





































































































specifically excluded and null and void. Clicking shall not represent acknowledgement or agreement to any terms or conditions contained in those agreements.

## **UNANTICIPATED AMENDMENTS**

### **Purpose**

The unanticipated amendments clause is necessary to allow the state agency and contractor to address additional work, within the SOW of the original contract as authorized by the terms of the contract, and is due to legitimate, unforeseen circumstances. N.D.A.C. § 4-12-13-01(3). This type of amendment often does not trigger additional procurement requirements. However, the absence of this language may trigger procurement requirements to contract for work to address the unforeseen circumstances.

### **Recommended Language**

#### **UNANTICIPATED AMENDMENTS**

If additional work is required within the scope of this Contract due to a legitimate unforeseen circumstance, STATE shall provide CONTRACTOR a written description of the additional work and request CONTRACTOR to submit a proposal for accomplishing the scope of work. CONTRACTOR will not commence additional work until all Parties agree in writing.

## **SEVERABILITY**

### **Purpose**

The Severability clause should be included in a contract so if one or more provisions in the contract are declared illegal, and performance of the contract without the illegal clause is possible, the remaining terms of the contract remain enforceable. Contract termination may be an option if it suits the situation.

### **Recommended Language**

#### **SEVERABILITY**

If any term of this Contract is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Contract did not contain the illegal or unenforceable term.

## **APPLICABLE LAW AND VENUE**

### **Purpose**

The Applicable Law and Venue clause is necessary to identify the law governing the contract and the court or courts in which contract disputes may be heard. The goal of this provision is to have a contract interpreted according to North Dakota law (i.e., applicable law) and any dispute resolved in North Dakota state courts (i.e., venue).

Absent legislative authority, an agency may not agree to submit to the jurisdiction of the federal courts, or to the court of another state or foreign country. N.D. Const. art. I, § 9. If an agency were to agree to federal court jurisdiction, the state’s 11th Amendment immunity could be waived. Generally, the federal courts lack jurisdiction because a state is not considered a citizen for purposes of diversity jurisdiction.

Subjecting the agency to another state’s laws or jurisdiction, or that of a foreign country, may not be in the agency’s (the state’s) best interests and any risks involved must be weighed against those interests through legal consultation.

**If a contractor is unwilling to agree to be bound by North Dakota law or be subject to the jurisdiction of North Dakota courts, the agency must consult with its assigned legal counsel, the Office of Attorney General, and the OMB Risk Management Division.**

## **Recommended Language**

### **APPLICABLE LAW AND VENUE**

This Contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota. Each Party consents to the exclusive jurisdiction of the state District Court located in Burleigh County, North Dakota and waives any claim of lack of jurisdiction or *forum non conveniens*.

## **ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

**Without specific, legislative authority, agencies are without the authority to bind the state to an alternative dispute resolution process.**

## **Purpose**

Occasionally a contractor (or private party) will propose a clause that requires contractual disputes to be resolved through alternative dispute resolution. An agency is without authority to agree to mandatory mediation or arbitration. “The director of [OMB], in consultation with the head of the state agency involved and the attorney general, may agree to submit a claim covered by the state risk management fund to mediation or binding arbitration.” N.D.C.C. § 32-12.2-05.

Although alternative dispute resolution may be helpful as a cost-effective alternative to litigation, the Attorney General does not recommend this type of dispute resolution as the required first step in resolving a dispute. The Attorney General has the authority to determine the best course of action for an agency to resolve a dispute, including instituting litigation as the first option if it is determined to be in the best interests of the state.

**“The attorney general and the attorney general’s assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state to do so.” N.D.C.C. § 54-12-02.**

This is not to say that an agency is prohibited from resolving contractual disputes through an agreed process between the agency (in consultation with its assigned legal counsel) and the contractor. Generally, resolving disputes or disagreements at the lowest level is viewed as being in the best interests of all parties.

**HOWEVER**, it should be noted that mandating any form of alternative dispute resolution as the first step in resolving a dispute, or mandating the agency bind the state to a specific dispute process prior to pursuing litigation in a court of law, is something to which an agency is without authority to agree.

An agency should not waive the right to litigate if the parties are unable to reach a resolution or settlement that is authorized by law. Generally, an agency should not waive any right to a jury trial. However, although uncommon, there may be certain contracts that are better suited for a bench trial if litigated. An agency’s assigned legal counsel should be consulted when determining this language.

## **Recommended Language**

### **ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

## **ATTORNEY FEES AND COSTS**

### **Purpose**

The Attorney Fees and Costs clause should be used to allocate responsibility for paying attorneys’ fees and costs incurred by the agency in litigation to enforce the contract. Contracts between private parties commonly include this clause, however it is reciprocal in nature, awarding attorneys’ fees and costs to the prevailing party. A reciprocal provision in favor of the contractor is not allowed without an appropriation for expenditure of public funds for such purposes.

**This type of expense would not be covered by the North Dakota Risk Management fund and could only be paid pursuant to an appropriation for such expenditure.**

## **Recommended Language**

### **ATTORNEY FEES**

If a lawsuit is initiated by STATE to obtain performance due under this contract, and STATE is the prevailing Party, CONTRACTOR shall pay STATE's reasonable attorney fees and costs in connection with the lawsuit, unless prohibited by N.D.C.C. § 28-26-04.

## **NONDISCRIMINATION – COMPLIANCE WITH LAWS**

### **Purpose**

The Nondiscrimination – Compliance with Laws clause must be included in state contracts. Because the public's confidence in its government could be undermined if contractors for the state are allowed to discriminate or violate the laws that other members of the public are expected to follow, failure to comply with these requirements may be deemed a material breach of contract giving the agency the remedy of termination for cause.

The North Dakota Department of Labor and Human Rights is responsible for enforcing North Dakota labor and human rights laws. Wage and hour laws may be found throughout N.D.C.C. Title 34 and N.D.A.C. Chapter 46-02-07. It is in the best interest of the agency to have contractors affirmatively verify the contractor operates in compliance with these requirements.

The federal government requires that by April 2026, all state and local government websites, mobile applications, and electronic documents comply with the digital accessibility standards under the Americans with Disabilities Act (ADA). This rule was implemented by the U.S. Department of Justice and more in depth information can be found at [ADA](#).

This clause also addresses a contractor's obligations to timely file any required reports, make required payroll deductions, and timely pay all applicable taxes and premiums, including sales and use taxes, unemployment insurance compensation and workers' compensation premiums as required by law.

This clause also addresses statutory changes enacted by the 68<sup>th</sup> Legislative Assembly regarding contractors who may participate in boycotting Israel. (*See* N.D.C.C. § 54-44.4-15.) HB 1368 prohibits state entities from contracting with companies that engage in commercial actions intended to limit commercial relations with persons doing business in Israel or in Israeli-controlled territories.

## **Recommended Language**

### **AMERICANS WITH DISABILITIES ACT (ADA) – NONDISCRIMINATION – COMPLIANCE WITH LAWS**

- a. CONTRACTOR shall comply with all applicable federal and state laws, rules, and policies, including those relating to nondiscrimination, accessibility, and civil rights (*See* N.D.C.C. Title 34 – Labor and Employment, specifically N.D.C.C. ch. 34-06.1 Equal Pay for Men and Women).
- b. **ADA Compliance** –CONTRACTOR shall ensure that all user-facing components of the solution comply with the Americans with Disabilities Act (ADA) and at a minimum, conform to 28 CFR § 35.200 federal Requirements for Web and Mobile Accessibility; available at: 28 CFR § 35.200. CONTRACTOR shall verify accessibility compliance through automated and manual testing prior to delivery and shall provide reports to STATE quarterly or as mutually agreed by STATE and CONTRACTOR.

CONTRACTOR is responsible for maintaining accessibility compliance of the solution throughout the Term of the Contract, including all renewals and extensions. If a compliance issue is discovered, CONTRACTOR shall provide a remediation plan, including timelines and impacts, to STATE. CONTRACTOR shall indemnify STATE for any and all claims, including penalties, costs, and expenses, related to accessibility claims under the ADA related to the solution.

- c. CONTRACTOR shall file all required reports timely, make required payroll deductions, and pay all taxes and premiums owed timely, including sales and use taxes, and unemployment compensation and workers' compensation premiums.
- d. CONTRACTOR shall have and keep current and in good standing all licenses and permits required by law during the Term of this Contract.
- e. CONTRACTOR is prohibited from boycotting Israel for the duration of this Contract. (*See* N.D.C.C. § 54-44.4-15.) CONTRACTOR represents that it does not and will not engage in boycotting Israel during the term of this Contract. If STATE receives evidence that CONTRACTOR boycotts Israel, STATE shall determine whether the company boycotts Israel. The foregoing does not apply to contracts with a total value of less than \$100,000 or if CONTRACTOR has fewer than ten (10) full-time employees.

CONTRACTOR's failure to comply with this section is a material breach by CONTRACTOR and STATE may terminate this Contract in accordance with its Termination for Cause section.

## **STATE AUDIT**

### **Purpose**

The State Audit clause informs a contractor of the State Auditor's authority to "...examine the books and accounts of all private institutions with which the state has any dealings so far only as the same related to such dealings." N.D.C.C. § 54-10-19. This clause is included to inform a contractor of the State Auditor's obligations to audit agencies when required under law. An agency is without authority to

limit the State Auditor’s ability to perform statutory duties and obligations. Agencies should not accept language proposing to limit the number of audits conducted under this contract clause.

## **Recommended Language**

### **STATE AUDIT**

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this Contract are subject to examination by the North Dakota State Auditor, the Auditor’s designee, or Federal auditors, if required. CONTRACTOR shall maintain these records for at least three (3) years following completion of this Contract and be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor’s designee shall provide reasonable notice to CONTRACTOR prior to conducting examination.

## **COUNTERPARTS**

### **Purpose**

The Counterparts clause allows parties to the contract, often located in different cities or states, to each sign a different, but identical, copy of the contract. In other words, not all parties need to sign the same page or sign in person.

## **Recommended Language**

### **COUNTERPARTS**

This Contract may be executed in multiple, identical counterparts, each of which is deemed an original, and all of which taken together constitute one and the same contract.

## **EFFECTIVE DATE OF AGREEMENT**

### **Purpose**

All contracts should contain an effective date which will indicate when work on the contract should begin and when the terms of the contract are enforceable. Contracts may specify a begin date in the Term of Contract clause or a contract may begin on the Effective Date as defined in the Effectiveness of Contract clause.

## **Recommended Language**

### **EFFECTIVENESS OF CONTRACT**

This Contract is not effective until fully executed by both Parties. If no start date is specified in the Term of Contract, the most recent date of the signatures of the Parties is the Effective Date.

# **SIGNATURES**

## **Purpose**

The signatures on the contract should match the parties identified in the introduction to the contract. When contracting with a corporation or business, the person who signs the contract should be an officer or another person with authority to act for the corporation or business. If the person is not an officer with apparent authority, insist on a board resolution, power of attorney from an officer, or some documentation showing that the person is authorized to act on behalf of the corporation or business.

All signatures must be dated, accurately reflecting the date on which the contract was signed, and if not signed electronically, written in ink, preferably in blue ink for easy identification of an original signature. The official title or position of the individuals executing the contract should appear below each signature line.

Electronic signatures are addressed in N.D.C.C. ch. 9-16. The state's ITD has created guidelines for agencies to consult when electronic signatures are requested.

# CHAPTER 6 – INFORMATION TECHNOLOGY CONTRACT CLAUSES

---

Information Technology (IT) contracts are complex. Agencies must ensure coordination with ITD and OMB’s SPO when procuring anything related to IT, including software, hardware, and development of an IT solution.

*Institutions under the control of the SBHE should ensure IT contracts are reviewed by the institution’s assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.*

Template documents for the IT Contract and applicable Exhibits are NOT included in this manual. Because these are frequently updated, please use the following links to access the most current version of each of these documents.

Links to the most current versions:

- a. [Template IT Contract](#) with
  - a. Template, Exhibit A (Statement of Work)
  - b. Template, Exhibit B (Compensation Details)
  - c. Template, Exhibit C (Software as a Service (SaaS) and Service Level Agreement (SLA))
  - d. Template, Exhibit D (License)
- b. [Additional SOW examples](#).

**As used in this chapter, terms such as *software, program, solution, product, etc.* are used interchangeably to refer to the specific offering from the contractor that the agency is purchasing. To avoid ambiguity in contract interpretation, agencies should ensure their contract uses consistent terminology.**

IT contracts may involve a variety of delivery methods for the solution sought by the state agency.

- **Commercial off-the-shelf (COTS)** – This consists of a packaged or “canned” hardware or software product that may be adapted aftermarket to the specific needs of the state agency. COTS offerings generally require very little customization for the state agency. COTS offerings are commercially available to purchasers regardless of their status as a public or private entity or a member of the public. For example, Microsoft is a COTS service provider.

- **Software as a Service (SaaS)** – This is a cloud computing service model in which a contractor delivers application software to the state agency while managing the required physical and software resources. SaaS offerings are accessed through web-applications or locally installed software. They may include COTS software, customized software, or a combination of both provided by the contractor. SaaS offerings generally involve the hosting of state data outside of the state’s network (or off-premises) and extra care must be taken to ensure the agency’s data is protected through robust contractual language addressing data security requirements, cyber liability allocation, and risk mitigation.

Contracts may include "recitals" at the beginning of the agreement that identify the parties to the agreement and the purpose of the agreement. Although not legally required, recitals can effectively explain the agreement, which will help in understanding the remaining terms of the contract. Recitals often begin with terms such as: “*Whereas...*” and “*Therefore...*”.

## **PARTIES – IDENTIFYING THE PARTIES AND PURPOSE**

A contract should begin by identifying the parties to the contract. Except for contracts between agencies, the state, rather than a particular agency or official, is the real party to state contracts. For contracts between agencies, separate terms describing each agency should be used. The agency should be identified as follows: “This Contract is between the State of North Dakota acting through its [agency] (STATE) and [ABC Company] (CONTRACTOR).”

Use one-word descriptive terms, introduced in the opening clause identifying the parties, to refer to the parties throughout the contract. Check to be sure that references to the parties are consistent throughout the contract. An example of an acceptable paragraph identifying the parties is: “This agreement is between the State of North Dakota, acting through its Commissioner of Labor (STATE), and ABC Company (CONTRACTOR).” Note that when this is done the one-word descriptive term is considered a proper noun and, in most cases, no longer needs to be preceded by the definite article “the.” Example: “CONTRACTOR and STATE will ...” rather than “The CONTRACTOR and the STATE will ...”.

### **Recommended Language**

#### **PARTIES**

The parties to this contract (Contract) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a [type of business]* (e.g. *Delaware corporation or privately held company*) having its principal place of business at *principal business address* (CONTRACTOR).

## **DEFINITIONS**

### **Purpose**

Contracts often include defined terms that are distinguished from other language in the contract by capitalization. Using defined terms ensures mutual understanding as to a term’s meaning and use

throughout the contract. Defined terms avoid ambiguities or misinterpretations that may lead to disputes. When similar terms are used in the contract without capitalization, the usage takes on the common understanding of the word in everyday use. When capitalized, the defined term takes on the meaning as described in the definitions section of the contract.

Not every defined term has to be included in the definitions section. If a defined term is used minimally in the contract, it may be defined where it is first used. Defined terms used throughout the contract should be included in the definitions section.

## Recommended Language

### DEFINITIONS

*Note: These are common definitions used in State IT Contracts. Update as required.*

- a. **Control Environment** – is the set of standards, processes, and structures that provide the basis for carrying out internal control across the organization.
- b. **Data** – means any information provided to, or collected, generated, stored, or processed by the system. Data includes user identification information and metadata which may contain Data or from which STATE’s Data may be ascertainable.
- c. **Data Breach** – means any access, destruction, loss, theft, use, modification or disclosure of Data by an unauthorized party or that is in violation of Contract terms and/or applicable state or federal law.
- d. **Data Classification** – means the process of defining data into relevant categories so the information has the appropriate controls in place to protect confidentiality, integrity, and availability based on the type of information.
- e. **Personally Identifiable Information (PII)** – information about an individual maintained by an agency, including that 1) can be used to distinguish or trace an individual’s identity, such as name, social security number, date and place of birth, mother’s maiden name, or biometric records; or (2) is linked or linkable to an individual, such as medical, educational, financial, and employment information.
- f. **Recovery Point Objective (RPO)** – means the point in time to which Data can be recovered or systems restored, or both, when service is restored after an interruption. The Recovery Point Objective is expressed as a length of time between the interruption and the most proximate backup of Data immediately preceding the interruption. The RPO is detailed in the SLA.
- g. **Recovery Time Objective (RTO)** – means the period within which information technology services, systems, applications and functions must be recovered following an unplanned interruption. The RTO is detailed in the SLA.
- h. **Software as a Service (SaaS)** – any software or infrastructure hosted outside the State of North Dakota’s environment.
- i. **Users** – means contractors, subcontractors, outsourcing vendors, consultants and others who have a need to use the software for the benefit of STATE.

## SCOPE OF WORK

### Purpose

Describe the goods or services required under the contract in sufficient detail that a failure of the contractor to meet the state's expectations as described will be a breach of contract. The goods or services are typically described in general terms in the contract itself or a more detailed description, sometimes called the “statement of work” or “scope of work” (both referred to as SOW), may be attached as an exhibit to the contract and incorporated by reference.

If the description contained in the SOW is too vague, it will be difficult for the state to enforce the contract or establish a breach of contract by the contractor. Because SOWs generally relate to the policies, business practices and specific needs of the agency, the content of the SOW should be drafted by agency personnel having intimate knowledge of the solicitation and what work is required.

**Because IT contracts are detailed and complex, the SOW is most often jointly negotiated and drafted by the parties to ensure there is a meeting of the minds as to expectations for various deliverables and acceptance criteria. The IT contract template in this manual contains a sample SOW as a starting point.**

**A Scope of Work (SOW) should be reviewed by the agency’s assigned legal counsel to ensure there are no legal concerns with the SOW’s language and the obligations of the parties under the SOW.**

### Recommended Language

#### SCOPE OF WORK

*Note: If the Scope of Work (SOW) is brief, insert your language into the sentence provided directly below. If the SOW is a lengthy document, you may consider referencing the SOW as a separate section at the end of the IT contract. A sample SOW section is provided in Exhibit A to the IT contract template in this manual.*

CONTRACTOR, in exchange for the compensation paid by STATE under this Contract, shall provide *SOW description* as described in the Scope of Work (Exhibit A) and in the documents listed in the Merger and Modification, Conflict in Documents Section.

## COMPENSATION

### Purpose

The Compensation – Payments clause identifies the amount of money the state must pay pursuant to the contract. If a total number of goods or hours of service cannot be identified, a monetary cap should be placed on the total amount, which may not be exceeded without the written consent of the agency in the form of a contract amendment. Contracts requiring payment for each good or hour of service should not

be open-ended and should instead identify the total number of goods or hours of service being purchased.

## **Prepayment**

The Attorney General and the State Auditor discourage the use of prepayment provisions. An agency should not only avoid paying public funds before verifying the quality or sufficiency of the goods or services being purchased but should reconsider doing business with a contractor whose financial condition is so marginal that it needs an infusion of cash to proceed with the project. An agency should strongly consider requiring the contractor to post a performance bond if the contractor requires prepayment.

**Payment required for IT software maintenance or IT software-as-a-service (SaaS) subscription services are not “prepayment” as described in the paragraph above.** This is because these maintenance and subscription services are generally available to the agency at the same time payment is made, therefore payment is not considered prepayment.

## **Taxpayer ID**

An agency should obtain the contractor’s federal employer ID number (FEIN) by requiring this in the contract. Although this clause is not essential to the contract, it may save time for the agency.

## **Payment of Taxes by State**

State has tax exempt status. Contracts must ensure that the agency is not responsible for the payment of taxes.

## **Interest Due on Overdue Payments**

Although there is no need to include a provision governing interest in state contracts, agencies should be aware that interest must be paid on a payment due from an agency if the payment is not made by the date specified in the contract or, if no date is specified, within forty-five (45) days of receipt of an invoice. N.D.C.C. § 13-01.1-02. Because this statute provides forty-five (45) days for payment, it is recommended that agencies negotiate the same period as the time allotted for payments due under the contract.

## **Retainage**

Retainage in a contract specifies a percentage of payments to the contractor that is withheld by the purchasing agency until certain conditions are met. Generally, IT contracts pay out retainage when final acceptance occurs based on the SOW. Retainage is a form of security to ensure a contractor remains incentivized to perform, correct deficiencies, and complete the project on schedule. It is a form of risk management to ensure the purchasing agency receives the product and services the contractor is obligated to deliver under the contract.

IT contracts requiring milestone payments or deliverable-based payments should contain a retainage clause. Typically, agencies require twenty percent (20%) retainage in IT contracts. However, this percentage may be negotiated and determined based on risk.

## Travel

Travel reimbursement language in a contract simply defines how costs related to travel by the contractor will be authorized and reimbursed by the agency.

## Recommended Language

### COMPENSATION

*Note: A sample Compensation Details section is provided in Exhibit B to the IT contract template at the link provided at the beginning of this Chapter and in Appendix 2 to this manual. STATE and CONTRACTOR may negotiate payment terms for all commodities and services procured. If a date for payment is not specified in this Contract, payment must be made pursuant to section N.D.C.C. § 13-01.1-01.*

#### a. Contractual Amount

STATE shall pay for the accepted services provided by CONTRACTOR under this Contract an amount not to exceed *[Amount]* (Contractual Amount). STATE shall pay Contractual Amount according to the Compensation Details as Exhibit B.

The Contractual Amount is firm for the duration of this Contract and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Contract regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Contract.

#### b. Retainage

*Note: Retainage should be reasonable in relation to the specific project and should be set in consultation with Office of Management and Budget (OMB), Information Technology Department (ITD), and assigned legal counsel.*

All deliverable payments are subject to *[Number]* % retainage. STATE shall pay CONTRACTOR retained amounts due upon Final Acceptance, minus any amount(s), including withholdings or setoffs, due to STATE under this Contract.

#### c. Invoicing

The final cost set forth on each invoice must be equivalent to the cost for each deliverable or service as specified in the Scope of Work. CONTRACTOR may not submit an invoice for any deliverable or service specified in the Scope of Work that STATE has not fully accepted.

CONTRACTOR shall invoice STATE within seven (7) days for any accepted deliverable, service, or goods.

STATE may only expend public funds for any deliverable, service, or goods accepted within the Fiscal Year for which the funds are appropriated. STATE's Fiscal Year is July 1 through June 30. An invoice for any deliverable, service, or goods accepted

within the Fiscal Year must be dated prior to July 1 and received by STATE no later than July 7 of each Fiscal Year.

**d. Payment**

Payment made in accordance with this Compensation section constitutes payment in full for the services and work performed and the deliverables and work(s) provided under this Contract and CONTRACTOR may not receive any additional compensation under this Contract.

STATE shall make payment under this Contract within forty-five (45) calendar days after receipt of an approved invoice.

Payment of an invoice by STATE will not prejudice STATE's right to object to or question that or any other invoice or matter in relation to the Contract. STATE may reduce CONTRACTOR's invoice for amounts included in any invoice or payment previously made which are determined by STATE not to constitute allowable costs, on the basis of audits conducted in accordance with the terms of this Contract. STATE may reduce any payments for amounts equal to prior overpayments to CONTRACTOR.

STATE may deduct the amount owed or that will be owed to STATE by CONTRACTOR from payments that are or will become due and payable to CONTRACTOR under this Contract.

***NOTE: If your contract allows for separately billed travel expenses (i.e.: outside of fixed price contract), modify or delete the following clauses as applicable:***

**e. Travel**

Travel costs are covered by the Contractual Amount. CONTRACTOR may not invoice STATE for travel costs.

***OR***

STATE shall reimburse CONTRACTOR for expenses related to travel as outlined below:

- 1) **Lodging:** Reimbursement may not exceed the published GSA rate for the travel location in effect for the dates of travel. CONTRACTOR shall provide copies of receipts for lodging reimbursement. STATE may not reimburse incidental and miscellaneous expenses charged to the room.
- 2) **Transportation:** STATE shall reimburse air travel at the actual cost of air fare for coach class travel only. CONTRACTOR shall make air travel arrangements at least fourteen (14) days in advance whenever possible. STATE shall determine reasonable rates for the reimbursement of rented, chartered, or contracted vehicle transportation.
- 3) **Meals:** STATE shall reimburse meals on a per diem basis for each day of travel at the published GSA per diem rate for the travel location in effect for the dates of

travel. STATE shall pay per diem for the first and last day of travel at seventy-five percent (75%) of the GSA per diem rate. CONTRACTOR's requests for per diem payments must specify the start and end dates of travel, the location where the services are performed, and the allowable per diem amount for each trip on the billing/invoice.

Payment for travel expenses that exceed the travel budget as agreed by the Parties must be approved by STATE's project manager.

**f. Prepayment**

STATE will not make any advance payments before performance or delivery by CONTRACTOR under this Contract.

**g. Payment of Taxes by STATE**

STATE is not responsible for and will not pay local, state, or federal taxes. STATE sales tax exemption number is E-2001. STATE will furnish a certificate of exemption upon request by CONTRACTOR.

**h. Taxpayer ID**

CONTRACTOR's federal employer ID number (FEIN) is: *[Insert FEIN]*.

**i. Payment Methods**

- 1) STATE may make payment using a government credit card. CONTRACTOR shall accept a government credit card without passing the processing fees for the government credit card back to STATE.
- 2) STATE may make payment using an ACH transfer, wire transfer, or by issuing a check to CONTRACTOR.

## **EQUIPMENT, MATERIALS, AND WORKSPACE – RESOURCES PROVIDED BY PARTIES**

### **Purpose**

This clause specifically identifies the obligations of the parties for providing equipment, materials, and workspace for on-site work by the contractor. Not all IT contracts include on-site work.

This clause may be deleted if on-site work is not contemplated under the contractual relationship.

### **Recommended Language**

**EQUIPMENT, MATERIALS, AND WORKSPACE – RESOURCES PROVIDED BY PARTIES**

*Note: Modify this section to reflect the expectation for having contract staff on site, which party is providing office space, equipment, etc.*

For periods during which the Parties mutually agree that CONTRACTOR's assigned staff is on site:

- a. On site means *list agency physical location address*.
- b. STATE agrees to provide an adequate working space, when required.
- c. *CONTRACTOR or Agency name* shall provide equipment and software for on-site CONTRACTOR personnel .
- d. When STATE and CONTRACTOR agree that remote access to systems is required, STATE shall provide the necessary supervised remote access security to enable CONTRACTOR access to the appropriate STATE systems.

## TERM OF CONTRACT

### Purpose

The Term of Contract clause identifies the period during which the agency and contractor are subject to the contract's commitments.

An agency generally lacks authority to commit funds beyond the term of the current biennium. A contract may extend beyond the current biennium if the agency has express authority to enter the contract or if the Termination clause in the contract allows the agency to terminate the contract if sufficient funds are unavailable, if the law regarding the contract is changed, or without cause at any time. *See N.D.A.G. 77-01.*

Options for going beyond the initial term are titled: Renewal, Extension, and Renegotiation. They are outlined below with brief descriptions as to their applicability.

**Exercise of an Extension, Renewal, or Renegotiation requires a written contract amendment identifying the amended terms and conditions.**

**Contract amendments should be drafted in consultation with the agency's assigned legal counsel.**

### Term of Contract

This clause identifies the start and end of the contract's initial term. A contract may begin on a specified date, or it may begin on the contract's Effective Date, that is defined in the Effectiveness of Contract clause at the end of the contract. The Effective Date is generally defined as the most recent date of the parties' signatures.

## **No Automatic Renewal**

Contracts may be considered renewed only when the agency specifically exercises a unilateral right to renew the contract or both parties agree that the contract will be renewed. Any language referencing automatic renewal should be struck from a contract. Automatic renewal clauses run the risk of the agency unintentionally entering a renewal term.

## **Renewal Option**

A renewal option is normally used when a multi-year contract is anticipated. A renewal option provides the agency with the unilateral right to renew the contract beyond the current contract term end date. The renewal provision allows the existing contract terms and conditions to be renewed for additional contract terms after the completion of the initial contract term.

If a contract is renewed, the agency should compare the cost of the goods or services in the contract to the current market for those goods or services. Continuing an existing contract may spare the agency time, but the agency also loses the opportunity to go through a competitive procurement process and obtain similar or better services or goods at similar or better prices. If renewal is expected or a possibility, parties to a contract should agree to the number of potential renewal terms in advance and in writing in the initial contract. If the contract was awarded through a procurement process, the number of renewals must be negotiated in the initial contract.

When exercising a renewal option, the new term should be specified and acknowledged by the parties in writing in the form of a contract amendment.

## **Extension Option**

An extension option provides the agency with the unilateral right to extend the contract beyond the current contract term end date up to twelve (12) months. The extension option is intended as a one-time option to be used after all renewal options have been exercised or it has been determined remaining renewal options will not be exercised. Generally, extensions are exercised when additional time is needed to complete a contract or it is necessary to keep a contract in place and prevent a gap in coverage for goods or services while a new procurement process is conducted.

When exercising an option to extend, the new term should be specified and acknowledged by the parties in writing in the form of a contract amendment.

## **Renegotiation Option**

A renegotiation option would normally be used for a strategic solution/product, for example a critical line-of-business application that is expected to be used for an extended period of time (e.g. IT solutions with perpetual licenses, software maintenance, equipment maintenance, subscription services), and where it is in the state's best interest to have the ability to renegotiate the contract. Renegotiation occurs after completion of the initial term, any renewals, and extension, if applicable.

Agencies subject to N.D.C.C. ch. 54-44.4 procurement laws must ensure that the proper authorization exists within their current procurement process to include the renegotiation option within their contract.

## Recommended Language

### Term of Contract

*NOTE: The Term should either begin on a specific date (post-execution) OR, if no start date is specified, on its Effective Date (the date of execution). Do NOT include both descriptors as the start date.*

*Some IT contracts do not require performance or obligations after Final Acceptance, the state agency may use the optional “specific time after Final Acceptance” to ensure the contract provides additional time beyond the expected termination date if there is a delay in performance or obligations. Do NOT include both descriptors in this clause as the end date.*

This Contract term (Term or Initial Term) begins on *[Month, Day], 20[Year], OR its Effective Date*, and ends on *[Month, Day], 20[Year], OR a specific time after Final Acceptance (for example: 3, 6, 9, or 12 months)*.

#### a. No Automatic Renewal

This Contract will not automatically renew.

#### b. Renewal Option

STATE may renew this Contract upon satisfactory completion of the Initial Term. STATE may execute up to *[Number]* options to renew this Contract under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

#### c. Extension Option

STATE may extend this Contract for an additional period, not to exceed *[Number]* months, beyond the current termination date of this Contract.

#### d. Renegotiation Option

Because it is unknown how long the solution and services will be used by STATE and ongoing maintenance and support are required for as long as the system is operational, STATE and CONTRACTOR may renegotiate this Contract. After completion of the Initial Term, renewals, and extensions, STATE and CONTRACTOR may renegotiate the pricing and Term of this Contract. STATE and CONTRACTOR shall agree on new pricing and Term in a written amendment.

