



Invitation to Bid (ITB)
For WIC Infant Formula
Event # 32110-13069

1. Section 1 -- Background Information

- 1.1 The purpose of this Invitation to Bid (“ITB”) is to establish a Statewide Contract, which will provide a rebate for iron-fortified infant milk-based and soy-based formulas in all physical forms (liquid concentrate, powder, and ready-to-feed) in their contract brand infant formula product line through the State Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) retail distribution system. The Contractor must provide a rebate for soy-based infant formula and will subcontract with another manufacturer if the Contractor does not manufacture the product line. In this case, any soy-based infant formula that is subcontracted is also considered a contract brand infant formula and will be rebated.

The total redeemed food benefits of any individual item on the contract are not known. The Central Procurement Office has attempted to give an accurate estimate of probable redeemed food benefits of each item based on a monthly average derived from six (6) months actual participation and issuance data for the period of September 2022 through August 2023 (Attachment III – WIC Infant Formula Rebate Invoices). The participation and infant formula usage data does not necessarily reflect the actual issuance and redemption that will occur under the contract.

The Central Procurement Office does not guarantee that any or all estimated amounts of any specified item or any total amount will be redeemed by the state except that primary contract infant formula will be the formula of first choice for issuance to infants and all other formula will be issued as an alternative to ensure regulatory compliance.

Based on the most current data as shown in Attachment III the average monthly rebate was \$3,583,253.43 with an estimated annual total of \$42,999,041.15.

- 1.2. Refer to SWC #437 WIC Infant Formula Specifications for more details, Section 4, page 11 below.
- 1.3. **Statewide Contract.** The purpose of this Invitation to Bid is to establish a source or sources of supply for all Tennessee State Agencies, Tennessee local governmental entities, the board of trustees of the University of Tennessee system, the Tennessee board of regents system or the state university boards, and the nonprofit entities identified in Tenn. Code Ann. § 33-2-1001.
- 1.4. **Pre-response Conference Notification.** The Central Procurement Office will hold a pre-response conference for this solicitation at the date, time, and location specified below:

Date/Time: Wednesday, December 13, 2023 at 9:30 AM –
10:30 AM CST

Location: Microsoft TEAMS: [Click here to join the meeting](#)

Meeting ID: 299 675 041 255

Passcode: mPZYxM

[Download Teams](#) | [Join on the web](#)

Join with a video conferencing device

stateoftn@m.webex.com

Video Conference ID: 117 541 739 0

[Alternate VTC instructions](#)

Or call in (audio only)

[+1 629-209-4396,,214696283#](tel:+16292094396214696283) United States, Nashville

Phone Conference ID: 214 696 283#

[Find a local number](#) | [Reset PIN](#)

Prospective respondents are encouraged to attend this pre-response conference; however attendance is not mandatory in order to submit a response. The Central Procurement Office conducts pre-response conferences to discuss and answer questions prior to response due date. The pre-response conference is for informational purposes only. Nothing stated at the pre-response conference shall change the solicitation unless the change is reflected in writing and disseminated to all prospective respondents that attended the pre-response conference.

1.5 Accommodation for People with Disabilities. Any individuals with disabilities who wish to participate in public meetings such as a scheduled pre-response conference or other scheduled function should contact the Solicitation Coordinator to discuss any auxiliary aids or services needed. Such contact should be made no less than three (3) business days prior to the public meeting to allow time for the Solicitation Coordinator to provide needed aids or services.

1.6 Questions and Comments. Each prospective Respondent must carefully review this ITB, including but not limited to, attachments, terms and conditions, and any amendments, for questions, comments, defects, objections, or any other matter requiring clarification or correction (collectively called "questions and comments"). Protests based on any objection to the ITB shall be considered waived and invalid if the objection has not been brought to the attention of the State, in writing, by the Written Questions & Comments Deadline.

Any prospective Respondent having questions and comments concerning this ITB must provide them in writing to the Solicitation Coordinator. All questions must be submitted no later than Monday, December 18th, 2023, at 2:00 PM CST.

1.7 Responses Due. The response must be received by the State on or before the date and hour designated for the response opening. Responses that are submitted untimely shall be rejected. All responses received will be read aloud during the response opening per federal requirements (7 C.F.R. 246.16a(c)(ii)).

Response Opening:

Date/Time: Thursday, February 29, 2024 at 2:00 PM CDT –
3:00 PM CDT Location: Central Procurement Office
William R. Snodgrass TN Tower, 3rd Floor
312 Rosa L. Parks Avenue, Nashville, TN 37243

Room: Conference Room A

Room Call-In: Local callers dial: 615-253-0068
Long distance callers dial: 844-885-6968

Microsoft Teams: [Click here to join the meeting](#)
Meeting ID: 262 294 964 211

Passcode: bYvJPT
[Download Teams](#) | [Join on the web](#)
Join with a video conferencing device
stateoftn@m.webex.com
 Video Conference ID: 118 169 647 9
[Alternate VTC instructions](#)
Or call in (audio only)
[+1 629-209-4396,,89077014#](#) United States, Nashville
 Phone Conference ID: 890 770 14#
[Find a local number](#) | [Reset PIN](#)

The following Schedule of Events represents the State's best estimate for this Solicitation.

EVENT	TIME (central time zone)	DATE
1. RFI Solicitation Issued		December 1, 2023
2. Disability Accommodation Request Deadline		December 11, 2023
3. Pre-response Conference	9:30 am to 10:30 am CST	December 13, 2023
4. Written "Questions & Comments" Deadline	2:00 p.m.	December 18, 2023
5. Final Solicitation with State's Response to "Questions & Comments" Issued		January 30, 2024
6. Response Deadline	2:00 p.m.	February 29, 2024
7. State Opening & Scoring of Cost Proposals	2:00 p.m.	February 29, 2024
8. State Notice of Intent to Award Released and Procurement Files Opened for Public Inspection	8:00 a.m.	March 5, 2024
9. End of Open File Period	4:30 p.m.	March 12, 2024

The State reserves the right, at its sole discretion, to adjust the Schedule of Events as it deems necessary. Any adjustment of the Schedule of Events will be issued through a new version of the ITB.

2. Section 2 -- Award Criteria

- 2.1. **Single Award -- Lowest Cost.** A single contract will be awarded for all line items to the Contractor with the responsive and responsible bidder offering the lowest total monthly net price for infant formula or the highest monthly rebate (subject to 7 C.F.R. § 246.2 and 7 C.F.R. § 246.16a (c) (4-7) (i-iv) for a standardized number of units of infant formula. The percentage discount will be calculated by dividing the rebate for the primary contract infant formula by each physical form (e.g., concentrated liquid, powdered, and ready-to-feed) by the manufacture's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the primary contract infant formula. The rebate for each type and form (e.g., concentrated liquid, powdered, and ready-to-feed) of all other contract brand infant formulas will be calculated by multiplying the determining the percentage discount for each physical form (e.g., concentrated liquid, powdered, and ready-to-feed) of the primary contract infant formula(s). The rebates resulting from the application of the percentage discount must remain the same throughout the contract period except for the cent-for-cent rebate adjustments required in 7 C.F.R. 247.16 a (c) (7) (iv). The State agency must calculate the lowest net price using the lowest national wholesale cost per unit for a full truckload of the infant formula on the date of the bid opening.

3. Section 3 -- Standard Terms of the Solicitation

- 3.1. **Respondent Registration.** Pursuant to Tenn. Code Ann. § 4-56-105 all respondents must be registered prior to the issuance of a contract or a purchase order. Respondents can register online at the State of Tennessee Supplier Portal:

https://sso.edison.tn.gov/psp/paprd/SUPPLIER/SUPP/h/?tab=PAPP_GUEST
- 3.2. **Respondent's Ability to Perform.** The State shall have the right to require evidence of the respondent's ability to perform the services or deliver the goods required pursuant to the terms and conditions of this ITB.
- 3.3. **Quality of Workmanship and Materials.** Unit price responses are requested on goods or services that equal or exceed the specifications, unless the specifications limit the dimensions, brands, or model of goods or services. The absence of detailed specifications or the omission of detailed descriptions shall mean that only the best commercial practices and only first quality goods and workmanship shall be supplied.
- 3.4. **Performance.** The respondent who is awarded a contract will be responsible for delivering the goods or providing the services set out in this ITB. All goods or services are subject to inspection and evaluation by the State.
- 3.5. **Clarifications.** The State reserves the right to conduct clarifications with one or more respondents. All communications and clarifications shall be conducted in a manner that is

fair and transparent.

3.6 Negotiations. The State may elect to negotiate by requesting revised Cost Proposals from apparently responsive and responsible respondents. However, the State reserves the right to award a contract on the basis of initial responses received. Therefore, each response should contain the respondent's best terms from a price and technical standpoint. The State reserves the right to conduct multiple negotiation rounds. If the State exercises its right to enter into negotiations, it may identify areas of a response that may require further clarification or areas in which it is apparent that there may have been miscommunications or misunderstandings as to the State's specifications or requirements. The State may seek to clarify those identified issues during negotiations. All responsive respondents will be given equivalent information with respect to cost negotiations. All cost negotiations will be documented for the procurement file. Additionally, the State may conduct target pricing and other price or service level negotiations. Target pricing may be based on considerations such as current pricing, market considerations, benchmarks, budget availability, or other method that does not reveal individual respondent pricing. During target price negotiations respondents are not obligated to meet or beat target prices, but will not be allowed to increase prices. All communications, clarifications and negotiations shall be conducted in a manner that supports fairness in response improvement. Note that each clarification sought by the State may be unique to an individual respondent.

