**CHECKLIST FOR AGENCIES**

**þ Signed By Appropriate Executors:**

**Order of Contract signing:**

* **OIT CIO**
* **Div. Admin.**
* **DNRC Legal**
* **DNRC F.S.O.**
* **State CIO**

**þ Consistent formatting throughout the contract:**

* **Font Type and Sizing is uniform**
* **Font Color is black throughout**
* **Section Numbering is accurate (NOTE: Section Numbers DO NOT ONLY appear at the beginning of each clause, but often within the clauses themselves – agencies should run a search for “section” and update each reference accordingly)**

**þ Attachment References are accurate and the documents attached (NOTE: attachment references often appear within the clauses as titles only and may not include ‘Attachment X’ reference – agencies should run a search for “attachment and attached” to be sure all referenced documents have been addressed and attached appropriately.)**

* **Optional Clauses that were not used have been removed**
* **Any instructional (blue) wording has been removed**
* **All agency-determined terms have been inserted into the appropriate (insert) field**
* **All applicable agency-specific contracting policies have been addressed**
* **“The Master Agreement and the Participating Addendum contain detailed terms and conditions that address, among other things, requirements of Montana law. Please do not attach a purchase order or task order containing terms and conditions that conflict with those in the Master Agreement and Participating Addendum. If a purchase order or task order has terms and conditions that conflict with either the Master Agreement or Participating Addendum’s terms and conditions, the Master Agreement or Participating Addendum terms and conditions govern.”**

**INSERT IN PA**

If a purchase order or task order has terms and conditions that conflict with the Master Agreement or Participating Addendum terms and conditions, the Master Agreement or Participating Addendum terms and conditions govern.

**Approved**

**No. « 2»**

**Amendment No. « 3»**

**OIT CIO \_\_\_\_\_\_\_\_**

**Div. Admin.**

**DNRC Legal**

**DOA Legal**

**DNRC F.S.O.**

**ITPR Approval #: \_\_\_\_\_\_\_\_**

 

***FOR DNRC USE ONLY***

**Maximum amount under this agreement: « 1»**

**Source of Funds**

**Fund Name Fund No.**

**« 4» « 5»**

**Subclass Org. No. Percent**

**« 6» « 7» « 8»**

**DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION**

**[insert division, office, or program name] [insert system name]**

THIS CONTRACT is entered into by and between the State of Montana Department of Natural Resources and Conservation, (hereinafter referred to as the “State”), whose address and phone number are P.O. Box 201601, Helena, MT and 406-444-2074, and [insert contractor name], (hereinafter referred to as the “Contractor”), whose address and phone number are [insert contractor address] and [insert contractor phone number].

The purpose of this contract is [State the objectives and product or desired result to be set out under the terms below. If applicable, state any details that are not anticipated or included in this contract. If a project is subject to multiple parallel or serial contracts, reference those contracts here.]

IN FURTHERANCE OF THE PURPOSES STATED ABOVE, THE PARTIES AGREE AS FOLLOWS:

**1. EFFECTIVE DATE, DURATION, AND RENEWAL**

**1.1 Contract Term.** The Contract’s initial term is (insert date), (insert year), (or upon contract execution), through (insert date), (insert year), unless terminated earlier as provided in this Contract. In no event is this Contract binding on State unless State’s authorized representative has signed it. The legal counsel signature approving legal content of the Contract and the procurement officer signature approving the form of the Contract do not constitute an authorized signature.

**1.2 Contract Renewal.** The State may renew this contract under its then-existing terms and conditions (subject to potential cost adjustments described below in section 2) in one (1)-year intervals, or any interval that is advantageous to the State. This contract, including any renewals, may not exceed a total of [*insert* number (#)] years.

**2. COST ADJUSTMENTS**

**2.1 Cost Increase by Mutual Agreement.** After the Contract’s initial term and if State agrees to a renewal, the parties may agree upon a cost increase. State is not obligated to agree upon a renewal or a cost increase. Any cost increases must be based on demonstrated industry-wide or regional increases in Contractor’s costs. Publications such as the Federal Bureau of Labor Statistics and the Consumer Price Index (CPI) for all UrbanConsumers may be used to determine the increased value.