If, during the Initial Term, any renewal, or extension, STATE determines a realignment of the Term is needed (e.g. to align with STATE’s fiscal biennium, SaaS period), the Parties may agree, in writing, to a new Term with a termination date not to exceed the total available length of Contract including its Initial Term, renewals, and extensions.

## **TIME IS OF THE ESSENCE**

**“Time is of the Essence” is a clause not commonly used in state contracts for goods or services.** However, there may be unique circumstances surrounding a contract where time is of the essence. An agency should consult with its assigned legal counsel to determine whether time is of the essence.

Generally, if time is not of the essence, reasonable delay in performance does not constitute a material breach; unreasonable delay constitutes a material breach.

Time is of the essence when a Contractor’s service(s) must be performed within a specified time and that performance is essential to require performance on the part of the agency (the Contractor needs to do their part to require the agency to do its). The Contractor is not afforded any opportunity to cure a delay in performance, and any delay may be a material breach of the contractual terms and conditions. The agency must be prepared to terminate a contract if a material breach occurs and time is of the essence. Waiving “Time is of the Essence” for a Contractor’s delay in performance at any time during the contract term may result in a waiver of all “Time is of the Essence” milestones unless otherwise agreed, in writing, by the agency and Contractor.

If it is determined that time is of the essence, the following recommended language should be used.

### **Recommended Language**

#### **TIME IS OF THE ESSENCE**

Time is of the essence for performance under this Contract unless otherwise agreed in writing by the Parties.

## **TERMINATION**

### **Purpose**

**Termination under any provision of the contract should be documented in the form of a written amendment. Termination for Cause may be in the form of written correspondence to the contractor.**

The Termination clause identifies the circumstances under which the contract may be cancelled prior to the scheduled termination date specified in the contract.

### **Termination for Convenience or by Agreement**

Termination for convenience is a simple provision that allows a party to a contract to terminate the contract without having to provide justification for the termination. Because these are state contracts for which the agency has dedicated numerous resources to procure the contract, it is to the state’s benefit to allow for the unilateral right of termination for convenience by the agency but not accept termination for

convenience by the contractor. Termination by agreement is a simple provision that allows the parties to terminate the contract at any time during the Term of contract provided both parties agree to the terms of termination.

### **Early Termination in the Public Interest**

Early termination in the public interest allows an agency to unilaterally terminate the contract that might no longer serve the public policy interests of the state of North Dakota.

### **Termination for Lack of Funding or Authority**

Termination for lack of funding or authority is a **required** clause for agency contracts. This clause allows an agency to unilaterally terminate the contract if there is no longer an appropriation of funds or the agency's authority to contract for the goods or services no longer exists. This is vitally important in contracts that may contain Renewal or Extension clauses, or even an Initial Term, that may extend beyond the current biennium. Agencies are only authorized to expend public funds in accordance with specific statutory authority or legislative authority. An agency cannot bind itself to financial obligations beyond its current legislative and statutory authority for each biennium.

### **Termination for Cause**

Termination for cause allows an agency to terminate the contract when the contractor ceases to perform, fails to perform, or breaches a material provision of the contract. It is imperative that agencies document performance matters related to each contract to ensure termination for cause is justified and can be demonstrated through documentation of contractor's failure to perform that may be considered a material breach of the contract.

### **Recommended Language**

#### **TERMINATION**

##### **a. Termination for Convenience or by Agreement**

STATE may terminate this Contract upon thirty (30) days' written notice to CONTRACTOR. This Contract may be terminated by consent of both Parties executed in writing.

##### **b. Early Termination in the Public Interest**

STATE is entering this Contract to carry out the public policy of the State of North Dakota, as determined by its Governor, Legislative Assembly, and Courts. If this Contract ceases to further the public policy of the State of North Dakota, STATE, by written notice to CONTRACTOR, may terminate this Contract in whole or in part.

##### **c. Termination for Lack of Funding or Authority**

STATE by written notice to CONTRACTOR, may terminate the whole or any part of this Contract under any of the following conditions:

- 1) If funding from federal, state, or other sources is not obtained or continued at levels sufficient to allow for purchase of the services or goods under this contract in the indicated quantities or term.
- 2) If federal or state laws or rules are modified or interpreted in a way that the services or goods are no longer allowable or appropriate for purchase under this Contract or are no longer eligible for the funding proposed for payments authorized by this Contract.
- 3) If any CONTRACTOR license, permit, or certificate required by law or rule, or by the terms of this Contract, is for any reason denied, revoked, suspended, or not renewed.

Termination of this Contract under this subsection is without prejudice to any obligations or liabilities of either Party accrued prior to termination.

**d. Termination for Cause.**

STATE may terminate this Contract effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- 1) If CONTRACTOR fails to provide services or goods required by this Contract within the time specified or any extension agreed to in writing by STATE; or
- 2) If CONTRACTOR fails to perform any provisions of this Contract or fails to pursue the work so as to endanger performance of this Contract in accordance with its terms.

The rights and remedies of STATE provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

## **SUSPENSION FOR CONVENIENCE**

### **Purpose**

Suspension for convenience language allows the state agency to temporarily suspend or halt work on a contract without cause. This clause allows for flexibility to adapt to changing circumstances and to mitigate risk in the event of unforeseen circumstances arising.

Suspension for convenience should only be used when the success of the contract may be jeopardized if performance continues without adapting to changes or unforeseen circumstances.

### **Recommended Language**

#### **SUSPENSION FOR CONVENIENCE**

STATE at any time may order the services of CONTRACTOR fully or partially stopped for STATE's own convenience. STATE shall provide CONTRACTOR written notice of the reason for and duration of the suspension. The schedule will be delayed on a day-for-day basis to the extent STATE has issued a stop work order to CONTRACTOR and the stop work order is causing delays in completing services in accordance with the schedule. CONTRACTOR may submit claims in the form of an itemized invoice in accordance with the Compensation section of this Contract as a result of stop work orders issued under this section.

## **DELAY OR DEFAULT FORCE MAJEURE (NATURAL DISASTER/ACTS OF GOD)**

### **Purpose**

The Force Majeure clause is necessary to identify the obligations of the parties and expectations of the parties if timely performance of the contract is impossible or extremely difficult for reasons beyond a party's control.

Immediate termination is an option, but an agency generally should consider giving a contractor a grace period to resume providing services or goods before terminating the contract and finding a new contractor.

### **Recommended Language**

#### **FORCE MAJEURE**

Neither Party will be held responsible for delay or default caused by fire, riot, terrorism, pandemic, acts of God, executive orders issued by the governor or U.S. President, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or reasonably expected to cause a delay or default. If CONTRACTOR is the affected Party and does not resume performance within fifteen (15) days or another period agreed between the Parties, STATE may seek all available remedies, up to and including termination of this Contract pursuant to its Termination Section, and STATE is entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.

## **LIQUIDATED DAMAGES**

### **Purpose**

Liquidated damages are not common in contracts for general goods or services; however, liquidated damages are common in IT contracts. A Liquidated Damages clause is used to compensate a party for losses caused by the other party, depending upon the language of the contract. The clause should state the estimated amount of damages in advance, if a contractor breaches the contract.

## Concern

“Penalties imposed by contract for any nonperformance thereof are void.” N.D.C.C. § 9-08-03.

Contracts may not include a damages provision that fixes the amount of damages upon nonperformance or breach of contract, “...except that the parties may agree therein upon an amount presumed to be the damage sustained by a breach in cases in which it would be impracticable or extremely difficult to fix the actual damage.”<sup>20</sup> This exception is addressing liquidated damages. For liquidated damages to be upheld, three facts must exist at the time the contract was formed, or the Liquidated Damages clause was executed<sup>21</sup>:

1. “[T]he damages stemming from a breach of contract are impractical or extremely difficult to ascertain at the time the contract was entered;
2. there was a reasonable endeavor by the parties to fix their compensation; and
3. the amount stipulated bears a reasonable relation to the probable damages and is not disproportionate to any damages reasonably to be anticipated.”

*Eddy v. Lee*, 312 N.W.2d 326, 330 (N.D. 1981). These requirements are more liberally applied in public contracts.

**Liquidated damages provisions that may be enforced against the state are strongly discouraged.**

Liquidated damages against the agency should be struck. An agency must be able to terminate a contract not only for cause or by mutual consent, but also if funding is reduced or for another legitimate reason without incurring additional liability. There is also questionable appropriation authority to expend public funds for the purposes of paying liquidated damages to a contractor.

## Recommended Language

### LIQUIDATED DAMAGES

*Note: STATE may suffer damages if CONTRACTOR fails to perform on schedule. Liquidated damages clauses assist STATE in being made whole if this occurs. While it is impracticable, at the time of contracting, to compute the exact damages caused by a future delay, the Parties can agree on an amount that is a fair and reasonable estimate of damages due to STATE if there is a delay by CONTRACTOR. An agency must discuss liquidated damages clauses with assigned legal counsel.*

The Parties agree STATE may suffer damages due to a failure by CONTRACTOR to provide deliverables or services under this Contract. Because it is difficult to fix the actual damages sustained in the event of those delays, STATE and CONTRACTOR agree the amount of damages will be determined as per this section. In the event of any non-

---

<sup>20</sup> N.D.C.C. § 9-08-04.

<sup>21</sup> “A contract provision, to be upheld as a valid liquidated-damages clause, must not only meet the statutory requirement of § 9-08-04, N.D.C.C., but also must fulfill the requirements imposed by case law.” *Eddy v. Lee*, 312 N.W.2d 326, 330 (N.D. 1981).

performance CONTRACTOR shall pay that amount as liquidated damages and not as a penalty. Amounts due to STATE as liquidated damages may be deducted by STATE from any amounts payable to CONTRACTOR, and CONTRACTOR shall promptly pay STATE any amount outstanding over and above the amounts deducted from the invoice.

Delays due to causes of Force Majeure or due to STATE's responsibility extend the time for performance on a day-for-day basis. STATE may not assess liquidated damages against CONTRACTOR when the delay in delivery or performance is beyond control and without the fault or negligence of CONTRACTOR.

*Note: The following are examples of liquidated damages provisions. One or both may be applicable. Assigned agency legal counsel should assist in selecting or drafting appropriate language for liquidated damages.*

**a. Failure to Complete Deliverable on Schedule**

If CONTRACTOR fails to complete a Deliverable identified in *SOW or project schedule reference* by the specified deadline (or revised deadline as agreed between the Parties through the Integrated Change Control Process), CONTRACTOR shall pay liquidated damages to STATE in the amount of *[/Amount]* per calendar day for each day the Deliverable is delayed.

**b. Failure to Complete Project on Schedule**

If CONTRACTOR fails to complete the project per the approved project schedule by the specified deadline (or revised deadline as agreed between the Parties through the Integrated Change Control Process), STATE shall deduct liquidated damages from amounts payable to CONTRACTOR in the amount of *[/Amount]* per calendar day for each day the project is delayed according to the Project Schedule.

## LIMITATIONS OF LIABILITY

Contracts that limit a contractor's liability to the state are governed by N.D.C.C. § 32-12.2-15 and are limited to the types of contracts specified in its subsection 1. "An agency's authority to agree to a limitation is **limited to contracts for the purchase or lease of, or services related to, software, communication, electronic equipment, and economic forecasting.**" N.D.C.C. § 32-12.2-15(1) (Emphasis added).

A proposed limitation of liability for direct damages "must be equal to twice the total value of the contract, unless all parties to the contract agree to an alternative amount."<sup>22</sup> N.D.C.C. § 32-12.2-15(3).

Limitation(s) of the following types of loss to the state are **prohibited**:

1. Loss resulting from fraud,
2. Loss resulting from intentional or willful misconduct,
3. Breach of confidentiality obligations, or
4. Loss resulting from tangible property damage or personal injury.<sup>23</sup>

---

<sup>22</sup> Liquidated damages provisions and retainage provisions are not subject to limitations of liability, either for direct or indirect damages, pursuant to N.D.C.C. § 32-12.2-15(3).

<sup>23</sup> N.D.C.C. § 32-12.2-15(4).

N.D.C.C. § 32-12.2-15 authorizes agencies to limit a contractor’s liability to the agency (the state). It does not authorize the agency to limit a contractor’s liability to third parties who may bring a claim against the contractor.

**An agency should work with its assigned legal counsel to assist in removing any requirement that the state contractually limit the liability of a contractor and to ensure any limitation expressly excludes direct damages that cannot be limited under N.D.C.C. § 32-12.2-15(4).**

## Recommended Language

### LIMITATION OF LIABILITY

*NOTE: This manual does not offer a sample clause for an agency to limit the liability of a contractor or third party because these clauses should not be used without the specific advice of the agency’s assigned legal counsel.*

Other than contracts approved under the process outlined in N.D.C.C. § 32-12.2-15, the Risk Management Fund will not cover claims against the state that arise by an indemnity or limitation of liability provision included in a state contract. See N.D.C.C. ch. 32-12.2.

For further information on limitations of liability, consult the OMB Risk Management Division’s manual titled “*Guidelines to Managing Contractual Risk*” under “Risk Services” of the “Team Member Resources” tab found at [Team ND Connect](#).

## INJUNCTIVE RELIEF

### Purpose

Injunctive relief addresses relief to the state agency if contractor materially breaches the contract and monetary damages may not be adequate to address the harm to the state agency. This clause allows the state agency to seek an injunction from a court to rapidly intervene and prevent further harm to the state.

## Recommended Language

### INJUNCTIVE RELIEF

CONTRACTOR shall immediately report to STATE any and all unauthorized disclosures or uses of STATE’s confidential information or proprietary information of which CONTRACTOR or its staff is aware of or has knowledge. CONTRACTOR acknowledges any unauthorized publication or disclosure of STATE’s confidential information or proprietary information to others may cause immediate and irreparable harm to STATE. If CONTRACTOR publishes or discloses the confidential information or proprietary information without authorization, STATE immediately may receive

injunctive relief or any other remedies to which it is entitled under law or equity without requiring a cure period. CONTRACTOR shall indemnify, defend, and hold harmless STATE from all damages, costs, liabilities, and expenses (including without limitation reasonable attorneys' fees) caused by or arising from CONTRACTOR's unauthorized use or disclosure of STATE's confidential information or proprietary information. As a condition to these indemnity obligations, STATE shall provide CONTRACTOR prompt notice of any claim of which STATE is aware and for which indemnification will be sought under this Contract and shall cooperate in all reasonable respects with CONTRACTOR in connection with that claim.

## **RIGHT TO SET OFF DAMAGES**

### **Purpose**

The right to set off damages allows the state agency to withhold amounts owed to the agency from future undisputed payments to the contractor. It streamlines the debt and damage settlement process, reduces administrative burden and costs on the parties, and is seen as a financially responsible manner for the state to recover damages without the costly process of a collection action or litigation.

### **Recommended Language**

#### **RIGHT OF SET OFF DAMAGES**

Amounts due to STATE by CONTRACTOR, including liquidated or other damages, or claims for damages, may be deducted or set off by STATE from any money payable to CONTRACTOR pursuant to this Contract.

## **RIGHT TO WITHHOLD AMOUNTS OTHERWISE DUE IF CONTRACTOR IS IN BREACH**

### **Purpose**

Right to withhold amounts otherwise due if contractor is in breach language incentivizes the contractor to fulfill its obligations under the contract.

### **Recommended Language**

#### **RIGHT TO WITHHOLD AMOUNTS OTHERWISE DUE IF CONTRACTOR IS IN BREACH**

If CONTRACTOR fails to deliver Deliverables or to provide Services which satisfy CONTRACTOR's obligations under this Contract, STATE may withhold any and all payments due under this Contract. STATE may withhold any and all payments due to CONTRACTOR under this Contract without penalty or work stoppage by CONTRACTOR, until CONTRACTOR's failure to perform is cured.

## **RIGHT TO REMEDIES AND CUMULATION OF RIGHTS**

### **Purpose**

This language ensures that if the contract provides multiple ways for a party to address a material breach or failure to perform, the party seeking a remedy is not limited to one course of action to resolve the dispute. For example, if a contractor is in breach, the state agency may be able to seek monetary recovery for damages due to the breach while also seeking to terminate the contract for cause.

### **Recommended Language**

#### **RIGHT TO REMEDIES AND CUMULATION OF RIGHTS**

No remedy conferred by any of the specific provisions of this Contract is intended to be exclusive of any other remedy, and each and every remedy is cumulative and in addition to every other remedy given under this Contract, now or in the future existing at law or in equity or by statute or otherwise.

## **NON-WAIVER**

### **Purpose**

Non-waiver language preserves rights under a contract if a party fails to assert a right in one instance. In other words, failure to assert a remedy at one point does not result in that party forfeiting any future right to assert that remedy.

### **Recommended Language**

#### **NON-WAIVER**

Either party's failure to exercise any of its rights under this Contract, its delay in enforcing any right, or its waiver of its rights on any occasion, does not constitute a waiver of those rights on any other occasion. No course of dealing by either party in exercising any of its rights constitutes a waiver of that right. A waiver of any provision of this Contract is not effective unless it is in writing and signed by the party against whom the waiver is sought to be enforced.

## **INDEMNIFICATION**

### **Purpose**

The Indemnification clause is often the most contentious in any contract negotiation. The purpose of the Indemnification clause is to allocate responsibility for risks of liability and costs of legal defense that may arise out of a dispute related to a contract. The clause ensures the party exercising control over the activities governed by the contract, and in the best position to implement safety and loss control practices, retains as much risk of liability and costs of legal defense as is commercially reasonable.

The indemnification obligations of the contractor may not be limited by a Limitation of Liability clause in the contract.

**Absent legislative authority or specific statutory authority, an agency may NOT agree to indemnify a party to a contract.**

When contracting with political subdivisions, an agency’s ability to limit its liability is statutorily constrained. N.D.C.C. § 32-12.2-13. An agency should consult with its assigned legal counsel regarding any contract with a political subdivision.

## **Recommended Language**

### **INDEMNIFICATION**

*NOTE: The following indemnification language is for contracts that include IT professional services requiring special intellectual ability to perform the contracted services, some of which will be performed on site. If the Contract does not include this type of professional services, consult with the OMB Risk Management Division for appropriate indemnification language. The Risk Management manual “Guidelines to Managing Contractual Risk” is found under “Risk Services” of the “Team Member Resources” tab at [Team ND Connect](#).*

CONTRACTOR agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of State or its agents, but not against claims based on State’s contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The legal defense provided by CONTRACTOR to State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for State is necessary. Any attorney appointed to represent State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under [N.D.C.C. § 54-12-08](#). CONTRACTOR also agrees to reimburse State for all costs, expenses and attorneys’ fees incurred if State prevails in an action against CONTRACTOR in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this Contract.

## **INTELLECTUAL PROPERTY INFRINGEMENT INDEMNIFICATION**

### **Purpose**

Similar to indemnification described above, the purpose of the Intellectual Property (IP) Infringement Indemnification clause is to allocate responsibility for risks of liability and costs of legal defense that may arise out of an intellectual property dispute related to a contract.

The above, general Indemnification obligation is based in the vicarious liability of the state agency and is primarily relied upon in contracts where the contractor may be performing onsite work or work that could result in a claim against the purchasing agency by virtue of its contracting with the contractor to perform specific services or supply specific goods. IP infringement indemnification is specific to claims based in allegations that the contractor does not own or have a license to use IP within its software solution, therefore the claim is that the contractor is infringing on the IP rights of a third party.

IT contracts should include specific indemnification for the infringement of intellectual property. If the contractor's IT solution infringes on the IP rights, including patents, copyright, or trademarks, of a third party, the contractor must indemnify the state agency against claims that may be brought against the state for the alleged infringement.

In addition to defending, indemnifying, and holding harmless the state agency, this clause includes remedies that the contractor must offer to remedy the infringement and bring the state agency's use into compliance with intellectual property laws.

IP infringement indemnification obligations of the contractor may not be limited by a Limitation of Liability clause in the contract.

## **Recommended Language**

### **INTELLECTUAL PROPERTY INFRINGEMENT INDEMNIFICATION**

- a. CONTRACTOR, at its own expense, shall defend and indemnify STATE against claims that products furnished under this Contract infringe a United States patent or copyright or misappropriate trade secrets protected under United States law.

CONTRACTOR's obligation shall not extend to a claim based on any alleged infringement arising from any: (a) additions, changes, or modifications to the services by or on behalf of STATE; (b) incorporation of the services or any component thereof into any other product or process; or (c) use of the services other than as permitted by this Contract.

- b. As to any product which is subject to a claim of infringement or misappropriation, CONTRACTOR may (a) obtain the right of continued use of the product for STATE or (b) replace or modify the product to avoid the claim. If neither alternative is available on commercially reasonable terms, then, at the request of CONTRACTOR, any applicable Software license and its charges will end, STATE will stop using the product and will return the product to CONTRACTOR. Upon return of the product, CONTRACTOR will give STATE a credit for the price paid to CONTRACTOR, less a reasonable offset for use and obsolescence.

## **REPRESENTATIONS**

### **Purpose**

A representations clause requires that the contractor offers certain assurances to the state agency regarding authority to contract and that contractor is not knowingly infringing on the rights of another

party by entering the contract or offering the product or services under the contract. Representations are statements of fact. False representations may result in the state agency terminating the contract or pursuing claims for misrepresentation.

### **Recommended Language**

#### **REPRESENTATIONS**

CONTRACTOR represents to STATE that neither CONTRACTOR, in connection with performing the services in performance of this Contract, nor the completed product delivered by CONTRACTOR, will infringe any patent, copyright, trademark, trade secret or other proprietary right of any person. CONTRACTOR further represents to STATE that it will not use any trade secrets, or confidential or proprietary information owned by any third party in performing the services related to this Contract or in delivery of the completed product unless CONTRACTOR has the authority to license, use or provide those trade secrets or confidential or proprietary information to STATE. CONTRACTOR further represents to STATE that neither CONTRACTOR nor any other company or individual performing services pursuant to this Contract is under any obligation to assign or give any work done under this Contract to any third party.

## **INSURANCE**

### **Purpose**

The Insurance clause is necessary to ensure sufficient coverage is in place to cover all claims against the contractor and any claims and costs the state might incur. Thus, it is important to identify the types and amounts of insurance coverage required to be maintained by the parties to the contract. An agency should make sure the insurance coverages required by the contract cover the types of claims that may arise under that contract.

The benefit of requiring a contractor to indemnify the state or have certain levels of insurance coverage, or both, can be easily neutralized if the details of the contractor's insurance policy are written in a way to effectively exclude from coverage the very claims the state wants covered by the policy. For example, an insurance policy offers little protection if it is offered by an insolvent insurer or if the policy has an unusually high deductible.

It is common for a contractor to omit or remove any clause requiring that the state be named as an additional insured.<sup>24</sup> However, agencies should be aware of the significant risk this poses to the state and decreased protection from liability. Without an additional insured endorsement, insurance coverage will generally cover claims against the contractor but disregard claims against the state. An attempt to seek indemnity from the contractor personally may be unsuccessful because the contractor may have insufficient assets to fulfill the contractor's duty to indemnify the state.

### **Recommended Language**

#### **INSURANCE**

---

<sup>24</sup> "If indemnification is required, the contract must require that the state be endorsed on the contractor's commercial general liability policy as an additional insured or must require an equivalent form of protection for the state." N.D.C.C. § 32-12.2-17.

*Note: The following insurance language corresponds with the indemnification language above. If the Contract will use different indemnification language, consult with the OMB Risk Management Division for appropriate insurance language. Please review the Risk Management Manual “Guidelines to Managing Contractual Risk” found under “Risk Services” of the “Team Member Resources” tab at [Team ND Connect](#).*

- a. CONTRACTOR shall provide certificate of insurance and any endorsements to STATE electronically to: *Agency to complete the following*

Name: *[Insert Name]*

Email Address: *[Insert Email Address] (email should be an agency contact or agency info account*

Email Subject Line: Certificate of Insurance - *[Insert Contract Number/Name]*

- b. CONTRACTOR shall secure and keep in force during the term of this Contract and CONTRACTOR shall require all subcontractors, prior to commencement of an agreement between CONTRACTOR and the subcontractor, to secure and keep in force during the term of this CONTRACT, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence.
- 3) Workers’ compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this Contract.

*Note: Optional clause (b4) employer’s liability. This coverage is recommended for CONTRACTOR’s domiciled outside the state of North Dakota. Delete (4) if contracting with a resident (North Dakota) CONTRACTOR.*

***OPTION: DELETE IF NOT REQUIRED***

- 4) Employer’s liability or “stop gap” insurance of not less than \$2,000,000 as an endorsement on the workers compensation or commercial general liability insurance.
  - 5) Professional errors and omissions with minimum limits of \$1,000,000 per claim and in the aggregate, CONTRACTOR shall continuously maintain such coverage during the Contract period and for three (3) years thereafter. In the event of a change or cancellation of coverage, CONTRACTOR shall purchase an extended reporting period to meet the time periods required in this section.
- c. The insurance coverages listed above must meet the following additional requirements:

*Note: Optional sentence in (c1) “The amount of any deductible of self-retention is subject to approval by the State.” This sentence is needed when there is a question about the financial wherewithal of CONTRACTOR to self-retain the exposure. This requirement does not pertain to large, financially viable potential CONTRACTORS.*

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of CONTRACTOR. **OPTIONAL PROVISION:** The amount of any deductible of self-retention is subject to approval by State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated “A-” or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an “A-” rating must be approved by State. The policies shall be in form and terms approved by State.
- 3) The duty to defend, indemnify, and hold harmless State under this Contract shall not be limited by the insurance required in this Contract.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this Contract or by the contractual indemnity obligations of CONTRACTOR.
- 5) A “Waiver of Subrogation” waiving any right to recovery the insurance company may have against State.
- 6) CONTRACTOR shall furnish a certificate of insurance to the undersigned STATE representative electronically prior to commencement of this Contract. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this Contract is a material breach of contract entitling STATE to terminate this Contract immediately.
- 8) CONTRACTOR shall provide at least thirty-day (30-day) notice of any cancellation or material change to the policies or endorsements. CONTRACTOR shall provide on an ongoing basis, current certificates of insurance during the term of the Contract. A renewal certificate will be provided electronically ten (10) days prior to coverage expiration. **OPTIONAL PROVISION:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

## **CYBERLIABILITY AND SECURITY INSURANCE**

### **Purpose**

Some IT contracts may include the contractor hosting the solution or storing sensitive state information. These contracts may require cyber-liability insurance. OMB’s Risk Management Division has cyber-liability insurance requirements that are dependent on the type of information the contractor may be hosting or may access.

Cyber liability language should address remedies available to those who may be harmed by a cyber incident and must meet the requirements of N.D.C.C. ch. 51-30.

**Cyber liability insurance coverages must be discussed with the agency's assigned legal counsel and the OMB Risk Management Division.**

## **Recommended Language**

### **CYBER LIABILITY AND SECURITY INSURANCE**

*Note: The following language should be considered when purchasing software that is hosted by CONTRACTOR. It is of critical importance when information such as PHI or PII is involved. Consult with the OMB Risk Management Division and procuring agency's assigned legal counsel before using this language.*

In the event CONTRACTOR will host data, or provide for the hosting of data through a third-party entity, CONTRACTOR shall secure and maintain Cyber Liability and Security Insurance or equivalent insurance product(s), with minimum liability limits of not less than \$5,000,000 and first party limits of not less than \$1,000,000, that will provide, without cost to CONTRACTOR or STATE, an immediate response in the event of a data breach, including meeting all notification obligations of CONTRACTOR and STATE and in the event the data breach involves personal information as defined by N.D.C.C. § 51-30-01(4), the insurance policy shall also make available free credit monitoring for any affected individual for a minimum period of one (1) year. CONTRACTOR shall defend, indemnify, save and hold harmless, State, its officers, agents and employees from liability of any nature or kind, including costs and expenses, on account of a data breach arising from CONTRACTOR hosting, transmission, or control of data, any and all suits, claims, or damages of any character whatsoever, resulting from injuries or damages sustained by any person or persons or property by virtue of performance of this Contract.

## **WORKS FOR HIRE AND WORK PRODUCT**

### **Purpose**

The Works for Hire and Work Product clauses establish ownership of work product, materials, and equipment purchased or created under the contract. This is to ensure the agency gets full value for the amount of public funds expended to purchase or create documents, materials, or equipment under the contract.

If a contractor is allowed to retain valuable property that was purchased or created with public funds, the agency should determine whether the contract price should be adjusted to reflect the value retained by the contractor.

Works for hire and work product may not be applicable in every state contract. Works for hire is specifically defined under the United States Copyright Act (Title 17, U.S.C.). The [US Copyright Office](#) has more specific information.

These clauses are especially important in IT contracts and distinctions may need to be negotiated concerning ownership of the contractor's intellectual property that was developed separately from the contract with the state agency.

## **Recommended Language**

### **WORKS FOR HIRE**

*Note: If federal funds are used for this project, your agency may have restrictions tied to those federal funds that do not allow CONTRACTOR to sell what they develop for you to another state. If this is true, you may need to add language from the applicable Federal guidelines that identifies this limitation on CONTRACTOR.*

All work(s) under this Contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and CONTRACTOR assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Contract exclusively for STATE are the sole property of STATE, and CONTRACTOR assigns and transfers all its right, title, and interest in the software and related materials to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE's intellectual property rights under this section.

### **WORK PRODUCT**

All work product, equipment or materials created exclusively for STATE or purchased by STATE under this Contract belong to STATE and must be immediately delivered to STATE at STATE's request upon termination of this Contract.

## **PERSONNEL**

### **Purpose**

The personnel section of the IT contract is necessary to ensure the Parties have dedicated personnel to work on the contract. Because IT contracts are complex and require unique background, experience, and qualifications it is in the best interest of both Parties to establish teams and build positive working relationships from the beginning of the project through final acceptance as defined in the contract.

Further, IT contracts often involve access to sensitive state data or the state IT network. As a risk mitigation matter and to comply with N.D.C.C., contractor personnel may be required to complete a background check.

### **Recommended Language**

## PERSONNEL

- a. STATE shall designate a Project Manager to serve as the primary project manager for this Contract. If, during the course of this Contract, it becomes necessary for STATE to change the person assigned as STATE's Project Manager, STATE shall notify CONTRACTOR in writing, pursuant to the Notice section of this Contract.
- b. Unless STATE otherwise notifies CONTRACTOR, STATE's Project Manager shall carry out STATE's administrative and management functions under this Contract, shall be responsible for acceptance of the Contract deliverables, and shall provide support and overall direction to CONTRACTOR.
- c. CONTRACTOR shall designate a *[Project Manager] or [Certified Project Manager] (select one based on your RFP requirement)* and provide individuals to meet the requirements and accomplish the work as stated in this Contract including any mutually agreed Scope of Work.
- d. STATE's execution of this Contract is predicated, in part and among other considerations, on the utilization of the specific individuals and personnel qualifications as identified; primary being *[Name of appropriate personnel, if applicable]*. Therefore, CONTRACTOR:
  - 1) Prior to reassignment of personnel, shall obtain written approval from STATE for all personnel to be assigned to this project.
  - 2) Shall ensure the personnel assigned have the knowledge necessary to complete requirements as defined in this Contract.
  - 3) Shall warrant that all personnel assigned to perform tasks in response to this Contract will remain assigned for the agreed-upon length of time.
  - 4) Shall not replace, reassign or substitute any assigned individuals or personnel qualifications without the prior written approval of STATE and shall make any approved replacement, reassignment, or substitution at no additional cost to STATE.
  - 5) Shall make any substitution under this paragraph that results in equal or higher skills, knowledge, and abilities than those personnel originally proposed. STATE shall not unreasonably withhold approval of a substitution, but STATE's approval of a substitution may not be construed as acceptance of the substitution's performance potential.
- e. Upon request by STATE, CONTRACTOR shall replace any CONTRACTOR personnel that STATE, in its sole discretion, determines is unable to perform the responsibilities of this Contract acceptably for reasons including inappropriate or unprofessional personal conduct, or professional inabilities.
- f. STATE's working hours are Monday through Friday from 8:00 AM until 5:00 PM (CT) with one hour for lunch. STATE Project Manager may approve alternate work schedules.
- g. According to STATE's policy, STATE personnel are only obligated to work a forty-hour workweek, Monday through Friday, and are allowed reasonable vacation, sick and educational absences.