3.7 Response Cancellation and Rejection. The State may cancel this ITB in its entirety and reissue it in whole or in part.

The State may reject any or all responses in its sole discretion. Additionally, the State may reject a response that: (a) qualifies the offer to provide goods or services as required by this ITB; (b) proposes alternative goods or services unless expressly requested by this ITB; (c) involves collusion, consultation, communication, or agreement among respondents; (d) includes information the respondent knew or should have known was materially incorrect; or (e) does not comply with the terms, conditions, specifications, or performance requirements of this ITB.

After the State opens the responses, no price changes shall be permitted.

3.8 Communications and Contacts. Prospective respondents must direct communications concerning this ITB to the following person designated as the Solicitation Coordinator:

Sondra Parks
Department of General Services, CPO
312 Rosa L Parks Avenue, 3rd Floor Tennessee Tower
Nashville TN 37243-1102
615-532-6357
Sondra.Parks@tn.gov

Unauthorized contact about this ITB with employees or officials of the State of Tennessee except as detailed in this ITB may result in disqualification from consideration under this procurement process. Notwithstanding the foregoing, respondents may alternatively contact:

Staff of the Governor's Office of Diversity Business Enterprise for assistance available to minority-owned, woman-owned, service-disabled veteran owned, businesses owned by persons with disabilities and small businesses as well as general, public information relating to this ITB (visit <https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/governor-s-office-of-diversity-business-enterprise--godbe--godbe-general-contacts.html> for contact information); and

The following individual designated by the State to coordinate compliance with the nondiscrimination requirements of the State of Tennessee, Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, and associated federal regulations:

Helen Crowley
Department of General Services, CPO
312 Rosa L Parks Avenue, 3rd Floor Tennessee Tower
Nashville, TN 37243-1102
615-741-1035
Helen.Crowley@tn.gov

3.9 Responses Submitted by Mail. If submitting a response by mail: (1) all prices must be typed or written in ink on the "Attachment II – Pricing Worksheet" portion of this ITB; (2) any corrections, erasures, or other alterations to prices must be initialed by the respondent; and (3) the response shall be manually signed by the respondent in ink. Each individual response must be returned in a separate envelope package or contain and must be properly labeled on the outside referencing the applicable event number and the response opening date. Responses should be mailed in a properly labeled sealed envelope to the following address:

Bidder Services
Department of General Services, CPO
312 Rosa L Parks Avenue, 3rd Floor Tennessee Tower
Nashville, TN 37243-1102.

Failure to comply with these requirements may result in rejection of the response.

3.10 Models Included in Response. All goods identified in the response must be new, of current manufacturer production, and must have been formally announced by the manufacturer or provider of services as being commercially available as of the date of response opening. Goods may include internal refurbished or reconditioned components normally used in the manufacturing process and deemed and warranted and sold as new equipment by the manufacturer.

3.11 Respondent Certification. By signing or electronically submitting the response, the respondent agrees to the terms and conditions of this ITB and certifies that all goods or services included in the response meet or exceed the Scope or Specifications of this ITB. The respondent agrees that, if it is awarded a contract, it will deliver goods or services that meet or exceed the specifications in this ITB.

3.12 Exceptions or New Terms or Conditions. Exceptions to terms and conditions or new terms and conditions proposed by the respondent that vary from this ITB may, in the discretion of the State, render the response nonresponsive. A response deemed nonresponsive will not be considered for an award of a contract.

3.13 Conflict of Interest. The State shall not consider a response from an individual who is, or within the past six (6) months has been, a State employee. For purposes of this ITB:

- a. An individual shall be deemed a State employee until such time as all compensation for salary, termination pay, and annual leave has been paid;
- b. A contract with or a response from a company, corporation, or any other contracting entity in which a controlling interest is held by any State employee shall be considered to be a contract with or proposal from the employee; and
- c. A contract with or a response from a company, corporation, or any other contracting entity that employs an individual who is, or within the past six (6) months has been, a State employee shall not be considered a contract with or a proposal from the employee and shall not constitute a prohibited conflict of interest.

3.14 Specifications Govern. Brands or model numbers identified in the specifications of this

ITB are deemed to meet all written specifications. In the event of a conflict between specified brands and models and the written specifications, the conflict shall be resolved in favor of the written specifications.

- 3.15 Firm Offer.** The response constitutes a firm offer that is irrevocable for ninety (90) days. An award of a contract shall, subject to necessary State approvals, be binding on the respondent without any further action by the respondent.
- 3.16 F.O.B. Destination.** Respondent's prices shall include delivery of all items F.O.B. destination or as otherwise specified by the State.
- 3.17 Tax Exemption.** The State of Tennessee is exempt from local, state, and federal excise taxes. These taxes shall not be included in respondent's prices. The successful respondent shall pay all taxes lawfully imposed on it with respect to any goods or services delivered in accordance with this ITB.
- 3.18 Prompt Pay Discount.** Any prompt pay discounts offered by respondents shall be extended to all authorized users of the contract.
- 3.19 Fixed Discount or Surcharge.** The net price per line item must be fixed for the contract's term.
- 3.20 On-site Inspection.** All respondents should visit the site to take exact measurements and examine the premises to become familiar with any problems or unusual circumstances. No allowances will be made by the State for errors in quotations due to any respondent not visiting the site prior to submitting their response. Respondents shall be responsible for their own measurements.
- 3.21 Samples - Optional.** The State may request samples of the products listed below for evaluation and testing: Reference Line(s): 1-41.

Samples provided shall be identical to the products identified in the response. If the State requests samples, respondents must provide the samples, at no cost to the State, to the Central Procurement Office within ten (10) calendar days of the request. The Central Procurement Office will not accept any samples unless all transportation charges have been prepaid. Samples must be clearly labeled as follows:

State of Tennessee Department of General Services, Central Procurement Office
312 Rosa L Parks Avenue
William R. Snodgrass Tennessee Tower, 3rd floor
Nashville, TN 37243-1102
Attn: Seth Lake
Name of Respondent:
Address:
ITB Number:
Item Number(s):
Response Deadline:

If requested samples are not provided or are improperly labeled, the State may consider the response non responsive. A respondent may submit a written request at the time the samples are submitted for the State to return the samples at the end of testing. As long as the samples are not destroyed in the evaluation and testing processes, then the State may return the samples at the respondent's expense. If the State does not receive a written request to return the samples, then the State will utilize or dispose of the samples at its discretion. The State may retain samples from the successful respondent for the contract's term. The State assumes no liability for samples.

- 3.22 Used Equipment.** When this ITB authorizes offers of used items, no used item is acceptable if serial numbers or any other manufacturer's identifying label or markings have been removed, obliterated, or changed in any way.
- 3.23 Tennessee Contractor License.** Respondents shall be properly licensed as of the date it files a response to this ITB and shall provide evidence of compliance with all applicable provisions of the Contractors Licensing Act of 1994, Tenn. Code Ann. § 62-6-101, *et seq.* in providing the specified information within this ITB. Any response that does not comply with Tenn. Code Ann. § 62-6-119, when applicable, shall be rejected.
- 3.24 Purchase of Materials for Highways or Roadways.** Respondents must comply with Tenn. Code Ann. § 54-5-135 when purchasing materials used for highway or road construction, resurfacing, or maintenance.
- 3.25 Energy Star Products.** Any goods ordered by the State must be Energy Star certified and meet applicable Energy Star specifications for energy efficiency.
- 3.26 Safety of Chemical Products.** All respondents awarded a contract must maintain, for all of its chemical products available under this Contract, a Safety Data Sheet ("SDS") on the chemical manufacturer's website. A site operated by or on behalf of the manufacturer or a relevant trade association is acceptable so long as the information is accessible to the public, free of charge.
- 3.27 Professional Licensure.** All persons, agencies, firms, or other entities that provide legal or financial opinions, which a respondent provides for consideration and evaluation by the State as a part of a response to this ITB, shall be properly licensed to render such opinions. Upon submitting the response, the respondent (and respondent employees and subcontractors, as applicable) must hold all necessary or appropriate business or professional licenses to provide the goods or services as required by the contract. The State may require any respondent to submit evidence of proper licensure.
- 3.28 Department of Revenue Registration.** Respondent must be registered with the Tennessee Department of Revenue for the collection of Tennessee sales and use tax. The State shall not award a contract unless the respondent provides proof of such registration or provides documentation from the Department of Revenue that the Contractor is exempt from this registration requirement. The foregoing is a mandatory requirement of an award of a contract pursuant to this ITB. To register, please visit the Department of Revenue's Tennessee Taxpayer Access Point (TNTAP) website for Online Registration and the Vendor Contract Questionnaire. These resources are available at the following: <https://tntap.tn.gov/eservices/#1>
- 3.29 Prohibition of Illegal Immigrants.** Any respondent awarded a contract shall comply with Tenn. Code Ann. § 12-3-309 and submit semi-annual attestations to the State.
- 3.30 Inspection of Procurement File.** All respondents have the right to inspect the procurement file, prior to award, upon completion of the evaluation by the Central Procurement Office. Interested respondents should contact the Solicitation Coordinator following the response opening date or once the file is open for the seven (7) day inspection period. A "Notice of Intent to Award" letter will be sent to all respondents detailing which respondent(s) has been recommended for award and the evaluated award amount(s). Upon request, a reasonable opportunity to inspect the procurement file will be provided to the respondent.
- 3.31 Protest by Respondent.** Pursuant to Tenn. Code Ann. § 12-3-514, any actual respondent may protest. Please refer to the Central Procurement Office's website to obtain a copy of the protest procedures and protest bond requirements or contact the sourcing analyst or category specialist at 615-741-1035. The website for the Central Procurement Office is as follows: <https://www.tn.gov/generalservices/procurement.html>. If

a written protest and a protest bond are not received by the end of the seven-day period to protest then the Solicitation Coordinator will proceed with the contract award.