**OR**

**2.1 Cost Increase by Fixed Amount.** After the Contract’s initial term and if State agrees to a renewal, the parties may agree upon a cost increase of **(insert %)**%, not to exceed **(insert %)**%. Contractor shall request the increase and shall provide justification for the increase. State is not obligated to agree upon a renewal or a cost increase.

 **OR**

**2.1 Cost Adjustments per Increase in CPI.** After the Contract’s initial term and if State agrees to a renewal, the parties may agree upon annual pricing adjustments during a renewal based on the cost of living as reflected in the Federal Bureau of Labor Statistics, Consumer Price Index (CPI) for all Urban Consumers (see <http://www.bls.gov/cpi/> for reference), or any other index that may be substituted in the future. The CPI for the last 12-month period of the Contract shall be the CPI base on which later adjustments are computed, and the original CPI base shall be the index announced for the month in which the Contract was signed. The allowable percentage change shall be calculated as follows:

New CPI Base - Original CPI Base

Original CPI Base

The original Contract costs shall be adjusted according to this percentage change. Each time an adjustment is made, the original CPI base shall be replaced by the adjusted CPI base. The percentage of adjustment to Contract prices shall in no event exceed the percentage change in the index. State is not obligated to agree upon a renewal or a cost increase.

**OR**

**2.1 Cost Adjustments Negotiated Based on Changes in Contractor’s Costs. *After the Contract’s initial term and if State agrees to a renewal***, the parties may negotiate cost adjustments at the time of Contract renewal. Any cost increases must be based on demonstrated industrywide or regional increases in Contractor’s costs. State is not obligated to agree upon a renewal or a cost increase.

**3. SERVICES AND/OR SUPPLIES**

**3.1 Development Plan or Statement of Work.** Contractor shall prepare a Development Plan or Statement of Work (“SOW”) that may have been prepared in anticipation of this contract. Contractor may incorporate its Development Plan or SOW into this contract if the Development Plan was part of its successful submission to an RFP and contains all functional and design specifications to be incorporated into the software product. A Development Plan or SOW incorporated from an RFP shall be the final Development Plan or SOW approved by the State prior to awarding this contract or as negotiated to become part of this contract.

 **3.1.1 Preparation of Development Plan or Statement of Work.**

Contractor shall prepare Development Plan or SOW for the software development project satisfying the requirements set forth in the Functional Specifications for the software end product. The Development Plan shall include:

(a) detailed specifications for the software;

(b) a listing of all items to be delivered to State under this contract (“Deliverables”);

(c) a delivery schedule containing a delivery date for each Deliverable; and

(d) a payment schedule setting forth the amount and time of Contractor's compensation.

 **3.1.2** **Delivery.** Contractor shall deliver the Development Plan or SOW to State by [*insert* date, 20##]. State shall have [*insert* number (#)] days to review the SOW or Development Plan. Upon approval of the SOW or Development Plan by State, it will be marked as Exhibit [*insert* #] and will be deemed by both parties to have become a part of this Contract and will be incorporated by reference. Contractor shall then commence development of software that will substantially and materially conform to the requirements set forth in the Development Plan.

If the Development Plan or SOW is in State’s reasonable judgment unsatisfactory in any material respect, State shall prepare a detailed written description of the objections. State shall deliver such objections to Contractor within [*insert* number (#)] days of receipt of the Development Plan or SOW. Contractor shall then have [*insert* number (#)] days to modify the Development Plan to respond to State’s objections. State shall have [*insert* number (#)] days to review the modified Development Plan. If State deems the modified Development Plan or SOW to be unacceptable, State has the option of terminating this Contract upon written notice to Contractor or permitting Contractor to modify the Development Plan or SOW again under the procedure outlined in this paragraph.

If this Contract is terminated, the obligations of both parties under it shall end except for State’s obligation to pay Contractor all sums due for preparing the Development Plan or SOW and the ongoing obligations of confidentiality, if any, that may be set forth in the provision of this Contract entitled “Confidentiality.”