- h. CONTRACTOR's personnel are not expected to work on State holidays or other mandatory leave days.

*Note: Background Investigation Language: There are two paragraphs for background investigation requirements provided in the template below. Use the first paragraph if your agency requires the contractor to perform a background check and furnish the results to you for evaluation. Edit the list of background checks to match the requirements for this Contract. Use the second paragraph if you intend to have STATE perform the criminal history checks per N.D.C.C. § 54-59-20 which gives ITD the authority to request criminal history checks via the ND Bureau of Criminal Investigation (BCI) conducted pursuant to N.D.C.C. § 12-60-24. If your Contract involves CONTRACTOR access to Criminal Justice Information, contact State Procurement for specific language addressing compliance with the FBI CJIS Security Policy.*

*Guidance: Be aware that while a CONTRACTOR may be able to procure background checks through private contractors, the results may be inconsistent from contractor to contractor and criminal history checks will not be as extensive as those obtained via BCI. Contracts for consultants that will augment internal IT staff and that will largely function as an internal employee should include the second paragraph.*

***Option 1 – DELETE IF NOT USED***

- i. CONTRACTOR shall conduct background investigations on all contracted staff and subcontractors assigned by CONTRACTOR to perform work under this Contract and shall furnish the results of those background investigations to STATE, unless prohibited by law. STATE may reject any individual assigned to perform work under this Contract if, in STATE's sole discretion, it determines the results of the background investigation make the individual unacceptable. The background investigations to be performed are:
  - 1) Criminal and civil matters *applicable/not applicable*
  - 2) References *applicable/not applicable*
  - 3) Employment *applicable/not applicable*
  - 4) Motor vehicle *applicable/not applicable*
  - 5) Credit *applicable/not applicable*
  - 6) Education *applicable/not applicable*

***Option 2 – DELETE IF NOT USED (If Option 2 is used, subparagraphs j and k should be included, or subparagraph j – It is NOT recommended to use subparagraph k alone. If Option 1 is deleted, renumber accordingly.)***

- j. STATE may require any personnel CONTRACTOR assigns to perform work under this Contract, including employees, contracted staff, subcontractors, or other individuals, to submit to a criminal history record check in accordance with N.D.C.C. §12-60-24, through the authority granted to the Chief Information Officer (CIO) of STATE pursuant to N.D.C.C. § 54-59-20. STATE may reject any individual CONTRACTOR assigns to perform work under this Contract if, in STATE's sole discretion, it determines the results of the criminal history record check make the individual unacceptable. CONTRACTOR shall be responsible for

all costs associated with criminal history record checks carried out pursuant to this paragraph.

- k. In lieu of requiring individual background checks for each assigned resource, STATE may accept from CONTRACTOR an annual attestation letter confirming all personnel assigned to perform work under this Contract have successfully completed criminal history background checks consistent with industry standards, such as an FBI or equivalent national criminal background check.

## PROJECT MANAGEMENT

### Purpose

Project management language in an IT contract is imperative. This language outlines the parties' understanding of the project management process and requirements, some to comply with N.D.C.C. and ND Information Technology standards. It specifies how the Parties will successfully complete the expectations and obligations of the SOW.

### Recommended Language

#### PROJECT MANAGEMENT

##### a. Reporting

*Note: Change report timing below to reflect the agency's desire reporting periods.*

*Item 1 – DELETE IF NOT USED. Item 1 would be included in contracts that are time and materials based.*

- 1) CONTRACTOR personnel shall provide their *[weekly/every other week/monthly]* time utilization for each individual in writing to STATE's Project Manager, or STATE's project staff as STATE's Project Manager may assign.
- 2) CONTRACTOR's Project Manager shall deliver to STATE's Project Manager, *[weekly/every other week/monthly]* report of CONTRACTOR's progress on the project and meeting the objective/deliverables as stated in the SOW. Each report must contain a description of the current status of the project, the tasks on which time was spent, the estimated progress to be made in the next reporting period, and the proposed solutions to any problems encountered and their effect, if any, on the project budget/schedule.
- 3) Project Variance Reporting – CONTRACTOR shall provide data to allow STATE's Project Manager to calculate cost and schedule variance in accordance with N.D.C.C. § 54-59-23 as determined by STATE. If STATE's analysis shows a negative cost or schedule variance exceeding twenty percent (20%), CONTRACTOR shall provide a subsequent report identifying proposed corrective measures to address the issues.

##### b. Integrated Change Control Process

CONTRACTOR and STATE shall utilize an integrated change control process to manage changes during the life of a project.

- 1) A change request must be in writing to document the potential change. The write-up for the proposed change must be submitted to CONTRACTOR and STATE's Project Managers who will in turn provide it to relevant Parties for assessment.
- 2) All change requests must be logged and tracked. STATE's Project Manager shall record the request in the project repository and shall update the repository throughout the change process.
- 3) The change will be reviewed and, if acceptable to STATE, CONTRACTOR shall submit to STATE an estimate of the impact to cost, schedule, scope, and quality.
- 4) CONTRACTOR shall continue performing the services in accordance with the original Contract unless otherwise agreed by STATE's Project Manager. Work may not commence on any new activities related to the change request until all Parties agree in writing.
- 5) CONTRACTOR's Project Manager and STATE's Project Manager shall adapt the Project Plan to incorporate approved changes.
- 6) The Parties shall incorporate each change request duly authorized in writing into the Contract to be considered part of the Contract.
- 7) During the course of this Contract, if CONTRACTOR determines or could reasonably determine any STATE actions or directions constitute a requirement to perform additional work, CONTRACTOR shall notify STATE within thirty (30) calendar days in the form of a change request utilizing the process above that STATE has requested CONTRACTOR to perform additional work. CONTRACTOR waives the right to request additional time and reimbursable costs if CONTRACTOR fails to notify STATE within thirty (30) calendar days of determining or reasonably being able to determine that STATE actions or directions constitute a requirement to perform additional work under this Contract.

**c. Deliverable Acceptance**

- 1) Upon completion of a deliverable, CONTRACTOR shall furnish STATE with the deliverable and associated documentation, the expected performance, and agreed upon Acceptance Criteria.
- 2) After receipt of items in this Deliverable Acceptance Section, STATE has five (5) working days or a different period of time as agreed by the Parties in the Project Schedule, in which to accept or reject each item in writing. STATE shall accept by signature. If STATE rejects the Deliverable, STATE shall specify its grounds for rejection in writing and CONTRACTOR shall use its best efforts to revise any issues for the deliverables to be acceptable to STATE within the following five (5) business days. If STATE rejects it a second time, STATE may repeat the procedure as described in the acceptance statement above, escalate the issue to *Option 1: [the Project Sponsor or Oversight Committee] or Option 2: [the Agency Head]*, or terminate this Contract upon written notice to CONTRACTOR.

**d. Final Acceptance**

*Note: If this Contract includes a retainage clause, that clause likely refers to "Final Acceptance" as the trigger for when STATE is to release retained amounts to*

***CONTRACTOR. Take care not to modify “Final Acceptance” in a way that causes ambiguity as to when retainage is released.***

Final Acceptance occurs based on the following criteria:

- 1) The successful completion of all deliverables as stated in the SOW in accordance with the deliverable acceptance process AND
- 2) The final delivered product fully implemented in STATE’s live production environment AND
- 3) STATE has sixty (60) calendar days thereafter in which to accept or reject it in writing. If STATE rejects it, STATE shall specify in writing its grounds for rejection and CONTRACTOR shall use its best efforts to make the product conform to the requirements of this Contract as soon as possible and at no additional cost to STATE. CONTRACTOR shall continue to use its best efforts to make the product conform to the requirements of this Contract until STATE accepts the product or terminates this Contract upon written notice to CONTRACTOR.

## **PRODUCT CONFORMITY**

### **Purpose**

Product conformity language is used to provide remedies to the state agency for the contractor to correct conformity discrepancies that were not detected during the deliverable acceptance phase of the SOW and were discovered after final acceptance.

Product conformity is often confused with warranty; however, they are distinct concepts and include specific remedies.

Product conformity addresses whether the product delivered by the contractor and accepted by the state agency meets the requirements of the SOW. The focus of product conformity is on compliance with the SOW. This language requires the contractor to cure defects related to non-conformance with the agreed upon requirements that are discovered after final acceptance.

### **Recommended Language**

#### **PRODUCT CONFORMITY**

STATE has twelve (12) months following Final Acceptance of the product delivered by CONTRACTOR pursuant to this Contract to verify the product conform to the requirements of this Contract and perform according to CONTRACTOR system design specifications. If STATE identifies an error, deficiency, or defect, STATE shall notify CONTRACTOR citing any specific deficiency (deficiency being defined as CONTRACTOR having performed incorrectly with the information provided by STATE, not CONTRACTOR having to modify a previous action due to additional and/or corrected information from STATE). CONTRACTOR, at no additional charge to STATE, shall provide a correction or provide a mutually acceptable plan for correction within thirty (30) calendar days following the receipt of STATE’s notice to

CONTRACTOR. If CONTRACTOR's correction is inadequate to correct the deficiency, or defect, or the error recurs, STATE may act to correct the problem. CONTRACTOR shall reimburse STATE for any costs incurred to correct the problem or STATE may consider this to be cause for breach of contract.

## WARRANTY

### Purpose

Warranty language focuses on whether the product operates in accordance with what was delivered and accepted. During a warranty period, the contractor is obligated to repair or replace the product if it fails to operate as it should at the time delivered. Warranty clauses should address the duration of the warranty period, the scope of the warranty coverage, remedies available for breach of warranty, and whether the contractor disclaims any implied or express warranties.

An express warranty is a warranty that is clearly stated in the contract.

An implied warranty is a warranty that is assumed by law, such as a warranty of merchantability. "To exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." N.D.C.C. § 41-02-33(2).

### Recommended Language

#### WARRANTY

*Note: At a minimum, a three (3) month warranty is desired, but some projects may require a different length of warranty based on requirements.*

CONTRACTOR warrants that the Software deployed and furnished to STATE under this Contract will conform in all material respects as accepted by STATE at the time of Final Acceptance. The warranty shall apply for a period of (#) months.

If there is a breach of warranty CONTRACTOR shall repair or replace the software or IT solution at no cost to STATE.

## DATA SECURITY

### Purpose

**ITD prohibits contractors from hosting state data or accessing state data from locations outside the United States.** The language ensures the contractor agrees to the access and hosting restrictions and provides notice to the state agency if the contractor relocates its data storage facility.

*This ITD prohibition does not apply to institutions under the control of SBHE. These institutions should ensure IT contracts are reviewed by the institution's assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.*

**Changes to this language MUST be approved by the North Dakota Information Technology Department through an approved waiver.**

## **Recommended Language**

### **DATA SECURITY**

#### ***DO NOT DELETE THIS CLAUSE UNLESS APPROVED BY LEGAL OR ITD PROCUREMENT***

- a. Remote access to Data from outside the United States, including remote access to Data by authorized support staff in identified support centers, is prohibited.
- b. CONTRACTOR shall transmit, process, and store STATE Data within the continental United States.
- c. CONTRACTOR shall notify STATE at least ninety (90) days prior to any relocation of STATE's Data to a different hosting facility. STATE may terminate the Contract without penalty if STATE does not approve of the new hosting facility.

## **SINGLE SIGN ON**

### **Purpose**

**ITD requires single sign on IT contracts.** This clause establishes that users of IT systems requiring login to a system must be authenticated through the state's central authentication system. It provides a single authentication for a user who then may access integrated system without additional authentication. This approach streamlines user access, enhances system security, and simplifies multiple account management.

*This ITD requirement does not apply to institutions under the control of SBHE. These institutions should ensure IT contracts are reviewed by the institution's assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.*

**Changes to this language MUST be approved by the North Dakota Information Technology Department through an approved waiver.**

## **Recommended Language**

### **SINGLE SIGN ON**

CONTRACTOR shall comply with the North Dakota Information Technology Department (ITD) authentication standards requiring integration of State users with ITD's managed instance of Microsoft Entra ID and/or Active Directory as the only method of authentication.

# VULNERABILITY MANAGEMENT

## Purpose

ITD requires proactive identification and remediation of vulnerabilities in provided technologies. Continuous monitoring of vulnerabilities in software, hardware, or other technologies provided through contract deliverables ensures vulnerabilities are identified, addressed, and mitigated to prevent attackers from exploiting weaknesses.

*This ITD requirement does not apply to institutions under the control of SBHE. These institutions should ensure IT contracts are reviewed by the institution's assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.*

**Changes to this language MUST be approved by the North Dakota Information Technology Department's Governance, Risk, and Compliance team.**

## Recommended Language

***NOTE: DO NOT DELETE THIS CLAUSE UNLESS APPROVED BY LEGAL OR ITD PROCUREMENT.***

### VULNERABILITY MANAGEMENT

CONTRACTOR shall apply all critical and high security patches to components of the solution within the requirements of STATE.

*Or*

CONTRACTOR shall apply or make available all critical and high security patches to components of the solution within the requirements of STATE.

If a vulnerability has a Common Vulnerabilities and Exposures (CVE) score determined by the National Vulnerability Database that will determine severity. Otherwise, STATE will determine the severity level based on the following. The severity level may not be changed unless agreed by STATE and CONTRACTOR.

Security Severity	Response Time	Resolution Time
Critical Zero-day Exploitable/Critical - Vulnerabilities that allow remote code execution, privilege escalation, or complete system compromise without user interaction. CVE Score 9.0-10.0	1 hour	Final Resolution within: 24 hours

<b>High –</b> Vulnerabilities that can cause significant damage but may require some user interaction or specific conditions, resulting in data loss, service disruption, or unauthorized access. CVE Score 7.0-8.9	4 hours	Final Resolution within: 14 days
<b>Medium –</b> Vulnerabilities that are harder to exploit or have limited impact, resulting in information disclosure or minor disruptions. CVE Score 4.0-6.9	8 hours	Final Resolution within: 60 days
<b>Low –</b> Vulnerabilities with minimal impact or low likelihood of exploitation. CVE Score 0.1-3.9	24 hours	Final Resolution within: 90 days

CONTRACTOR’s failure to meet the above defined Response Times or Resolution Times in any given month during the term and any renewal term shall be deemed a service level default (“Service Level Default”) and STATE may obtain the non-exclusive remedies set forth below.

<b>Response and Resolution Service Levels (calculated monthly on a per incident basis)</b>	<b>Service Level Credit (Prorated Fees – Monthly)</b>
Meets Response or Resolution Time	0%
1st Failure to meet Response or Resolution Time	Warning, 0%
2nd Failure to meet Response or Resolution Time	10%
3rd Failure to meet Response or Resolution Time	20%

If STATE is eligible for a 20% Service Level Credit under this section for any two (2) consecutive months of the term, STATE may terminate this Contract without penalty upon written notice to CONTRACTOR.

STATE shall apply credits against the next invoice. If a Service Level Default occurs after a party has given notice of termination, or STATE has made final payment to CONTRACTOR for the software support services and no further invoices will issue as a result, CONTRACTOR shall refund to STATE the amount of the appropriate Service Level Credit due for the period of default.

## **SOFTWARE RELEASE MANAGEMENT**

### **Purpose**

ITD requires IT contracts include software release management language to address clarity and accountability related to support services provided by the contractor after final acceptance and during the support and maintenance phase of the contract. This language ensures risk is mitigated by requiring the contractor to meet specified standards for software versions used, test new versions with the state agency prior to upgrade, and timely implement upgrades. Further, it prohibits the contractor from incorporating end-of-life or unsupported software as part of the contract deliverable.

*This ITD requirement does not apply to institutions under the control of SBHE. These institutions should ensure IT contracts are reviewed by the institution's assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.*

**Changes to this language MUST be approved by the North Dakota Information Technology Department's Governance, Risk, and Compliance team.**

## **Recommended Language**

***NOTE: DO NOT DELETE THIS CLAUSE UNLESS APPROVED BY LEGAL OR ITD PROCUREMENT.***

### **SOFTWARE RELEASE MANAGEMENT**

The software under this Contract must be maintained on an N-1 version (previous version of a given major software release) that is currently supported by the original software manufacturer, to maintain new feature sets or as agreed by STATE and CONTRACTOR. CONTRACTOR shall work with STATE to verify and test version upgrades and impacts to STATE prior to upgrade. The new version must be completed within ninety (90) days of its release unless agreed by STATE and CONTRACTOR. End-of-life or unsupported software may not be used in any part of the solution.

If updating outside of N-1 as described above due to a security vulnerability CONTRACTOR shall notify STATE of the needed update to comply with the Vulnerability Management requirements. CONTRACTOR shall adhere to the resolution times based on criticality of vulnerability.

## **USE OF ARTIFICIAL INTELLIGENCE (AI) AND MACHINE LEARNING (ML)**

### **Purpose**

**ITD requires state IT contracts include language establishing criteria for a contractor to use artificial intelligence (AI) and machine learning (ML) within its product.** Contractors are required to disclose how they currently use AI and ML within their product or how they envision using these in the product being developed. Furthermore, the clause expressly states a contractor is prohibited from using state data in any form to train, fine-tune, or improve contractor's AI models without prior approval of the state.

*This ITD requirement does not apply to institutions under the control of SBHE. These institutions should ensure IT contracts are reviewed by the institution's assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.*

**Changes to this language MUST be approved by the North Dakota Information Technology Department.**

## **Recommended Language**

***NOTE: DO NOT DELETE THIS CLAUSE UNLESS APPROVED BY LEGAL OR ITD PROCUREMENT.***

### **USE OF ARTIFICIAL INTELLIGENCE (AI) AND MACHINE LEARNING (ML)**

CONTRACTOR may wish to use Artificial Intelligence (AI) and Machine Learning (ML) (together AI/ML) to complete CONTRACTOR's obligations under this Contract. CONTRACTOR's use of AI/ML is subject to prior, written approval by STATE. CONTRACTOR shall provide STATE detailed information, in writing, on the use of AI/ML in completing CONTRACTOR's obligations under this Contract. CONTRACTOR agrees to submit new information to STATE for approval any time CONTRACTOR substantially changes its use of AI/ML. STATE may terminate the Contract for cause if CONTRACTOR uses AI/ML in a manner that STATE has not approved. Use of STATE Data for training, fine-tuning, or improving AI models is strictly prohibited unless expressly authorized in writing by STATE. CONTRACTOR may not share STATE data, in any form, with a third party without express written approval by STATE.

## **SOFTWARE AUDIT**

### **Purpose**

Software audit language in an IT contract is different from the state audit language included in all state contracts. Typically, IT contracts involve end-user licenses and accessibility criteria. Contractors often want the right to audit the state agency's use of those licenses to ensure the agency is within its allotted license allocation and is using the software in accordance with applicable licensing terms and conditions.

The language ensures that the pricing for additional licenses is consistent with the contract pricing and that the audit is not disruptive to business operations.

### **Recommended Language**

#### **SOFTWARE AUDIT**

***Note: Optional Section for Software Audit – if CONTRACTOR licensing requires a provision for software audits, ensure STATE is given adequate notice and documentation of the audit scope.***

Upon sixty (60) calendar days' notice to STATE, but not more frequently than once per year, CONTRACTOR either may, request a signed certification by an officer of STATE verifying that the software is being used in accordance with the terms of this Contract or audit STATE's use of the software to ensure compliance with the terms and conditions of

this Contract. CONTRACTOR shall conduct this audit at CONTRACTOR's expense during regular business hours at STATE's offices and may not unreasonably interfere with STATE's business activities. CONTRACTOR shall provide documentation to STATE defining the scope of the audit not less than thirty (30) calendar days prior to the audit. STATE has sixty (60) calendar days to review CONTRACTOR's audit findings. If an audit reveals STATE's use of the Software exceeds the use permitted under the terms and conditions of this Contract, CONTRACTOR may invoice STATE for the applicable additional amounts based on the price agreement in effect between the Parties as of the date of completion of the audit.

## **NOTICE**

### **Purpose**

All contracts must contain a notice provision identifying the representative of each party to whom notices required under the contract must be provided.

These contractual notice requirements, however, do not replace or supersede any other statutory notice requirement.

### **Recommended Language**

#### **NOTICE**

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses, or by email complete on the date sent:

<b>STATE</b>	<b>CONTRACTOR</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip
Email	Email

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

## **CONFIDENTIALITY**

### **Purpose**

The Confidentiality clause is to ensure certain information remains confidential. A Confidentiality clause should explain the obligations of the parties in maintaining, releasing, and discarding information that is confidential.

**Regardless of the language of the contract, all parties must abide by applicable confidentiality laws.**

Contractors frequently ask the agency to keep all information provided by a contractor confidential. The public records law does not allow an agency to deny a request for records unless the records are closed or confidential under a specific law.

Further information regarding public records and meetings may be found at [ND Attorney General Open Records and Meetings](#).

**An agency may not contractually agree to keep records confidential that are not specifically exempted from mandatory public disclosure under applicable laws.**

## Recommended Language

### CONFIDENTIALITY

CONTRACTOR may not use or disclose any information it receives from STATE under this Contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Contract or that STATE has authorized in advance. STATE may not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, [N.D.C.C. ch. 44-04](#). The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the Term of this Contract.

## COMPLIANCE WITH PUBLIC RECORDS LAWS

### Purpose

A state contract should contain a clause notifying a contractor that the contract is subject to the state's public records laws and advise the contractor of its responsibilities under the public records law.

As previously indicated, the parties must comply with the public records laws even if this clause is omitted. Including this clause in the contract places contractors on notice regarding the requirements of the public records laws and prevents misunderstandings about how those laws may apply to certain records.

An agency should consult with its assigned legal counsel to determine whether a contract should also include language notifying a contractor that it could be considered a public entity under N.D.C.C. ch. 44-04 and N.D.C.C. § 44-04-17.1(13)(c) which would subject the contractor to the open meetings laws.

## **Recommended Language**

### **COMPLIANCE WITH PUBLIC RECORDS LAWS**

Under the North Dakota public records law certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from CONTRACTOR under this Contract, (b) records obtained by either Party under this Contract, and (c) records generated by either Party under this Contract.

CONTRACTOR shall contact STATE immediately upon receiving a request for information under the public records law and shall comply with STATE's instructions on how to respond to that request.

## **INDEPENDENT ENTITY**

### **Purpose**

The Independent Entity clause clearly defines the relationship between the parties. When an agency hires a contractor, the contract should clearly indicate that the contractor is not acting as a state employee when performing the contract. Otherwise, the state might be required to deduct certain amounts from payments to the contractor and comply with other laws governing employer-employee relationships.

The contract should indicate that the contractor retains sufficient control and discretion over carrying out the activities in the contract and the contractor will not be considered a state employee.

### **Recommended Language**

#### **INDEPENDENT ENTITY**

CONTRACTOR is an independent entity under this Contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR's activities and responsibilities under this Contract, except to the extent specified in this Contract.

## **ASSIGNMENT AND SUBCONTRACTS**

### **Purpose**

The Assignment and Subcontracts clause allows the agency to maintain some control over its choice of the contractor who will provide the goods or services under the contract. A contractor will often bid on a project with the intent of having a subcontractor complete the work. This ultimately may result in inflated costs to the agency; or, if a contract is awarded based on the qualifications of the contractor, and the contractor assigns or transfers those duties to another person who may lack those qualifications, the agency's expectations are frustrated. The clause should identify the obligations of the contractor under the contract that may be assigned (transferred) or delegated to another person.

There may be times when assignments or subcontracts are appropriate. Therefore, an agency may permit assignments but should require the contractor to obtain the agency's consent before the assignment. For subcontracts, the consent of the agency is not required, but the contract should ensure the contractor remains responsible and liable for performance of the contract and for the acts of its subcontractors.

If the contractor requests to assign the contract, the agency should determine whether the assignee (the new contractor being granted the assignment) is a contractor that has been barred from contracting with the state of North Dakota for procurement or bidder violations to ensure the contract is not assigned to a barred contractor.

### **Recommended Language**

#### **ASSIGNMENT AND SUBCONTRACTS**

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE's express written consent, provided, however, that CONTRACTOR may assign its rights and obligations under this contract if there is a change of control or sale of all or substantially all of CONTRACTOR's assets related to this Contract, whether by merger, reorganization, operation of law, or otherwise. If Assignee is a business or entity with whom STATE is prohibited from conducting business, STATE may terminate this Contract in accordance with the Termination for Cause section of this Contract.

CONTRACTOR may enter subcontracts provided that any subcontract acknowledges the binding nature of this Contract and incorporates this Contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor with whom CONTRACTOR contracts. CONTRACTOR may not contract or incur obligations on behalf of STATE.

## **SPOILIATION (DESTRUCTION OR SEVERE MODIFICATION OF EVIDENCE)**

### **Purpose**

The Spoliation clause is included in the contract to require a contractor to be responsible for preventing spoliation (destruction or severe modification of evidence), particularly when the scene of an accident or

claim is beyond the state’s control. It also identifies responsibilities for controlling the scene of an accident or potential claim and for preserving any relevant evidence of the circumstances surrounding the accident or potential claim.

Determining the cause of an accident is important for future loss prevention and for determining responsibility for the accident. Spoliation can interfere with proper investigation of an accident, jeopardize or nullify applicable insurance coverage, and even result in a separate lawsuit against the party responsible for the spoliation. However, controlling the scene of an accident and preservation of evidence should not take priority over public safety.

A similar clause may be used in service contracts as well as leases. This clause is not required by law and may be omitted when services are provided in locations that are under the state’s control.

For further information on spoliation, consult the Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB. The manual can be found under “Risk Services” of the “Team Member Resources” tab at [Team ND Connect](#).

## **Recommended Language**

### **SPOLIATION (NOTICE OF POTENTIAL CLAIMS)**

CONTRACTOR shall notify STATE promptly of all potential claims that arise or result from this Contract. CONTRACTOR also shall take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect such evidence, including the scene of the accident.

## **MERGER AND MODIFICATION: CONFLICT IN DOCUMENTS**

### **Purpose**

The Merger and Modification – Conflict in Documents clause is necessary to confirm the provisions of the contract supersede any prior oral negotiations and prevent subsequent, unwritten communications from being considered amendments to the contract. This clause also outlines the controlling order (i.e., order of precedence) for documents if there is a conflict between the terms and conditions contained within the documents. The clause should also explain how the contract may be amended.

### **Recommended Language**

#### **MERGER AND MODIFICATION – CONFLICT IN DOCUMENTS**

*Note: For brevity, only four documents have been included. Please make sure you list all documents to be considered including amendment to the RFP or proposal, Best and Final Offers, Questions and Answers to the RFP, etc. In addition, make sure the order of these documents always has STATE’s documents first, and CONTRACTOR’s documents last, to ensure STATE’s documents always take precedence. Consult with your assigned legal counsel if you have questions on the order of precedence.*

This Contract, including the following documents, constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Contract. This Contract may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

Notwithstanding anything to the contrary in this Contract, if there is any inconsistency or conflict among the documents making up this Contract, the documents control in this order of precedence:

- a. The terms of this Contract as may be amended;
- b. STATE's Solicitation Amendment(s) to Request for Proposal ("RFP") number [X];
- c. STATE's Request for Proposal ("RFP") number [X], dated [X];
- d. CONTRACTOR's proposal dated [X] in response to RFP number [X].

Unless negotiated between the Parties and incorporated into this Contract by reference, all automated end-user agreements (e.g., click-through, shrink-wrap, or browse-wrap) are specifically excluded and null and void. Clicking shall not represent acknowledgement or agreement to any terms or conditions contained in those agreements.

## **UNANTICIPATED AMENDMENTS**

### **Purpose**

The unanticipated amendments clause is necessary to allow the state agency and contractor to address additional work within the SOW of the original contract as authorized by the terms of the contract, and is due to legitimate, unforeseen circumstances. N.D.A.C. § 4-12-13-01(3). This type of amendment often does not trigger additional procurement requirements. However, the absence of this language may trigger procurement requirements to contract for work to address the unforeseen circumstances.

### **Recommended Language**

#### **UNANTICIPATED AMENDMENTS**

If additional work is required within the scope of this Contract due to a legitimate unforeseen circumstance, STATE shall provide CONTRACTOR a written description of the additional work and request CONTRACTOR to submit a proposal for accomplishing the scope of work. CONTRACTOR will not commence additional work until all Parties agree in writing.

## **SEVERABILITY**

### **Purpose**

The Severability clause should be included in a contract so if one or more provisions in the contract are declared illegal, and performance of the contract without the illegal clause is possible, the remaining terms of the contract remain enforceable. Contract termination may be an option if it suits the situation.

## Recommended Language

### SEVERABILITY

If any term of this Contract is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Contract did not contain the illegal or unenforceable term.

## APPLICABLE LAW AND VENUE

### Purpose

The Applicable Law and Venue clause is necessary to identify the law governing the contract and the court or courts in which contract disputes may be heard. The goal of this provision is to have a contract interpreted according to North Dakota law (i.e., applicable law) and any dispute resolved in North Dakota state courts (i.e., venue).

Absent legislative authority, an agency may not agree to submit to the jurisdiction of the federal courts, or to the court of another state or foreign country. N.D. Const. art. I, § 9. If an agency were to agree to federal court jurisdiction, the state's 11th Amendment immunity could be waived. Generally, the federal courts lack jurisdiction because a state is not considered a citizen for purposes of diversity jurisdiction.

Subjecting the agency to another state's laws or jurisdiction, or that of a foreign country, may not be in the agency's (the state's) best interests and any risks involved must be weighed against those interests

**If a contractor is unwilling to agree to be bound by North Dakota law or be subject to the jurisdiction of North Dakota courts, the agency must consult with its assigned legal counsel, the Office of Attorney General, and the OMB Risk Management Division.**

through legal consultation.

### Recommended Language

#### APPLICABLE LAW AND VENUE

This Contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota. Each Party consents to the exclusive jurisdiction of the state District Court located in Burleigh County, North Dakota and waives any claim of lack of jurisdiction or *forum non conveniens*.

## ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

**Without specific, legislative authority, agencies are without the authority to bind the state to an alternative dispute resolution process.**

### Purpose

Occasionally a contractor (or private party) will propose a clause that requires contractual disputes to be resolved through alternative dispute resolution. An agency is without authority to agree to mandatory mediation or arbitration. “The director of [OMB], in consultation with the head of the state agency involved and the attorney general, may agree to submit a claim covered by the state risk management fund to mediation or binding arbitration.” N.D.C.C. § 32-12.2-05.