GOVERNOR'S OFFICE OF DIVERSITY BUSINESS ENTERPRISE

Efforts to Achieve Diversity Business Participation

The Governor's Office of Diversity Business Enterprise ("Go-DBE") is the State's central point of contact to attract and assist minority-owned, woman-owned, service-disabled veteran-owned, disabled-owned, and small business enterprises interested in competing in the State of Tennessee's procurement and contracting activities. These diversity business enterprises are defined as follows:

Minority Business Enterprise (MBE) and Woman Business Enterprise (WBE)

Businesses that are a continuing, independent, for-profit business which performs a commercially useful function, and is at least fifty-one percent (51%) owned and controlled by one (1) or more individuals in the minority or woman category who were impeded from normal entry into the economic mainstream because of past practices of discrimination based on race, ethnic background, or gender.

Service-Disabled Veteran Business Enterprise (SDVBE)

"Service-disabled veteran-owned business" means a service-disabled veteran-owned business located in the State of Tennessee that satisfies the criteria in Tenn. Code. Ann. § 12-3-1102(8). "Service-disabled veteran" means any person who served honorably in active duty in the armed forces of the United States with at least a twenty percent (20%) disability that is service-connected, i.e., the disability was incurred or aggravated in the line of duty in the active military, naval or air service.

Small Business Enterprise (SBE)

"Small business" means a business that is a continuing, independent, for profit business which performs a commercially useful function with residence in Tennessee and has total gross receipts of no more than ten million dollars (\$10,000,000) averaged over a three-year period or employs no more than ninety-nine (99) persons on a full-time basis.

"Disabled Business Enterprise (DSBE)

"Disabled Business Enterprise" means a business owned by a person with a disability that is a continuing, independent, for-profit business that performs a commercially useful function, and is at least fifty-one (51%) owned and controlled by one (1) or more persons with a disability, or, in the case of any publicly-owned business, at least fifty one percent (51%) of the stock of which is owned and controlled by one(1) or more persons with a disability and whose management and daily business operations are under the control of one (1) or more persons with a disability.

For additional program eligibility information, visit:

<https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/governor-s-office-of-diversity-business-enterprise--godbe--/program-eligibility.html>

Instructions

As part of this Invitation to Bid, the respondent should complete the Diversity Utilization Plan below. To assist in your effort to seek and solicit the participation of diversity businesses on this solicitation, a directory of certified Diversity Business Enterprise firms may be found on the State's website at:

<https://tn.diversitysoftware.com/FrontEnd/VendorSearchPublic.asp?TN=tn&XID=1215>

directory or by calling Go-DBE toll free at 866-894-5026.

RESPONDENT'S DIVERSITY UTILIZATION PLAN

Respondent's Company Name:		
Solicitation Event Name:	Event Number:	
Respondent's Contact Name:	Phone: ()	Email:
Does the Respondent qualify as the diversity business enterprise? <input type="checkbox"/> Yes <input type="checkbox"/> No		
If yes, which designation does the Respondent qualify? <input type="checkbox"/> MBE <input type="checkbox"/> WBE <input type="checkbox"/> DSBE <input type="checkbox"/> SDVBE <input type="checkbox"/> SBE		
Certifying Agency:		

Estimated level of participation by DBEs if awarded a contract pursuant to this ITB:

Diversity Business Information (List all subcontractors, joint-ventures, and suppliers)	% of Contract	Estimated Amount	MBE/ WBE/ SDVBE/ SBE / DSBE Designation	Currently Certified (Yes or No)
Business Name:				
Contact Name:				
Contact Phone:				
Business Name:				
Contact Name:				
Contact Phone:				

If awarded a contract pursuant to this ITB, we confirm our commitment to make reasonable business efforts to meet or exceed the commitment to diversity as represented in our Diversity Utilization Plan. We shall assist the State in monitoring our performance of this commitment by providing, as requested, a monthly report of participation in the performance of this Contract by small business enterprises and businesses owned by minorities, women, service-disabled veterans and persons with disabilities. Such reports shall be provided to the state of Tennessee Governor's Office of Diversity Business Enterprise in the TN Diversity Software available online at: <https://tn.diversitysoftware.com/FrontEnd/StartCertification.asp?TN=tn&XID=9810>
 We further agree to request in writing and receive prior approval from the Central Procurement Office for any changes to the use of the above listed diversity businesses.

Authorized Signature: _____ Date: _____

Printed Name and Title of Signatory: _____



Statewide Contract # 437 WIC Infant Formula

4. SCOPE AND SPECIFICATIONS:

- 4.1. **Scope.** The Contractor shall provide all goods or services and deliverables as required, described, and detailed in the Scope or Specifications set forth in the Invitation to Bid and meet all service and delivery timelines as specified by the Invitation to Bid.
- 4.2. **Purpose.** The purpose of this Contract is to provide a rebate for, iron-fortified, containing at least 10 milligrams of iron per liter (at least 1.5 milligrams per 100 kilocalories) at standard dilution, infant milk- based and soy-based formulas in all physical forms (liquid concentrate, powder, and ready- to-feed) in the Contractor's contract brand infant formula product line through the state WIC Program retail distribution system. The infant formula must meet the requirements of 7 C.F.R. § 246.10(e)(1)(iii)-(iv) and 246.10 (e)(2)(iii) and be suitable for the routine issuance to the majority of generally healthy, full term infants.
- 4.3. **Definitions.**
 - a. Clinics - Health facilities where applicants for WIC services are certified eligible for the WIC program and receive WIC services.
 - b. Contract Brand Infant Formula - All infant formulas produced by the manufacturer awarded the contract to include iron-fortified infant milk-based and soy- based formulas in all physical forms (liquid concentrate, powder, and ready-to-feed) and any other formulas in their infant formula product lines to include formulas that are introduced by the manufacturer after contract has been awarded. Any soy-based infant formula that is subcontracted is also considered a contract brand infant formula.
 - c. Estimated Monthly Number of Units - The projected number of units to be purchased on a monthly basis by product type, physical form and container size.
 - d. Exempt Infant Formula - Infant formula which meets the requirements for an exempt infant formula under section 412(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350a(h) and the regulations at 7 C.F.R. 246.16 a (c) (9), 246.10 (d) (1) –(4) and 21 C.F.R. parts 106.
 - e. Food Benefit - A negotiable food benefit such as EBT card issued by the clinics that lists authorized foods and infant formulas that may be exchanged for such foods and infant formulas at a participating WIC retail vendor.
 - f. FNS - Food and Nutrition Services, United States Department of Agriculture (USDA).
 - g. Infant Formula - A food which meets the definition of an infant formula in section 201(z) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 321(z)) and which meets the

requirements for an infant formula under section 412(h) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §350a) and the regulations at 21 C.F.R. parts 106 and 107.

- h. Invoices - Monthly bill submitted by the State to the Contractor for payment of the rebate.
- i. Issue Date - This is the date the WIC food benefit is issued to the participant.
- j. Net Monthly Wholesale Cost to the State for Milk-Based Formula (for evaluation purpose only) - The total of the "net per unit wholesale cost to the State" multiplied by the standardized number of units" to be purchased (See Attachment II: Pricing Worksheet).
- k. Net per Unit Cost to the State - The best full truckload national wholesale price per unit less rebate offer per unit.
- l. Non-Contract Brand Infant Formula – Any non-exempt infant formula that is produced by a manufacturer other than the Contractor and any exempt infant formula produced by the Contractor and any other manufacturer.
- m. Primary Contract Infant Formula - The specific infant formula which will become the first choice for issuance (by physical form) and for which the Contractor submits a bid in response to this solicitation.
- n. Rebate - Amount payable to Tennessee Department of Health for each unit of contract brand infant formula authorized on a redeemed food benefit and purchased by the participant (see §246.16a(k)).
- o. Redeemed Food Benefit - A negotiable Food Benefit which has been exchanged by a participant at a WIC retail vendor for authorized foods and infant formulas identified on the food benefit and submitted to the bank-processing firm by the WIC retail vendor for payment and paid by the state WIC agency.
- p. Standardized Number of Unit(s) - The average monthly number of infants using each physical form is multiplied by the maximum monthly allowable number of ounces for each form (as allowed under §246.10(e)(9)(Table1)), 246.16a(c)(5)(i) and divided by the corresponding unit size (i.e., number of ounces per unit being bid).
- q. State WIC Agency or Agency - State of Tennessee Department of Health Division of Family Health and Wellness, Special Supplemental Nutrition Program for Women Infants and Children.
- r. Truckload Price - Lowest national wholesale cost per unit for a full truckload of the infant formula on the date of the bid opening (§246.16a(c)(5)).
- s. WIC - Special Supplemental Nutrition Program for Women, Infants and Children.
- t. WIC Retail Vendors - Individuals or business entities that:
 - 1. Operate one or more retail establishment such as a grocery store or pharmacy.
 - 2. Are authorized by the State WIC Agency to exchange food benefits for WIC authorized foods and infant formulas.
 - 3. Are under agreement with the State WIC Agency.

