

4. Flow Down Requirement. Contractor must include these ARRA Terms and Conditions in any subcontract.

5. Prohibition on Use of Funds. No ARRA funds may be used for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool, or any other items prohibited by ARRA.

6. Required Job Posting. To ensure Pennsylvanians have the utmost opportunity to be hired for jobs created through the receipt of ARRA funding, all Contractors shall post jobs they create or seek to fill as a result of receiving ARRA funding to the PA CareerLink® system at www.pacareerlink.state.pa.us . Contractors can locate their local PA CareerLink® office through the same website or by calling 1-866-858-2753. Staff at local PA CareerLinks® can assist Contractors with posting positions and explain how to retrieve resumes or applications within the system.

7. Wage Rate Requirements. Section 1606 of ARRA requires that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to ARRA shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the U.S. Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.

8. Whistleblower Provision.

(a) An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of:

- (1) gross mismanagement of an agency contract or grant relating to covered funds;
- (2) a gross waste of covered funds;
- (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
- (4) an abuse of authority related to the implementation or use of covered funds; or
- (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

(b) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint regarding the reprisal to the appropriate U.S. Office of the Inspector General.

(c) Any employer receiving covered funds under ARRA, shall post notice of the rights and remedies as required by Section 1553 of ARRA. See www.recovery.gov.

9. Duty to Report Fraud. Contractors and subcontractors shall promptly refer to the U.S. Office of Inspector General and Commonwealth Office of Inspector General any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor or other person will or has: 1) submitted a false claim under the False Claims Act; 2) committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, ethics or similar misconduct involving ARRA funds; or 3) engaged in misuse, gross waste, gross mismanagement or abuse of authority related to the use or award of ARRA funds.

10. Environmental and Preservation Requirements. The Contractor shall comply with all applicable Federal, State, and local environmental and historic preservation (EHP) requirements and shall provide any information requested by the awarding Federal agency to ensure compliance with applicable laws including: National Environmental Policy Act, National Historic Preservation Act, Endangered Species Act, the Clean Air Act, the Federal Water Pollution and Control Act, and Executive Orders on Floodplains (11988), Wetlands (11990) and Environmental Justice (12898). Failure of the Contractor to meet Federal, State, and local EHP requirements and obtain applicable permits may jeopardize Federal funding. The Contractor shall not undertake any project having the potential to impact

EHP resources without the prior approval of the awarding Federal agency, including but not limited to communication towers, physical security enhancements, new construction, and modification to buildings that are 50 years old or greater. The Contractor must comply with all conditions placed on the project as a result of the EHP review. Any change to the approved project scope of work will require re-evaluation for compliance with these EHP requirements.

If ground disturbing activities occur during project implementation, the Contractor must ensure monitoring of ground disturbance and if any potential archeological resources are discovered, the Contractor will immediately cease construction in that area and notify the awarding Federal agency and the Pennsylvania Historical and Museum Commission. Any construction activities that have been initiated prior to the full environmental and historic preservation review will result in a non-compliance finding.

11. No Contracts with Debarred or Suspended Entities. The Contractor shall not enter into any contract or subcontract with any party that has been debarred or suspended from either:

- (a) contracting with the Federal Government or the Commonwealth; or
- (b) participating in any Federal or Commonwealth assistance programs.

12. Prohibition on Lobbying.

(a) The Contractor covenants and agrees that it will not expend any funds appropriated by Congress to pay any person for influencing or attempting to influence an officer or employee of any agency, or a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract; the making of any Federal grant; the making of any Federal loan; the entering into of any Agreement; and, the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or Agreement.

(b) Section 319 of Public Law 101-121 (31 U.S.C. Section 1352) and any applicable regulations are incorporated by reference and the Contractor agrees to comply with all the provisions thereof, including any amendments to the Interim Final Rule that may hereafter be issued.

13. Nondiscrimination Provisions. The Contractor covenants and agrees that no person shall be denied benefits of, or otherwise be subjected to discrimination in connection with the Contractor's performance under this Agreement. Accordingly, and to the extent applicable, the Contractor covenants and agrees to comply with the following:

(a) On the basis of race, color or national origin, in Title V I of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d, et seq.), as implemented by applicable regulations.