Although alternative dispute resolution may be helpful as a cost-effective alternative to litigation, the Attorney General does not recommend this type of dispute resolution as the required first step in resolving a dispute. The Attorney General has the authority to determine the best course of action for an agency to resolve a dispute, including instituting litigation as the first option if it is determined to be in the best interests of the state.

**“The attorney general and the attorney general’s assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state to do so.” N.D.C.C. § 54-12-02.**

This is not to say that an agency is prohibited from resolving contractual disputes through an agreed process between the agency (in consultation with its assigned legal counsel) and the contractor. Generally, resolving disputes or disagreements at the lowest level is viewed as being in the best interests of all parties.

**HOWEVER**, it should be noted that mandating any form of alternative dispute resolution as the first step in resolving a dispute, or mandating the agency bind the state to a specific dispute process prior to pursuing litigation in a court of law, is something to which an agency is without authority to agree.

An agency should not waive the right to litigate if the parties are unable to reach a resolution or settlement that is authorized by law. Generally, an agency should not waive any right to a jury trial. However, although uncommon, there may be certain contracts that are better suited for a bench trial if litigated. An agency’s assigned legal counsel should be consulted when determining this language.

### Recommended Language

**ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

## **ATTORNEY FEES AND COSTS**

### **Purpose**

The Attorney Fees and Costs clause should be used to allocate responsibility for paying attorneys' fees and costs incurred by the agency in litigation to enforce the contract. Contracts between private parties commonly include this clause, however it is reciprocal in nature, awarding attorneys' fees and costs to the prevailing party. A reciprocal provision in favor of the contractor is not allowed without an appropriation for expenditure of public funds for such purposes.

**This type of expense would not be covered by the North Dakota Risk Management fund and could only be paid pursuant to an appropriation for such expenditure.**

### **Recommended Language**

#### **ATTORNEY FEES**

If a lawsuit is initiated by STATE to obtain performance due under this contract, and STATE is the prevailing Party, CONTRACTOR shall pay STATE's reasonable attorney fees and costs in connection with the lawsuit, unless prohibited by N.D.C.C. § 28-26-04.

## **NONDISCRIMINATION - COMPLIANCE WITH LAWS**

### **Purpose**

The Nondiscrimination – Compliance with Laws clause must be included in state contracts. Because the public's confidence in its government could be undermined if contractors for the state are allowed to discriminate or violate the laws that other members of the public are expected to follow, failure to comply with these requirements may be deemed a material breach of contract giving the agency the remedy of termination for cause.

The North Dakota Department of Labor and Human Rights is responsible for enforcing North Dakota labor and human rights laws. Wage and hour laws may be found throughout N.D.C.C. Title 34 and N.D.A.C. Chapter 46-02-07. It is in the best interest of the agency to have contractors affirmatively verify the contractor operates in compliance with these requirements.

The federal government requires that by April 2026, all state and local government websites, mobile applications, and electronic documents comply with the digital accessibility standards under the Americans with Disabilities Act (ADA). This rule was implemented by the U.S. Department of Justice and more in depth information can be found at [ADA](#).

This clause also addresses a contractor's obligations to timely file any required reports, make required payroll deductions, and timely pay all applicable taxes and premiums, including sales and use taxes, unemployment insurance compensation and workers' compensation premiums as required by law.

This clause also addresses statutory changes enacted by the 68<sup>th</sup> Legislative Assembly regarding contractors who may participate in boycotting Israel. (See N.D.C.C. § 54-44.4-15.) HB 1368 prohibits state entities from contracting with companies that engage in commercial actions intended to limit commercial relations with persons doing business in Israel or in Israeli-controlled territories.

## **Recommended Language**

### **AMERICANS WITH DISABILITIES ACT (ADA) – NONDISCRIMINATION – COMPLIANCE WITH LAWS**

- a. CONTRACTOR shall comply with all applicable federal and state laws, rules, and policies, including those relating to nondiscrimination, accessibility, and civil rights. (See N.D.C.C. Title 34-Labor and Employment, specifically N.D.C.C. ch. 34-06.1 Equal Pay for Men and Women.)
- b. **ADA Compliance** – CONTRACTOR shall ensure that all user-facing components of the solution comply with the Americans with Disabilities Act (ADA) and at a minimum, conform to 28 CFR § 35.200 federal Requirements for Web and Mobile Accessibility; available at: [28 CFR § 35.200](#). CONTRACTOR shall verify accessibility compliance through automated and manual testing prior to delivery and shall provide reports to STATE quarterly or as mutually agreed by STATE and CONTRACTOR.

CONTRACTOR is responsible for maintaining accessibility compliance of the solution throughout the Term of the Contract, including all renewals and extensions. If a compliance issue is discovered, CONTRACTOR shall provide a remediation plan, including timelines and impacts, to STATE. CONTRACTOR shall indemnify STATE for any and all claims, including penalties, costs, and expenses, related to accessibility claims under the ADA related to the solution.

- c. CONTRACTOR shall file all required reports timely, make required payroll deductions, and pay all taxes and premiums owed timely, including sales and use taxes, and unemployment compensation and workers' compensation premiums.
- d. CONTRACTOR shall have and keep current and in good standing all licenses and permits required by law during the Term of this Contract.
- e. CONTRACTOR is prohibited from boycotting Israel for the duration of this Contract. (See N.D.C.C. § 54-44.4-15.) CONTRACTOR represents that it does not and will not engage in boycotting Israel during the Term of this Contract. If STATE receives evidence that CONTRACTOR boycotts Israel, STATE shall determine whether the company boycotts Israel. The foregoing does not apply to contracts with a total value of less than \$100,000 or if CONTRACTOR has fewer than ten (10) full-time employees.

CONTRACTOR's failure to comply with this section is a material breach by CONTRACTOR and STATE may terminate this Contract in accordance with the Termination for Cause section of this Contract.

## **STATE AUDIT**

### **Purpose**

The State Audit clause informs a contractor of the State Auditor's authority to "...examine the books and accounts of all private institutions with which the state has any dealings so far only as the same related to such dealings." N.D.C.C. § 54-10-19. This clause is included to inform a contractor of the State Auditor's obligations to audit agencies when required under law. An agency is without authority to limit the State Auditor's ability to perform statutory duties and obligations. Agencies should not accept language proposing to limit the number of audits conducted under this contract clause.

### **Recommended Language**

#### **STATE AUDIT**

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this Contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. CONTRACTOR shall maintain these records for at least three (3) years following completion of this Contract and be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to CONTRACTOR prior to conducting examination.

## **RIGHT TO INSPECT PLACE OF BUSINESS**

### **Purpose**

The right to inspect place of business clause affords the state agency the right to enter and inspect the contractor's place of business upon reasonable notice to the contract and with the cooperation of the contractor.

### **Recommended Language**

#### **RIGHT TO INSPECT PLACE OF BUSINESS**

*Note: Delete if not applicable.*

At reasonable times, STATE may inspect those areas of CONTRACTOR'S place of business that relate to the performance of this Contract. If STATE inspects, CONTRACTOR must provide reasonable assistance.

## **F.O.B. POINT AND FREIGHT**

### **Purpose**

Free on board (F.O.B.) point language addresses the location where responsibility and ownership of goods transfers from the contractor (seller) to the state agency (buyer). The language is necessary to address liability for damage of goods during transit and responsibility for shipping or freight costs.

This language must be included in IT contracts involving the purchase of hardware (i.e. laptops, servers)

### **Recommended Language**

#### **F.O.B. POINT AND FREIGHT**

*Note: Delete if the purchase does not include the purchase of commodities. This is the most common freight option.*

All commodities purchased through this Contract shall be Free on Board (“F.O.B.”) final destination, freight prepaid. Unless specifically stated otherwise, all prices offered must include the delivery costs to any location within the state of North Dakota. Title shall pass to STATE at destination, and CONTRACTOR shall be responsible for any freight claims.

## **COUNTERPARTS**

### **Purpose**

The Counterparts clause allows parties to the contract, often located in different cities or states, to each sign a different, but identical, copy of the contract. In other words, not all parties need to sign the same page or sign in person.

### **Recommended Language**

#### **COUNTERPARTS**

This Contract may be executed in multiple, identical counterparts, each of which is deemed an original, and all of which taken together constitute one and the same contract.

## **EFFECTIVE DATE OF AGREEMENT**

### **Purpose**

All contracts should contain an effective date which will indicate when work on the contract should begin and when the terms of the contract are enforceable. Contracts may specify a begin date in the Term of Contract clause or a contract may begin on the Effective Date as defined in the Effectiveness of Contract clause.

## Recommended Language

### EFFECTIVENESS OF CONTRACT

This Contract is not effective until fully executed by both Parties. If a start date is not specified in the Term of Contract, the most recent date of the signatures of the Parties is the Effective Date.

*Note: If the Contract is for a Major IT Project, a signature line for ITD CIO or designee is required and the following statement. Additionally, if Option 2 under Background Checks is used in this Contract, the below paragraph should simply use “CIO” and not spell out “Chief Information Officer”:*

This Contract is not binding on STATE until it is executed by STATE and the Chief Information Officer (CIO) of North Dakota or a designee of the CIO, as required in [N.D.C.C. § 54-59-32\(4\)](#).

## SIGNATURES

### Purpose

The signatures on the contract should match the parties identified in the introduction to the contract. When contracting with a corporation or business, the person who signs the contract should be an officer or other person with authority to act for the corporation or business. If the person is not an officer with apparent authority, insist on a board resolution, power of attorney from an officer, or some documentation showing that the person is authorized to act on behalf of the corporation or business.

All signatures must be dated, accurately reflecting the date on which the contract was signed, and if not signed electronically, written in ink, preferably in blue ink for easy identification of an original signature. The official title or position of the individuals executing the contract should appear below each signature line.

Certain IT projects are subject to a Large IT Oversight Committee pursuant to N.D.C.C. § 54-59-32. These IT contracts require signatures from the contractor, the purchasing agency, and the state’s CIO or designee.

Electronic signatures are addressed in N.D.C.C. ch. 9-16. The state’s ITD has created guidelines for agencies to consult when electronic signatures are requested.

---

*Following are examples of Exhibits A, B, C, and D to the standard state IT contract. For ease of reading, each Exhibit begins as a new section on a new page.*

*Following the same formatting as used for the IT Contract Clauses portion of this chapter, each Exhibit contains Purpose statements and recommended language for each of its specific clauses.*

## EXHIBIT A – Scope of Work (SOW)

### Purpose

Describe the goods or services required under the contract in sufficient detail that a failure of the contractor to meet the state's expectations will be a breach of contract. The goods or services are typically described in general terms in the contract itself or a more detailed description, sometimes called the “statement of work” or “scope of work” (both referred to as SOW), may be attached as an exhibit to the contract and incorporated by reference.

If the description contained in the SOW is too vague, it will be difficult for the state to enforce the contract or establish a breach of contract by the contractor. Because SOWs generally relate to the policies, business practices and specific needs of the agency, the content of the SOW should be drafted by agency personnel having intimate knowledge of the solicitation and the work required.

**Because IT contracts are detailed and complex, the SOW is most often jointly negotiated and drafted by the parties to ensure there is a meeting of the minds as to expectations for various deliverables and acceptance criteria. Following is a template SOW for state IT contracts.**

**Deliverable.** The term deliverable means a specific, measurable good or service that must be produced and delivered by CONTRACTOR and must be accepted by STATE in accordance with the terms and conditions of the contract, including any applicable Scope(s) of Work (SOW). The parties to the contract should ensure there is a meeting of the minds and language is clear as to each party’s obligation(s), expectations, timelines, and accountability to provide successful and timely deliverable acceptance.

**Acceptance Criteria.** The term acceptance criteria means the specific conditions or requirements that must be met for STATE to accept a deliverable. These criteria translate abstract expectations to measurable requirements and define what is expected in terms of quality, functionality, information, or performance. Acceptance Criteria are used to assess whether the work meets the agreed-upon standards (often known as “what does good look like” or “definition of done”).

**Final Acceptance.** The term final acceptance is used in the SOW to refer to the formal acknowledgment by STATE that CONTRACTOR has fulfilled its obligations under the SOW. Final acceptance is key to determining when other contractual provisions are triggered, including the payment of retainage, product conformity, warranty, or the beginning of maintenance and support services.

The SOW must clearly define deliverables, acceptance criteria, and final acceptance.

### Recommended Language

*Note: If Exhibit A is not used, delete this Exhibit in its entirety.*

*This attachment is for the detailed Scope of Work (SOW) outlining deliverables to be produced as outcomes of the project, including description and acceptance criteria.*

*Modify these deliverables, including deliverable numbering and Exhibit B payment schedule to align with project approach.*

*When defining deliverable – see [SOW Examples](#).*

*Typically, the deliverable completion dates are determined during the planning process and may still be undetermined at Contract signature time. Therefore, exact completion dates are not included in this template. However, if you choose to include them, copy section “e” from the Project Kickoff Meeting deliverable and modify to note exact due dates.*

## **1. DELIVERABLE 1: PROJECT KICKOFF MEETING**

### **a. Description**

CONTRACTOR shall coordinate with STATE to schedule a Kickoff Meeting virtually via STATE’s Microsoft Teams site, or in *City Name*, ND, with the core project and planning team. CONTRACTOR’s Project Manager shall lead the meeting. The Kickoff Meeting must facilitate the introduction of CONTRACTOR and STATE core project team members, and level-set understanding and awareness of project objectives, scope, governance, schedule, and project risks and issues.

### **b. Expectations of CONTRACTOR**

- 1) CONTRACTOR shall provide content to STATE for a detailed agenda in advance of the meeting.
- 2) CONTRACTOR and STATE shall facilitate the meeting, and discuss and further define, at a minimum, the following:
  - (a) Effective project communication
  - (b) Project vision, background, purpose, and objectives
  - (c) Project governance structure, and project roles and responsibilities
  - (d) Approach to creating the Project Plan
  - (e) Initial risk assessment
- 3) CONTRACTOR project team members shall participate in the Kickoff Meeting.

### **c. Expectations of STATE**

- 1) STATE shall finalize agenda and send agenda to invitees.
- 2) STATE shall coordinate the logistics and co-facilitate the Kickoff Meeting.
- 3) STATE’s Project Sponsor and project team members shall participate in the Kickoff Meeting.

### **d. Acceptance Criteria**

For the acceptance of this deliverable to occur, the Kickoff Meeting results in:

- 1) Facilitation of Kickoff Meeting using a clearly defined agenda
- 2) An introduction of critical CONTRACTOR and STATE resources assigned to the project
- 3) Review of STATE’s Project Charter to include project governance structure, roles and responsibilities, project purpose, objectives, and scope
- 4) Discussion of communications approach and structure
- 5) Discussion of known project risks and issues

e. **Completion Date**

CONTRACTOR shall start work to schedule the Kickoff Meeting with STATE within five (5) business days after the signing of this Contract.

2. **DELIVERABLE 2: PROJECT PLAN**

a. **Description**

CONTRACTOR and STATE, led by STATE's Project Manager, will develop a baseline Project Plan. The Project Plan will include the project schedule.

b. **Expectations of CONTRACTOR**

1) CONTRACTOR shall participate, contribute, and collaborate with STATE to provide requested content for the Project Plan. Typically, STATE may ask CONTRACTOR to contribute to the following sections:

- (a) Management plans to control cost, schedule, scope, and quality
- (b) Governance structure for the project
- (c) Roles and responsibilities of the project team
- (d) Communication management
- (e) Quality management
- (f) Risk, issue, and action item management
- (g) Implementation and transition plan *Remove if this is a separate deliverable*

2) CONTRACTOR shall provide CONTRACTOR tasks and participate and collaborate with STATE on a detailed project schedule created in Microsoft Project. The project schedule will follow STATE best practices, including:

- (a) Project has appropriate start date.
- (b) Project has appropriate Work Breakdown Structure.
- (c) All project tasks have appropriate predecessors and successors, with the exception of summary tasks.
- (d) All project tasks are auto-scheduled using predecessors to drive the task dates (dates are not manually entered).
- (e) No use of constraints.
- (f) Both STATE and CONTRACTOR tasks are included.
- (g) Project tasks are broken into timeframes that can be reasonably managed – STATE encourages a maximum task length of approximately 80 hours/two (2) weeks.
- (h) Project tasks have appropriate resources assigned with appropriate and reasonable allocation.
- (i) Schedule has appropriate working times and incorporates STATE and CONTRACTOR holidays and nonworking times.

- 3) CONTRACTOR shall provide written confirmation from an individual authorized to act on CONTRACTOR's behalf confirming contents of the Project Plan.

**c. Expectations of STATE**

- 1) STATE shall lead the project planning effort.
- 2) STATE's Project Manager shall be responsible for the Project Plan.
- 3) The Project Plan must follow STATE template and best practices.
- 4) STATE's Project Manager shall incorporate STATE tasks into the project schedule.
- 5) STATE shall obtain written confirmation from an individual authorized to act on CONTRACTOR's behalf for the contents of the Project Plan.

**d. Acceptance Criteria**

- 1) CONTRACTOR has provided requested content to STATE for the Project Plan regarding all services, tasks, and products delivered by CONTRACTOR.
- 2) CONTRACTOR and STATE agree upon the baselines, scope, schedule, and management plans for the project.
- 3) The Project Plan adheres to STATE template and STATE project management best practices.
- 4) STATE's Oversight Committee has review as required. *Remove if not a major project*

**e. Completion Date**

CONTRACTOR shall start work to create the Project Plan with STATE within five (5) business days after signing of this Contract.

*Note: For additional deliverables, use the following deliverable template as a guideline.*

**3. DELIVERABLE 3: TEMPLATE**

**a. Description**

...

**b. Expectations of CONTRACTOR**

- 1) ...

**c. Expectations of STATE**

- 1) ...

**d. Acceptance Criteria**

- 1) ...

**e. Completion Date**

...

**4. DELIVERABLE 4: POST-IMPLEMENTATION REPORT**

*Note: Some projects have objective measurements (typically identified in the Project Charter) that extend three to six months beyond the implementation of the product, and therefore, completion of the Post-Implementation Report may be delayed. In these cases, consider what is reasonable for CONTRACTOR to provide for this deliverable and adjust the following language accordingly.*

**a. Description**

CONTRACTOR shall participate, contribute, and collaborate with STATE, led by STATE's Project Manager, to provide content for the Post-Implementation Report.

**b. Expectations of CONTRACTOR**

- 1) CONTRACTOR shall have project team members participate in the Post-Implementation Survey.
- 2) CONTRACTOR shall participate, contribute, and collaborate with STATE, led by STATE's Project Manager, to develop a Post-Implementation Report including, at a minimum, the following:
  - (a) Key project metrics related to schedule, cost, scope, and quality;
  - (b) Business metrics related to project objectives and measurements as defined in the Project Charter;
  - (c) Comprehensive lessons learned valuable to future projects;
  - (d) Success stories from the project;
  - (e) Results of the Post-Implementation Survey.

**c. Expectations of STATE**

- 1) STATE's Project Manager shall complete the final Post-Implementation Report.
- 2) STATE's Project Manager shall design and conduct the Post-Implementation Survey.
- 3) The Post-Implementation Report must follow STATE template.

**d. Acceptance Criteria**

- 1) CONTRACTOR participated in the Post-Implementation Survey and provided content to STATE for the Post-Implementation Report regarding all services, tasks and products CONTRACTOR delivered including:
  - (a) Key project metrics related to schedule, cost, scope, and quality;
  - (b) Business metrics related to project objectives and measurements as defined in the Project Charter;
  - (c) Lessons learned from the project;
  - (d) Success stories from the project.
- 2) Review may be required by STATE's Oversight Committee. *Remove if not a major project*

**5. DELIVERABLE 5: PROJECT CLOSEOUT MEETING**

*Note: Some projects have objective measurements (typically identified in the Project Charter) that extend three to six months beyond the implementation of the product, and therefore, completion of the Project Closeout Meeting may be delayed. In these cases: 1) consider what is reasonable for CONTRACTOR to provide for this deliverable and adjust the following language accordingly; 2) consider changing the name of this deliverable to “Post-Implementation Meeting,” with the goal of providing and discussing survey results, lessons learned, and success stories soon after implementation; and 3) schedule a separate Closeout Meeting with the agency at a later date to review the completed Post-Implementation Report (depending on project circumstances, CONTRACTOR may or may not be included in that later Closeout Meeting, and that meeting may or may not be included in this Scope of Work).*

**a. Description**

CONTRACTOR shall coordinate with STATE to schedule a Closeout Meeting virtually via STATE’s Microsoft Teams site, or in *City Name*, ND with the core project team and interested stakeholders. STATE’s Project Manager shall lead the meeting, though CONTRACTOR may be asked to present on certain agenda items. The Closeout Meeting must present a completed Post-Implementation Report and facilitate discussion of the project closeout.

**b. Expectations of CONTRACTOR**

- 1) CONTRACTOR shall provide content to STATE for detailed agenda in advance of the meeting.
- 2) CONTRACTOR shall provide STATE any required information for STATE’s Project Manager to present the Post-Implementation Report.
- 3) CONTRACTOR shall expand upon the success stories and lessons learned captured from the Post-Implementation Survey, and discuss details related to the lessons learned to provide comprehensive information to future projects.

**c. Expectations of STATE**

- 1) STATE shall finalize and send agenda to invitees.
- 2) STATE shall coordinate logistics and facilitate the Closeout Meeting.
- 3) STATE shall expand upon the success stories and lessons learned captured from the Post-Implementation Survey and discuss and further document details related to the lessons learned to provide comprehensive information to future projects.

**d. Acceptance Criteria**

For the acceptance of this deliverable to occur, the Closeout Meeting results in:

- 1) Completion and confirmation of the Post-Implementation Report deliverable
- 2) Comprehensive lessons learned and success stories valuable to future projects

**6. DELIVERABLE 6: FINAL ACCEPTANCE**

*Note: This deliverable signifies STATE’s acceptance of the product or service and could be due either after user acceptance testing (signifying an approval to move into production) or after implementation (signifying an approval to move into*

*maintenance mode), depending upon the project circumstances. Timing for this deliverable should take into consideration any warranty periods, rollouts, implementation risks, and phased implementations and/or testing. Ensure the Contract language in Final Acceptance subsection of the Deliverable Acceptance section of the Contract is reviewed.*

**a. Description**

Upon completion of all deliverables, and upon mutual agreement of STATE and CONTRACTOR, the project work will be considered complete and retainage paid to CONTRACTOR.

**b. Expectations of CONTRACTOR**

CONTRACTOR shall address any outstanding issues or completion of deliverables.

**c. Expectations of STATE**

STATE shall alert CONTRACTOR to any outstanding issues.

**d. Acceptance Criteria**

- 1) No outstanding or unfinished deliverables.
- 2) No outstanding project or system issues.

## EXHIBIT B – Compensation Details

### Purpose

IT contracts generally contain a specific exhibit outlining the compensation details of the contract. This is because payments under IT contracts are often tied to specific deliverable acceptance or “milestone” payments according to the project schedule. This exhibit lays out the specific payment table, including annotating retainage to be withheld, from the first Deliverable through Final Acceptance of the project.

Additional sections of this exhibit address compensation for the travel budget; professional services; ongoing software license, maintenance services, or subscription services, and any value-add options that may be added to the SOW at the election of the purchasing agency.

### Recommended Language

#### 1. PROJECT DELIVERABLE PAYMENT SCHEDULE

*Note: Deliverable Payment Table to be modified and/or amended.*

The following table defines all payment points.

#	Deliverable	Deliverable Value	To be Retained (XX%)	Invoice
1	Project Kickoff Meeting	\$amount	\$amount	\$amount
2	Project Plan	\$amount	\$amount	\$amount
3		\$amount	\$amount	\$amount
4		\$amount	\$amount	\$amount
X	Final Acceptance	\$Total Retained	\$amount	\$Total Retained
			<b>Project Deliverables Total</b>	\$amount

#### 2. TRAVEL BUDGET

*Note: If travel expenses will be paid outside of fixed price or deliverable payment points, include this section. Depending upon the complexity of the project this section could range from a simple statement that the budgeted travel amount is \$amount to a complex table below.*

#	Key Task/Deliverable	# of Trips	# of People Traveling	Budgeted Amount per Person	Total Budgeted Amount
1	Project Kickoff Meeting	#	#	\$amount	\$amount
2	Project Plan	#	#	\$amount	\$amount
3		#	#	\$amount	\$amount
4		#	#	\$amount	\$amount
X	Final Acceptance	#	#	\$amount	\$amount

#	Key Task/Deliverable	# of Trips	# of People Traveling	Budgeted Amount per Person	Total Budgeted Amount
				<b>Travel Budget Total</b>	<i>\$amount</i>

### 3. PROFESSIONAL SERVICES

*Note: If professional services are paid as a service and not a deliverable, include this table. If professional services are included in the project deliverables delete this section prior to attaching to RFP.*

Category	Value
Project Management (example)	<i>\$amount</i>
Business Analyst (example)	<i>\$amount</i>
<b>Professional Services Total</b>	<i>\$amount</i>

### 4. PROJECT TOTAL

*Note: This is a summary total of the above tables.*

The total budget for the project portion of this Contract as set out in 1, 2, and 3 above is *\$amount*.

### 5. ONGOING SOFTWARE LICENSE, MAINTENANCE SERVICES, OR SUBSCRIPTION SERVICES

*Note: If software license, maintenance services, or subscription services are included in the original Contract term, include in this table. This table should be updated to match your cost proposal.*

Time Period	Dollar Amount
Year One, <i>Month Day, Year</i> through <i>Month Day, Year</i>	<i>\$amount</i>
Year Two, <i>Month Day, Year</i> through <i>Month Day, Year</i>	
Year Three, <i>Month Day, Year</i> through <i>Month Day, Year</i>	
Year Four, <i>Month Day, Year</i> through <i>Month Day, Year</i>	
Year Five, <i>Month Day, Year</i> through <i>Month Day, Year</i>	

*Note: For additional payment information related to the Contractual Amount, add details to this attachment.*

### 6. VALUE-ADD ITEMS

*Note: Add value-add items being offered.*

...

## **EXHIBIT C – Software as a Service (SaaS) Service Level Agreement (SLA)**

If the contract involves a Software as a Service (SaaS) product, this exhibit should be included to fully address the terms of service related specifically to the SaaS product offering.

Key components of a SaaS product include the scope of the services provided; subscription services; service level support; data ownership and security; transition services; and liability for service availability.

*Note: If Exhibit C is not used delete in its entirety. These special provisions are to be used SaaS purchases where any software or infrastructure is hosted outside the State of North Dakota's environment. This Exhibit includes the expected Service Levels to be provided by CONTRACTOR and specific SaaS Terms and Conditions. This is to ensure agency has their service level needs met and agreed to. Please adjust accordingly, SLA items in paragraphs 1-7.*

### **Recommended Language**

CONTRACTOR represents and warrants that the services will be performed in a professional manner consistent with industry standards reasonably applicable to such services.

## **SOFTWARE AS A SERVICE (SAAS) AVAILABILITY**

### **Purpose**

This language addresses the expected uptime obligations of the contractor's SaaS product.

### **Recommended Language**

#### **1. SAAS AVAILABILITY**

The SaaS must be available twenty-four (24) hours per day, 365 days per year (excluding agreed-upon scheduled maintenance downtime).

## **SOFTWARE AS A SERVICE (SAAS) AND SERVICE LEVEL AGREEMENT (SLA)**

### **Purpose**

This language details the specifics of the SaaS product, subscription, and the service level support generally expected by the state agency. It also expressly states that the subscription services do not begin until the expiration of the warranty period of the contract.

## Subscription Services

This language outlines the definition of the subscription services that contractor is obligated to provide in its SaaS solution. The language address various components of the service, including whether it is based on the number of users or number of employees; the service shall be extended to additional users for the benefit of the state agency; no limitations shall be imposed based on the number of machines, locations, or size of processors on which the state agency operates the service; the contract shall provide hardware and software upgrades at no additional cost; and obligations of the contractor if the service is reduced or functionality is replaced during the subscription period.

**Keep in mind, payments required for IT software maintenance or IT software-as-a-service (SaaS) subscription services are not considered “prepayment” as described in the compensation section of the contract.** This is because these maintenance and subscription services are generally available to the agency at the same time payment is made, therefore payment is not considered prepayment.

## Subscription Period

This language specifies the term or period which the subscription services will be available to the agency. It defines the beginning date and the end date of the subscription.

## Purchase of Additional Users

This language ensures the agency may add additional users under the same terms and conditions, including pricing, of the contract.

## Subscription Fee Cap

This language is like the renegotiation language in the contract in that it caps the percentage of cost increase that may be assessed to the contractor upon each renewal term or on a specified basis such as annually. State contracts generally limit increases to three percent (3%) or the current Consumer Price Index (CPI), whichever is lower.

## Right to Change Support Plan Level

This language ensures the agency can increase or reduce its support plan during a subscription period so long as the contractor is provided with thirty (30) days’ notice of a change. This prevents the agency from being limited during the subscription period if the needs of the agency change.

## Right to Cancel Services

This language ensures the subscription services are not subject to auto-renewal and the agency may terminate upon thirty (30) days’ notice to the contractor prior to the end of the current subscription period.

## Recommended Language

### 2. SAAS AND SLA

*Note: This section is for SaaS Services (Hosting Services).*

*If SaaS services are provided by CONTRACTOR, the agency must first obtain a hosting waiver approved by ITD and OMB. N.D.C.C. § 54-59-22 requires ITD host all information technology systems unless a hosting exemption is granted. Insert the following clauses.*

CONTRACTOR shall provide Subscription Services, including software/hardware updates and technical support services for the Subscription Services pursuant to the Contract commencing at the end of the Contract's warranty period. CONTRACTOR warrants that it will continue to offer Subscription Services for the product(s) for a minimum of five (5) years from the date of final acceptance of any software/product update.

**a. Subscription Services**

**Language will be developed during contract negotiations to describe what CONTRACTOR is providing to STATE (intended to be a few sentences).**

- 1) The service is based on **(include what service is based upon, such as users, total employees, etc.)**
- 2) Service shall be extended to any Users who have a need to use the SaaS for the benefit of STATE.
- 3) There shall be no limit on the number of machines, number of locations, or size of processors on which STATE can operate the service.
- 4) CONTRACTOR shall provide software/hardware updates at no additional cost to STATE, including any professional services needed.
- 5) If CONTRACTOR reduces or replaces the functionality contained in the software and provides this functionality as a separate or renamed product, then STATE shall be entitled to usage of such software product at no additional fees.

**b. Subscription Period**

**SELECT ONE OR REVISE AS NEEDED**

**Option 1 – DELETE IF NOT USED**

The subscription period begins on **[Month, Day], 20[Year]**, and continues on an annual basis for **[X]** years.

**Option 2 – DELETE IF NOT USED**

The subscription period begins with a prorated period on **[Month, Day], 20[Year]**, and continues on an annual basis for **[X]** years.

**c. Purchase of Additional Users**

STATE may purchase additional Users during the term of this Contract at the same price offered by CONTRACTOR under the terms of this Contract.