4.4. Certification and Assurance of Compliance. Contractor shall assure compliance with:

- a) Registration with the Secretary of the United States, Department of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §301 et seq.)
- b) All federal regulations pertaining to WIC.
- c) The Federal Food, Drug, and Cosmetic Act and regulations issued pursuant to such act.
- d) The Tennessee Department of Health's requirement that all infant formulas identified will carry the label of the Contractor.

4.5. Contractor Responsibilities.

- a) The Contractor shall provide the State with advance written notification of any changes in product price (i.e. any increase or decrease) at least 35 calendar days prior to the effective date of such change(s).
- b) The Contractor shall provide the State with advance written notification of any changes in product packaging, size, product labels, product information and/or reformulation of infant formula. This notice shall be provided at least 30 calendar days prior to the effective date of such change(s).
- c) Contractor must ensure adequate supplies are available to WIC authorized retail vendors with adequate time to place and fulfill orders to ensure start-up on July 1, 2024. Contractor shall maintain adequate supply levels of all types and forms of all contract brand Infant formulas to ensure that all WIC authorized retail vendors can meet the minimum stocking requirements for contract brand infant formulas. In the event of any contract brand infant formula(s) shortages, including but not limited to supply chain disruptions, emergencies, and disasters, the manufacturer must allow issuance of, and pay rebates on non-contract brand formula in any available unit size, type, or form authorized by the Food and Drug Administration (FDA), or for which FDA is exercising enforcement discretion. The Maximum Monthly Allowance (MMA) may be exceeded in the event of a supply chain disruption, emergency, and disaster. The State agency will implement remedies in accordance with an applicable waivers and the remedies will remain in effect for the duration of the waivers, unless discontinued earlier by the State agency. The State agency will choose to first issue contract brand infant formula in a different product line, size, and/or physical form prior to issuing a non-contract brand infant formula in the event of a supply chain disruption, emergency, and disaster.
- d) In the event of an infant formula recall, supply chain disruption, emergency, or disaster, as determined by USDA under the ABFA (CNA; 42 USC 1786), the Contractor must ensure that WIC participants can purchase formula using WIC benefits (WIC Policy Memorandum #2022-6). The Contractor must allow issuance of, and pay rebates on, non-contract brand formula in any available unit size, type, or form authorized by the Food and Drug Administration (FDA) or for which FDA is exercising enforcement discretion to protect against disruption of WIC participants using WIC benefits. (WIC Policy Memorandum #2022-6) The State agency, at its sole discretion, will obtain USDA waivers and, upon notifying the contractor, immediately implement such waivers.
- e) In the event, infant formula is purchased with WIC benefits, and it does not meet the needs of the participant, the participant will return the formula to their local WIC clinic to be destroyed and issued a replacement product (WIC Policy Memorandum #2020-1).

- f) In the event the Contractor introduces an infant formula designed to replace the primary contract infant formula(s) referenced in the contract, the Contractor shall provide such formulas at the same net wholesale cost per fluid ounce cost as the original formula.
- g) In the event the Contractor discontinues any of the contract brand infant formulas, the Contractor shall provide a comparable substitute by the same manufacturer or any other manufacturers' brand of comparable infant formula at the same net wholesale cost per fluid ounce cost as the original contract infant formula.
- h) The rebate for each of the milk-based or soy-based infant formulas shall yield the same percent discount on the wholesale cost as to the rebate for the primary contract brand of infant formula for concentrate, powdered and ready-to-feed infant formulas. Additionally, rebates will apply to any new formulas added to the Contractor's product line after initial contract date which yield the same percent discount as the corresponding physical form of the primary contract brand based on the wholesale price in effect at the time the State agency approved for issuance.

4.6. The Tennessee Department of Health Responsibilities.

- a) Have present, the names of the awarded Contractor's infant formula on the food benefits to be used by the WIC program participants to purchase infant formula in accordance with 7 C.F.R. § 246.10 (e)(1) thru (e)(3) and (e)(9).
- b) Submit on a monthly basis a detailed invoice reflecting the number of units (brand names) authorized on redeemed food benefit from the WIC program's WIC authorized retail vendors and the rebate to be remitted to the state. The payment by the Contractor is made after the receipt of the invoice sent by the Tennessee Department of Health. The monthly rebate invoice will include the total number of units calculated based on redemptions authorized on redeemed food benefit multiplied by the rebate offer per unit.
- c) Provide supporting documentation to verify the accuracy of the invoice on a monthly basis. Such documentation will include a comparison of redeemed food benefits issued for the full nutrition benefit (FNB) redeemed food benefits.
- d) Validate and correct any overbilling error for the infant formula rebate that occurs.
- e) Upon resolution of a rebate invoice dispute, pay any funds to the Contractor within a period not to exceed 45 calendar days. All rebate disputes must be resolved by the close-out of the federal fiscal year in which the dispute occurred.
- f) Notify all WIC sites, contracted WIC authorized retail vendors and physicians of the Contractor's brands of allowable infant formulas under this contract to be exclusive infant formulas of the Tennessee WIC program.
- g) Not provide Contractor access to:
 1. Any records identifying applicant or participant and/or family members, regardless of the source (7CFR 246.26 (d)(1)(i) and WIC Policy Memorandum #2021-6).
 2. Any information about WIC authorized retail vendors that individually identifies the vendor, except for vendor's name, website, address, email address, store type, telephone number, authorization status, and vendor identification

number, as well as “pseudo” and partial Vendor IDs. (7 CFR 246.26 (e) and WIC Policy Memorandum #2021-6).

- h) Reserve the rounding up option in order to provide the full nutrition benefit (FNB) when the FNB can only be met by using the rounding up methodology (7 C.F.R. § 246.10(h)). The State agency may issue ready-to-feed infant formula as outlined in regulations 7 C.F.R. 246.10 (e) (1) (iv) and 246.10 (b) (1) (ii).
- i) The State agency will require medical documentation before issuing the following described at 7 C.F.R 246.10 (d) (1):
 - 1. Any non-contract brand infant formula, except as allowed under any applicable waivers;
 - 2. Any infant formula prescribed to an infant, child, or adult who receives Food Package III, except as allowed under any applicable waivers;
 - 3. Any exempt infant formula, except as allowed under any applicable waivers;
 - 4. Any WIC-eligible nutritional, except as allowed under any applicable waivers; Any authorized supplemental food issued to participants who receive Food Package III, except as allowed under any applicable waivers;
 - 5. Any contract brand infant formula that does not meet the requirements in 7 C.F.R 246.10 (e) (12), except as allowed under any applicable waivers.

4.7. Monitoring:

a) Inspection:

- 1. The Contractor shall, at all times during the period that this contract is in force, assure to authorized personnel of the Tennessee Department of Health, USDA, the Tennessee Comptroller of the Treasury, and Comptroller General of the United States, the right, during the Contractor's normal business hours, to inspect or otherwise evaluate the quality, appropriateness, and timeliness of the services provided, determine the amounts payable under the contract, and inspect the Contractor's rebate cost records at such intervals as the State and/or USDA deems necessary.

b) Program Reports:

- 1. As requested, the Contractor shall meet with the Agency to review the progress and performance of the current contract. The Contractor shall address any concerns regarding billing procedures at these meetings. If the State should require information related to the contract, the Contractor will provide such information within ten (10) working days from the agency's written request at no additional cost to the State.
- 2. The Contractor must have a management information system sufficient to provide the state with up-to-date detailed information and program reports if needed excluding any data that is deemed confidential, proprietary or trademarked. The data must be provided in an electronic format.
- 3. The State must have a management information system sufficient to provide the Contractor with up-to-date detailed information and program reports if needed excluding any data that is deemed confidential, proprietary or trademarked. The data must be provided in an electronic format.

4.8. Use of WIC Service Marks as referenced in FNS Policy Memo #2009-1:

- a) Manufacturer acknowledges the WIC acronym and the WIC logo are service marks owned by the U.S. Department of Agriculture (USDA), and all rights therein, and

goodwill pertaining thereto, belong exclusively to USDA. Manufacturer shall not use these service marks in any manner on its goods, containers, packaging, tags, or labels affixed thereto.

- b) Manufacturer also shall not use the WIC logo in advertising or other promotional materials (collectively: "advertising"). Manufacturer shall not use the WIC acronym in advertising in any manner that is likely to cause confusion, mistake, or deception as to the affiliation, connection, or association of manufacturer with the WIC program, or as to the sponsorship or approval of manufacturer's goods, services, advertising, or commercial activities, including nutritional message(s), by the WIC program, USDA, or the State Agency.
- c) Manufacturer shall include the following statement with any use of the WIC acronym in advertising: "WIC is a registered service mark of the U.S. Department of Agriculture for USDA's special supplemental nutrition program for women, infants and children.