 **3.1.3** **Payment for SOW or Development Plan.** If the Development Plan or SOW is not accepted by State and State terminates this contract, Contractor shall be entitled to compensation on a time and materials basis at an hourly rate of [*insert* X and ##/100 dollars ($#.##)] plus expenses to the date of termination. Contractor shall submit an invoice detailing its time and expenses preparing the Development Plan or SOW. If the invoice amount is less than the amounts paid to Contractor prior to termination, Contractor shall promptly return the excess to State. If the invoice amount exceeds the amounts paid to Contractor prior to termination, State shall promptly pay Contractor the difference. [**Optional:** However, Developer’s total compensation for preparing the Development Plan shall not exceed [insert X and ##/100 dollars ($#.##)]]

**4. WARRANTIES AND LIMITATIONS TO LIABILITY**

**4.1 Warranty for Services.** Contractor warrants that it will perform all services using reasonable care and skill and according to its current description (including any completion criteria) contained in this Contract. State agrees to provide timely written notice of any failure to comply with this warranty so that Contractor can take corrective action.

**4.2 Warranty for Hardware.** Contractor warrants that hardware provided is free from defects in materials and workmanship and conforms to the specifications. The warranty period for provided hardware is a fixed period commencing on the date specified in a statement of work or applicable Contract. If the hardware does not function as warranted during the warranty period and Contractor is unable to either: (a) make it do so; or (b) replace it with one that is at least functionally equivalent, State may return it to Contractor for a full refund.

**4.3 Warranty for Off the Shelf Software.** Contractor’s warranties or State’s warranties for software purchased as commercially available software shall be the warranties provided by the software vendor. If Contractor furnishes purchased software as part of its performance under this Contract, Contractor shall be responsible for: (a) transferring all warranty available to the State; or (b) if non-transferable, shall obtain any warranty work, including replacement or refund for the term of the vendor’s stated warranty.

**4.4** **Warranty for Customized Software Development.** Contractor warrants that any software developed under this Contract conforms to all written representations provided by the Contractor to the State including, but not necessarily limited to, all features and functions as described in its written materials or otherwise published materials including Contractor’s web site. Any such representations are part of this Contract.

**4.4.1** **Warranty of Legal Compliance.** Contractor warrants that the software code developed for the State under the specifications governed by the Contract conforms with all applicable laws including privacy laws for any data that may be subject to the developed software application.

**4.4.2** **Warranty of Non-Infringement.** Contractor warrants that any software developed under this Contract for the State does not infringe upon intellectual property rights of any third party. The Contractor shall provide the remedies under Section 13 in the event of a third-party claim of infringement.

**4.4.3** **Warranty of Development Conformance.** Contractor warrants that the software developed under this Contract has not been modified by anyone not authorized by Contractor to make such modifications. Contractor further warrants that the software will perform as represented.

**4.4.4** **Warranty of Title.** Contractor warrants that it owns and has the right to license or convey title to the software and documentation covered by this Contract. Contractor shall not grant any rights or licenses in any intellectual property or technology to another individual or entity that would conflict with Contractor’s obligations under this Contract.

**4.4.5** **Warranty of No Protection Features.** Contractor warrants that no portion of the software contains or will contain any protection feature designed to prevent its use. This includes, without limitation, any computer virus, worm, software lock, drop dead device, trojan-horse routine, trap door, time bomb, or any other codes or instructions that may be used to access, modify, delete, damage or disable State’s software or computer system. Contractor further warrants that it will not impair the operation of the software in any way other than by order of a court of law.

**4.4.6** **Warranty of Compatibility.** Contractor warrants that the software shall be compatible with the Customer’s hardware and software as set forth in the SOW.

**4.4.7** **Personal Information Security.** Contractor warrants that if it receives personal information as this term is defined by § 2-6-1501(4)(a), MCA, as a third party as this term is defined by § 2-6-1501(7), MCA, that Contractor has reviewed and shall comply with the provisions of § 2-6-1502 and -1503(2), MCA. In the event of a breach of the security of any personal information as part of data that the State may have provided or provided access to Contractor as a third party, Contractor shall be responsible for all notifications and shall indemnify the State as provided for under this Contract.