**d. Subscription Fee Cap**

CONTRACTOR agrees that any change to the annual Services fee may increase by not more than the lower of three percent (3%) or Consumer Price Index (CPI). The rates shall be adjusted in accordance with the index titled "All Urban Consumers (CPI-U). for the U.S. City Average. All Items 1982-84=100", prepared by the U.S. Bureau of Labor Statistics.

**e. Right to Change Support Plan Level**

STATE may choose to change its subscription to CONTRACTOR’s Subscription Services plan to a higher or lower-level plan that is offered by CONTRACTOR at the Contract’s next renewal date upon thirty (30) calendar days’ notice to CONTRACTOR.

**f. Right to Modify or Cancel Services**

STATE may choose to cancel Subscription Services at this Contract’s next renewal date upon thirty (30) calendar days’ notice to CONTRACTOR.

## **SUPPORT AND ERROR RESOLUTION**

### **Purpose**

This language is important to ensure that errors are resolved in a timely manner to mitigate any disruption in the SaaS solution to the agency and its users. This section defines the severity levels of various incidents that may occur, the expected response and resolution times, and the escalation procedure of the contractor. The table provides measurable performance metrics, and the section includes remedies if the contractor fails to meet the metrics.

This section also addresses service level credits. Service level credits are issued to the agency when the contractor fails to meet the defined response and resolution times for incident response. The language outlines the requirements for when service level credits are owed to the agency and how those credits are applied for the benefit of the agency.

**Service level credits for failure to meet support and error resolution response and resolution times should not be confused with service level credits for the contractor’s failure to meet the contractual requirement for service availability, e.g. uptime.**

### **Recommended Language**

#### **3. SUPPORT AND ERROR RESOLUTION**

CONTRACTOR will respond to STATE requests for support services regarding the licensed software in accordance with the procedures identified below. In each case, STATE may describe and submit the problem by telephone, email or online helpdesk/service desk tool. STATE will determine the Severity level. The Severity level will not be changed unless agreed to by STATE and CONTRACTOR.

<b>Incident Severity</b>	<b>Response Time</b>	<b>Resolution Time</b>	<b>Escalation Procedure</b>
<b>High Impact – software unusable</b>	1 hour	Final Resolution within: <b>4 hours</b>	<b>[CONTRACTOR] Describe escalation procedure</b>

<b>Incident Severity</b>	<b>Response Time</b>	<b>Resolution Time</b>	<b>Escalation Procedure</b>
<b>Medium Impact</b> – software useable with severely restricted functionality or performance	4 hours	Final Resolution within: <b>8 hours (1 business day)</b>	<b>[CONTRACTOR] Describe escalation procedure</b>
<b>Low Impact</b> – software useable with minor impact on functionality or performance	8 hours	Final Resolution within: <b>40 hours (1 business week)</b>	<b>[CONTRACTOR] Describe escalation procedure</b>

CONTRACTOR’s failure to meet the above defined Response Times or Resolution Times in any given month during the term and any renewal term shall be deemed a service level default (“Service Level Default”) and STATE may obtain the non-exclusive remedies set forth below.

<b>Response and Resolution Service Levels (calculated monthly on a per incident basis)</b>	<b>Service Level Credit (Prorated Feed – Monthly)</b>
Meets Response or Resolution Time	0%
1 <sup>st</sup> Failure to meet Response or Resolution Time	Warning, 0%
2 <sup>nd</sup> Failure to meet Response or Resolution Time	10%
3 <sup>rd</sup> Failure to meet Response or Resolution Time	20%

In the event STATE is eligible for a twenty percent (20%) Service Level Credit under this section for any two (2) consecutive months of the term, STATE may terminate this Contract without penalty upon written notice to CONTRACTOR.

Credits shall be applied against the next invoice. In the event a Service Level Default occurs after a party has given notice of termination, or STATE has made final payment to CONTRACTOR for the software support services, and no further invoices shall issue as a result, CONTRACTOR shall refund to STATE the amount of the appropriate Service Level Credit due for the period of default.

## **AVAILABILITY SERVICE LEVEL**

### **Purpose**

This language is important to define the availability, e.g. uptime, of the SaaS solution. 99.9% availability is the expectation in most SaaS contracts with state agencies. This section defines the expected available levels by month. The table provides measurable performance metrics, and the section includes remedies if the contractor fails to meet the metrics.

This section also addresses service level credits. Service level credits are issued to the agency when the contractor fails to meet the defined availability percentages. The language outlines the requirements for

when service level credits are owed to the agency and how those credits are applied for the benefit of the agency.

**Service level credits for failure to meet the service availability, e.g. uptime, should not be confused with service level credits for the contractor’s failure to meet the contractual requirement for support and error resolution response and resolution times.**

## **Recommended Language**

### **4. AVAILABILITY SERVICE LEVEL**

CONTRACTOR’s failure to make the services available at least 99.9% of the time in any given month during the term and any Renewal Term, excluding scheduled maintenance, shall be deemed a service level default (“Service Level Default”) and STATE may obtain the non-exclusive remedies set forth below. For purposes of this Contract, “Available” means that STATE users are able to access all features and functions of the licensed product and services including but not limited to the licensed software and licensed content.

<b>Service Level (Monthly)</b>	<b>Service Level Credit (Prorated Feed – Monthly)</b>
100% – 99.9%	0%
99% – 99.89%	10%
98.99% – 97%	20%
96.99% – 95%	25%
94.99% – 93%	50%
Below 93%	100%

In the event STATE is eligible for a 100% Service Level Credit under this section during any given month of the term or is eligible for a Service Level Credit greater than ten percent (10%) in any two (2) months, during any rolling twelve (12) month period, STATE may terminate this Contract without penalty upon written notice to CONTRACTOR.

Credits shall be applied against the next invoice. In the event a Service Level Default occurs after a party has given notice of termination, or STATE has made final payment to CONTRACTOR for the software support services, and no further invoices shall issue as a result, CONTRACTOR shall refund to STATE the amount of the appropriate Service Level Credit due for the period of default.

Once each calendar month during the term of this Contract, CONTRACTOR shall provide STATE with a written report comparing the actual performance of licensed product and services with the Service Level Requirement. Such report shall also contain such other information with respect to the performance of the licensed product and services as mutually agreed upon by the Parties from time to time, and in conformity with reporting CONTRACTOR provides to its other customers utilizing the licensed product and services.

STATE retains the right to use a Third-Party service to validate CONTRACTOR's performance meeting agreed upon service levels.

## RESPONSE TIME SERVICE LEVEL

### Purpose

This language considers the contractor's overall performance and whether response times are consistently met. If the contractor does not maintain that 95% of all transactions will be processed in accordance with the contract's timeframes, service level credits may be owed to the agency. The language allows the agency to pursue use of a third party to validate these response times.

The language outlines the requirements for when service level credits are owed to the agency and how those credits are applied for the benefit of the agency. Additionally, it includes a specific right of termination for the agency.

### Recommended Language

#### 5. RESPONSE TIME SERVICE LEVEL

*Note: Review response time level for business needs.*

CONTRACTOR represents and warrants that 95% of all transactions shall process at a mutually agreed upon time threshold. STATE retains right to use a Third-Party service to validate the performance of CONTRACTOR's response times.

If CONTRACTOR's service level response times fall below the warranted level for two (2) or more consecutive weeks, STATE shall receive service credits in the amount of *[Written number]* percent (#%) of the fees for that month. If CONTRACTOR's system response times fall below the warranted level for six (6) out of eight (8) consecutive weeks, CONTRACTOR shall be considered in default, and STATE may terminate the Contract without penalty.

CONTRACTOR represents and warrants that the above performance Service Levels shall be valid with up to *[Written number]* (#) Users using the system at any given time.

## SCHEDULED MAINTENANCE AND NOTIFICATIONS

### Purpose

This language defines the terms for the contractor's routine, scheduled maintenance periods, e.g. downtime. Agencies should recognize that SaaS solutions do not have 100% uptime guarantees due to scheduled maintenance to ensure the solution remains secure and functional. The section specifies the time periods in which contractor generally conducts system maintenance. It also addresses notification requirements in the event unscheduled, or emergency maintenance is required.

## Recommended Language

### 6. MAINTENANCE AND NOTIFICATIONS

#### a. Standard Maintenance Window(s)

**[CONTRACTOR] Define maintenance window schedule**

#### b. Notification of Scheduled Maintenance Downtime

CONTRACTOR shall provide forty-eight (48) hours advance notice to STATE of any scheduled maintenance downtime which will cause the total scheduled maintenance downtime for the month to exceed **[Written number] (#)** hours or will occur outside of the Standard Maintenance Windows outlined above.

#### c. In cases of emergency, CONTRACTOR shall use its best efforts to notify STATE of a planned downtime as soon as practicable.

## RECOVERY POINT OBJECTIVE (RPO) AND RECOVERY TIME OBJECTIVE (RTO) Purpose

Recovery Point Objectives (RPO) and Recovery Time Objectives (RTO) are critical metrics within an IT contract to mitigate risk of loss related to disaster recovery and business continuity.

RPO specifies the maximum acceptable amount of data loss measured in time. Example, an RPO of four (4) hours means that in the event of failure, the data from the four (4) hours prior to the failure may be lost and unrecoverable.

RTO indicates the maximum acceptable downtime after a system disruption. Example, an RTO of twelve (12) hours means the system(s) should be fully restored and operations within twelve (12) hours of the event of failure/disruption.

## Recommended Language

### 7. RECOVERY POINT OBJECTIVE (RPO) AND RECOVERY TIME OBJECTIVE (RTO)

*Note: The following language will need to match SOW if defined. The RPO and RTO must take into consideration the criticality of the system to the business. For example, the RPO may need to be less than four (4) hours.*

CONTRACTOR commits to a RPO of four (4) hours and RTO of twelve (12) hours. In other words, when unscheduled downtime occurs, CONTRACTOR will resume service with data matching what the system contained at some point within the four hours preceding the unscheduled downtime. Additionally, the system cannot be down for longer than twelve (12) hours during unscheduled downtime.

# DATA SECURITY

## Purpose

The data security language is essential to protecting sensitive, state data or information. It ensures that the contractor is held to specific data security standards and the agency can verify those standards and protocols are in place and operating properly throughout the contract term.

This section also addresses ITD's requirement for third party risk management review process that is part of the IT initial intake process which state agencies are required to complete when contracting for an IT service or product.

***This ITD requirement does not apply to institutions under the control of SBHE. These institutions should ensure IT contracts are reviewed by the institution's assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.***

## Recommended Language

### 8. DATA SECURITY

*Note: The following language may need to be modified to meet the security requirements for the appropriate Data Classification.*

- a. CONTRACTOR shall:
  - 1) Certify the sufficiency of its security standards, tools, technologies, and procedures in providing SaaS under this Contract
  - 2) Compliance with the following:
    - (a) Undergo an annual Statement of Standards for Attestation Engagements (SSAE) Service Organization Control (SOC) 2 Type II audit or equivalent such as ISO 27001 for CONTRACTOR's Control Environment. Audit results and CONTRACTOR's plan to correct any negative findings shall be provided to STATE within seven (7) calendar days upon CONTRACTOR's receipt of such
    - (b) Provide STATE with a detailed description of the audited Control Environment. If STATE determines the Control Environment is not satisfactory, STATE may request CONTRACTOR to correct any deficiencies
  - 3) Compliance with applicable industry standards, law, regulations, and guidelines
- b. CONTRACTOR shall undergo the third-party security questionnaire on an annual basis at no cost to STATE, unless CONTRACTOR has received FedRAMP, StateRAMP, or HiTrust certification. CONTRACTOR shall provide completed questionnaire within twenty-one (21) calendar days of receiving a written request. CONTRACTOR shall undergo the third-party security questionnaire when a breach has occurred.
- c. CONTRACTOR shall implement and maintain all appropriate administrative, physical, technical and procedural safeguards in accordance with Section a. above at all times during the term of this Contract to secure such Data from Data Breach,

protect the Data and the SaaS from hacks, introduction of viruses, disabling devices, malware and other forms of malicious or inadvertent acts that can disrupt STATE's access to its Data.

- d. CONTRACTOR shall allow STATE reasonable access to SaaS security logs, latency statistics, and other related SaaS security data that affect this Contract and STATE's Data, at no cost to STATE.
- e. CONTRACTOR assumes responsibility for the security and confidentiality of the Data under its control.
- f. No Data shall be copied, modified, destroyed or deleted by CONTRACTOR other than for normal operation or maintenance of SaaS during the Contract period without prior written notice to and written approval by STATE.
- g. CONTRACTOR shall return STATE Data in an agreed format. CONTRACTOR shall perform media sanitization in accordance with NIST SP 800-88 for media containing STATE Data. A Data Destruction Certificate shall be provided to STATE within thirty (30) days of termination or expiration and include sanitization method selection (Clear, Purge, or Destroy).

## **ARCHITECTURE**

### **Purpose**

The architecture language ensures that the state agency can review the IT architecture of the contractor's SaaS solution to verify that it meets security standards and appropriately mitigates risk.

### **Recommended Language**

#### **9. ARCHITECTURE**

CONTRACTOR shall provide STATE with detailed architectural diagrams on an annual basis. The architectural diagrams are to include but not limited to servers, hardware, software solution (operating system, application servers, databases, identity repository), network architecture (dataflow diagram, firewalls, proxies, IDS/IPS). CONTRACTOR shall allow STATE reasonable access to review the architecture.

## **ENCRYPTION**

### **Purpose**

Data encryption language is necessary to address protections of sensitive state agency that may be transmitted or hosted during the term of the contract.

### **Recommended Language**

#### **10. ENCRYPTION**

Information designated as sensitive, including PII, shall be encrypted end-to-end while it is in transit and at rest. Data must be encrypted using the most current Federal

Information Processing Standard (FIPS) 140-2 validated cryptographic modules and the current Advanced Encryption Standard algorithm.

## **RIGHTS TO DATA**

### **Purpose**

This rights to data section addresses the obligations of the parties in relation to the state's data that may be accessed, transmitted, hosted, or used in any manner in connection with the obligations of the contractor under the contract. This language grants the contractor a limited license to use the state's data to perform its contractual obligations. It prohibits unauthorized access to the data by third parties and also specifies prohibited use(s) by contractor itself. Finally, it ensures the state agency can export its data, in the agency's preferred format, at any time during the term of the contract and without interference by the contractor.

### **Recommended Language**

#### **11. RIGHTS TO DATA**

The Parties agree that as between them, all rights, including all intellectual property rights, in and to Data shall remain the exclusive property of STATE, and CONTRACTOR has a limited, non-exclusive license to access and use the Data as provided to CONTRACTOR solely for performing its obligations under the Contract. Nothing herein shall be construed to confer any license or right to the Data, including user tracking and exception Data within the system, by implication, estoppel or otherwise, under copyright or other intellectual property rights, to any third party. Unauthorized use of Data by CONTRACTOR or third parties is prohibited. For the purposes of this requirement, the phrase "unauthorized use" means the data mining or processing of data, stored or transmitted by the service, for unrelated commercial purposes, advertising or advertising-related purposes, or for any other purpose other than security or service delivery analysis that is not explicitly authorized.

STATE shall have the ability to export data in partial or in entirety at its discretion without interference from CONTRACTOR. This includes the ability for STATE to export data to other service providers.

## **DATA BACKUP**

### **Purpose**

Data backup language is imperative to address key components of data storage by the contractor. This clause generally addresses frequency of backups, storage and location of storage of data, the type of data requiring backup, retention of backup information, and additional components of data backup that the state agency may require for the scope of the contract.

## Recommended Language

### 12. DATA BACKUP

*Note: Review and modify the backup requirements of agency for business continuity*

- a. CONTRACTOR shall provide geographical disparate storage on a daily basis of all backup disks, data, or materials of any type whatsoever produced in whole or in part in connection with or related to the performance by CONTRACTOR of its obligations under this Contract (including without limitations discs, tapes, other storage media, work papers and partial drafts of documentation code).
- b. CONTRACTOR shall use appropriate and reliable storage media. CONTRACTOR shall regularly back up STATE Data and retain such backup copies for a minimum of twelve (12) months or timeframe required by applicable laws and regulations.

## DATA RETENTION SCHEDULE AND DISPOSAL

### Purpose

A data retention schedule and data disposal language goes with the previous data backup clause. This language outlines the procedures and requirements for data retention during the contract term and data disposal in the even the contract terminates. This section mitigates risk of unauthorized disclosure or access by ensuring data is only retained by the contractor in accordance with the contract and that contractor certifies to the state agency that the data has been properly disposed of upon termination.

## Recommended Language

### 13. DATA RETENTION SCHEDULE AND DISPOSAL

*Note: Review data retention and disposal schedule of agency. If there is a specific retention requirement, update the language below.*

- a. CONTRACTOR shall retain STATE's Data until STATE deletes the Data.
- b. At STATE's election, CONTRACTOR will either securely destroy or transmit to STATE repository any backup copies of STATE Data.
- c. CONTRACTOR shall supply STATE a certificate indicating the records disposed, the date disposed, and the method of disposition.
- d. CONTRACTOR shall retain logs associated with STATE activity for a minimum of twelve (12) months or timeframe required by applicable laws and regulations.

# TRANSITION ASSISTANCE

## Purpose

Transition assistance means the obligation of the contractor to assist the state agency in transitioning from the contractor's current SaaS solution to an upgraded version of the contractor's solution, to a new hosting arrangement, or to another contractor's solution in the event of termination between the state agency and the current contractor.

This language outlines the obligations of the parties during the transition period, the scope of transition services, and the timeline surrounding transition plan implementation. It is recommended that the state agency and the contractor establish and agree upon costs that may be incurred within the negotiated transition plan.

## Recommended Language

### 14. TRANSITION ASSISTANCE

*Note: Transition assistance should be considered as a future option for business continuity. Include costs of transition and support services. It is recommended that a minimum of ninety (90) days be allowed prior to termination for data transition; the agency may negotiate the number with the contractor. The transition plan may be included as a deliverable in the SOW, when plan is a deliverable of the project. If the plan is defined during contract negotiations, it may be placed directly in a transition plan attachment. If this is not applicable, they are to be considered included in the Contract at no additional cost and documented as such.*

- a. For *[Written number]* (#) days prior to the expiration date of this Contract, or upon notice of termination of this Contract, CONTRACTOR shall assist STATE in extracting and/or transitioning all Data securely in the format determined by STATE ("Transition Period"). CONTRACTOR agrees that there shall be no additional fees to execute the transition of Data during Transition Period.
- b. CONTRACTOR and STATE shall develop a Transition Plan ("Transition Plan") detailing each party's respective tasks in connection with the orderly transition and migration of the licensed software, Data, any generated contextual data such as reference tables, metadata, structured and unstructured data not necessarily provided by STATE, and hosting services.
- c. Upon termination or non-renewal of this Contract or in the event STATE makes a determination to host the licensed software at STATE's hosting location or a third-party location as defined in *[SOW or Exhibit [X] (Transition Plan)]*, the Transition Plan shall be implemented.
- d. During the Transition Period, SaaS and Data access shall continue to be made available to STATE without alteration.
- e. Unless otherwise stated in *[SOW or Exhibit [X] (Transition Plan)]*, as determined by STATE, CONTRACTOR shall permanently destroy or render inaccessible any portion of the Data in CONTRACTOR's and/or subcontractor's possession or control following the expiration of all obligations in this section.

Within thirty (30) days, CONTRACTOR shall issue a written statement to STATE confirming the destruction or inaccessibility of STATE's Data.

- f. In the event the Transition Plan is implemented, costs shall not be higher than the current amounts assessed to STATE by CONTRACTOR under this Contract. CONTRACTOR shall provide reasonable assistance as requested by STATE to successfully complete transition. STATE at its option, may purchase additional transition services as agreed upon in the *[SOW or Exhibit [X] (Transition Plan)]*.
- g. In the event the SaaS is decommissioned or no longer offered, the Transition Plan shall be implemented.

## **DATA BREACH**

### **Purpose**

Data breach language is imperative to address liabilities and mitigate risk involved in the event of a data breach or cybersecurity incident. The language outlines the obligations of the parties, including notice requirements and investigation requirements.

### **Recommended Language**

#### **15. DATA BREACH**

- a. Upon discovery or reasonable belief of any Data Breach, CONTRACTOR shall provide notice, by phone and through electronic mail, to the individuals identified in SAAS NOTICE section of this Exhibit. CONTRACTOR shall provide such notification within the lesser of twelve (12) hours or the timeframe required by applicable laws and regulations after CONTRACTOR reasonably believes there has been such a Data Breach. To the extent known at the time of notification, CONTRACTOR's notice shall include:
  - 1) The nature of the Data Breach;
  - 2) The Data accessed, used or disclosed;
  - 3) The person(s) who accessed, used, disclosed, and/or received Data (if known);
  - 4) What CONTRACTOR has done or will do to quarantine and mitigate the Data Breach; and
  - 5) What corrective action CONTRACTOR has taken or will take to prevent future Data Breaches
- b. CONTRACTOR will provide daily updates, or more frequently if required by STATE, regarding findings and actions performed by CONTRACTOR until the Data Breach has been effectively resolved to STATE's satisfaction.
- c. CONTRACTOR shall quarantine the Data Breach, ensure secure access to Data, and repair SaaS as needed in accordance with SLA set above in this attachment. Failure to do so may result in STATE exercising its options for assessing damages or other remedies under this Contract.

- d. CONTRACTOR shall conduct an investigation of the Data Breach and shall share the report of the investigation with STATE. STATE and/or its authorized agents shall have the right to lead (if required by law) or participate in the investigation. CONTRACTOR shall cooperate fully with STATE, its agents and law enforcement.

## **DISASTER RECOVER/BUSINESS CONTINUITY**

### **Purpose**

This language addresses the obligations of the parties in the event of a disaster or catastrophic failure that may result in extensive data loss or extended loss of data access. The language addresses timelines for expected restoration of data and access in addition to notice requirements and investigation requirements.

### **Recommended Language**

#### **16. DISASTER RECOVERY/BUSINESS CONTINUITY**

- a. In the event of disaster or catastrophic failure that results in significant Data loss or extended loss of access to Data, CONTRACTOR shall provide notice, by phone and through electronic mail, to the individuals identified in the SAAS NOTICE section of this exhibit. CONTRACTOR shall provide such notification within twenty-four (24) hours after CONTRACTOR reasonably believes there has been such a disaster or catastrophic failure. In the notification, CONTRACTOR shall inform STATE of:
  - 1) The scale and quantity of the Data loss;
  - 2) What CONTRACTOR has done or will do to recover the Data and mitigate any deleterious effect of the Data loss; and
  - 3) What corrective action CONTRACTOR has taken or will take to prevent future Data loss
  - 4) If CONTRACTOR fails to respond immediately and remedy the failure, STATE may exercise its options for assessing damages or other remedies under this Contract.
- b. CONTRACTOR shall restore continuity of SaaS, restore Data in accordance with the RPO and RTO as set forth in the SLA, restore accessibility of Data, and repair SaaS as needed to meet the performance requirements stated in the SLA. Failure to do so may result in STATE exercising its options for assessing damages or other remedies under this Contract.
- c. CONTRACTOR shall conduct an investigation of the disaster or catastrophic failure and shall share the report of the investigation with STATE. STATE and/or its authorized agents shall have the right to lead (if required by law) or participate in the investigation. CONTRACTOR shall cooperate fully with STATE, its agents, and law enforcement.

# AUDIT AND EXAMINATION

## Purpose

This language authorizes the state agency to audit and examine the contractor's SaaS information, related to the contract, to ensure the SaaS solution continues to operate in accordance with the requirements of the contract. Additionally, the language requires the contractor to conduct a timely audit of its SaaS solution in the event of a disaster or catastrophic event.

## Recommended Language

### 17. AUDIT AND EXAMINATION

- a. Upon advanced request, CONTRACTOR agrees that STATE or its designated representative shall have access to CONTRACTOR's SaaS operational documentation, records and databases, including online inspections, that relate to the SaaS purchased by STATE.
- b. The online inspection shall allow STATE, its authorized agents, or a mutually acceptable third party to test that controls are in place and working as intended. Tests may include, but not be limited to, the following:
  - 1) Operating system/network vulnerability scans,
  - 2) Web application vulnerability scans,
  - 3) Database application vulnerability scans, and
  - 4) Any other scans to be performed by STATE or representatives on behalf of STATE
- c. After any significant Data loss or Data Breach or as a result of any disaster or catastrophic failure, CONTRACTOR will at its expense have an independent, industry-recognized, STATE-approved third party perform an information security audit. The audit results shall be shared with STATE within seven (7) days of CONTRACTOR's receipt of such results. Upon CONTRACTOR receiving the results of the audit, CONTRACTOR will provide STATE with written evidence of planned remediation within thirty (30) days and promptly modify its security measures in order to meet its obligations under this Contract.

# DISCOVERY

## Purpose

This language outlines the obligations of the contractor in the event of a request for information, access to state's data, or service of a subpoena requesting state's data for purposes of litigation. This section requires the contractor notify the state agency of such request prior to responding and prohibits the contractor from responding to legal requests directed at the state agency without authorization from the agency.

## Recommended Language

### 18. DISCOVERY

If CONTRACTOR receives a request which may reasonably be interpreted as requiring access to the Data of STATE or STATE's use of the SaaS, CONTRACTOR shall provide notice, by phone and through electronic mail, to the individuals identified in the SAAS NOTICE section of this Exhibit, unless prohibited by law from providing such notification. CONTRACTOR shall provide such notification within forty-eight (48) hours after CONTRACTOR receives the request. CONTRACTOR shall not respond to subpoenas, service of process, Public Records Act requests, and other legal requests directed at CONTRACTOR regarding this Contract without first notifying STATE unless prohibited by law from providing such notification. CONTRACTOR agrees to provide its intended responses to STATE with adequate time for STATE to review, revise and, if necessary, seek a protective order in a court of competent jurisdiction. CONTRACTOR shall not respond to legal requests directed at STATE unless authorized in writing to do so by STATE.

## SAAS NOTICE

### Purpose

This section provides the pertinent point of contact information for notices specifically required under the SaaS exhibit to the contract. In addition to the state agency and the contractor, ITD requires notice be provided to its Governance, Risk, and Compliance section.

*This ITD requirement does not apply to institutions under the control of SBHE. These institutions should ensure IT contracts are reviewed by the institution's assigned legal counsel and IT personnel to ensure compliance with SBHE policies and procedures.*

## Recommended Language

### 19. SAAS NOTICE

*Note: Modify based on notification requirements in this exhibit as referenced in the sections named DATA BREACH, DISASTER RECOVERY/BUSINESS CONTINUITY and DISCOVERY.*

All notices or other communications required under this exhibit must be provided to the following:

<b>STATE – Agency</b>	<b>CONTRACTOR</b>
<i>[Name]</i>	<i>[Name]</i>
<i>[Title]</i>	<i>[Title]</i>
<i>[Address]</i>	<i>[Address]</i>
<i>[City, State, Zip]</i>	<i>[City, State, Zip]</i>
<i>[Phone]</i>	<i>[Phone]</i>
<i>[Email]</i>	<i>[Email]</i>

<b>STATE – ITD</b>
GRC Team
GRC Team
4201 Normandy Street
Bismarck, ND 58503
(701) 328-4470
<a href="mailto:cygrc@nd.gov">cygrc@nd.gov</a>

## EXHIBIT D – LICENSING

**Note: If this is a SaaS offering, Exhibit D does not apply and will be deleted.**

### SOFTWARE LICENSE

#### Purpose

Software license language is necessary to define the terms under which the licensed software may be use, distributed, and modified. The license outlines ownership (contractor or licensor) rights and the rights granted to the state agency (licensee). License language often addresses liability and risk mitigation between the parties for misuse of the licensed product as well as indemnification for intellectual property infringement claims against the contractor.

It is not uncommon for the contractor to propose its own, standard licensing terms and conditions. The state agency must ensure that those terms and conditions are negotiated and appropriately reflect the licensing arrangement that the agency may have required within a competitive procurement process, if applicable.

#### Recommended Language

##### 1. SOFTWARE LICENSE

*Note: OPTIONAL SOFTWARE LICENSE, SUPPORT, HOSTING CLAUSES – Often CONTRACTOR will provide separate software license and software support/maintenance agreements. Insert the following clauses as necessary in the license agreement. Delete these sections if not applicable.*

All ownership rights to CONTRACTOR’s software provided to STATE under this Contract (intellectual property owned by CONTRACTOR prior to performance of this Contract) shall remain with CONTRACTOR. If CONTRACTOR incorporates any of CONTRACTOR’s Software in any work product provided to STATE, CONTRACTOR agrees to provide written notice to STATE of its incorporation in the work product and to convey to STATE a non-exclusive, perpetual, cost-free license, and patent and copyright indemnity, for STATE to use that software for its intended purpose.

### LICENSE GRANT AND SCOPE OF USE

#### Licensing

This language summarizes the terms of the license grant, specifically to whom the license may extend for the benefit of the state agency.

## Software Functionality and Replacement

This language obliges the contractor to consistently update the software to ensure functionality. It also requires replacement of the software in the event it becomes nonfunctional or is no longer maintained or supported by the contractor.

## Purchase of Additional Licenses

This language ensures the agency may add additional licenses under the same terms and conditions, including pricing, of the contract.

## Delivery of Authorized Software Only

This language specifies that the contractor may only deliver software authorized for use by the state agency.

## Authorized Software Platform

This language ensures that the state agency may transfer the software to any platform, operating system, or database supported by the contractor.

## Recommended Language

### 2. LICENSE GRANT AND SCOPE OF USE

*Note: The Contract should include the broadest usage for the agency that is entering the Contract. If this is a statewide Contract used by multiple agencies, be sure that is clearly conveyed in the scope of the license use language. If this is a critical application that will be using STATE's disaster recovery location, ensure that the Contract allows the application to be installed in a disaster recovery high availability environment.*

#### a. Licensing

- 1) CONTRACTOR grants to STATE a perpetual, nonexclusive license to use the software and associated documentation, plus any additional software which shall be added by mutual agreement of the Parties during the term of this Contract.
- 2) The license usage model is based on **[CONTRACTOR] clearly describe license model, concurrent users, named users, and/or total employees, etc.**
- 3) The license grant shall be extended to any contractors, subcontractors, outsourcing vendors, consultants and others who have a need to use the software for the benefit of STATE.
- 4) There shall be no limit on the number of machines, number of locations, or size of processors on which STATE can operate the software.

#### b. Software Functionality and Replacement

This software, licensed by CONTRACTOR to STATE provides the following functionality:

**[CONTRACTOR] Describe functionality of software product licensed.**

Regarding this software functionality licensed by CONTRACTOR to STATE, CONTRACTOR agrees:

- 1) CONTRACTOR shall provide software/hardware updates at no additional cost to STATE, including any professional services needed.
- 2) If CONTRACTOR reduces or replaces the functionality contained in the licensed product and provides this functionality as a separate or renamed product, then STATE shall be entitled to license such software product at no additional license or maintenance fee.
- 3) If CONTRACTOR releases an option, future product or other release that has substantially the same functionality as the software product licensed to STATE, and it ceases to provide maintenance for the older software product, then STATE shall have the option to exchange licenses for such replacement product or function at no additional charge.

**c. Purchase of Additional Licenses**

STATE may purchase additional software licenses during the term of this Contract at the same price offered by CONTRACTOR under the terms of this Contract.