4.9. Warranty Clauses:

- 4.9.1. **Warranty.** Contractor represents and warrants that the term of the warranty ("Warranty Period") shall be the greater of the Term of this Contract or any other warranty generally offered by Contractor, its Suppliers, or manufacturers to customers of its goods or services. The goods or services provided under this Contract shall conform to the terms and conditions of this Contract throughout the Warranty Period. Any nonconformance of the goods or services to the terms and conditions of this Contract shall constitute a "Defect" and shall be considered "Defective." If Contractor receives notice of a Defect during the Warranty Period, then Contractor shall correct the Defect, at no additional charge. Contractor represents and warrants that the State is authorized to possess and use all equipment, materials, software, and deliverables provided under this Contract.

Contractor represents and warrants that all goods or services provided under this Contract shall be provided in a timely and professional manner, by qualified and skilled individuals, and in conformity with standards generally accepted in Contractor's industry.

If Contractor fails to provide the goods or services as warranted, then Contractor will re-provide the goods or services at no additional charge. If Contractor is unable or unwilling to re-provide the goods or services as warranted, then the State shall be entitled to recover the fees paid to Contractor for the Defective goods or services. Any exercise of the State's rights under this Section shall not prejudice the State's rights to seek any other remedies available under this Contract or applicable law.

- 4.10. **Inspection and Acceptance.** The State shall have the right to inspect all goods or services provided by Contractor under this Contract. If, upon inspection, the State determines that the goods or services are Defective, the State shall notify Contractor, and Contractor shall re-deliver the goods or provide the services at no additional cost to the State. If after a period of thirty (30) days following delivery of goods or performance of services the State does not provide a notice of any Defects, the goods or services shall be deemed to have been accepted by the State.

5. TERM OF CONTRACT:

- 5.1. **Term of Contract.** This Contract, including the rebate amounts that are bid, shall be effective on July 01, 2024 ("Effective Date") and extend for a period of thirty-six (36) months after the Effective Date ("Term"). ~~The State shall have no obligation for goods~~

or services provided by the Contractor prior to the Effective Date. In no event, however, shall the maximum Term, including all renewals or extensions, exceed a total of sixty (60) months.

- 5.2. **Renewal Options.** This Contract, including the rebate amounts that are bid, may be renewed upon satisfactory completion of the Term. The State reserves the right to execute up to two (2) renewal options under the same terms and conditions for a period not to exceed twelve (12) months each by the State, at the State's sole option.
- 5.3. **Term Extension.** The State may extend the Term an additional period of time, not to exceed one hundred-eighty (180) days beyond the expiration date of this Contract, under the same terms and conditions, at the State's sole option.

6. PAYMENT TERMS AND CONDITIONS:

- 6.1. The Contractor shall remit to the State the total monthly rebate in full as determined by the State to be due, based on the rebate offered on the ITB's Pricing Worksheet (Attachment III) as will be adjusted for any price increases or decreases for the number of units authorized on redeemed food benefits for infant formula manufactured by the Contractor. Payment shall be made by the Contractor within 30 calendar days from the receipt of an invoice from the Agency detailing the number of units authorized on redeemed food benefits for infant formula manufactured by the Contractor purchased by the participants. Payment shall be wire transferred to the Agency into an account number provided by the Agency.
- 6.2. The Contractor shall notify the Agency by email or telephone at least one (1) business day prior to transmitting wire transfer to the Agency. Contact person:

WIC Accountant: Habib Hanna
Department of Health, Account Management Office
701 James Robertson Parkway, 6th Floor
Nashville, TN 37243
615-253-4097
Habib.Hanna@tn.gov
- 6.3. The Contractor shall remit to the Agency the rebate due in full for all units of the Contractor's infant formula purchased with redeemed food benefits from an infant and women and children issued infant formula under Food Package III during the contract period. Because the WIC Program issues three (3) months of food benefits at a time, the rebate shall continue to apply to any authorized redeemed food benefits for the Contractor's infant formula for up to 90 days following the end of the contract period.
- 6.4. The Contractor shall work with the Tennessee Department of Health to settle all disputes prior to the closeout of the Federal Fiscal Year in which the dispute occurred. Any dispute not settled by the closeout of the Federal Fiscal Year in which the dispute occurred shall constitute a waiver and release of any dispute, error, correction, or change; except in the case of an audit or a situation where negligence, errors beyond human control, and/or illegal activity prevented the Contractor or the State from being able to identify the error, correction, or change.
- 6.5. The Contractor will not withhold, under any circumstances, any rebate payments due the Agency, nor shall the Contractor interrupt or reduce rebate payments during the period that the resolution of any invoice dispute is pending.

The Tennessee Department of Health shall:

Work with the Contractor to settle all disputes prior to the closeout of the Federal Fiscal Year in which the dispute occurred. Any dispute not settled by the closeout of the Federal Fiscal Year in which the dispute occurred shall constitute a waiver and release of any dispute, error, correction, or change in the contractor's rebate payment that would otherwise have been raised by the agency, except in the case of an audit or a situation where negligence, errors beyond human control, and/or illegal activity prevented the agency from being able to identify the error, correction, or change in the contractor's rebate payment.

- 6.6. **Estimated Revenue.** The total usages of any goods or services under the Contract are not known. The State estimates the rebate during the Term shall be thirty-eight million two hundred forty-seven thousand four hundred thirty-two dollars \$38,247,432.00 annually ("Estimated Revenue").
- 6.7. **Price Changes.** The manufacturer will adjust the rebate for any price increase or decrease to the lowest national wholesale price per unit for a full truckload subsequent to the bid opening in accordance with CFR 246.16a(c)(5)(iv). This shall include the entire contract brand infant formula product line and will result in an automatic rebate increase or decrease on a cent for cent basis of such formulas taking effect for food benefits redeemed on the first day of the month following the effective date of any such increase or decrease in the manufacturer's best full truckload national wholesale price per unit.
- 6.8. **Travel Compensation.** The Contractor shall not be compensated or reimbursed for travel time, travel expenses, meals, or lodging.

7. MANDATORY TERMS AND CONDITIONS:

- 7.1. **Required Approvals.** The State is not bound by this Contract until it is duly approved by the Parties and all appropriate State officials in accordance with applicable Tennessee laws and regulations. Depending upon the specifics of this Contract, this may include approvals by the Commissioner of Finance and Administration, the Commissioner of Human Resources, the Comptroller of the Treasury, and the Chief Procurement Officer. Approvals shall be evidenced by a signature or electronic approval.
- 7.2. **Communications and Contacts.** All instructions, notices, consents, demands, or other communications required or contemplated by this Contract shall be in writing and shall be made by certified, first class mail, return receipt requested and postage prepaid, by overnight courier service with an asset tracking system, or by email. All communications, regardless of method of transmission, shall be addressed to the respective party at the appropriate mailing address or email address as stated below or any other address provided in writing by a party.

The Contractor:

Contractor
Contractor's Contact Name & Title
Address
Email Address
Telephone Number

State of Tennessee:

Sondra Parks
Department of General Services, CPO
312 Rosa L Parks Avenue, 3rd Floor Tennessee Tower
Nashville TN 37243-1102
615-532-6357
Sondra.Parks@tn.gov

All instructions, notices, consents, demands, or other communications shall be considered effective upon receipt or recipient confirmation as may be required.

- 7.3. **Modification and Amendment.** This Contract may be modified only by a written amendment signed by all parties and approved by all applicable State officials.
- 7.4. **Subject to Funds Availability.** The Contract is subject to the appropriation and availability of State or federal funds. In the event that the funds are not appropriated or are otherwise unavailable, the State reserves the right to terminate this Contract upon written notice to the Contractor. The State's exercise of its right to terminate this Contract shall not constitute a breach of Contract by the State. Upon receipt of the written notice, the Contractor shall cease all work associated with the Contract. If the State terminates this Contract due to lack of funds availability, the Contractor shall be entitled to compensation for all conforming goods requested and accepted by the State and for all satisfactory and authorized services completed as of the termination date. Should the State exercise its right to terminate this Contract due to unavailability of funds, the Contractor shall have no right to recover from the State any actual, general, special, incidental, consequential, or any other damages of any description or amount.
- 7.5. **Termination for Convenience.** The State may terminate this Contract for convenience without cause for any reason. The State's election to terminate this Contract for convenience shall be effective upon the date specified and shall not be deemed a breach of contract by the State. The State shall give the Contractor at least one hundred eighty (180) days written notice before the termination date. The Contractor shall be entitled to compensation for all conforming goods delivered and accepted by the State or for satisfactory, authorized services completed as of the termination date. In no event shall the State be liable to the Contractor for compensation for any good or service that has not been provided, nor shall the Contractor be relieved of any liability to the State for any damages or claims arising under this Contract.
- 7.6. **Termination for Cause.** If the Contractor fails to properly perform its obligations under this Contract in a timely or proper manner, or if the Contractor materially violates any terms of this Contract ("Breach Condition"), the State shall have the right to immediately terminate the Contract and withhold payments in excess of compensation for completed services or provided goods. Notwithstanding the above, the contractor shall not be relieved of liability to the State for damages sustained by virtue of any Breach Condition and the State may seek other remedies allowed at law or in equity for breach of this Contract.
- 7.7. **Assignment and Subcontracting.** The Contractor shall not assign this Contract or enter into a subcontract for any of the goods or services provided under this Contract without the prior written approval of the State. Notwithstanding any use of the approved subcontractors, the Contractor shall be the prime contractor and responsible for compliance with all terms and conditions of this Contract. The State reserves the right to request additional information or impose additional terms and conditions before approving an assignment of this Contract in whole or in part or the use of subcontractors in fulfilling the Contractor's obligations under this Contract.