 **4.5** **Remedies In The Event Of Developed Software Non-Conformance.** In addition to the general remedies for breach under Section 16, if any software developed under this Contract by the Contractor does not conform to all written representations provided by the Contractor to the State for the warranty term and the State has notified Contractor within the warranty period, the Contractor, at the State’s option, shall:

 **(A)** Repair the non-conforming software to bring the software developed into conformance with all written representations issued by the Contractor; or

 **(B)** Replace the non-conforming software with different software that is materially in conformance with the technical specifications of the original non-conforming software provided by the Contractor; or

 **(C)** Refund to the State all fees and development costs it has paid under the Contract and Contractor shall accept return of its software. The state shall first elect option (A), then (A), and invoke option (B) as the last resort if neither options (A) nor (B) herein remedy the non-conformance, except if the developed software infringes on a third party’s intellectual property rights.

 **(C.1)** Option 5.5(C) shall apply without regard to 5.5(A) or 5.5(B) as remedies if the Contractor’s developed software in whole or in part, infringes upon the intellectual property rights of a third party rendering the developed software unusable to the State in whole or in part. The refund of all fees and development costs shall be in addition to indemnification under Section 13 and any other remedy that may apply.

**(C.2)** To remove any claim of infringement, the State may elect to retain the infringing software provided by the Contractor if Contractor secures a license for the benefit of the State that is royalty free and is at no cost to the State for as long as the State retains use of the software; or

**(C.3)** With the prior written consent of the State before proceeding, the Contractor may modify the developed software to remove all infringing aspects and such modification does not materially change the functionality or effectiveness of the developed software and such modification is at no cost to the State. Any warranty period provided that has expired shall not limit or bar any of the remedies under Section 4.5.

**(D)** If none of the above options 5.5(A) through 5.5(C) can be accomplished, or if the use of such product by the State is prevented by injunction, the State can give notice of contract termination, or pursue any remedies at law or equity or both, as provided for in Section 16.

 **4.6** The parties agree that the warranties set forth above do not require uninterrupted or error-free operation of hardware or services unless otherwise stated in the specifications.

 **4.7** These warranties are the State’s exclusive warranties and replace all other warranties or conditions, express or implied, including, but not limited to, the implied warranties or conditions of merchantability and fitness for a particular purpose.

**5. CONSIDERATION/PAYMENT**

**5.1 Payment Schedule.**  In consideration for the services successfully provided to the State by the Contractor pursuant to the terms and conditions of this contract, the State shall pay the Contractor within 30 days of the Contractor’s submission of an invoice to the State.

**5.2** **Invoices Based on Progress.** The Contractor will be paid upon completion of and acceptance of [*insert* {each deliverable} *or* {each milestone} *or* {system name} *as defined below*] ***OR*** [*insert* each minor enhancement and/or bug fix].

* Milestone 1. Contractor shall complete [Task] on or before [Date]. Contractor shall pay Contractor XX upon completion and the State’s acceptance of Milestone 1.
* Milestone 2. Contractor shall complete [Task] on or before [Date]. Contractor shall pay Contractor XX upon completion and the State’s acceptance of Milestone 2.
* [Add as needed]

**5.3** **Invoices Based on Fixed Hourly Rates.** Contractor’s invoice shall include an itemized list of hours or parts thereof and a description of the work performed. The Contractor will be paid at an hourly rate of [*insert* X and ##/100 dollars ($#.##)] and will be billable in 15-minute intervals. The hourly rate includes all Contractor travel expenses and any supplies. However, State’s total cumulative payment under this contract shall not exceed [*insert* X dollars and ##/100 dollars ($#.##)].

**5.4** **Invoices Based on Fixed Project Price**. The Contractor will be paid a fixed price of [*insert* X dollars and ##/100 dollars ($#.##)]. The fixed price includes all Contractor travel expenses and supplies related to performance under this contract.