**d. Delivery of Authorized Software Only**

CONTRACTOR shall not ship any software to STATE that STATE is not authorized to use.

**e. Authorized Software Platform**

STATE may transfer the software, at no additional cost, to any hardware platform, software operating system, or database that CONTRACTOR supports for this software.

## **SOFTWARE MAINTENANCE**

### **Purpose**

The purpose of software maintenance in an IT contract is to provide clear guidance and define the responsibilities and expectations of the parties regarding ongoing maintenance and support, including updates and patches, for the licensed software.

### **Maintenance Fee Cap**

This language is like the renegotiation language in the contract in that it caps the percentage of cost increase that may be assessed to the contractor upon each renewal term or on a specified basis such as annually. State contracts generally limit increases to three percent (3%) or the current Consumer Price Index (CPI), whichever is lower.

## Right to Change Support Plan Level

This language ensures the agency can increase or reduce its support plan during a subscription period so long as the contractor is provided with thirty (30) days' notice of a change. This prevents the agency from being limited during the subscription period if the needs of the agency change.

## Right to Modify or Cancel Support

This language ensures the subscription services are not subject to auto-renewal and the agency may terminate upon thirty (30) days' notice to the contractor prior to the end of the current subscription period. The language also allows the agency to delete or reduce maintenance for a subset of licenses that may no longer be needed; the agency may also increase or reactivate maintenance for lapsed periods.

## Recommended Language

### 3. SOFTWARE MAINTENANCE

CONTRACTOR shall provide, and STATE may subscribe to, Maintenance Services for the product(s) delivered pursuant to this Contract commencing at the end of the warranty period. CONTRACTOR and STATE shall negotiate the terms and price of such Maintenance Services. CONTRACTOR warrants that it will continue to offer Maintenance Services for the product(s) for a minimum of five (5) years from the **date of final acceptance or installation date of any software/product update.**

#### SELECT ONE OR REVISE AS NEEDED

##### Option 1 – DELETE IF NOT USED

The maintenance period begins on *[Month, Day], 20[Year]*, and continues on an annual basis for *[X]* years.

##### Option 2 – DELETE IF NOT USED

The maintenance period begins with a prorated period on *[Month, Day], 20[Year]*, and continues on an annual basis for *[X]* years.

##### a. Maintenance Fee Cap

CONTRACTOR agrees that any change to the annual Maintenance Services fee may increase by not more than the lower of three percent (3%) or Consumer Price Index (CPI). The rates shall be adjusted in accordance with the index titled "All Urban Consumers (CPI-U), for the U.S. City Average, All Items 1982-84=100", prepared by the U.S. Bureau of Labor Statistics.

##### b. Right to Change Support Plan Level

STATE may choose to change its subscription to CONTRACTOR's Maintenance Services plan to a higher or lower-level plan that is offered by CONTRACTOR at this Contract's next renewal date upon thirty (30) calendar days' notice to CONTRACTOR.

##### c. Right to Modify or Cancel Support

- 1) STATE may choose to cancel Maintenance Services at this Contract's next renewal date upon thirty (30) calendar days' notice to CONTRACTOR.

- 2) STATE may delete a subset of licenses that are no longer in use from Maintenance Services at this Contract's next renewal date upon thirty (30) calendar days' notice to CONTRACTOR.
- 3) STATE may resume Maintenance Services for lapsed periods by paying CONTRACTOR an amount no greater than the amount that would have been due if maintenance services had been continued over the lapsed period. Upon payment of such amounts for lapsed periods, CONTRACTOR agrees to provide STATE with the right to any upgrades released during that period.

## **SOFTWARE SUPPORT – SERVICE LEVEL REQUIREMENT**

### **Purpose**

This language is important to ensure that errors are resolved in a timely manner to mitigate any disruption in the licensed software to the agency and its users. This section defines the severity levels of various incidents that may occur, the expected response and resolution times, and the escalation procedure of the contractor. The table provides measurable performance metrics, and the section includes remedies if the contractor fails to meet the metrics.

This section also addresses service level credits. Service level credits are issued to the agency when the contractor fails to meet the defined response and resolution times for incident response. The language outlines the requirements for when service level credits are owed to the agency and how those credits are applied for the benefit of the agency.

**Service level credits for failure to meet support and error resolution response and resolution times should not be confused with service level credits for the contractor's failure to meet the contractual requirement for service availability, e.g. uptime.**

### **Recommended Language**

#### **4. SOFTWARE SUPPORT – SERVICE LEVEL REQUIREMENT**

*Note: Modify the following to meet agency business need. If this is a SaaS purchase, remove this section to avoid duplication.*

CONTRACTOR will respond to STATE requests for software support services regarding the licensed software in accordance with the procedures identified below. In each case, STATE may describe and submit the problem by telephone, email, or online helpdesk/service desk tool. STATE will determine the Severity level. The Severity level will not be changed unless agreed to by STATE and CONTRACTOR.

<b>Incident Severity</b>	<b>Response Time</b>	<b>Resolution Time</b>	<b>Escalation Procedure</b>
<b>High Impact</b> – software unusable	1 hour	Final Resolution within: <b>4 hours</b>	<b>[CONTRACTOR] Describe escalation procedure</b>
<b>Medium Impact</b> – software useable with severely restricted functionality or performance	4 hours	Final Resolution within: <b>8 hours (1 business day)</b>	<b>[CONTRACTOR] Describe escalation procedure</b>
<b>Low Impact</b> – software useable with minor impact on functionality or performance	8 hours	Final Resolution within: <b>40 hours (1 business week)</b>	<b>[CONTRACTOR] Describe escalation procedure</b>

CONTRACTOR’s failure to meet the above defined Response Times or Resolution Times in any given month during the term and any renewal term shall be deemed a service level default (“Service Level Default”) and STATE may obtain the non-exclusive remedies set forth below.

<b>Response and Resolution Service Levels (calculated monthly on a per incident basis)</b>	<b>Service Level Credit (Prorated Feed – Monthly)</b>
Meets Response or Resolution Time	0%
1 <sup>st</sup> Failure to meet Response or Resolution Time	Warning, 0%
2 <sup>nd</sup> Failure to meet Response or Resolution Time	10%
3 <sup>rd</sup> Failure to meet Response or Resolution Time	20%

In the event STATE is eligible for a twenty percent (20%) Service Level Credit under this section for any two (2) consecutive months of the term, STATE may terminate this Contract without penalty upon written notice to CONTRACTOR.

Credits shall be applied against the next invoice. In the event a Service Level Default occurs after a party has given notice of termination, or STATE has made final payment to CONTRACTOR for the software support services, and no further invoices shall issue as a result, CONTRACTOR shall refund to STATE the amount of the appropriate Service Level Credit due for the period of default.

# CHAPTER 7 – LEASE CLAUSES

---

This chapter covers leases of real property (i.e. office space, storage space). (Leases for equipment are covered under contracts for goods.)

## PARTIES – IDENTIFYING THE PARTIES AND PURPOSE

A lease should begin with a recital identifying the parties to the lease. The state should be identified as follows: “This lease (Lease) is between the State of North Dakota acting through its [agency] (STATE) and [ABC Company] (LANDLORD).”

Use one-word descriptive terms, introduced in the opening clause identifying the parties, to refer to the parties throughout the lease. Check to be sure references to the parties are consistent throughout the lease. An example of an acceptable paragraph identifying the parties is: “This agreement is between the State of North Dakota, acting through its Commissioner of Labor (STATE), and ABC Company (LANDLORD).” Note that when this is done the one-word descriptive term is considered a proper noun and, in most cases, no longer needs to be preceded by the definite article “the.” Example: “LANDLORD and STATE will ...” rather than “The LANDLORD and the STATE will ...”.

### Recommended Language

#### PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD).

## SCOPE OF LEASE

### Purpose

Describe the property to be leased in sufficient detail so there is no confusion as to the precise location.

### Recommended Language

#### SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by STATE, hereby leases to STATE the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

---

---

---

---

*[Insert property description of the specific premises to be leased by agency.]*

# OWNERSHIP OF PREMISES

## Purpose

Identify the individuals who may have an ownership interest in the premises being leased by the state entity. “A lease or rental agreement entered under this section must include a list of all owners of the leased property, including each individual with an ownership interest in a business or businesses that directly or indirectly own the leased property if the individual's aggregate ownership interest in the leased property is ten percent or more.” N.D.C.C. § 54-21-24.1.

**Premises owners must be identified as individual persons, not as business entities that may share ownership. If multiple business entities share ownership, a breakdown of the individual owners of those entities must be provided.**

## Recommended Language

### OWNERSHIP OF PREMISES

Pursuant to North Dakota Century Code (N.D.C.C.) § 54-21-24.1, LANDLORD identifies the following individual(s) as an owner(s) of the Premises, including each individual(s) having an ownership interest in a business or businesses that directly or indirectly own the Premises if the individual’s aggregate ownership is the Premises is ten percent or more.

Individual Owner	Business Affiliation	Percentage of Ownership

*[Insert individuals and ownership percentage of the specific premises to be leased by agency. Add additional rows if necessary.]*

## TERM OF LEASE

### Purpose

Identify the period during which the agency and landlord are subject to the lease’s commitments. An agency generally lacks authority to commit funds beyond the term of the current biennium. A lease may extend beyond the current biennium if the agency has express authority to enter the lease or if the Termination clause in the lease allows the agency to terminate the lease if sufficient funds are unavailable, if the law regarding the lease is changed, or space becomes available in a state-owned

government building. *See* N.D.A.G. 77-01. In addition, for most leases, an agency will want to prohibit the landlord from terminating the lease on short notice.

## **Term of Lease**

The Term of Lease clause identifies the start and end of the lease's initial term.

## **No Automatic Renewal**

Leases should only be considered renewed when the agency specifically exercises a unilateral right to renew the lease, both parties agree the lease will be renewed, or the Holding Over clause of the Lease is triggered. Any language (excluding the Holding Over clause) referencing automatic renewal should be struck from a lease. Automatic renewal clauses run the risk of the agency unintentionally entering a renewal term.

## **Renewal Option**

A renewal option is normally used when a multi-year lease is anticipated. A renewal option provides the agency the unilateral right to renew the lease beyond the current lease Term end date. The renewal provision allows the existing lease terms and conditions to be renewed for additional lease terms after the completion of the initial lease term.

When exercising a renewal option, the new term should be specified and acknowledged by the parties in writing in the form of a lease amendment.

## **Recommended Language**

### **TERM OF LEASE**

The term of this Lease (Initial Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

### **Renewal Option**

STATE may renew this Lease upon satisfactory completion of the Initial Term. STATE may execute up to *[Number]* options to renew this Lease under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

## **HOLDING OVER**

### **Purpose**

The Holding Over clause may be necessary if an agency wants to retain possession of a leased premises on a short-term basis under the same lease terms. If an agency remains in possession of the premises after the expiration of the lease, and the landlord accepts rent from the agency, the parties are presumed to have renewed the lease on the same terms and for the same time, not exceeding one year. N.D.C.C. §

47-16-06. Because this statute provides for extension up to one year, agencies are encouraged to use the recommended language specifying any renewal under the Holding Over clause is on a month-to-month basis.

**An agency should be reluctant to consider alternatives to this language and should only do so after consulting its assigned legal counsel.**

## Recommended Language

### HOLDING OVER

If STATE remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from STATE, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

## RENTAL PAYMENTS

### Purpose

The Rental Payments clause identifies the amount of money the agency must pay pursuant to the lease. The lease should indicate the amount **per square foot** for the specific location being leased and provide a total amount per annum that the agency will pay landlord for rent.

This clause should be specific as to when rental payments will be due landlord and to where rental payments may be made by the agency.

## Recommended Language

### RENTAL PAYMENTS

STATE shall pay rent (Rent) for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent shall be paid in advance by the 10<sup>th</sup> day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert Landlord's address]*, unless STATE is notified otherwise in writing by LANDLORD.

# LANDLORD'S OBLIGATIONS

## Purpose

Leases usually contain a Landlord's Obligations clause identifying the duties owed by the landlord to the agency as a tenant. These duties often include utilities, janitorial services, and grounds keeping. The inclusion of these items will largely depend upon how the lease is negotiated. The list of duties identified below is not exhaustive or required, but is merely a suggested starting point, and the agency is encouraged to review the duties and requirements to ensure their needs are met. An agency should, however, make parking access a priority for office space leases.

## Recommended Language

### LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which must be done daily, including furnishing related supplies.
- c. To perform all maintenance and repairs requested by STATE which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the Premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. If other portions of the building are leased to other parties, not to permit any activity to be conducted in other portions of the building or grounds that will materially interfere with STATE's use and enjoyment of the Premises.
- f. To allow STATE to install items it deems necessary for maximum and optimum use of the Premises. STATE may, at any time, remove from the Premises all fixtures and other equipment owned by STATE; provided the removal is completed before termination of this Lease, including any Renewal Term.
- g. To allow STATE to place decorations, wall hangings, signs, and directories upon entrance doors, in hallways leading to its Premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by STATE, its agents, or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the Term of the Lease.

## STATE'S OBLIGATIONS

### Purpose

Similarly, many leases contain a State's Obligations clause that identifies the duties owed by the agency as a tenant to the landlord. These obligations will also depend, in large part, upon how the lease is negotiated. Obviously, an agency wishing to keep its costs down will want to limit the obligations it is willing to assume.

### Recommended Language

#### STATE'S OBLIGATIONS

- a. To pay the Rent when due;
- b. To pay for its own telephone service;
- c. To keep the Premises in a reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty;
- d. Not to make any unlawful, improper, or offensive use of the Premises, and to observe all the laws of the state of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises;
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises;
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of Rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD; and
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE and to repair any damage that may be done to the Premises resulting from the removal of these items, if any.

## TERMINATION OF LEASE

### Purpose

A lease should contain a Termination clause so the lease may be cancelled under the appropriate circumstances. An agency should not enter a lease that allows the landlord to terminate the lease with little or no notice to the agency.

### Recommended Language

#### TERMINATION OF LEASE

STATE has no obligation under this Lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this Lease by providing thirty (30) days' written notice, if space becomes available within a state-owned government

building, if its legislative appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law, government directive (i.e. by Governor for executive branch agencies or agency heads), or by reductions in federal or other grant funds to a point, STATE deems insufficient to pay the full rental cost for the remainder of the Term of this Lease.

During the Term of this Lease or any renewal or extension, STATE may terminate this Lease by providing thirty (30) days' written notice to LANDLORD if LANDLORD fails to comply with any of its obligations under this Lease or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rule.

### **TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES**

If the leased Premises are destroyed or damaged by fire or the elements to the extent it becomes untenable, LANDLORD, within twenty (20) days of the happening of the event, must give written notice of intention to restore the building and fully restores the Premises within a reasonable time. If LANDLORD fails to provide written notice of intention to restore the Premises, STATE may terminate the Lease. During the time between destruction and restoration of the Premises Rent shall not be due, and if Rent has already been paid, LANDLORD shall refund to STATE the portion of the prepaid Rent attributable to the time during which STATE was unable to use the Premises for its intended use.

## **MERGER AND MODIFICATION**

### **Purpose**

The Merger and Modification clause is necessary to confirm the provisions of the lease supersede any prior oral negotiations and prevent subsequent, unwritten communications from being considered amendments to the lease. The clause should also explain how the lease may be amended.

### **Recommended Language**

#### **MERGER AND MODIFICATION**

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

## **SEVERABILITY**

### **Purpose**

The Severability clause should be included in a lease so that if one or more provisions in the lease are declared illegal, and performance of the lease without the illegal clause is possible, the remaining terms of the lease will remain enforceable. Lease termination could be an option if it suited the situation.

### **Recommended Language**

#### **SEVERABILITY**

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain the illegal or unenforceable term.

## **ASSIGNMENT – SALE OF PREMISES**

### **Purpose**

The Assignment – Sale of Premises clause allows an agency to maintain its status as tenant if the landlord sells the premises to another party. This clause also restricts the agency from assigning or subleasing the premises to a third party, excluding other agencies, without the landlord's written consent.

### **Recommended Language**

#### **ASSIGNMENT – SALE OF PREMISES**

This Lease must not be assigned or subleased by STATE without LANDLORD's written consent, unless to another state entity. This Lease does not terminate if the Premises are sold but continues throughout its entire Term, including any exercised or remaining Renewal Term(s).

## **NOTICE**

### **Purpose**

The lease should contain a Notice clause identifying the representative of each contracting party to whom notices required under the lease must be provided. Notice requirements, however, do not replace or supersede any other statutory notice requirement.

## Recommended Language

### NOTICE

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses, or by email complete on the date sent:

<b>STATE</b>	<b>CONTRACTOR</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip
Email	Email

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

## APPLICABLE LAW AND VENUE

### Purpose

The Applicable Law and Venue clause is necessary to identify the law governing the lease and the court or courts in which lease disputes may be heard. The goal of this provision is to have a lease interpreted according to North Dakota law (i.e., applicable law) and any dispute resolved in North Dakota state courts (i.e., venue).

Absent legislative authority, an agency may not agree to submit to the jurisdiction of the federal courts, or to the court of another state or foreign country. N.D. Const. art. I, § 9. If an agency were to agree to federal court jurisdiction, the state's 11th Amendment immunity could be waived. Generally, the federal courts lack jurisdiction because a state is not considered a citizen for purposes of diversity jurisdiction.

Subjecting the agency to another state's laws or jurisdiction or that of a foreign country may not be in the agency's (the state's) best interests and any risks involved must be weighed against those interests through legal consultation.

**If a landlord is unwilling to agree to be bound by North Dakota law or to be subject to the jurisdiction of North Dakota courts, the state agency must consult with its assigned legal counsel, the Office of Attorney General, and the OMB Risk Management Division.**

## **Recommended Language**

### **APPLICABLE LAW AND VENUE**

This Lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of *[Premises location]* County, North Dakota. Each Party consents to the exclusive jurisdiction of the state District Court located in *[Premises location]* County, North Dakota and waives any claim of lack of jurisdiction or *forum non conveniens*.

## **ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

### **Purpose**

Occasionally a landlord will propose a clause that requires lease disputes to be resolved through alternative dispute resolution. An agency is without authority to agree to mandatory mediation or arbitration. “The director of [OMB], in consultation with the head of the state agency involved and the attorney general, may agree to submit a claim covered by the state risk management fund to mediation or binding arbitration.” N.D.C.C. § 32-12.2-05.

Although alternative dispute resolution may be helpful as a cost-effective alternative to litigation, the Attorney General does not recommend this type of dispute resolution as the required first step in resolving a dispute. The Attorney General has the authority to determine the best course of action for an agency to resolve a dispute, including instituting litigation as the first option if it is determined to be in the best interests of the state.

**Without specific, legislative authority, agencies are without the authority to bind the state to an alternative dispute resolution process.**

**“The attorney general and the attorney general’s assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state to do so.” N.D.C.C. § 54-12-02.**

This is not to say that an agency is prohibited from resolving disputes through a mutually agreed upon process between the agency (in consultation with its assigned legal counsel) and the landlord. Generally,

resolving disputes or disagreements at the lowest level is viewed as being in the best interests of all parties.

**HOWEVER**, it should be noted that mandating any form of alternative dispute resolution as the first step in resolving a dispute, or mandating the agency bind the state to a specific dispute process prior to pursuing litigation in a court of law, is something to which an agency is without authority to agree.

An agency should not waive the right to litigate if the parties are unable to reach a resolution or settlement that is authorized by law. Generally, an agency should not waive any right to a jury trial. However, although uncommon, there may be certain leases that are better suited for a bench trial if litigated. An agency's assigned legal counsel should be consulted when determining this language.

## **Recommended Language**

### **ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

By entering this Contract, STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

## **SPOILIATION (DESTRUCTION OR SEVERE MODIFICATION OF EVIDENCE)**

### **Purpose**

The Spoliation clause is included in a lease to require a landlord be responsible for preventing spoliation (destruction or severe modification of evidence), particularly when the scene of an accident or claim is beyond the state's control. It also identifies responsibilities for controlling the scene of an accident or potential claim and for preserving any relevant evidence of the circumstances surrounding the accident or potential claim.

Determining the cause of an accident is important for future loss prevention and for determining responsibility for the accident. Spoliation can interfere with proper investigation of an accident, jeopardize, or nullify applicable insurance coverage, and even result in a separate lawsuit against the party responsible for the spoliation. However, controlling the scene of an accident and preservation of evidence should not take priority over public safety.

For further information on spoliation, consult the Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB. The manual can be found under "Risk Services" of the "Team Member Resources" tab at [Team ND Connect](#).

## **Recommended Language**

### **SPOILIATION – PRESERVATION OF EVIDENCE**

LANDLORD shall notify STATE promptly of all potential claims that arise from or result from this Lease. LANDLORD also shall take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and shall grant to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

## INDEMNIFICATION

**Absent legislative authority or specific statutory authority, an agency may NOT agree to indemnify a party to a lease.**

### Purpose

The Indemnification clause is often the most contentious in any lease negotiation. The purpose of the clauses is to allocate responsibility for risks of liability and costs of legal defense that may arise out of the lease. The clause ensures that the party exercising control over the activities governed by the lease, and in the best position to implement safety and loss control practices, retains as much risk of liability and costs of legal defense as is commercially reasonable.

When leasing with political subdivisions, an agency's ability to limit its liability is statutorily constrained. N.D.C.C. § 32-12.2-13. An agency should consult with its assigned legal counsel regarding any lease with a political subdivision.

### Recommended Language

#### INDEMNIFICATION

*NOTE: The Risk Management Division of OMB has sample indemnity and limitation of liability language that should be used in each lease with the state. Depending upon the type of lease, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division and determine which clause is best suited for your specific situation. The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB can be found under "Risk Services" of the "Team Member Resources" tab at [Team ND Connect](#).*

## INSURANCE

### Purpose

The Insurance clause is necessary to ensure that sufficient coverage is in place to cover all claims against the landlord, and any claims and costs the state might incur. Thus, it is important to identify the types and amounts of insurance coverage that will be maintained by the parties to the lease. An agency should make sure the insurance coverage required by the lease will cover the types of claims that may arise under that lease.

The benefit of requiring a landlord to indemnify the state or have certain levels of insurance coverage, or both, can be easily neutralized if the details of the landlord’s insurance policy are written in a way to effectively exclude from coverage the very claims the state wants covered by the policy. For example, an insurance policy offers little protection if it is offered by an insolvent insurer or if the policy has an unusually high deductible.

It is common for a landlord to omit or remove any clause requiring the state be named as an additional insured.<sup>25</sup> However, agencies should be aware of the significant risk this poses to the state and decreased protection from liability. Without an additional insured endorsement, the insurance coverage will generally cover claims against the landlord but disregard claims against the state. An attempt to seek indemnity from the landlord personally may be unsuccessful because the landlord may have insufficient assets to fulfill the landlord’s duty to indemnify the state.

## Required Coverages

### INSURANCE

*NOTE: The Risk Management Division of OMB has sample insurance language that should be used in each lease with the state. Depending upon the type of lease, different provisions may be used. It is therefore imperative that you review the language provided by the Risk Management Division, and determine which clause is best suited for your specific situation. The Guidelines to Managing Contractual Risk Manual of the Risk Management Division of OMB can be found under “Risk Services” of the “Team Member Resources” tab at [Team ND Connect](#).*

## CONFIDENTIALITY

### Purpose

The Confidentiality clause is used by parties to ensure that certain information remains confidential. This clause should explain the obligations of the parties in maintaining, releasing, and discarding information that is confidential.

Unique to leases, an agency must also ensure that the landlord understands and acknowledges that some information stored on the premises may be confidential and landlord must protect that information in accordance with state law.

**Regardless the language of the lease, all parties must abide by applicable confidentiality laws.**

Landlords frequently ask the agency to keep all information provided by a landlord confidential. The public records law does not allow an agency to deny a request for records unless the records are closed or confidential under a specific law.

---

<sup>25</sup> “If indemnification is required, the contract must require that the state be endorsed on the contractor’s commercial general liability policy as an additional insured or must require an equivalent form of protection for the state.” N.D.C.C. § 32-12.2-17.

Further information regarding public records and meetings may be found at [ND Attorney General Open Records and Meetings](#).

**An agency is without authority to agree to keeping records confidential under a contract that are not specifically excluded from public disclosure in accordance with applicable laws.**

## Recommended Language

### CONFIDENTIALITY

LANDLORD may not use or disclose any information it receives from STATE under this Lease which STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Lease or as authorized in advance by STATE. STATE may not disclose any information it receives from LANDLORD that LANDLORD has previously identified as confidential and that STATE determines is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and LANDLORD to maintain confidentiality of information under this section continues beyond the Term of this Lease.

LANDLORD acknowledges STATE possesses substantial amounts of information at the leased Premises that is confidential pursuant to state law. LANDLORD, if it views, comes into possession of, or otherwise becomes knowledgeable of confidential information located at the leased Premises, shall maintain the confidentiality of that information and shall refrain from re-disclosing that information to any third party. LANDLORD shall require, by contract, any agent it retains to fulfill its obligations otherwise set out in this Lease to similarly maintain the confidentiality of any information agent views, comes into possession of, or about which agent otherwise becomes knowledgeable. Those indemnity provisions otherwise set out in this Lease specifically apply to this confidentiality requirement.

## COMPLIANCE WITH PUBLIC RECORD LAWS

### Purpose

A state lease should contain a clause notifying a landlord the lease is subject to the state public records laws and advise the landlord of its responsibilities under the public records law.

As previously indicated, the parties must comply with the public records laws even if this clause is omitted. Including this clause in the lease places landlords on notice regarding the requirements of the public records laws and prevents misunderstandings about how those laws may apply to certain records.

An agency should consult with its assigned legal counsel to determine whether a lease should also include language notifying a landlord that it could be considered a public entity under N.D.C.C. ch. 44-04 and N.D.C.C. § 44-04-17.1(13)(c) which would subject the landlord to the public meetings laws.

## **Recommended Language**

### **COMPLIANCE WITH PUBLIC RECORDS LAWS**

Under the North Dakota public records law and subject to the Confidentiality clause of this Lease, certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from LANDLORD under this Lease, (b) records obtained by either Party under this Lease, and (c) records generated by either Party under this Lease.

LANDLORD agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to that request.

## **STATE AUDIT**

### **Purpose**

The State Audit clause informs a landlord of the State Auditor's authority to "...examine the books and accounts of all private institutions with which the state has any dealings so far only as the same related to such dealings." N.D.C.C. § 54-10-19. This clause is included to inform a landlord of the State Auditor's obligations to audit agencies when required under law. An agency is without authority to limit the State Auditor's ability to perform statutory duties and obligations. Agencies should not accept language proposing to limit the number or occurrences of audits conducted under this lease clause.

### **Recommended Language**

#### **STATE AUDIT**

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of LANDLORD relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. LANDLORD shall maintain these records for at least three (3) years following completion of this Lease and shall be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to LANDLORD prior to conducting examination.

## **COUNTERPARTS**

### **Purpose**

The Counterparts clause allows parties to the lease, often located in different cities or states, may each sign a different, but identical, copy of the lease. In other words, not all parties need to sign the same page or sign in person.

## Recommended Language

### COUNTERPARTS

This Lease may be executed in multiple, identical counterparts, each of which is to be deemed an original, and all of which taken together constitute one and the same lease.

## EFFECTIVE DATE OF LEASE

### Purpose

All leases should contain an effective date which will indicate when the lease should begin, and when the terms of the lease are enforceable.

## Recommended Language

### EFFECTIVENESS OF LEASE

This Lease is not binding on STATE until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

## APPROVAL

**All leases, including renewals, to which an agency is a party MUST be approved by OMB Facility Management and be reviewed by the Office of Attorney General in compliance with N.D.C.C. § 54-21-24.1 and OMB Facility Management policies and procedures.**

The procedure for completing a state office lease may be found under “Leasing Office Space” of the “Purchasing and Leasing” tab found at [Team ND Connect](#).

## SIGNATURES

### Purpose

The signatures on the lease should match the parties identified in the introduction to the lease. When leasing with a corporation or business, the person who signs the lease should be an officer or other person with authority to act for the corporation or business. If the person is not an officer with apparent authority, insist on a board resolution, power of attorney from an officer, or some documentation showing the person is authorized to act on behalf of the corporation or business.

All signatures must be dated, accurately reflecting the date on which the lease was signed, and if not signed electronically, written in ink, preferably in blue ink for easy identification of an original

signature. The official title or position of the individuals executing the lease should appear below each signature line.

Electronic signatures are provided for in N.D.C.C. ch. 9-16. The state's ITD has created guidelines for state agencies to consult when electronic signatures are requested.

# APPENDICES

---

## APPENDIX 1

### 1. GOODS and SERVICES CONTRACTS

- a. Goods and Services Contract Checklist
- b. Template, Goods and Services Contract

## APPENDIX 2

### 2. INFORMATION TECHNOLOGY CONTRACTS

- a. Information Technology Contract Checklist
- b. Template, Information Technology Contract
  - 1) Template, Exhibit A Statement of Work (SOW)
  - 2) Template, Exhibit B Compensation Details
  - 3) Template, Exhibit C Software as a Service (SaaS) and Service Level Agreement (SLA)
  - 4) Template, Exhibit D Licensing

## APPENDIX 3

### 3. PUBLIC IMPROVEMENT (CONSTRUCTION) Contract Checklist

## APPENDIX 4

### 4. LEASES

- a. Agency as Tenant
  - 1) Lease Checklist
  - 2) Template, Lease
- b. Agency as Landlord
  - 1) Lease Checklist
  - 2) Template, Lease
- c. Interagency Lease
  - 1) Lease Checklist
  - 2) Template, Lease

## APPENDIX 5

### 5. INTERAGENCY AGREEMENTS

- a. Agreement Checklist
- b. Template, Agreement

## APPENDIX 6

### 6. JOINT POWERS AGREEMENTS

- a. Joint Powers Agreement Checklist (Civil)
- b. Joint Powers Agreement Checklist (Law Enforcement)

## GOODS AND SERVICES CONTRACT CHECKLIST

- 1. Does the agency or official have the authority to enter the contract?
- 2. Does the agency have an appropriation for the subject matter of the contract?
- 3. Does the other party have the authority to enter the contract?
- 4. Has the proposed contract been reviewed by the agency's assigned legal counsel?
- 5. Is the contract in writing with all pages numbered?
  - Does the contract contain any exhibits or attachments?
  - Are all the documents appropriately numbered or labeled and attached?
- 6. Are all payment amounts and dates correct?
- 7. Are there any handwritten changes or other alterations to the contract?
  - If so, have all the changes or alterations been initialed by all signers?
- 8. Are the parties properly identified in the introductory paragraph or first clause?
- 9. Has the contract been checked for the following ambiguities and inconsistencies:
  - If recitals are used, are they unambiguous and consistent with the terms of the contract?
  - Are all references to parties, exhibits and other things internally consistent?
  - Are all references to other clauses, attachments or other applicable documents correct?
- 10. Are all terms unambiguous or clearly defined?
  - Is the contract written in plain English using the present tense and the active voice?
  - Are the terms "shall," "may," and "must" used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
  - Is the connective "and" used properly in the conjunctive?
  - Is "or" used properly in the disjunctive?
  - Is it clear to what any modifier or dependent clause refers?
  - Where particulars are listed, is it clear whether the list is exhaustive?
- 11. If the contract contains a "liquidated damages" provision, was it drafted and approved by the agency's assigned legal counsel?
- 12. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 13. Is the name and title or position of each person signing the document listed below the signature line?
  - Do all signatures match the typed or printed names?
- 14. If contracting with a corporation:
  - Has at least one officer of the corporation signed the document?