- 7.8. **Conflicts of Interest.** The Contractor warrants that no part of the Contractor's compensation shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed under this Contract.

The Contractor acknowledges, understands, and agrees that this Contract shall be null and void if the Contractor is, or within the past six (6) months has been, an employee of the State of Tennessee or if the Contractor is an entity in which a controlling interest is held by an individual who is, or within the past six (6) months has been, an employee of the State of Tennessee.

- 7.9. **Nondiscrimination.** The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of handicap or disability, age, race, creed, color, religion, sex, national origin, or any other classification protected by federal or state law. The Contractor shall, upon request, show proof of nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.
- 7.10. **Equal Opportunity.** During the performance of this Contract, the Contractor agrees as follows:

- a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:
1. Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising;
 2. Layoff or termination;
 3. Rates of pay or other forms of compensation; and
 4. Selection for training, including apprenticeship.

The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause. The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, State that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

- b) If the State approves any subcontract, the subcontract shall include paragraphs (a) and (b) above.
- 7.11. **Prohibition of Illegal Immigrants.** The requirements of Tenn. Code Ann. § 12-3-309 addressing the use of illegal immigrants in the performance of any contract to supply goods or services to the state of Tennessee, shall be a material provision of this Contract, a breach of which shall be grounds for monetary and other penalties, up to and including termination of this Contract.
- a) The Contractor agrees that the Contractor shall not knowingly utilize the services of an illegal immigrant in the performance of this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant

in the performance of this Contract. The Contractor shall reaffirm this attestation, in writing, by submitting to the State a completed and signed copy of the document at: <https://www.tn.gov/generalservices/procurement/central-procurement-office--cpo-/supplier-information-.html>, semi-annually during the Term. If the Contractor is a party to more than one contract with the State, the Contractor may submit one attestation that applies to all contracts with the State. All Contractor attestations shall be maintained by the Contractor and made available to State officials upon request.

- b) Prior to the use of any subcontractor in the performance of this Contract, and semi-annually thereafter, during the Term, the Contractor shall obtain and retain a current, written attestation that the subcontractor shall not knowingly utilize the services of an illegal immigrant to perform work under this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant to perform work under this Contract. Attestations obtained from subcontractors shall be maintained by the Contractor and made available to State officials upon request.
- c) The Contractor shall maintain records for all personnel used in the performance of this Contract. Contractor's records shall be subject to review and random inspection at any reasonable time upon reasonable notice by the State.
- d) The Contractor understands and agrees that failure to comply with this section will be subject to the sanctions of Tenn. Code Ann. § 12-3-309 for acts or omissions occurring after its effective date.
- e) For purposes of this Contract, "illegal immigrant" shall be defined as any person who is not: (i) a United States citizen; (ii) a Lawful Permanent Resident; (iii) a person whose physical presence in the United States is authorized; (iv) allowed by the federal Department of Homeland Security and who, under federal immigration laws or regulations, is authorized to be employed in the U.S.; or (v) is otherwise authorized to provide services under the Contract.

7.12. **Records.** The Contractor shall maintain documentation for all charges under this Contract. The books, records, and documents of the Contractor, for work performed or money received under this Contract, shall be maintained for a period of five (5) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the State, the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be prepared in accordance with generally accepted accounting principles.

7.13. **Monitoring.** The Contractor's activities conducted and records maintained, pursuant to this Contract, shall be subject to monitoring and evaluation by the State, the Comptroller of the Treasury, or their duly appointed representatives.

7.14. **Progress Reports.** The Contractor shall submit brief, periodic, progress reports to the State as requested.

7.15. **Strict Performance.** Failure by any Party to this Contract to require, in any one or more cases, the strict performance of any of the terms, covenants, conditions, or provisions of this Contract shall not be construed as a waiver or relinquishment of any term, covenant, condition, or provision. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written amendment signed by the Parties.

7.16. **Independent Contractor.** The parties shall not act as employees, partners, joint ventures, or associates of one another. The parties are independent contracting entities. Nothing in this Contract shall be construed to create an employer/employee relationship

or to allow either party to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The employees or agents of one party are not employees or agents of the other party.

- 7.17. **Patient Protection and Affordable Care Act.** The Contractor agrees that it will be responsible for compliance with the Patient Protection and Affordable Care Act ("PPACA") with respect to itself and its employees, including any obligation to report health insurance coverage, provide health insurance coverage, or pay any financial assessment, tax, or penalty for not providing health insurance. The Contractor shall indemnify the State and hold it harmless for any costs to the State arising from contractor's failure to fulfill its PPACA responsibilities for itself or its employees.
- 7.18. **Limitation of State's Liability.** The State shall have no liability except as specifically provided in this Contract. In no event will the State be liable to the Contractor or any other party for any lost revenues, lost profits, loss of business, decrease in the value of any securities or cash position, time, money, goodwill, or any indirect, special, incidental, punitive, exemplary or consequential damages of any nature, whether based on warranty, contract, statute, regulation, tort (including but not limited to negligence), or any other legal theory that may arise under this Contract or otherwise. .
- 7.19. **Limitation of Contractor's Liability.** In accordance with Tenn. Code Ann. § 12-3-701, the Contractor's liability for all claims arising under this Contract shall be limited to an amount equal to two (2) times the Maximum Revenue amount and as may be amended. Except as set forth below, in no event will the Contractor be liable to the State or any other party for any lost revenues, lost profits, loss of business, decrease in the value of any securities or cash position, time, money, goodwill, or any indirect, special, incidental, punitive, exemplary or consequential damages of any nature, whether based on warranty, contract, statute, regulation, tort (including but not limited to negligence), or any other legal theory that may arise under this Contract or otherwise. PROVIDED THAT in no event shall this Section limit the liability of the Contractor for: (i) intellectual property or any Contractor indemnity obligations for infringement for third-party intellectual property rights; (ii) any claims covered by any specific provision in the Contract providing for liquidated damages; or (iii) any claims for intentional torts, criminal acts, fraudulent conduct, or acts or omissions that result in personal injuries or death.
- 7.20. **Hold Harmless.** The Contractor agrees to indemnify and hold harmless the State of Tennessee as well as its officers, agents, and employees from and against any and all claims, liabilities, losses, and causes of action which may arise, accrue, or result to any person, firm, corporation, or other entity which may be injured or damaged as a result of acts, omissions, or negligence on the part of the Contractor, its employees, or any person acting for or on its or their behalf relating to this Contract. The Contractor further agrees it shall be liable for the reasonable cost of attorneys for the State to enforce the terms of this Contract.
- In the event of any suit or claim, the Parties shall give each other immediate notice and provide all necessary assistance to respond. The failure of the State to give notice shall only relieve the Contractor of its obligations under this Section to the extent that the Contractor can demonstrate actual prejudice arising from the failure to give notice. This Section shall not grant the Contractor, through its attorneys, the right to represent the State in any legal matter, as the right to represent the State is governed by Tenn. Code Ann. § 8-6-106.
- 7.21. **Statewide Contract Reports.** All reports shall be submitted electronically in Microsoft Excel format. Reports shall include the ability to sort or summarize data in accordance with the Contract Administrator's specifications. All reports shall be provided at no additional cost to the State.

- a) Custom Reports: When requested by the State, the Contractor shall submit custom reports to the Contract Administrator within thirty (30) days of the request.

7.22. **HIPAA Compliance**. The State and Contractor shall comply with obligations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Health Information Technology for Economic and Clinical Health ("HITECH") Act and any other relevant laws and regulations regarding privacy (collectively the "Privacy Rules"). The obligations set forth in this Section shall survive the termination of this Contract.

- a) Contractor warrants to the State that it is familiar with the requirements of the Privacy Rules, and will comply with all applicable requirements in the course of this Contract.
- b) Contractor warrants that it will cooperate with the State, including cooperation and coordination with State privacy officials and other compliance officers required by the Privacy Rules, in the course of performance of the Contract so that both parties will be in compliance with the Privacy Rules.
- c) The State and the Contractor will sign documents, including but not limited to business associate agreements, as required by the Privacy Rules and that are reasonably necessary to keep the State and Contractor in compliance with the Privacy Rules. This provision shall not apply if information received or delivered by the parties under this Contract is NOT "protected health information" as defined by the Privacy Rules, or if the Privacy Rules permit the parties to receive or deliver the information without entering into a business associate agreement or signing another document.

The Contractor will indemnify the State and hold it harmless for any violation by the Contractor or its subcontractors of the Privacy Rules. This includes the costs of responding to a breach of protected health information, the costs of responding to a government enforcement action related to the breach, and any fines, penalties, or damages paid by the State because of the violation.

7.23. **Tennessee Consolidated Retirement System**. Subject to statutory exceptions contained in Tenn. Code Ann. §§ 8-36-801, et seq., the law governing the Tennessee Consolidated Retirement System ("TCRS"), provides that if a retired member of TCRS, or of any superseded system administered by TCRS, or of any local retirement fund established under Tenn. Code Ann. §§ 8-35-101, et seq., accepts State employment, the member's retirement allowance is suspended during the period of the employment. Accordingly and notwithstanding any provision of this Contract to the contrary, the Contractor agrees that if it is later determined that the true nature of the working relationship between the Contractor and the State under this Contract is that of "employee/employer" and not that of an independent contractor, the Contractor, if a retired member of TCRS, may be required to repay to TCRS the amount of retirement benefits the Contractor received from TCRS during the Term.