(b) On the basis of race, color, religion, sex, or national origin, in Executive Order 11246 (3 CFR, 1964-1965 Comp. pg. 339), as implemented by applicable regulations.

(c) On the basis of sex or blindness, in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), as implemented by applicable regulations.

(d) On the basis of age, in The Age Discrimination Act of 1975 (42 U.S.C. Section 6101 et seq.), as implemented by applicable regulations.

(e) On the basis of handicap, in Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by applicable regulations.

14. DBE Provisions. The Contractor shall comply with all applicable federal Disadvantaged Business Enterprises (DBE) requirements related to DBE programs. In the event there are no federal DBE programs applicable to this agreement, the Contractor shall comply with the Pennsylvania Department of General Services (DGS) policy for contracting (http://www.portal.state.pa.us/portal/server.pt/community/bureau_of_minority_and_women_business_opportunities/1358). In the event this agreement is a grant agreement not covered by federal DBE requirements, the Contractor shall use reasonable and good faith efforts to solicit and utilize DGS-certified Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) for those contracting, subcontracting and purchase opportunities that exist and report utilization to DGS.

15. Access to Records. Contractor agrees that with respect to each agreement using, in whole or in part, ARRA funds, any representative of an appropriate U.S. Inspector General appointed under section 3 or 8G of the Inspector General Act of 1988 (5 U.S.C. App.) or of the U.S. Comptroller General is authorized:

(a) to examine any records of the Contractor, any of its subcontractors, or any state or local agency administering such contract that pertain to, and involve transactions relating to the contract; and

(b) to interview any officer or employee of the contractor, subcontractor or agency regarding such transactions.

16. Records Retention. The Contractor shall retain all such contract records intact in a form, if not original documents, as may be approved by the Federal Government, for at least three (3) years following termination of a project funded by ARRA or for such longer period of time as required by the Commonwealth.

17. Access to Information. This contract and any records or expenditures related thereto may be subject to disclosure under the Pennsylvania Right to Know Law, 65 P.S. 67.101, et seq., and the Freedom of Information Act, 5 U.S.C. §552.

18. Compliance. The Contractor shall comply with all applicable laws, regulations and program guidance. A **non-exclusive** list of statutes, regulations and/or guidance commonly applicable to Federal funds follows:

General

- Drug-Free Workplace Act of 1988 (Public Law 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.; 32 CFR part 26, Subpart B
- Copeland “Anti-Kickback Act”, 18 U.S.C. Section 874; 29 CFR Part 3
- Contract Work Hours and Safety Standards Act, 40 U.S.C. §§327-330; 29 CFR Part 5
- Americans with Disabilities Act of 1990, as amended; 42 U.S.C. Chapter 126; 28 C.F.R. §35.101 et seq.

Administrative Requirements

- OMB Circular A-102, State and Local Governments (10/07/94, amended 08/28/07) (44 CFR Part 13)
- OMB Circular A-110, Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations (11/19/93, amended 09/30/99) (2 CFR Part 215)

Cost Principles

- OMB Circular A-87, State and Local Governments (05/10/04) (2 CFR Part 225)
- OMB Circular A-21, Educational Institutions (5/10/04) (2 CFR Part 220)
- OMB Circular A-122, Non-Profit Organizations (5/10/04) (2 CFR Part 230) Audit

Requirement

- OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations (6/24/97, includes revisions published in the Federal Register 6/27/03)

Consulting Services Invitation to Qualify (ITQ) Contract 4400007410

Amendment #1 to Contract Terms and Conditions

The following modifications have been made to the Consulting Services ITQ Contract Terms and Conditions:

Paragraph 10 of the Contract is deleted in its entirety and replaced with the following:

10. TERM OF CONTRACT

The term of the Contract shall commence on the Effective Date and shall end when terminated by the Commonwealth pursuant to Paragraph 23 Termination.

Paragraph 11 of the Contract is deleted in its entirety and replaced with the following:

11. OPTION TO EXTEND

Intentionally left blank.