- If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- 15. Does the contract specify both the date on which it begins and the date on which it ends?
- 16. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 17. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- 18. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed as required by law?
- 19. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- 20. Is approval needed from the Attorney General and the director of the OMB?
- 21. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

## TEMPLATE, GOODS AND SERVICES CONTRACT

### 1. PARTIES

The parties to this contract (Contract) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business, a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (CONTRACTOR).

### 2. SCOPE OF WORK

CONTRACTOR, in exchange for the compensation paid by STATE under this Contract, shall provide the following:

---

---

---

---

*[Describe what is to be done under the contract. If the description is too vague, it will be difficult for the state to enforce the contract or establish a breach of contract by the contractor. If the Scope of Work is a lengthy document, you may consider referencing the Scope of Work as a separate exhibit at the end of the contract.]*

### 3. COMPENSATION – PAYMENTS

#### a. Contractual Amount

STATE shall pay for the accepted services provided by CONTRACTOR under this Contract an amount not to exceed *[Amount]* (Contractual Amount).

The Contractual Amount is firm for the duration of this Contract and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Contract regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Contract.

#### b. Invoicing

The final cost set forth on each invoice must be equivalent to the cost for each service or goods as specified in the Scope of Work. CONTRACTOR may not submit an invoice for any service or goods specified in the Scope of Work that STATE has not fully accepted.

STATE may only expend public funds for any service or goods accepted within the Fiscal Year for which the funds are appropriated. STATE's Fiscal Year is July 1 through June 30. An invoice for any service or goods accepted within the Fiscal Year must be dated prior to July 1 and received by STATE no later than July 7 of each Fiscal Year.

**c. Payment**

- 1) Payment made in accordance with this Compensation section constitutes payment in full for the services and work performed and the deliverables and work(s) provided under this Contract and CONTRACTOR may not receive any additional compensation under this Contract.
- 2) STATE shall make payment under this Contract within forty-five (45) calendar days after receipt of an approved invoice.
- 3) Payment of an invoice by STATE will not prejudice STATE's right to object to or question that or any other invoice or matter in relation to the Contract. STATE may reduce CONTRACTOR's invoice for amounts included in any invoice or payment previously made which are determined by STATE not to constitute allowable costs, on the basis of audits conducted in accordance with the terms of this Contract. STATE may reduce any payments for amounts equal to prior overpayments to CONTRACTOR.
- 4) STATE may deduct the amount owed or that will be owed to STATE by CONTRACTOR from payments that are or will become due and payable to CONTRACTOR under this Contract.

***NOTE: If your contract allows for separately billed travel expenses (i.e.: outside of fixed price contract), modify or delete the following clauses as applicable:***

**d. Travel**

Travel costs are covered by the Contractual Amount. CONTRACTOR may not invoice STATE for travel costs.

***OR***

STATE shall reimburse CONTRACTOR for expenses related to travel as outlined below:

- 1) **Lodging:** Reimbursement may not exceed the published GSA rate for the travel location in effect for the dates of travel. CONTRACTOR shall provide copies of

receipts for lodging reimbursement. STATE may not reimburse incidental and miscellaneous expenses charged to the room.

2) **Transportation:** STATE shall reimburse air travel at the actual cost of air fare for coach class travel only. CONTRACTOR shall make air travel arrangements at least fourteen (14) days in advance whenever possible. STATE shall determine reasonable rates for the reimbursement of rented, chartered, or contracted vehicle transportation.

3) **Meals:** STATE shall reimburse meals on a per diem basis for each day of travel at the published GSA per diem rate in effect for the dates of travel for the travel location. STATE shall pay per diem for the first and last day of travel at seventy-five percent (75%) of the GSA per diem rate. CONTRACTOR's requests for per diem payments must specify the start and end dates of travel, the location where the services are performed, and the allowable per diem amount for each trip on the billing/invoice.

Payment for any travel expenses that exceed the travel budget as agreed by the Parties must be approved by STATE.

**e. Prepayment**

STATE will not make any advance payments before performance or delivery by CONTRACTOR under this Contract.

**f. Payment of Taxes by STATE**

STATE is not responsible for and will not pay local, state, or federal taxes. STATE sales tax exemption number is E-2001. STATE will furnish a certificate of exemption upon request by CONTRACTOR.

**g. Taxpayer ID**

CONTRACTOR'S federal employer ID number is: *[Insert FEIN]*

**h. Payment Methods**

- 1) STATE may make payment using a government credit card. CONTRACTOR shall accept a government credit card without passing the processing fees for the government credit card back to STATE.
- 2) STATE may make payment using an ACH transfer, wire transfer, or by issuing a check to CONTRACTOR.

**4. TERM OF CONTRACT**

*NOTE: The Term should either begin on a specific date (post-execution) OR, if no start date is specified, on its Effective Date (the date of execution). Do NOT include both descriptors in this clause.*

This Contract term (Term or Initial Term) begins on *[Month, Day], 20[Year]* or its *Effective Date*, and ends on *[Month, Day], 20[Year]*.

**a. No Automatic Renewal**

This Contract will not automatically renew.

*Note: Any exercise of an Extension, Renewal, or Renegotiation requires a written contract amendment identifying the amended terms and conditions. Contract amendments should be drafted in consultation with an agency's assigned legal counsel.*

**b. Renewal Option**

*NOTE: A Renewal provision is normally used when a multi-year contract is anticipated. The renewal provision allows the contract to be renewed for additional terms after the completion of the initial contract period.*

STATE may renew this Contract upon satisfactory completion of the Initial Term. STATE may execute up to *[Number]* options to renew this Contract under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

**c. Extension Option**

*Note: An Extension provision is a brief period used to wrap up ongoing work that could not be completed by the end of the contract. It may also be used when all renewal options have been exercised, and additional time is needed to close out the Contract.*

STATE reserves the right to extend this Contract for an additional period, not to exceed *[Number]* months, beyond the current termination date of this Contract.

**d. Renegotiation Option**

*NOTE: A Renegotiation option would normally be used for a strategic solution/product, for example a critical line-of-business application that is expected to be used for an extended period of time and where it is in the state's best interest to have the ability to renegotiate the contract. Renegotiation occurs after completion of the initial term and any extensions and renewals.*

Because it is unknown how long the solution and services will be used by STATE and ongoing maintenance and support are required for as long as the system is operational, STATE and CONTRACTOR may renegotiate this Contract. After completion of the initial Term, renewals, and extensions, STATE and CONTRACTOR may renegotiate the pricing

and Term of this Contract. STATE and CONTRACTOR shall agree on new pricing and Term as set forth and executed in writing.

If, during the initial Term, any renewal, or extension, STATE determines a realignment of the Term is needed (e.g. to align with STATE'S fiscal biennium), the parties may agree, in writing, to a new Term with a termination date not to exceed the total available length of Contract including its initial Term, renewals, and extensions.

## **5. TIME IS OF THE ESSENCE**

***NOTE: Generally, if time is not of the essence, reasonable delay in performance does not constitute a material breach; unreasonable delay constitutes a material breach. If time is not of the essence, DELETE this clause.***

Time is of the essence for performance under this Contract unless otherwise agreed in writing by the Parties.

## **6. TERMINATION**

### **a. Termination for Convenience or by Agreement**

STATE may terminate this Contract upon thirty (30) days' written notice to CONTRACTOR. This Contract may be terminated by consent of both Parties executed in writing.

### **b. Early Termination in the Public Interest**

STATE is entering into this Contract to carry out the public policy of the State of North Dakota, as determined by its Governor, Legislative Assembly, Agencies and Courts. If this Contract ceases to further the public policy of the State of North Dakota, STATE, in its sole discretion, by written notice to CONTRACTOR, may terminate this Contract in whole or in part.

### **c. Termination for Lack of Funding or Authority**

STATE by written notice to CONTRACTOR, may terminate the whole or any part of this Contract under any of the following conditions:

- 1) If funding from federal, state, or other sources is not obtained or continued at levels sufficient to allow for purchase of the services or goods under this Contract in the indicated quantities or term.
- 2) If federal or state laws or rules are modified or interpreted in a way that the services or goods are no longer allowable or appropriate for purchase under this Contract or are no longer eligible for the funding proposed for payments authorized by this Contract.

- 3) If any CONTRACTOR license, permit, or certificate required by law or rule, or by the terms of this Contract, is for any reason denied, revoked, suspended, or not renewed.

Termination of this Contract under this subsection is without prejudice to any obligations or liabilities of either Party already accrued prior to termination.

**d. Termination for Cause.**

STATE may terminate this Contract effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- 1) If CONTRACTOR fails to provide services or goods required by this Contract within the time specified or any extension agreed to in writing by STATE; **or**
- 2) If CONTRACTOR fails to perform any provisions of this Contract or fails to pursue the work so as to endanger performance of this Contract in accordance with its terms.

The rights and remedies of STATE provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

**7. FORCE MAJEURE**

Neither Party will be held responsible for delay or default caused by fire, riot, terrorism, pandemic, acts of God, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default. If CONTRACTOR is the affected Party and does not resume performance within fifteen (15) days or another period agreed between the Parties, STATE may seek all available remedies, up to and including termination of this Contract pursuant to its Termination Section, and STATE is entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.

**8. RIGHT TO REMEDIES AND CUMULATION OF RIGHTS**

No remedy conferred by any of the specific provisions of this Contract is intended to be exclusive of any other remedy, and each and every remedy shall be cumulative and shall be in addition to every other remedy given under this Contract, now or in the future existing at law or in equity or by statute or otherwise.

**9. NON-WAIVER**

Either party's failure to exercise any of its rights under this Contract, its delay in enforcing any right, or its waiver of its rights on any occasion, shall not constitute a waiver of such rights on any other occasion. No course of dealing by either party in exercising any of its rights shall

constitute a waiver thereof. No waiver of any provision of this Contract shall be effective unless it is in writing and signed by the party against whom the waiver is sought to be enforced.

## 10. INDEMNIFICATION

*[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at [Team ND Connect.](#)]*

## 11. INSURANCE

*[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at [Team ND Connect.](#)]*

## 12. WORKS FOR HIRE

All work(s) under this Contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and CONTRACTOR assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Contract for STATE are the sole property of STATE, and CONTRACTOR assigns and transfers all its right, title, and interest in the software and related materials to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE’s intellectual property rights under this section.

## 13. WORK PRODUCT

All work product, equipment or materials created for STATE or purchased by STATE under this Contract belong to STATE and must be immediately delivered to STATE at STATE’s request upon termination of this Contract.

## 14. NOTICE

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses, or by email complete on the date sent:

<b>STATE</b>	<b>CONTRACTOR</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip
Email	Email

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

## **15. CONFIDENTIALITY**

CONTRACTOR may not use or disclose any information it receives from STATE under this Contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Contract or that STATE has authorized in advance. STATE may not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the Term of this Contract.

## **16. COMPLIANCE WITH PUBLIC RECORDS LAWS**

Under the North Dakota public records law certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from CONTRACTOR under this Contract, (b) records obtained by either Party under this Contract, and (c) records generated by either Party under this Contract.

CONTRACTOR shall contact STATE immediately upon receiving a request for information under the public records law and shall comply with STATE's instructions on how to respond to that request.

## **17. INDEPENDENT ENTITY**

CONTRACTOR is an independent entity under this Contract and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR's activities and responsibilities under this Contract, except to the extent specified in this Contract.

## **18. ASSIGNMENT AND SUBCONTRACTS**

CONTRACTOR may not assign or otherwise transfer or delegate any right or duty without STATE's express written consent, provided, however, that CONTRACTOR may assign its rights and obligations under this Contract if there is a change of control or sale of all or substantially all of CONTRACTOR's assets related to this Contract, whether by merger, reorganization, operation of law, or otherwise. If Assignee is a business or entity with whom STATE is prohibited from conducting business, STATE may terminate this Contract in accordance with the Termination for Cause section of this Contract.

CONTRACTOR may enter subcontracts provided that any subcontract acknowledges the binding nature of this Contract and incorporates this Contract, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor with whom

CONTRACTOR contracts. CONTRACTOR may not contract for or incur obligations on behalf of STATE.

## **19. SPOILIATION – PRESERVATION OF EVIDENCE**

CONTRACTOR shall notify STATE promptly of all potential claims that arise or result from this Contract. CONTRACTOR also shall take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

## **20. MERGER AND MODIFICATION, CONFLICT IN DOCUMENTS**

*NOTE: For brevity, only four documents have been included. Please make sure you list all documents to be considered including amendments to the RFP or proposal, Best and Final Offers, Questions and Answers to the RFP, etc. In addition, make sure the order of these documents always has STATE's documents first, and CONTRACTOR's documents last, to ensure STATE's documents always take precedence. Consult with your assigned legal counsel if you have questions on the order of precedence.*

This Contract, including the following documents, constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Contract. This Contract may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

Notwithstanding anything herein to the contrary, if there is any inconsistency or conflict among the documents making up this Contract, the documents must control in this order of precedence:

- a. The terms of this Contract as may be amended;
- b. STATE's Solicitation Amendment(s) to Request for Proposal ("RFP") number *[X]*;
- c. STATE's Request for Proposal ("RFP") number *[X]*, dated *[X]*;
- d. CONTRACTOR's proposal dated *[X]* in response to RFP number *[X]*.

Unless negotiated between the Parties and incorporated into this Contract by reference, all automated end-user agreements (e.g., click-through, shrink-wrap, or browse-wrap) are specifically excluded and null and void. Clicking shall not represent acknowledgement or agreement to any terms or conditions contained in those agreements.

## **21. UNANTICIPATED AMENDMENTS**

If additional work is required within the scope of this Contract due to a legitimate unforeseen circumstance, STATE shall provide CONTRACTOR a written description of the additional work and request CONTRACTOR to submit a proposal for accomplishing the scope of work. CONTRACTOR will not commence additional work until all Parties agree in writing.

## **22. SEVERABILITY**



- c. CONTRACTOR shall file all required reports timely, make required payroll deductions, and pay all taxes and premiums owed timely, including sales and use taxes, and unemployment compensation and workers' compensation premiums.
- d. CONTRACTOR shall have and keep current and in good standing all licenses and permits required by law during the Term of this Contract all licenses and permits required by law.
- e. CONTRACTOR is prohibited from boycotting Israel for the duration of this Contract. (See N.D.C.C. § 54-44.4-15.) CONTRACTOR represents that it does not and will not engage in boycotting Israel during the term of this Contract. If STATE receives evidence that CONTRACTOR boycotts Israel, STATE shall determine whether the company boycotts Israel. The foregoing does not apply to contracts with a total value of less than \$100,000 or if CONTRACTOR has fewer than ten (10) full-time employees.
- f. CONTRACTOR's failure to comply with this section is a material breach by CONTRACTOR and STATE may terminate this Contract in accordance with the Termination for Cause section of this Contract.

**26. STATE AUDIT**

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this Contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. CONTRACTOR shall maintain these records for at least three (3) years following completion of this Contract and be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to CONTRACTOR prior to conducting examination.

**27. COUNTERPARTS**

This Contract may be executed in multiple, identical counterparts, each of which is be deemed an original, and all of which taken together constitute one and the same contract.

**28. EFFECTIVENESS OF CONTRACT**

This Contract is not effective until fully executed by both Parties. If no start date is specified in the Term of Contract, the most recent date of the signatures of the Parties is the Effective Date.

<b>CONTRACTOR</b>	<b>STATE OF NORTH DAKOTA</b>
<i>[insert business]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

## INFORMATION TECHNOLOGY CONTRACT CHECKLIST

- 1. Does the agency or official have the authority to enter the contract?
  - Has the agency completed the ITD IT Initiative Intake process?
  - Has the agency completed the ITD Third Party Risk Management review process?
- 2. Does the agency have an appropriation for the subject matter of the contract?
- 3. Does the other party have the authority to enter the contract?
- 4. Has the proposed contract been reviewed by the agency's assigned legal counsel?
- 5. Has the agency consulted with ITD for approval of proposed changes to ITD-required IT contract language?
- 6. Is the contract in writing with all pages numbered?
  - Does the contract contain any exhibits or attachments?
    - Have the parties negotiated the SOW (Exhibit A) with clear deliverable expectations and acceptance criteria?
    - Have the parties negotiated the compensation details (Exhibit B) in accordance with the project schedule and the SOW?
  - Are all the documents appropriately numbered or labeled and attached?
- 7. Are all payment amounts and dates correct?
- 8. Are there any handwritten changes or other alterations to the contract?
  - If so, have all the changes or alterations been initialed by all signers?
- 9. Are the parties properly identified in the introductory paragraph or first clause?
- 10. Has the contract been checked for the following ambiguities and inconsistencies:
  - If recitals are used, are they unambiguous and consistent with the terms of the contract?
  - Are all references to parties, exhibits, and other things internally consistent?
  - Are all references to other clauses, attachments, or other applicable documents correct?
- 11. Are all terms unambiguous or clearly defined?
  - Is the contract written in plain English using the present tense and the active voice?
  - Are the terms "shall," "may," and "must" used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
  - Is the connective "and" used properly in the conjunctive?
  - Is "or" used properly in the disjunctive?
  - Is it clear to what any modifier or dependent clause refers?
  - Where particulars are listed, is it clear whether the list is exhaustive?
- 12. If the contract contains a "liquidated damages" provision, was it drafted and approved by the agency's assigned legal counsel?

- 13. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 14. Is the name and title or position of each person signing the document listed below the signature line?
  - Do all signatures match the typed or printed names?
- 15. If contracting with a corporation:
  - Has at least one officer of the corporation signed the document?
  - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- 16. Does the contract specify both the date on which it begins and the date on which it ends?
- 17. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 18. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- 19. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed as required by law?
- 20. Is there an acceptable indemnification and hold harmless provision indicating how risks arising out of the contract are assigned among the parties?
- 21. Is approval needed from the Chief Information Officer, Attorney General, or the director of OMB?
- 22. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
- 23. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

## CONSTRUCTION CONTRACT CHECKLIST

- 1. If using an AIA®, EJCDC®, or other contractor-provided contract, has an appropriate addendum been drafted by the agency's assigned legal counsel?
- 2. Have all required bonds been provided in a legally enforceable form?
  - If required, is a proper performance bond attached?
- 3. Are the terms of the bond adequate to guarantee all payments required by the contract?
- 4. Does the bond guarantee payment of interest on bills and claims not paid within 90 days?
- 5. Does the bond include a guarantee of payment of workers' compensation premiums?
- 6. Have all necessary licenses and permits been verified?
- 7. Are copies of the contractor's license or renewal certificate and contractor's bond attached?
- 8. Has a certificate been filed with the state by the contractor showing payment of state taxes?
- 9. Unless prohibited by law, does the contract include clauses requiring preference for North Dakota residents, with first preference given to veterans and for materials produced in the state?
- 10. Does the agency or official have the authority to enter the contract?
  - Have sufficient funds been appropriated?
- 11. Does the other party have the authority to enter the contract?
- 12. Has the proposed contract been reviewed by the agency's assigned legal counsel?
- 13. Is the contract in writing with all pages numbered?
  - If there are any exhibits or attachments referenced in the contract, are all the documents attached?
- 14. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
- 15. Are there any handwritten changes or other alterations to the contract?
  - If so, have all the changes or alterations been initialed by all signers?
- 16. Are the parties identified in the introductory paragraph or first clause?
- 17. Has the agreement been checked for the following ambiguities and inconsistencies:
  - If recitals are used, are they unambiguous and consistent with the terms of the contract?
  - Are all references to parties, exhibits, and other things internally consistent?
- 18. Are all terms unambiguous or clearly defined?
  - Is the contract written in plain English using the present tense and the active voice?

- Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
  - Is the connective “and” used properly in the conjunctive?
  - Is “or” used properly in the disjunctive?
  - Is it clear to what any modifier or dependent clause refers?
  - Where particulars are listed, is it clear whether the list is exhaustive?
19. If the contract contains a “liquidated damages” provision, are damages otherwise difficult to estimate in the event of a breach?
20. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
21. Is the name and title or position of each person signing the document listed below the signature line?
- Do all signatures match the typed or printed names?
22. If contracting with a corporation:
- Has at least one officer of the corporation signed the document?
  - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
23. Does the contract specify both the date on which it begins and the date on which it ends?
24. If a contract requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term, a provision terminating the contract without penalty if sufficient funds are not appropriated or otherwise made available, or a provision permitting termination without cause upon notice to the other party?
25. Regardless of the specified term of the contract, does the contract include an acceptable termination clause permitting the state to terminate the agreement at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
26. Can the state terminate the contract if it is unable to fulfill any term of the contract or if the contractor is not licensed, bonded, or permitted as required by law or otherwise noncompliant with the law?
27. Is there an acceptable indemnification provision indicating how risks arising out of the contract are assigned among the parties?
28. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
29. Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?
- Has the state struck the standard “waiver of subrogation” language? State should NOT waive subrogation.
  - Is the contractor required to carry builder’s risk or all risk insurance coverage?

## LEASE CHECKLIST – AGENCY AS TENANT

- 1. Have OMB and the Office of Attorney General approved the lease?
- 2. Does the lease adequately describe the premises?
- 3. Does the lease identify ownership in accordance with the requirements of N.D.C.C. § 54-21-24.1?
- 4. If a lease requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 5. Regardless of the specified term of the lease, does the lease include an acceptable termination clause permitting the state to terminate the lease at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- 6. Are the terms and amount of payment stated and correctly calculated?
  - If based on square footage, is the square footage also stated?
- 7. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
  - Is there a clause governing availability of parking?
  - Is the landlord's responsibility for fire or other insurance stated?
  - Is there a clause governing events of damage or destruction to property?
- 8. Is there a clause concerning accessibility requirements and compliance with ADA?
- 9. Is the lease in writing with all pages numbered?
  - Does the lease contain any exhibits or attachments?
  - Are all the documents appropriately numbered or labeled and attached?
- 10. Are the parties identified in the introductory paragraph or first clause?
- 11. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 12. Is the name and title of position of each person signing the lease listed below the signature line?
  - Do all the signatures match the typed or printed names?
- 13. If leasing from a corporation:
  - Has at least one officer of the corporation signed the document?
  - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- 14. Does the lease specify both the date on which it begins and the date on which it ends?
- 15. Can the state terminate the lease if it is unable to fulfill any term of the lease, or if the landlord fails to fulfill its obligations under the lease, or if the state determines it must relocate to comply with the Americans with Disabilities Act of 1990 or any rules adopted under the Act, or with any other state or federal laws or rules?

- 16. Is there an acceptable indemnification and hold harmless provision indicating how risks arising from the lease are assigned among the parties?
- 17. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

## TEMPLATE, LEASE (AGENCY AS TENANT)

### 1. PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD).

### 2. SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by STATE, hereby leases to STATE the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

---

---

---

*[Insert property description of the specific premises to be leased by agency.]*

### 3. OWNERSHIP OF PREMISES

Pursuant to North Dakota Century Code (N.D.C.C.) § 54-21-24.1, LANDLORD identifies the following individual(s) as an owner(s) of the Premises, including each individual(s) having an ownership interest in a business or businesses that directly or indirectly own the Premises if the individual's aggregate ownership in the Premises is ten percent or more.

Individual Owner	Business Affiliation	Percentage of Ownership

*[Insert individuals and ownership percentage of the specific premises to be leased by agency. Add additional rows if necessary.]*

### 4. TERM OF LEASE

The term of this Lease (Initial Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

#### Renewal Option

STATE may renew this Lease upon satisfactory completion of the Initial Term. STATE may execute up to *[Number]* options to renew this Lease under the same terms and conditions for a period of *[Number]* months each (Renewal Term).

## 5. HOLDING OVER

If STATE remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from STATE, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

## 6. RENTAL PAYMENTS

STATE shall pay rent (Rent) for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent shall be paid in advance by the 10th day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert landlord's address]*, unless STATE is notified otherwise in writing by LANDLORD.

## 7. LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which must be done daily, including furnishing related supplies.
- c. To perform all maintenance and repairs requested by STATE which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. If other portions of the building are leased to other parties, not to permit any activity to be conducted in other portions of the building or grounds that will materially interfere with STATE's use and enjoyment of the Premises.
- f. To allow STATE to install items it deems necessary for maximum and optimum use of the premises. STATE may, at any time, remove from the premises all fixtures and other equipment owned by STATE; provided the removal is completed before termination of this Lease, including any Renewal Term.

- g. To allow STATE to place decorations, wall hangings, signs, and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by STATE, its agents or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the terms of the Lease.

## 8. STATE'S OBLIGATIONS

- a. To pay the Rent when due.
- b. To pay for its own telephone service.
- c. To keep the Premises in a reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty.
- d. Not make any unlawful, improper, or offensive use of the Premises, and observe all the laws of the State of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises.
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of Rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD.
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by STATE and to repair any damage that may be done to the Premises resulting from the removal of these items, if any.

## 9. TERMINATION OF LEASE

STATE has no obligation under this Lease for the initial or succeeding terms if the North Dakota Legislature fails to appropriate to STATE sufficient funds to defray the full rental costs. STATE, without any liability, may terminate this Lease by providing thirty (30) days' written notice, if space becomes available within a state-owned government building, if its legislative

appropriations are reduced or if its authority to spend its appropriations is reduced or limited by law, government directive (i.e. by Governor for executive branch agencies or agency heads), or by reductions in federal or other grant funds to a point STATE deems insufficient to pay the full rental cost for the remainder of the Term of this Lease.

During the Term of this Lease or any renewal or extension, STATE may terminate this Lease by providing thirty (30) days' written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this Lease, or if STATE determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rule.

#### **10. TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES**

If the leased Premises are destroyed or damaged by fire or the elements to the extent they become untenable, LANDLORD, within twenty (20) days of the happening of the event, must give written notice of intention to restore the building and fully restores the Premises within a reasonable time. If LANDLORD fails to provide written notice of intention to restore the premises, STATE may terminate the Lease. During the time between destruction and restoration of the Premises Rent will not be due, and if Rent has already been paid LANDLORD shall refund to STATE the portion of the prepaid Rent attributable to the time during which STATE was unable to use the Premises for its intended use.

#### **11. MERGER AND MODIFICATION**

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

#### **12. SEVERABILITY**

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain the illegal or unenforceable term.

#### **13. ASSIGNMENT – SALE OF PREMISES**

This Lease must not be assigned or subleased by STATE without LANDLORD's written consent unless to another state entity. This Lease does not terminate if the Premises are sold but continues throughout its entire Term, including any exercised or remaining Renewal Term(s).

#### **14. NOTICE**

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses, or by email complete on the date sent:

<b>STATE</b>	<b>CONTRACTOR</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip
Email	Email

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

### **15. APPLICABLE LAW AND VENUE**

This Lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of *[Premises location]* County, North Dakota. Each Party consents to the exclusive jurisdiction of the state District Court located in *[Premises location]* County, North Dakota, and waives any claim of lack of jurisdiction or *forum non conveniens*.

### **16. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL**

By entering this Lease, STATE does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. STATE does not waive any right to a jury trial.

### **17. SPOILIATION – PRESERVATION OF EVIDENCE**

LANDLORD shall notify STATE promptly of all potential claims that arise from or result from this Lease. LANDLORD also shall take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and shall grant to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

### **18. INDEMNIFICATION**

*[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: [Team ND Connect.](#)]*

### **19. INSURANCE**

[\[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: Team ND Connect.\]](#)

## **20. CONFIDENTIALITY**

LANDLORD may not use or disclose any information it receives from STATE under this Lease which STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Lease or as authorized in advance by STATE. STATE may not disclose any information it receives from LANDLORD that LANDLORD has previously identified as confidential and that STATE determines is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and LANDLORD to maintain confidentiality of information under this section continues beyond the Term of this Lease.

LANDLORD acknowledges that STATE possesses substantial amounts of information at the leased Premises that is confidential pursuant to state law. LANDLORD, if it views, comes into possession of, or otherwise becomes knowledgeable of confidential information located at the leased Premises, shall maintain the confidentiality of that information and shall refrain from re-disclosing that information to any third party. LANDLORD shall require, by contract, any agent it retains to fulfill its obligations otherwise set out in this Lease to similarly maintain the confidentiality of any information agent views, comes into possession of, or about which agent otherwise becomes knowledgeable. The indemnity provisions otherwise set out in the Lease agreement specifically apply to this confidentiality requirement.

## **21. COMPLIANCE WITH PUBLIC RECORDS LAWS**

Under the North Dakota public records law and subject to the Confidentiality clause of this Lease, certain records may be open to the public upon request.

Public records may include: (a) records STATE receives from LANDLORD under this Lease, (b) records obtained by either Party under this Lease, and (c) records generated by either Party under this Lease.

LANDLORD agrees to contact STATE immediately upon receiving a request for information under the public records law and to comply with STATE’s instructions on how to respond to that request.

## **22. STATE AUDIT**

Pursuant to N.C.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of LANDLORD relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor’s designee, or Federal auditors, if required.

LANDLORD shall maintain all of these records for at least three (3) years following completion of this Lease and shall be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor’s designee shall provide reasonable notice to LANDLORD prior to conducting examination.

## **23. COUNTERPARTS**

This Lease may be executed in multiple, identical counterparts, each of which is to be deemed an original, and all of which taken together constitute one and the same lease.

**24. EFFECTIVENESS OF LEASE**

This Lease is not binding on STATE until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

<b>LANDLORD</b>	<b>STATE OF NORTH DAKOTA</b>
<i>[insert business]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

<b>REVIEWED BY ATTORNEY GENERAL</b>	<b>APPROVED BY OMB FACILITY MANAGEMENT</b>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

## LEASE CHECKLIST – AGENCY AS LANDLORD

- 1. Have OMB and the Office of Attorney General approved the lease?
- 2. Does the lease adequately describe the premises?
- 3. Are the terms and amount of payment stated and correctly calculated?
  - If based on square footage, is the square footage also stated?
- 4. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
  - Is there a clause governing availability of parking?
  - Is the tenant's responsibility for fire or other insurance stated?
  - Is there a clause governing events of damage or destruction to property?
- 5. Is there a clause concerning accessibility requirements and compliance with ADA?
- 6. Is the lease in writing with all pages numbered?
  - Does the lease contain any exhibits or attachments?
  - Are all the documents appropriately numbered or labeled and attached?
- 7. Are the parties identified in the introductory paragraph or first clause?
- 8. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 9. Is the name and title of position of each person signing the lease listed below the signature line?
  - Do all the signatures match the typed or printed names?
- 10. If leasing to a corporation:
  - Has at least one officer of the corporation signed the document?
  - If the only signature is that of a person other than an officer of the corporation, is a board resolution or power of attorney attached authorizing that person to act for the corporation?
- 11. Does the lease specify both the date on which it begins and the date on which it ends?
- 12. Is there an acceptable indemnification and hold harmless provision indicating how risks arising from the lease are assigned among the parties?
- 13. Is there an acceptable insurance provision or other source of funds to satisfy any obligation imposed under an indemnification or hold harmless clause?
  - Has sufficient proof of any required insurance coverage, including endorsements, been provided to the agency?