**5.5 Withholding of Payment.** The State may withhold disputed payments to Contractor under the subject statement of work (or where no statement of work exists, the applicable contract). The withholding may not be greater than, in the aggregate, 15% of the total value of the subject statement of work or applicable contract. With respect to payments subject to Milestone acceptance criteria, the State may withhold payment only for such specific milestones if and until the subject milestone criteria are met. The Contractor is not relieved of its performance obligation in the event such payment is withheld.

**5.6 Payment Terms.** Unless otherwise noted in the solicitation document, State has 30 days to pay invoices, as allowed by § 17-8-242, MCA. Contractor shall provide banking information at the time of Contract execution in order to facilitate State’s electronic funds transfer payments.

**5.7 Reference to Contract.** The Contract number MUST appear on all invoices, packing lists, packages, and correspondence pertaining to the Contract. If the number is not provided, State is not obligated to pay the invoice.

**6. ACCESS AND RETENTION OF RECORDS**

**6.1 Access to Records.** Contractor shall provide State, Legislative Auditor, or their authorized agents access to any records necessary to determine Contract compliance. State may terminate this Contract under Section 16, Contract Termination, without incurring liability, for Contractor’s refusal to allow access as required by this section. (Section 18-1-118, MCA).

 **6.2 Retention Period.** The Contractor agrees to create and retain records supporting the contract for a period of eight years after either the completion date of this contract or the conclusion of any claim, litigation, or exception relating to this contract taken by the State of Montana or a third party.

**7. ASSIGNMENT, TRANSFER, AND SUBCONTRACTING**

Contractor may not assign, transfer, or subcontract any portion of this Contract without State’s prior written consent. (Section 18-4-141, MCA). Contractor is responsible to State for the acts and omissions of all subcontractors or agents and of persons directly or indirectly employed by such subcontractors, and for the acts and omissions of persons employed directly by Contractor. No contractual relationships exist between any subcontractor and State under this Contract.

**8. DEFENSE, INDEMNIFICATION / HOLD HARMLESS**

Contractor shall defend, indemnify and hold harmless the State of Montana and the contracting agency hereunder and their  elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, from and against all claims, demands, causes of action, liabilities, damages, judgments, expenses or fees, including the reasonable cost of defense thereof and attorney fees,  arising or awarded in favor of Contractor’s or its subcontractor’s employees or agents or third parties for bodily or personal injuries, death,  damage to property, or financial or other loss resulting or allegedly resulting in whole or part from: (a) the services performed or products provided; or (b) other acts or omissions of Contractor and/or its agents, employees, representatives, assigns, subcontractors, except the sole negligence of State.

**OR**

To the fullest extent permitted by law, Contractor shall indemnify and hold harmless State, its elected and appointed officials, officers, agents, directors, and employees from and against all claims, damages, losses and expenses, including the cost of defense thereof, to the extent caused by or arising out of Contractor’s negligent acts, errors, or omissions in work or services performed under this Contract, including but not limited to, the negligent acts, errors, or omissions of any Subcontractor or anyone directly or indirectly employed by any Subcontractor for whose acts Subcontractor may be liable.

**9. LIMITATION OF LIABILITY**

Contractor's liability for Contract damages is limited to direct damages and further to no more than twice the Contract amount. Contractor shall not be liable for special, incidental, consequential, punitive, or indirect damages. Damages caused by injury to persons or tangible property, or related to intellectual property indemnification, are not subject to a cap on the amount of damages.

**10. REQUIRED INSURANCE**

**10.1 General Requirements.** Contractor shall maintain for the duration of this contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by Contractor, agents, employees, representatives, assigns, or subcontractors. This insurance shall cover such claims as may be caused by any negligent act or omission.

**10.2 Primary Insurance.** Contractor’s insurance coverage shall be primary insurance with respect to the State, its officers, officials, employees, and volunteers and shall apply separately to each project or location. Any insurance or self-insurance maintained by the State, its officers, officials, employees, or volunteers shall be excess of Contractor’s insurance and shall not contribute with it.