7.24. **Tennessee Department of Revenue Registration**. The Contractor shall comply with all applicable registration requirements contained in Tenn. Code Ann. §§ 67-6-601 -- 608. Compliance with applicable registration requirements is a material requirement of this Contract.

7.25. **Debarment and Suspension**. The Contractor certifies, to the best of its knowledge and belief, that it, its current and future principals, its current and future subcontractors and their principals:

- a) are not presently debarred, suspended, proposed for debarment, declared ineligible,

or voluntarily excluded from covered transactions by any federal or state department or agency;

- b) have not within a three (3) year period preceding this Contract been convicted of, or had a civil judgment rendered against them from commission of fraud, or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or grant under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property;
- c) are not presently indicted or otherwise criminally or civilly charged by a government entity (federal, state, or local) with commission of any of the offenses detailed in section b. of this certification; and
- d) have not within a three (3) year period preceding this Contract had one or more public transactions (federal, state, or local) terminated for cause or default.

The Contractor shall provide immediate written notice to the State if at any time it learns that there was an earlier failure to disclose information or that due to changed circumstances, its principals or the principals of its subcontractors are excluded or disqualified.

- 7.26. **Force Majeure.** "Force Majeure Event" means fire, flood, earthquake, elements of nature or acts of God, wars, riots, civil disorders, rebellions or revolutions, acts of terrorism or any other similar cause beyond the reasonable control of the party except to the extent that the non-performing party is at fault in failing to prevent or causing the default or delay, and provided that the default or delay cannot reasonably be circumvented by the non-performing party through the use of alternate sources, workaround plans or other means. A strike, lockout or labor dispute shall not excuse either party from its obligations under this Contract. Except as set forth in this Section, any failure or delay by a party in the performance of its obligations under this Contract arising from a Force Majeure Event is not a default under this Contract or grounds for termination. The non-performing party will be excused from performing those obligations directly affected by the Force Majeure Event, and only for as long as the Force Majeure Event continues, provided that the party continues to use diligent, good faith efforts to resume performance without delay. The occurrence of a Force Majeure Event affecting Contractor's representatives, suppliers, subcontractors, customers or business apart from this Contract is not a Force Majeure Event under this Contract. Contractor will promptly notify the State of any delay caused by a Force Majeure Event (to be confirmed in a written notice to the State within one (1) day of the inception of the delay) that a Force Majeure Event has occurred, and will describe in reasonable detail the nature of the Force Majeure Event. If any Force Majeure Event results in a delay in Contractor's performance longer than forty-eight (48) hours, the State may, upon notice to Contractor: (a) cease payment of the fees until Contractor resumes performance of the affected obligations; or (b) immediately terminate this Contract or any purchase order, in whole or in part, without further payment except for fees then due and payable. Contractor will not increase its charges under this Contract or charge the State any fees other than those provided for in this Contract as the result of a Force Majeure Event.
- 7.27. **State and Federal Compliance.** The Contractor shall comply with all applicable state and federal laws and regulations in the performance of this Contract.
- 7.28. **Governing Law.** This Contract shall be governed by and construed in accordance with the laws of the State of Tennessee. The Tennessee Claims Commission or the state or federal courts in Tennessee shall be the venue for all claims, disputes, or disagreements

arising under this Contract. The Contractor acknowledges and agrees that any rights, claims, or remedies against the State of Tennessee or its employees arising under this Contract shall be subject to and limited to those rights and remedies available under Tenn. Code Ann. §§ 9-8-101 -- 407.

- 7.29. **Entire Agreement.** This Contract is complete and contains the entire understanding between the parties relating to its subject matter, including all the terms and conditions of the parties' agreement. This Contract supersedes any and all prior understandings, representations, negotiations, and agreements between the parties, whether written or oral.
- 7.30. **Severability.** If any terms and conditions of this Contract are held to be invalid or unenforceable as a matter of law, the other terms and conditions of this Contract shall not be affected and shall remain in full force and effect. The terms and conditions of this Contract are severable.
- 7.31. **Headings.** Section headings of this Contract are for reference purposes only and shall not be construed as part of this Contract.
- 7.32. **Incorporation of Additional Documents.** Each of the following documents is included as a part of this Contract by reference. In the event of a discrepancy or ambiguity regarding the Contractor's duties, responsibilities, and performance under this Contract, these items shall govern in order of precedence below:
- a) any amendment to this Contract, with the latter in time controlling over any earlier amendments;
 - b) this Contract with any attachments (excluding the items listed at subsections c. through f., below);
 - c) any clarifications of or addenda to the Contractor's response seeking this Contract;
 - d) the Invitation to Bid, as may be amended, requesting responses in competition for this Contract; any technical specifications provided to respondents during the procurement process to award this Contract; and,
 - e) the Contractor's response seeking this Contract.
- 7.33. **Iran Divestment Act.** The requirements of Tenn. Code Ann. § 12-12-101 et.seq., addressing contracting with persons with investment activities in Iran, shall be a material provision of this Contract. The Contractor agrees, under penalty of perjury, that to the best of its knowledge and belief that it is not on the list created pursuant to Tenn. Code Ann. § 12-12-106.
- 7.34. **Boycott of Israel.** The Contractor certifies that it is not currently engaged in, and covenants that it will not, for the duration of the Contract, engage in a Boycott of Israel, as that term is defined in Tenn. Code Ann. § 12-4-119.

7.35. Insurance Requirements:

7.35.1 Insurance. Contractor shall provide the State a certificate of insurance ("COI") evidencing the coverages and amounts specified below. The COI shall be provided ten (10) business days prior to the Effective Date and again upon renewal or replacement of coverages required by this Contract. If insurance expires during the Term, the State must receive a new COI at least thirty (30) calendar days prior to the insurance's expiration

date. If the Contractor loses insurance coverage, does not renew coverage, or for any reason becomes uninsured during the Term, the Contractor shall notify the State immediately.

The COI shall be on a form approved by the Tennessee Department of Commerce and Insurance ("TDCI") and signed by an authorized representative of the insurer. The COI shall list each insurer's national association of insurance commissioners (also known as NAIC) number or federal employer identification number and list the State of Tennessee, Risk Manager, 312 Rosa L. Parks Ave., 3rd floor Central Procurement Office, Nashville, TN 37243 in the certificate holder section. At any time, the State may require the Contractor to provide a valid COI detailing coverage description; insurance company; policy number; exceptions; exclusions; policy effective date; policy expiration date; limits of liability; and the name and address of insured. The Contractor's failure to maintain or submit evidence of insurance coverage is considered a material breach of this Contract.

If the Contractor desires to self-insure, then a COI will not be required to prove coverage. In place of the COI, the Contractor must provide a certificate of self-insurance or a letter on the Contractor's letterhead detailing its coverage, liability policy amounts, and proof of funds to reasonably cover such expenses. Compliance with Tenn. Code Ann. § 50-6-405 and the rules of the TDCI is required for the Contractor to self-insure workers' compensation.

All insurance companies must be: (a) acceptable to the State; (b) authorized by the TDCI to transact business in the State of Tennessee; and (c) rated A- VII or better by A. M. Best. The Contractor shall provide the State evidence that all subcontractors maintain the required insurance or that the subcontractors are included under the Contractor's policy.

The Contractor agrees to name the State as an additional insured on any insurance policies with the exception of workers' compensation (employer liability) and professional liability (errors and omissions) ("Professional Liability") insurance. Also, all policies shall contain an endorsement for a waiver of subrogation in favor of the State.

The deductible and any premiums are the Contractor's sole responsibility. Any deductible over fifty thousand dollars (\$50,000) must be approved by the State. The Contractor agrees that the insurance requirements specified in this Section do not reduce any liability the Contractor has assumed under this Contract including any indemnification or hold harmless requirements.

The State agrees that it shall give written notice to the Contractor as soon as practicable after the State becomes aware of any claim asserted or made against the State, but in no event later than thirty (30) calendar days after the State becomes aware of such claim. The failure of the State to give notice shall only relieve the Contractor of its obligations under this Section to the extent that the Contractor can demonstrate actual prejudice arising from the failure to give notice. This Section shall not grant the Contractor or its insurer, through its attorneys, the right to represent the State in any legal matter, as the right to represent the State is governed by Tenn. Code Ann. § 8-6-106.

All coverage required shall be on a primary basis and noncontributory with any other insurance coverage or self-insurance carried by the State. The State reserves the right to amend or require additional endorsements, types of coverage, and higher or lower limits of coverage depending on the nature of the work. Purchases or contracts involving any hazardous activity or equipment, tenant, concessionaire and lease agreements, alcohol sales, cyber-liability risks, environmental risks, special motorized equipment, or property may require customized insurance requirements (e.g. umbrella liability insurance) in addition to the general requirements listed below.