This amendment is effective April 29, 2015. Except as amended by this Contract Amendment Number 1, all other terms and conditions of the Contract shall remain as originally written.

CRP CHECK CERTIFICATION FORM

Contractor TIN : [REDACTED]

Contractor Name : Funston Advisory Services LLC

User Performing CRP Check : cwopa\smjoshua

Results: No Record(s) Found

CONTRACTOR RESPONSIBILITY CERTIFICATION

I, the undersigned individual, hereby certify the above-referenced contractor has been determined to be a responsible contractor in accordance with the policies and procedures set forth in *Management Directive 215.9, Contractor Responsibility Program*.

I also certify that the contractor has certified in writing that:

- a. neither the contractor nor any subcontractors as defined in Management Directive 215.9, Contractor Responsibility Program are under suspension or debarment by the Commonwealth, the federal government, or any governmental entity, instrumentality, or authority or, if the contractor cannot so certify, it has instead provided a written explanation of why such certification cannot be made; and
- b. the contractor has no tax liabilities or other Commonwealth obligations, or has filed a timely administrative or judicial appeal if such liabilities or obligations exist, or is subject to a duly approved deferred payment plan if such liabilities exist.

Joshua Smith

Authorizing Signature

9/29/2015

Generated Date



**CONSULTING SERVICES
INVITATION TO QUALIFY CONTRACT
RECOMMENDATION FOR BEST VALUE SELECTION**

Date: September 14, 2015

To: David R. Fillman
SERS Chairman

From: Joshua D. Smith
Issuing Officer

RE: Evaluation of Proposals Submitted in Response to
Review of SERS Board and Organizational Structure RFQ
RFQ # SERS 2015-001

PART I.

The Issuing Office designated to conduct the **Review of SERS Board and Organizational Structure** best value selection for this project has completed its evaluation in accordance with Commonwealth policies and procedures. As further described below, **Funston Advisory Services, LLC** is recommended as the best value contractor for this project. This memorandum documents that all necessary steps were taken in conducting the best value selection in accordance with the provisions of the Consulting Services Invitation to Qualify (Consulting ITQ) Contract Solicitation Requirements and Evaluation Process, as prescribed by the Department of General Services (DGS), the procurement code and procurement handbook.

PART II.

A. METHOD OF SELECTING BEST VALUE CONTRACTOR:

1. The SERS Board, through its Audit Committee, sought consulting services of a Contractor with an established expertise in reviewing, assessing and developing the governance structure and practices of large state pension funds.
2. Consistent with the Commonwealth's strategic procurement objectives and policies to evaluate contractor technical capabilities, small diverse business participation, along with cost, in making best value selections from multiple award contracts, the State Employees' Retirement System issued a Request for Quotations (RFQ) to make a best value selection from the Consulting ITQ Contract as authorized by Section 517(f) of the Commonwealth Procurement Code.

- B. **NOTICE:** Notice of the RFQ was posted on the DGS website on **June 29, 2015** and sent via an e-alert email to all of the Contractors qualified in the applicable service categories. Contractors were afforded approximately **30 days** to respond to the RFQ.
- C. **EVALUATION COMMITTEE:** An evaluation committee was established consisting of agency representatives from the State Employees' retirement System (SERS) Board. Representatives from the Comptroller's Office were invited, but did not participate in the committee.
- D. **PRE-PROPOSAL CONFERENCE:** No pre-proposal conference was conducted.
- E. **ADDENDA TO THE RFQ:** Potential contractors were given the opportunity in accordance with Part I-6 of the RFQ to submit questions concerning the RFQ to the Issuing Office. The official responses to the questions were incorporated into the RFQ by addenda per Part I-7 of the RFQ.

PART III.

- A. **EVALUATION CRITERIA:** The Issuing Office established the relative importance of the major evaluation criteria prior to opening the proposals, consisting of technical **50%**, cost **30%** and Small Diverse Business participation **20%**.

NOTE: Up to three percent (3%) bonus points were available to committing to Domestic Workforce Utilization (DW).