**10.3 Deductibles and Self-Insured Retentions.** Any deductible or self-insured retention must be declared to and approved by the state agency. At the request of the agency, the Contractor will elect either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the State, its officers, officials, employees, or volunteers; or (2) at the expense of the Contractor, the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

 **10.4 Certificate of Insurance/Endorsements.** A certificate of insurance from an insurer with a Best’s rating of no less than A- indicating compliance with the required coverages, has been received by the State. The Contractor must notify the State immediately, of any material change in insurance coverage, such as changes in limits, coverages, change in status of policy, etc. The State reserves the right to require complete copies of insurance policies at all times.

 **10.5** **Specific Requirements for Cyber/Data Information Security Insurance (Optional depending on the presence of PII in the system/data).** The Contractor shall purchase and maintain cyber/information security insurance coverage with combined single limits for each wrongful act of $2,000,000 per occurrence to cover the unauthorized acquisition of personal information such as social security numbers, credit card numbers, financial account information, or other information that uniquely identifies an individual and may be of a sensitive nature in accordance with § 2-6-1501, MCA through § 2-6-1503, MCA. If the Contractor maintains higher limits than the minimums shown above, the State requires and shall be entitled to coverage for the higher limits maintained by the Contractor. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the State. Such insurance must cover, at a minimum, privacy notification costs, credit monitoring, forensics investigations, legal fees/costs, regulatory fines and penalties, and third-party liability settlements or judgements as may be caused by any act, omission, or negligence of the Contractor’s officers, agents, representatives, assigns or subcontractors. Note: If occurrence coverage is unavailable or cost-prohibitive, the State will accept ‘claims made’ coverage provided the following conditions are met: 1) the retroactive date must be shown, and must be before the date of the contract or the beginning of contract work; 2) insurance must be maintained and evidence of insurance must be provided for at least three (3) years after completion of the contract of work; and 3) if coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the contract effective date, the Contractor must purchase “extended reporting” coverage for a minimum of three (3) years after completion of work.

**11. COMPLIANCE WITH WORKERS' COMPENSATION ACT**

Contractors are required to comply with the provisions of the Montana Workers’ Compensation Act while performing work for the State of Montana in accordance with §§39-71-401, -405, and -417, MCA. Proof of compliance must be in the form of workers’ compensation insurance, an independent contractor's exemption, or documentation of corporate officer status. Neither the Contractor nor its employees are employees of the State. This insurance/exemption must be valid for the entire term of this contract. A renewal document must be sent to the Department of Natural Resources and Conservation, PO Box 201601, Helena, MT 59620-1601, upon expiration.

**12. COMPLIANCE WITH LAWS**

**12.1 Federal, State, or Local laws, Rules, and Regulations** Contractor shall, in performance of work under this Contract, fully comply with all applicable federal, state, or local laws, rules,and regulations including but not limited to, the Montana Human Rights Act, the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Contractor is the employer for the purpose of providing healthcare benefits and paying any applicable penalties, fees and taxes under the Patient Protection and Affordable Care Act [P. L. 111-148, 124 Stat. 119]. Any subletting or subcontracting by Contractor will subject subcontractors to the same provisions. In accordance with § 49-3-207, MCA, Contractor agrees that the hiring of persons to perform this Contract will be made on the basis of merit and qualifications and there will be no discrimination based on race, color, religion, sex, pregnancy, childbirth or medical conditions related to pregnancy or childbirth, political or religious affiliation or ideas, culture, creed, social origin or condition, genetic information, sexual orientation, gender identity or expression, national origin, ancestry, age, disability, military service or veteran status, or marital status by the persons performing this Contract.

**12.2 Nondiscrimination Against Firearms Entities/Trade Associations. (To be used for all contracts $100,000 or greater.**

Contractor shall not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association, and Contractor shall not discriminate during the term of the contract against a firearm entity or firearm trade association. This section shall be construed in accordance with HB 356, Ch. 193, Mont. L. 2023.

**13. DISABILITY ACCOMMODATIONS**

State does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services, or activities. Individuals who need aids, alternative document formats, or services for effective communications or other disability related accommodations in the programs and services offered are invited to make their needs and preferences known to this office. Interested parties should provide as much advance notice as possible.