7.35.2 Workers' Compensation and Employer Liability Insurance.

- a) For Contractors statutorily required to carry workers' compensation and employer liability insurance, the Contractor shall maintain:
- b) Workers' compensation and employer liability insurance in the amounts required by appropriate state statutes; or
- c) In an amount not less than one million dollars (\$1,000,000) including employer liability of one million dollars (\$1,000,000) per accident for bodily injury by accident, one million dollars (\$1,000,000) policy limit by disease, and one million dollars (\$1,000,000) per employee for bodily injury by disease.
- d) If the Contractor certifies that it is exempt from the requirements of Tenn. Code Ann. §§ 50-6-101 -- 103, then the Contractor shall furnish written proof of such exemption for one or more of the following reasons:
 - 1. The Contractor employees fewer than five (5) employees;
 - 2. The Contractor is a sole proprietor;
 - 3. The Contractor is in the construction business or trades with no employees;
 - 4. The Contractor is in the coal mining industry with no employees;
 - 5. The Contractor is a state or local government; or
 - 6. The Contractor self-insures its workers' compensation and is in compliance with the TDCI rules and Tenn. Code Ann. § 50-6-405.

7.35.3 Commercial General Liability Insurance.

- a) The Contractor shall maintain commercial general liability insurance, which shall be written on an Insurance Services Office, Inc. (also known as ISO) occurrence form (or a substitute form providing equivalent coverage) and shall cover liability arising from property damage, premises/operations, independent contractors, contractual liability, completed operations/products, personal and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract).
- b) The Contractor shall maintain bodily injury/property damage with a combined single-limit not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) aggregate for bodily injury and property damage, including products and completed operations coverage with an aggregate limit of at least two million dollars (\$2,000,000).

7.36 Major Procurement Contract Sales and Use Tax. Pursuant to Tenn. Code Ann. § 4-39-102 and to the extent applicable, the Contractor and the Contractor's subcontractors shall remit sales and use taxes on the sales of goods or services that are made by the Contractor or the Contractor's subcontractors and that are subject to tax.

7.37 **Confidentiality of Records.** Strict standards of confidentiality of records and information shall be maintained in accordance with applicable state and federal law. All material and information, regardless of form, medium or method of communication, provided to the Contractor by the State or acquired by the Contractor on behalf of the State that is regarded as confidential under state or federal law shall be regarded as "Confidential Information." Nothing in this Section shall permit Contractor to disclose any Confidential Information, regardless of whether it has been disclosed or made available to the Contractor due to intentional or negligent actions or inactions of agents of the State or third parties. Confidential Information shall not be disclosed except as required or permitted under state or federal law. Contractor shall take all necessary steps to safeguard the confidentiality of such material or information in conformance with applicable state and federal law.

The obligations set forth in this Section shall survive the termination of this Contract.

8 SPECIAL TERMS AND CONDITIONS:

- 8.1. **Conflicting Terms and Conditions.** Should any of these special terms and conditions conflict with any other terms and conditions of this Contract, the special terms and conditions shall be subordinate to the Contract's other terms and conditions.
- 8.2. **Prohibited Advertising or Marketing.** The Contractor shall not suggest or imply in advertising or marketing materials that Contractor's goods or services are endorsed by the State. The restrictions on Contractor advertising or marketing materials under this Section shall survive the termination of this Contract.
- 8.3. **Authorized Users -- Statewide Contract.** This Contract establishes a source or sources of supply for all Tennessee State Agencies. "Tennessee State Agency" refers to the various departments, institutions, boards, commissions, and agencies of the executive branch of government of the State of Tennessee with exceptions as addressed in Tenn. Comp. R. & Regs. 0690-03-01-.01. The Contractor shall provide all goods or services and deliverables as required by this Contract to all Tennessee State Agencies.

The Contractor shall make this Contract available to the following entities, who are authorized to and who may purchase off of this Statewide Contract ("Authorized Users"):

- a) all Tennessee State governmental entities (this includes the legislative branch; judicial branch; and, commissions and boards of the State outside of the executive branch of government);
- b) Tennessee local governmental agencies;
- c) the board of trustees of the University of Tennessee system, the Tennessee board of regents system, or the State university boards;
- d) any private nonprofit institution of higher education chartered in Tennessee; and,
- e) any corporation which is exempted from taxation under 26 U.S.C. Section 501(c)(3), as amended, and which contracts with the Department of Mental Health and Substance Abuse Services or the Department of Intellectual and Developmental Disabilities to provide services to the public (Tenn. Code Ann. § 33-2-1001).

These Authorized Users may utilize this Contract by purchasing directly from the Contractor according to their own procurement policies and procedures. The State is not responsible or liable for the

transactions between the Contractor and Authorized Users.

- 8.4. Cleanup.** The Contractor is responsible for the removal of all debris and shall leave the work area in a "broom clean" condition, less wear and tear excepted. In the event Contractor fails to return the work area to a broom clean condition after completion of work, the State reserves the right to assess the Contractor reasonable costs for cleanup and disposal.
- 8.5. State Ownership of Goods.** The State shall have ownership, right, title, and interest in all goods provided by Contractor under this Contract including full rights to use the goods and transfer title in the goods to any third parties.
- 8.6. Additional Lines, Items or Options.** At its sole discretion, the State may make written requests to the Contractor to add lines, items, or options that are needed and within the Scope but were not included in the original Contract. Such lines, items, or options will be added to the Contract through a Memorandum of Understanding ("MOU"), not an amendment.
- a) After the Contractor receives a written request to add lines, items, or options, the Contractor shall have ten (10) business days to respond with a written proposal. The Contractor's written proposal shall include:
1. The effect, if any, of adding the lines, items, or options on the other goods or services required under the Contract;
 2. Any pricing related to the new lines, items, or options;
 3. The expected effective date for the availability of the new lines, items, or options; and
 4. Any additional information requested by the State.
- b) The State may negotiate the terms of the Contractor's proposal by requesting revisions to the proposal.
- c) To indicate acceptance of a proposal, the State will sign it. The signed proposal shall constitute a MOU between the Parties, and the lines, items, or options shall be incorporated into the Contract as if set forth verbatim.
- d) Only after a MOU has been executed shall the Contractor perform or deliver the new lines, items, or options.
- 8.7. State Furnished Property.** The Contractor shall be responsible for the correct use, maintenance, and protection of all articles of nonexpendable, tangible personal property furnished by the State for the Contractor's use under this Contract. Upon termination of this Contract, all property furnished by the State shall be returned to the State in the same condition as when received, less ordinary wear and tear. Should the property be destroyed, lost, or stolen, the Contractor shall be responsible to the State for the fair market value of the property at the time of loss.
- 8.8. Environmental Tobacco Smoke.** Pursuant to the provisions of the federal "Pro-Children Act of 1994" and the Tennessee "Children's Act for Clean Indoor Air of 1995," the Contractor shall prohibit smoking of tobacco products within any indoor premises in which services are provided pursuant to this Contract to individuals under the age of eighteen (18) years. The Contractor shall post "no smoking" signs in appropriate, permanent sites within such premises. This prohibition shall be applicable during all hours, not just the hours in which children are present. Violators of the prohibition may be subject to civil penalties and fines. This prohibition shall apply to and be made part of any subcontract related to this Contract.

- 8.9. Prison Rape Elimination Act (PREA).** The Contractor must comply with the Prison Rape Elimination Act (PREA) of 2003 (Federal law 42 U.S.C. 15601 et. seq.), with all applicable Federal PREA standards, and with all State policies and standards related to PREA for preventing, detecting, monitoring, investigating, and eradicating any form of sexual abuse within facilities/programs/offices owned, operated, or contracted.
- 8.10. Survival.** The terms, provisions, representations, and warranties contained in this Contract which by their sense and context are intended to survive the performance and termination of this Contract, shall so survive the completion of performance and termination of this Contract.
- 8.11 Lobbying.** The Contractor certifies, to the best of its knowledge and belief, that:
- a. No federally appropriated funds have been paid or will be paid, by or on behalf of the Contractor, to any person for influencing or attempting to influence an officer or employee of an agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
 - b. If any funds other than federally appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with any contract, grant, loan, or cooperative agreement, the Contractor shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
 - c. The Contractor shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.
- This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into and is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. § 1352.
- 8.12 Clean Air Act and Federal Water Pollution Control Act.** As a condition for receipt of federal awards, the Contractor agrees to comply with the Clean Air Act, 42 U.S.C. § 7401 *et seq.* and the Federal Water Pollution Control Act, 33 U.S.C § 1251 *et seq.*, as those sections are amended from time to time during the term. Violations must be reported to the [insert federal awarding agency] and the Region 4 Office of the Environmental Protection Agency.
- 8.13 Equal Employment Opportunity.** During the performance of this Contract, the Contractor agrees as follows:
- a. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

- b. The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.
- c. The Contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.
- d. The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- e. The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- f. The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- g. In the event of the Contractor's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- h. The Contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the

administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

8.14 Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment. If applicable and as required by 2 CFR 200.216, Contractor is prohibited from obligating or expending loan or grant funds to procure or obtain; extend or renew a contract to procure or obtain; or enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system. As described in Public Law 115-232, Section 889, "covered telecommunications equipment" is as follows:

- a. Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
- b. For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
- c. Telecommunications or video surveillance services provided by such entities or using such equipment.

Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

8.15 Domestic Preference for Procurements. As appropriate, and to the extent consistent with law, the Grantee should, to the greatest extent practicable, provide a preference for the purchase, acquisition, or use of goods, products or materials produced in the United States. This includes, but is not limited to iron, aluminum, steel, cement, and other manufactured products. For purposes of this clause: (1) "Produced in the United States" means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States; (2) "Manufactured products" means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.