- B. **PROPOSAL OPENING:**

1. Two (2) proposals were received in total on or before the due date of **July 29, 2015**. No contractors responded by stating that they would not be submitting proposals. No proposals were submitted late and disqualified as untimely.
2. The Issuing Office opened the proposals in a manner to avoid disclosure of their contents to competing contractors and reviewed them for responsiveness. No proposals were disqualified as non-responsive. The technical submittals were then distributed to the evaluation committee, and the Small Diverse Business (SDB) participation submittals were forwarded to the Bureau of Small Business Opportunities (BSBO) for its review and scoring. The Issuing Office retained the cost submittals.

- C. **RESULTS OF EVALUATION:**

1. **TECHNICAL SUBMITTAL EVALUATION:** The evaluation committee reported the results of its technical evaluation to the Issuing Office.
2. **70% TECHNICAL THRESHOLD:** As indicated in the Overall Scoring, **all of the Contractors' technical submittals scored at least 70% of the available technical points**

and were considered for selection for Best and Final Offers or final selection as the best value contractor.

3. **SMALL DIVERSE BUSINESS PARTICIPATION EVALUATION:** BSBO opened and scored the SDB participation submittals of those Contractors which passed the 70% technical threshold and reported the scores to the Issuing Office.
4. **COST SUBMITTAL EVALUATION:** The Issuing Office opened and scored the cost submittals of those Contractors which passed the 70% technical threshold.
5. **DOMESTIC WORKFORCE UTILIZATION EVALUATION:** The Issuing Office scored commitments to Domestic Workforce Utilization made by those Contractors which passed the 70% technical threshold.
6. **COMBINED SCORES:** The Issuing Office combined the technical scores, cost scores, SDB scores and Domestic Workforce Utilization scores of those Contractors which passed the 70% technical threshold.
7. **BEST AND FINAL OFFERS PHASE:** One Contractors' proposal, **Funston Advisory Services, LLC**, achieved overall combined scores placing them within the competitive range of proposals determined to be reasonably susceptible of being selected to provide the best value to the Commonwealth. As authorized by Part I-22 of the RFQ, this Contractor was selected to proceed to a "Best and Final Offer" phase of the evaluation process. Contractors were accorded fair and equal treatment during discussions and revisions of their proposals. There was no disclosure of any information derived from proposals submitted by competing Contractors.
8. **OVERALL SCORING:** The overall scoring for this RFQ concluded as follows:

| <i>Contractor</i> | <i>Technical Score</i> | <i>Cost Score</i> | <i>SDB Score</i> | <i>DW Bonus</i> | <i>Overall Score</i> |
|---|------------------------|-------------------|------------------|-----------------|----------------------|
| Funston Advisory Services, LLC | 500.00 | 247.83 | 0 | 30.00 | 777.80 |
| Buck Consultants | 432.43 | 300.00 | 0 | 0 | 732.40 |
| <i>Contractor(s) NOT meeting 70% Technical Threshold</i> | | | | | |
| N/A | | n/a | n/a | n/a | n/a |
| | | n/a | n/a | n/a | n/a |

9. **HIGHEST OVERALL SCORES:** After combining the final technical scores, final cost scores, final Small Diverse Business Participation scores and final Domestic Workforce Utilization scores in accordance with the relative weights assigned to these areas and fixed prior to the opening of the proposals, the proposal submitted by **Funston Advisory Services, LLC** received the highest overall score.

**State Employees' Retirement System
September 16, 2015 Meeting of the State Employees'
Retirement Board**

RESOLUTION

The Board hereby authorizes the Chairman to take all actions deemed necessary or desirable, including the execution of all legal documents, to effect the recommendation of the Board Audit Committee to approve the Recommendation for Best Value Selection issued by the SERS Issuing Officer to engage Funston Advisory Services, LLC (Funston) to provide those professional services to the Board as requested in the Review of SERS Board and Organizational Structure Request For Quotations (RFQ), being SERS RFQ Number 2015-001 and as described in Funston's proposal in response thereto, as modified by its best and final offer, all subject to final contract negotiations.