**14. REGISTRATION WITH THE SECRETARY OF STATE**

Any business intending to transact business in Montana must register with the Secretary of State. Businesses that are domiciled in another state or country, but which are conducting activity in Montana, must determine whether they are transacting business in Montana in accordance with §§ 35-1-1026 and 35-8-1001, MCA. Such businesses may want to obtain the guidance of their attorney or accountant to determine whether their activity is considered transacting business.

If businesses determine that they are transacting business in Montana, they must register with the Secretary of State and obtain a certificate of authority to demonstrate that they are in good standing in Montana. To obtain registration materials, call the Office of the Secretary of State at (406) 444-3665, or visit their website at http://sos.mt.gov.

**15. INTELLECTUAL PROPERTY/OWNERSHIP**

**15.1 Title and Ownership Rights.** The State shall retain title to and all ownership rights in all data and content, including but not limited to multimedia or images (graphics, audio, and video), text, and the like provided by the State (the “content”), but grants the Contractor during the term of this Agreement the right to access and use content only for the purpose of complying with its obligations under this contract and any applicable statement of work.

**15.2 Ownership of Work Product.** The State owns the work product. The Contractor agrees to execute any documents or take any other actions as may reasonably be necessary, or as the State may reasonably request, to perfect the State’s ownership of any Work Product.

**15.3 Copy of Work Product.** The Contractor shall, at no cost to the State, deliver to the State, upon the State’s request during the term or at the expiration or termination of all or part of the Contractor’s performance hereunder, a current copy of all work product in the form and on the media in use as of the date of the State’s request, or as of such expiration or termination, as the case may be.

**15.4 Ownership of Contractor Pre-Existing Materials.** Literary works or other works of authorship (such as software programs and code, documentation, reports, and similar works), information, data, intellectual property, techniques, subroutines, algorithms, methods or rights thereto and derivatives thereof owned by the Contractor during the Contract Term, or otherwise developed or acquired independent of this contract and employed by the Contractor in connection with the services provided to the State (the “Contractor Pre-Existing Materials”) shall be and remain the property of the Contractor and do not constitute work product. The Contractor must provide full disclosure of any Contractor Pre-Existing Materials to the State prior to its use and prove its ownership, provided, however, that if the Contractor fails to disclose to the State such Contractor Pre-Existing Materials, the Contractor shall grant the State a nonexclusive, worldwide, paid-up license to use any Contractor Pre-Existing Materials embedded in the Work Product to the extent such Contractor Pre-Existing Materials are necessary for the State to receive the intended benefit under this contract. Such license shall remain in effect for so long as such Pre-Existing Materials remain embedded in the Work Product. Except as otherwise provided for in Section 14.2, or as may be expressly agreed to in any SOW, the Contractor shall retain title to and ownership of any hardware it provides under this Contract.

**16. PATENT AND COPYRIGHT PROTECTION**

**16.1 Third-Party Claim.** If a third party makes a claim against State that the products furnished under this Contract infringe upon or violate any patent or copyright, State shall promptly notify Contractor. Contractor shall defend such claim in State's name or its own name, as appropriate, but at Contractor’s expense. Contractor shall indemnify State against all costs, damages, attorney fees, and all other costs and expenses of litigation that accrue as a result of such claim. If State reasonably concludes that its interests are not being properly protected, or if principles of governmental or public law are involved, it may enter any action.

**16.2 Product Subject of Claim.** If any product furnished is likely to or does become the subject of a claim of infringement of a patent or copyright, then Contractor may, at its option, procure for State the right to continue using the alleged infringing product, or modify the product so that it becomes non-infringing. If none of the above options can be accomplished, or if the use of such product by State shall be prevented by injunction, State will determine whether the Contract has been breached.

**17. CONTRACT OVERSIGHT**

**17.1 CIO Oversight.** The Chief Information Officer (“CIO”) for the State of Montana, Chief Information Officer (“DCIO”) for the Department of Natural Resources, or their designees, may perform contract oversight activities. Such activities may include the identification, analysis, resolution, and prevention of deficiencies that may occur within the performance of contract obligations. The DCIO may require the issuance of a right to assurance or the issuance of a stop work order.