## TEMPLATE, LEASE (AGENCY AS LANDLORD)

### 1. PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (LANDLORD or STATE), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (TENANT).

### 2. SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by TENANT, hereby leases to TENANT the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

---

---

---

*[Insert property description of the specific premises to be leased by agency.]*

### 3. TERM OF LEASE

The term of this Lease (Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

### 4. HOLDING OVER

If TENANT remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from TENANT, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

### 5. RENTAL PAYMENTS

TENANT will pay rent for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent will be paid in advance by the 10th day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert landlord's address]*, unless TENANT is notified otherwise in writing by LANDLORD.

## 6. LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which will be done on a daily basis, including furnishing related supplies.
- c. To perform all maintenance and repairs requested by TENANT which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. If other portions of the building are leased to other parties, not to permit any activity to be conducted in other portions of the building or grounds that will materially interfere with TENANT's use and enjoyment of the Premises.
- f. To allow TENANT to install items that it deems necessary for maximum and optimum use of the premises. TENANT may, at any time, remove from the premises all fixtures and other equipment owned by TENANT; provided the removal is completed before termination of this Lease or any renewal or extension.
- g. To allow TENANT to place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by TENANT, its agents or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the terms of the Lease.

## 7. TENANT'S OBLIGATIONS

- a. To pay the rent when due.
- b. To pay for its own telephone service.

- c. To keep the Premises in reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty.
- d. Not make any unlawful, improper, or offensive use of the Premises, and to observe all the laws of the State of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises.
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD.
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by TENANT, and to repair any damage that may be done to the Premises resulting from the removal of these items, if any.

## **8. TERMINATION OF LEASE**

During the Term of this Lease or any renewal or extension, TENANT may terminate this Lease by providing thirty (30) days' written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this Lease, or if TENANT determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other state or federal law or rule.

LANDLORD has no obligation under this Lease for the initial or succeeding terms and may terminate the Lease if the North Dakota Legislature directs the LANDLORD to utilize the Premises in a manner inconsistent with this Lease. LANDLORD, without any liability, may terminate this Lease with proper notice to TENANT if Legislative, Executive, or Federal government guidance deems necessary, and LANDLORD, in its sole discretion determines such necessity. Proper notice to TENANT means thirty (30) days' written notice unless LANDLORD is otherwise directed by Legislative or Federal government instructions to terminate under different time conditions.

## **9. TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES**

If the Premises are destroyed or damaged by fire or the elements to the extent they become untenable, this Lease will terminate immediately, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the Premises within a reasonable time. During the term between destruction and restoration of the Premises rent will not be due, and if rent has already been paid LANDLORD shall refund to TENANT the portion of the prepaid rent attributable to the time during which TENANT was unable to use the Premises for its intended use.

## 10. MERGER AND MODIFICATION

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

## 11. SEVERABILITY

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain the illegal or unenforceable term.

## 12. ASSIGNMENT – SALE OF PREMISES

This Lease must not be assigned or subleased by TENANT without LANDLORD's written consent. This Lease does not terminate if the Premises are sold but continues throughout the entire Term.

## 13. NOTICE

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses, or by email complete on the date sent:

STATE	CONTRACTOR
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip
Email	Email

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

## 14. APPLICABLE LAW AND VENUE

This Lease is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Lease must be adjudicated exclusively in the state District Court of *[Premises location]* County, North Dakota. Each Party consents to the exclusive jurisdiction of the state District Court located in *[Premises location]* County, North Dakota and waives any claim of lack of jurisdiction or *forum non conveniens*.

## 15. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

By entering into this Lease, LANDLORD does not agree to binding arbitration, mediation, or any other form of mandatory Alternative Dispute Resolution. The Parties may enforce the rights and remedies in judicial proceedings. LANDLORD does not waive any right to a jury trial.

## **16. SPOILIATION – PRESERVATION OF EVIDENCE**

TENANT shall notify LANDLORD promptly of all potential claims that arise from or result from this Lease. TENANT also shall take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and shall grant to LANDLORD the opportunity to review and inspect such evidence, including the scene of an accident.

## **17. INDEMNIFICATION**

*[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: [Team ND Connect.](#)]*

## **18. INSURANCE**

*[Please see the “Guidelines to Managing Contractual Risk Manual” of OMB’s Risk Management Division found under “Risk Services” of the “Team Member Resources” tab at: [Team ND Connect.](#)]*

## **19. CONFIDENTIALITY**

TENANT may not use or disclose any information it receives from LANDLORD under this Lease which LANDLORD has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Lease or as authorized in advance by LANDLORD. LANDLORD may not disclose any information it receives from TENANT that TENANT has previously identified as confidential and that LANDLORD determines is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of TENANT and LANDLORD to maintain confidentiality of information under this section continues beyond the Term of this Lease.

## **20. COMPLIANCE WITH PUBLIC RECORDS LAWS**

Under the North Dakota public records law and subject to the Confidentiality clause of this Lease, certain records may be open to the public upon request.

Public records may include: (a) records LANDLORD receives from TENANT under this Lease, (b) records obtained by either Party under this Lease, and (c) records generated by either Party under this Lease.

TENANT agrees to contact LANDLORD immediately upon receiving a request for information under the public records law and to comply with LANDLORD’s instructions on how to respond to that request.

**21. STATE AUDIT**

Pursuant to N.D.C.C. § 54-10-19, all records, regardless of physical form, and the accounting practices and procedures of TENANT relevant to this Lease are subject to examination by the North Dakota State Auditor, the Auditor’s designee, or Federal auditors, if required. TENANT shall maintain these records for at least three (3) years following completion of this Lease and shall be able to provide them upon reasonable notice. STATE, State Auditor, or Auditor’s designee shall provide reasonable notice to TENANT prior to conducting examination.

**22. COUNTERPARTS**

This Lease may be executed in multiple, identical counterparts, each of which is to be deemed an original, and all of which taken together constitute one and the same lease.

**23. EFFECTIVENESS OF LEASE**

This Lease is not binding on LANDLORD until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

<b>LANDLORD</b>	<b>STATE OF NORTH DAKOTA</b>
<i>[insert business]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

<b>REVIEWED BY ATTORNEY GENERAL</b>	<b>APPROVED BY OMB FACILITY MANAGEMENT</b>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

## LEASE CHECKLIST – INTERAGENCY LEASE

- 1. Have OMB and the Office of Attorney General approved the lease?
- 2. Does the lease adequately describe the premises?
- 3. If a lease requires expenditure of state funds beyond the end of the current biennium, is there express authority and funding for a longer term?
- 4. Regardless of the specified term of the lease, does the lease include an acceptable termination clause permitting either party to terminate the lease at an earlier date without incurring additional liability if adequate funds are not appropriated or available?
- 5. Are the terms and amount of payment stated and correctly calculated?
  - If based on square footage, is the square footage also stated?
- 6. Is the responsibility for utilities, repairs and maintenance, janitorial service, snow removal, etc. clearly stated?
  - Is there a clause governing availability of parking?
- 7. Is there a clause concerning accessibility requirements and compliance with ADA?
- 8. Is the lease in writing with all pages numbered?
  - Does the lease contain any exhibits or attachments?
  - Are all the documents appropriately numbered or labeled and attached?
- 9. Are the parties identified in the introductory paragraph or first clause?
- 10. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
- 11. Is the name and title of position of each person signing the lease listed below the signature line?
  - Do all the signatures match the typed or printed names?
- 12. Does the lease specify both the date on which it begins and the date on which it ends?
- 13. Can either party terminate the lease if it is unable to fulfill any term of the lease, or if the landlord fails to fulfill its obligations under the lease, or if the party determines it must relocate to comply with the Americans with Disabilities Act of 1990 or any rules adopted under the Act, or with any other state or federal laws or rules?

## TEMPLATE, LEASE (INTERAGENCY)

### 1. PARTIES

The parties to this lease (Lease) are the state of North Dakota, acting through its *Department/Office* (TENANT), and *Name of Business a type of business (e.g. Delaware corporation or privately held company)* having its principal place of business at *principal business address* (LANDLORD).

### 2. SCOPE OF LEASE

LANDLORD, in consideration of the rent to be paid and the covenants to be performed by TENANT, hereby leases to TENANT the following described premises (Premises) situated in the city of *[city]*, county of *[county]* and state of North Dakota:

---

---

---

*[Insert property description of the specific premises to be leased by agency.]*

### 3. TERM OF LEASE

The term of this Lease (Term) is for a period of *[number]* months, commencing on *[day]* day of *[month]*, *[year]*, and terminating on the *[day]* day of *[month]*, *[year]*.

### 4. HOLDING OVER

If TENANT remains in possession of the Premises after this Lease expires, and LANDLORD accepts rent from TENANT, this Lease shall be deemed renewed on a month-to-month basis with all other terms and conditions of this Lease remaining in effect until otherwise agreed in writing.

### 5. RENTAL PAYMENTS

TENANT will pay rent for the Premises, consisting of *[number]* square feet, at *[amount]* per square foot per annum, or *[amount]* per annum.

Rent will be paid in advance by the 10th day of each month in an amount of *[amount]* which is 1/12 of the annual amount, commencing on the *[day]* day of *[month]*, *[year]* and continuing monthly thereafter for the Term of this Lease.

Rent is payable at the address of LANDLORD, *[insert landlord's address]*, unless TENANT is notified otherwise in writing by LANDLORD.

## 6. LANDLORD'S OBLIGATIONS

- a. To pay all water, sewer, heat, electricity, air conditioning, garbage collection, and all other utility fees (except telephone) charged against the Premises.
- b. To perform all required maintenance and repairs, including all janitorial services, which will be done on a daily basis, including furnishing related supplies.
- c. To perform all maintenance and repairs requested by TENANT which are related to use and habitability of the Premises.
- d. To keep the walkways and parking areas of the premises free of accumulations of snow and ice and to cut and care for the grass, shrubbery, plants, and trees on the Premises.
- e. If other portions of the building are leased to other parties, not to permit any activity to be conducted in other portions of the building or grounds that will materially interfere with TENANT's use and enjoyment of the Premises.
- f. To allow TENANT to install items that it deems necessary for maximum and optimum use of the premises. TENANT may, at any time, remove from the premises all fixtures and other equipment owned by TENANT; provided the removal is completed before termination of this Lease or any renewal or extension.
- g. To allow TENANT to place decorations, wall hangings, signs and directories upon entrance doors, in hallways leading to its Premises, or doors and walls within the Premises.
- h. To furnish *[number]* automobile parking stalls for use by TENANT, its agents or designees, in the lot provided for use by the building tenants.
- i. To comply at its own expense with all federal, state, county, and city laws and ordinances and all lawful rules, regulations, or orders of any duly constituted authority, present or future, affecting the Premises.
- j. To pay all real estate taxes and special assessments on the Premises during the terms of the Lease.

## 7. TENANT'S OBLIGATIONS

- a. To pay the rent when due.
- b. To pay for its own telephone and data service.

- c. To keep the Premises in reasonable condition the same as at the commencement of the Term or as it may be put by LANDLORD, except for reasonable use and wear, or damage by fire and unavoidable casualty.
- d. Not make any unlawful, improper, or offensive use of the Premises, and to observe all the laws of the State of North Dakota and the ordinances of the city of *[Premises location]* in force from time to time relating to the leased Premises.
- e. To permit LANDLORD at all reasonable times to enter and examine the Premises and to make necessary repairs for the protection of the Premises.
- f. To surrender the Premises to LANDLORD at the end of the Term; and, in default of the payment of rent due or failure to perform its obligations under this Lease, to surrender the Premises upon demand by LANDLORD.
- g. To maintain at its own expense and assume responsibility for all office equipment, furniture, and fixtures installed by TENANT, and to repair any damage that may be done to the Premises resulting from the removal of these items, if any.
- h. Employees of TENANT are responsible for knowledge of and compliance with all policies when accessing the Premises, including LANDLORD's office safety and emergency procedures.

## **8. COMMUNICATION WIRING**

All costs associated with the installation, wiring, networking, connectivity, and maintenance will be the responsibility of TENANT. TENANT will be billed directly from the State of North Dakota Information Technology Department (ITD). All applicable ITD standards must be followed for any of the above services.

TENANT shall notify LANDLORD of the requested services including any and all horizontal wiring, wiring within the wire closet, network services, along with the number of data and telephone ports connections necessary to conduct business.

Requests shall be reviewed and approved by LANDLORD prior to any services being performed.

Upon approval from LANDLORD, TENANT will be responsible for contacting ITD to perform the services.

Communication wiring currently located on the Premises may be used by TENANT, upon approval from LANDLORD. Any additional wiring installed on the Premises by TENANT, will remain intact upon vacating the premises and becomes the property of LANDLORD. TENANT shall notify the LANDLORD of any maintenance issues relating to LANDLORD-provided wiring or services while in TENANT's use.

## **9. TERMINATION OF LEASE**

TENANT, without any liability, may terminate this Lease by providing thirty (30) days' written notice, in its sole discretion, deems it has insufficient funds to pay the full rental cost for the remainder of the term of this Lease. During the term of this Lease or any renewal or extension, TENANT may terminate this Lease by providing thirty (30) days' written notice to LANDLORD, if LANDLORD fails to comply with any of its obligations under this Lease, or if TENANT determines it must relocate to comply with the Americans With Disabilities Act of 1990 or any rules adopted under the act, or with any other TENANT or federal law or rules. LANDLORD may terminate this Lease at its sole discretion in the event TENANT is in breach of its obligations under this Lease.

LANDLORD has no obligation under this Lease for the initial or succeeding terms and may terminate the Lease if the North Dakota Legislature directs the LANDLORD to utilize the Premises in a manner inconsistent with this Lease. LANDLORD, without any liability, may terminate this Lease with proper notice to TENANT if Legislative, Executive, or Federal government guidance deems necessary, and LANDLORD, in its sole discretion, determines such necessity. Proper notice to TENANT means thirty (30) days' written notice unless LANDLORD is otherwise directed by Legislative or Federal government instructions to terminate under different time conditions.

## **10. TERMINATION OF LEASE IN THE EVENT OF DESTRUCTION OF PREMISES**

If the Premises are destroyed or damaged by fire or the elements to the extent it becomes untenable, this Lease will terminate immediately, unless LANDLORD, within twenty (20) days of the happening of the event, gives written notice of intention to restore the building and fully restores the Premises within a reasonable time. During the term between destruction and restoration of the Premises rent will not be due, and if rent has already been paid LANDLORD shall refund to TENANT that the portion of the prepaid rent attributable to the time during which TENANT was unable to use the Premises for its intended use.

## **11. MERGER AND MODIFICATION**

This Lease constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Lease. This Lease may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

## **12. SEVERABILITY**

If any term of this Lease is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Lease did not contain the illegal or unenforceable term.

## **13. ASSIGNMENT**

TENANT may not assign or sublet this Lease without LANDLORD's written consent unless TENANT assigns or subleases this Lease to another state entity.

**14. NOTICE**

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses, or by email complete on the date sent:

STATE	CONTRACTOR
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip
Email	Email

**15. EFFECTIVENESS OF LEASE**

This Lease is not binding on STATE until it is reviewed and executed by the Office of Attorney General and approved and executed by the Director of Facility Management Division, OMB, as required in N.D.C.C. § 54-21-24.1.

LANDLORD	TENANT
<i>[insert AGENCY]</i>	<i>[insert AGENCY]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

REVIEWED BY ATTORNEY GENERAL	APPROVED BY OMB FACILITY MANAGEMENT
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

## INTERAGENCY AGREEMENT CHECKLIST

- 1. Does the agency or official have the authority to enter the contract?
  - If necessary, have sufficient funds been appropriated?
- 2. Are the following Contract clauses included:
  - Parties
  - Scope of Work (each Party's obligation)
  - Compensation (if applicable)
    - Contractual Amount
    - Payment
    - Travel
  - Term of Contract
  - If applicable:
    - No Automatic Renewal
    - Extension Option
    - Renewal Option
    - Renegotiation Option
  - Termination (ensure the termination rights are reciprocal between the state agencies)
    - Termination by Agreement
    - Termination without Cause
    - Termination for Lack of Funding or Authority
    - Termination for Cause
  - Force Majeure
  - Works for Hire (if applicable)
  - Work Product (if applicable)
  - Notice
  - Spoliation
  - Merger and Modification
  - Severability
  - Effectiveness of Contract
- 3. The following Contract clauses may be omitted from Interagency Agreements:
  - Compensation (if not applicable)
    - Prepayment
    - Payment of Taxes by STATE
    - Taxpayer ID
  - Time is of the Essence
  - Indemnity
  - Insurance
  - Confidentiality
  - Compliance with Public Records Laws
  - Independent Entity
  - Applicable Law and Venue

- Alternative Dispute Resolution – Jury Trial
  - Attorney Fees
  - Nondiscrimination and Compliance with Laws
  - State Audit
4. Has the proposed contract been reviewed by the agency’s assigned legal counsel?
5. Is the contract in writing with all pages numbered?
- If there are any exhibits or attachments referenced in the contract, are all the documents attached?
6. Are there any mistakes in addition or other mistakes in connection with payment amounts or other numbers?
7. Are there any handwritten changes or other alterations to the contract?
- If so, have all the changes or alterations been initialed by all signers?
8. Are the parties identified in the introductory paragraph or first clause?
9. Has the agreement been checked for the following ambiguities and inconsistencies:
- If recitals are used, are they unambiguous and consistent with the terms of the contract?
  - Are all references to parties, exhibits and other things internally consistent?
10. Are all terms unambiguous or clearly defined?
- Is the contract written in plain English using the present tense and the active voice?
  - Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
  - Is the connective “and” used properly in the conjunctive?
  - Is “or” used properly in the disjunctive?
  - Is it clear to what any modifier or dependent clause refers?
  - Where particulars are listed, is it clear whether the list is exhaustive?
11. Are signatures dated and written in ink, or do they comply with the electronic signature statute?
12. Is the name and title or position of each person signing the document listed below the signature line?
- Do all signatures match the typed or printed names?
13. Does the contract specify both the date on which it begins and the date on which it ends?
14. Are termination clauses reciprocal to the state agencies?

## TEMPLATE (INTERAGENCY AGREEMENT)

### 1. PARTIES

The parties to this agreement (Agreement) are the *Department/Office seeking goods or services* (STATE), and *Department/Office/Political Subdivision providing goods or services* (CONTRACTOR), each a “Party” and collectively “Parties”.

### 2. SCOPE OF WORK

CONTRACTOR, in exchange for the compensation paid by STATE under this Agreement, shall provide the following:

---

---

---

---

*[Describe what is to be done under the agreement. If the description is too vague, it will be difficult for the state to enforce the agreement or establish a breach of agreement by the contractor. If the Scope of Work is a lengthy document, you may consider referencing the Scope of Work as a separate exhibit at the end of the agreement.]*

### 3. COMPENSATION

#### a. Contractual Amount

STATE shall pay for the accepted services provided by CONTRACTOR under this Agreement an amount not to exceed *[Amount]* (Contractual Amount).

The Contractual Amount is firm for the duration of this Agreement and constitutes the entire compensation due CONTRACTOR for performance of its obligations under this Agreement, unless amended, regardless of the difficulty, materials or equipment required, including fees, licenses, overhead, profit and all other direct and indirect costs incurred by CONTRACTOR, except as provided by an amendment to this Agreement.

#### b. Payment

STATE shall make payment under this Agreement within forty-five (45) calendar days after receipt of an undisputed invoice from CONTRACTOR.

### 4. TERM OF AGREEMENT

This Agreement term (Term) begins on *[Month, Day], 20[Year] or its Effective Date*, and ends on *[Month, Day], 20[Year]*.

**a. No Automatic Renewal**

This Agreement will not automatically renew.

**b. Renewal Option**

*NOTE: A Renewal provision is normally used when a multi-year agreement is anticipated. The renewal provision allows the Agreement to be renewed for additional terms after the completion of the initial Agreement period.*

This Agreement may be renewed upon satisfactory completion of the initial Agreement Term and by agreement of the Parties. The Parties may renew this Agreement for up to [Number] additional periods, each period of renewal being for up to [Number] months. The Parties may negotiate to adjust the firm fixed price for each renewal period.

**c. Extension Option**

*NOTE: An Extension provision is a brief period of time used to wrap up ongoing work that could not be completed by the end of the Agreement. It may also be used when all renewal options have been exercised, and additional time is needed to close out the Agreement.*

STATE may extend this Agreement for an additional period of time, not to exceed [Number] months, beyond the current termination date of this Agreement.

**5. TERMINATION**

**a. Termination by Agreement**

This Agreement may be terminated by consent of both Parties executed in writing.

**b. Termination for Lack of Funding or Authority**

Either Party may terminate the whole or any part of this Agreement, effective upon delivery of written notice to the other Party or on any later date stated in the notice, under any of the following conditions:

- 1) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term.
- 2) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this Agreement or are no longer eligible for the funding proposed for payments authorized by this Agreement.

- 3) If any license, permit, or certificate required by law or rule for either party, or by the terms of this Agreement, is for any reason denied, revoked, suspended, or not renewed.

Termination of this Agreement under this subsection is without prejudice to any obligations or liabilities of either Party already accrued prior to termination.

### **c. Termination for Cause**

STATE may terminate this Agreement effective upon delivery of written notice to CONTRACTOR, or any later date stated in the notice:

- 1) If CONTRACTOR fails to provide services required by this Agreement within the time specified or any extension agreed to by STATE; **or**
- 2) If CONTRACTOR fails to perform any provisions of this Agreement or fails to pursue the work so as to endanger performance of this Agreement in accordance with its terms.

CONTRACTOR may terminate this Agreement effective upon delivery of written notice to STATE, or any later date stated in the notice:

- 1) If STATE fails to provide payment required by this Agreement in accordance with Compensation Section of this Agreement and within the time specified or any extension agreed by the Parties; **or**
- 2) If STATE fails to perform any provisions of this Agreement or fails to pursue the payment for services so as to endanger performance of this Agreement in accordance with its terms.

The rights and remedies of the Parties provided in this subsection are not exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

## **6. FORCE MAJEURE**

Neither Party will be held responsible for delay or default caused by fire, riot, terrorism, pandemic, acts of God, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default. If CONTRACTOR is the affected Party and does not resume performance within fifteen (15) days or another period agreed between the Parties, STATE may seek all available remedies, up to and including termination of this Contract pursuant to its Termination Section, and STATE shall be entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.

**7. INDEMNIFICATION**

STATE and CONTRACTOR each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys’ fees which may in any manner result from or arise out of this Lease.

**8. INSURANCE**

STATE and CONTRACTOR each shall secure and keep in force during the Term of this Lease, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability insurance with minimum limits of \$250,000 per person and \$1,000,000 per occurrence.

**9. WORKS FOR HIRE**

CONTRACTOR acknowledges that all work(s) under this Agreement is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and assigns to STATE all rights and interests CONTRACTOR may have in the work(s) it prepares under this Agreement, including any right to derivative use of the work(s). All software and related materials developed by CONTRACTOR in performance of this Agreement for STATE are the sole property of STATE, and CONTRACTOR assigns and transfers all its right, title, and interest in the software and related materials to STATE. CONTRACTOR shall execute all necessary documents to enable STATE to protect STATE’s intellectual property rights under this section.

**10. WORK PRODUCT**

All work product, equipment or materials created for STATE or purchased by STATE under this Agreement belong to STATE. CONTRACTOR shall deliver all work product, equipment, and materials immediately to STATE at STATE'S request upon termination of this Agreement.

**11. NOTICE**

All notices or other communications required under this Contract must be given by registered or certified mail and are complete on the date postmarked when addressed to the Parties at the following addresses, or by email complete on the date sent:

<b>STATE</b>	<b>CONTRACTOR</b>
Name	Name
Title	Title
Address	Address
City, State, Zip	City, State, Zip
Email	Email

Notice provided under this provision does not meet the notice requirements for monetary claims against the State found at N.D.C.C. § 32-12.2-04.

## **12. INDEPENDENT ENTITY**

CONTRACTOR is an independent entity under this Agreement and is not a STATE employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workforce Safety and Insurance Act. CONTRACTOR retains sole and absolute discretion in the manner and means of carrying out CONTRACTOR'S activities and responsibilities under this Agreement, except to the extent specified in this Agreement.

## **13. ASSIGNMENT AND SUBCONTRACTS**

Neither Party may assign nor otherwise transfer or delegate any right or duty without the other Party's express written consent.

CONTRACTOR may enter subcontracts provided that any subcontract acknowledges the binding nature of this Agreement and incorporates this Agreement, including any attachments. CONTRACTOR is solely responsible for the performance of any subcontractor with whom CONTRACTOR contracts. Neither Party may contract for or incur obligations on behalf of the other Party.

## **14. SPOILIATION – PRESERVATION OF EVIDENCE**

CONTRACTOR shall notify STATE promptly of all potential claims that arise or result from this Agreement. CONTRACTOR also shall take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and shall grant to STATE the opportunity to review and inspect such evidence, including the scene of an accident.

## **15. MERGER AND MODIFICATION, CONFLICT IN DOCUMENTS**

***NOTE: For brevity, only four documents have been included. Please make sure you list all documents to be considered including amendments to the RFP or proposal, Best and Final Offers, Questions and Answers to the RFP, etc. In addition, make sure the order of these documents always has STATE's documents first, and CONTRACTOR's documents last, in order to ensure that STATE's documents always take precedence. Consult with your Attorney General Counsel if you have questions on the order of precedence.***

This Agreement, including the following documents, constitutes the entire agreement between the Parties. There are no understandings, agreements, or representations, oral or written, not specified within this Agreement. This Agreement may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both Parties.

Notwithstanding anything herein to the contrary, in the event of any inconsistency or conflict among the documents making up this Agreement, the documents must control in this order of precedence:

- a. The terms of this Agreement as may be amended;

- b. STATE’s Solicitation Amendment(s)to Request for Proposal (“RFP”) number *[X]*;
- c. STATE’s Request for Proposal (“RFP”) number *[X]*, dated *[X]*;
- d. CONTRACTOR’s proposal dated *[X]* in response to RFP number *[X]*.

**16. SEVERABILITY**

If any term of this Agreement is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the remaining terms is unaffected and, if possible, the rights and obligations of the Parties are to be construed and enforced as if this Agreement did not contain the illegal or unenforceable term.

**17. EFFECTIVENESS OF CONTRACT**

This Agreement is not effective until fully executed by both Parties. If no start date is specified in the Term of Agreement, the most recent date of the signatures of the Parties shall be deemed the Effective Date.

CONTRACTOR	STATE OF NORTH DAKOTA
<i>[insert agency]</i>	Acting through its <i>[insert agency]</i>
BY: <i>[Signature]</i>	BY: <i>[Signature]</i>
<i>[Printed Name]</i>	<i>[Printed Name]</i>
<i>[Title]</i>	<i>[Title]</i>
Date:	Date:

## JOINT POWERS AGREEMENT CHECKLIST (CIVIL)

- 1. Is the agreement in writing with the following:
  - Page numbers;
  - If there are exhibits or attachments, they are properly numbered or labeled and referred to in the agreement
  - Correct dates;
  - Correct payment amounts, if applicable;
  - Signatures by all parties;
  - Signature by the Attorney General (or designee), if required;
  - Correct dates.
- 2. Are the parties to the agreement properly identified in the first paragraph?
  - The governmental entity as well as the department or agency the agreement is for the benefit of.
- 3. Is the purpose of the agreement clearly stated?
- 4. Is the purpose of the agreement authorized by state law to be carried out through a joint powers agreement?
- 5. Does one of the parties to the agreement possess the power or function to be jointly or cooperatively exercised?
- 6. Does each entity or official have the authority to enter the agreement?
- 7. Is the following statutory authority of each party stated in the agreement:
  - Statutory authority to enter into the agreement;
  - Statutory citation of the power or function to be exercised.
- 8. Does each entity have an appropriation for the subject matter of the contract?
- 9. If recitals are used, are they clear, unambiguous, and consistent with the terms of the agreement?
- 10. Are all references to parties, exhibits, and defined terms or shorthand references internally consistent?
- 11. Are all internal references to sections and exhibits correct?
- 12. Are all terms unambiguous or clearly defined?
- 13. Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?
- 14. Does the agreement specify both the date on which it begins and the date on which it ends?
- 15. Is there a method for a party to withdraw from an agreement prior to its termination?
- 16. Is there a method of termination of the agreement?

## **JOINT POWERS AGREEMENT CHECKLIST (LAW ENFORCEMENT)**

- 1. Is the agreement in writing with the following:
  - Page numbers;
  - If there are exhibits or attachments, they are properly numbered or labeled and referred to in the agreement
  - Correct dates;
  - Correct payment amounts, if applicable;
  - Signatures by all parties;
  - Signature by the Attorney General (or designee), if required;
  - Correct dates.
- 2. Are the parties to the agreement properly identified in the first paragraph?
  - The governmental entity as well as the law enforcement agency the agreement is for the benefit of.
- 3. Is the agreement creating a task force? If so, what is it called?
- 4. Is the purpose of the agreement clearly stated?
- 5. Is the purpose of the agreement authorized by state law to be carried out through a joint powers agreement?
- 6. Does one of the parties to the agreement possess the power or function to be jointly or cooperatively exercised?
- 7. Does each entity or official have the authority to enter the agreement?
- 8. What is the geographic jurisdiction of each entity acting under the color of the agreement?
- 9. Is the following statutory authority of each party stated in the agreement:
  - Statutory authority to enter into the agreement;
  - Statutory citation of the power or function to be exercised.
- 10. Does each entity have an appropriation for the subject matter of the contract?
- 11. If recitals are used, are they clear, unambiguous, and consistent with the terms of the agreement?
- 12. Are all references to parties, exhibits, and defined terms or shorthand references internally consistent?
- 13. Are all internal references to sections and exhibits correct?
- 14. Are all terms unambiguous or clearly defined?
- 15. Are the terms “shall,” “may,” and “must” used properly to describe what a party is required to do [shall], is authorized to do [may], or has to do [must] before something else happens?

- 16. Does the agreement specify both the date on which it begins and the date on which it ends?
- 17. What is the command structure?
  - How is it exercised?
  - If there is an executive board, who are the members?
- 18. Is there a method for a party to withdraw from an agreement prior to its termination?
- 19. Is there a method of termination of the agreement?
- 20. Is there a described method of disposing of any property or distributing any funds at the time of partial or whole termination of the agreement?
- 21. If the agreement requires the acquisition of real or personal property, does the agreement describe the manner the property will be acquired?
- 22. Does the agreement describe the manner of financing?
- 23. Does the agreement address the following:
  - Liability of the parties;
  - Risk assignment: indemnification of the parties, a hold harmless provision, etc.;
  - Insurance provisions;
  - Governmental immunity provisions;
- 24. Does the agreement address control of officers while they are working under the JPA?
- 25. Have points of contact and addresses been given for each party to receive notices under the agreement?
- 26. Have public records been addressed?
- 27. Has choice of law been specified?
- 28. Are all terms unambiguous or clearly defined?
- 29. Has asset forfeiture been addressed?
- 30. Have minimum standards for law enforcement personnel been addressed (licensure standards)?
- 31. Has the Attorney General approved the JPA?
- 32. Has the agreement been approved by the governing body or agency head of each entity?