**17.2 Right to Assurance.** If the State, in good faith, has reason to believe that the Contractor does not intend to, or is unable to perform or has refused to perform or continue performing all material obligations under this contract, the State may demand in writing that the Contractor give a written assurance of intent to perform. Failure by the Contractor to provide written assurance within the number of days specified in the demand (in no event less than five business days) may, at the State’s option, be the basis for terminating this contract under the terms and conditions or other rights and remedies available by law or provided by this contract.

**17.3 Stop Work Order.** The State may, at any time, by written order to the Contractor, require the Contractor to stop any or all parts of the work required by this contract for the period of days indicated by the State after the order is delivered to the Contractor. The order shall be specifically identified as a stop work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. If a stop work order issued under this clause is canceled or the period of the order or any extension expires, the Contractor shall resume work. The state’s project manager shall make the necessary adjustment in the delivery schedule or contract price, or both, and this contract shall be amended in writing accordingly.

**17.4 System Security**. Contractor shall ensure systems delivered under this Agreement are adequately secure. For purposes of this Agreement, adequate security is defined to require compliance with federal and State of Montana security requirements and to ensure freedom from those conditions that may impair the State's use of its data and information technology or permit unauthorized access to the State’s data or information technology. The State of Montana has established control standards and policies that align with the NIST Cybersecurity Framework. The latest revision of NIST SP 800-53 is used for control adherence evaluation established after developing a security categorization utilizing FIPS PUB 199. Thus, Contractor shall provide reasonable proof, through independent audit reports, that the system specified under this Agreement meets or exceeds federal and State of Montana security requirements to ensure adequate security and privacy, confidentiality, integrity, and availability of the State’s data and information technology. Annual assurance statements for ongoing builds and support contracts shall be delivered to the state’s authorized agent. Annual assurance statements must contain a detailed accounting of the security controls provided and must be in the form of a NIST Security Assessment Report or FedRAMP Security Assessment Report.

**17.5 Physical Access**. Contractor represents and warrants that it has established and during the Term it will at all times enforce:

(a) Physical protection mechanisms for all information assets and information technology to ensure such assets and technology are stored and protected in appropriate data centers;

(b) Appropriate facility entry controls limiting physical access to systems that store or process data;

(c) Processes to ensure access to facilities is monitored and is restricted on a “need to know” basis; and

(d) Controls to physically secure all Confidential Information and to properly destroy such information when it is no longer needed.

For cloud procured data center services, Contractor represents and warrants that such protection mechanisms are enforced by the provider of such data centers. This does not remove the Contractor from the responsibility and liability for securing state data on these systems or in such data centers.

**17.6 Prohibited Activities and Spoofing**. Contractor and its officers, employees, agents, subcontractors, and affiliated users shall not violate or attempt to violate the security of the State’s network or interfere or attempt to interfere with the State’s systems, networks, authentication measures, servers or equipment, or with the use of or access to the State’s network by any other user. Such prohibited activity includes: (a) accessing or logging into a server where access is not authorized; (b) unauthorized probing, scanning, or testing the security or vulnerability of the State’s network or other systems; and (c) attempting to portray itself as the State or an affiliate of the State or otherwise attempting to gain access, without authorization, via the State’s network or systems to any account or information technology resource not belonging to Licensor or its officers, employees, agents, subcontractors, and affiliated users (“Spoofing”). Licensor shall not perform unauthorized Spoofing or scanning of any kind, including user account identity. Systems shall not Spoof the mt.gov domain or engage in Email Spoofing. Email Spoofing is the creation of email messages with a forged sender address. For example, Email Spoofing includes creating or sending emails using the State’s domain.

**18. CONTRACT TERMINATION**

**18.1 State Termination for Cause with Notice to Cure Requirement.** State may terminate this Contract in whole or in part for Contractor’s failure to materially perform any of the services, duties, terms, or conditions contained in this Contract after giving Contractor written notice of the stated failure. The written notice must demand performance of the stated failure within a specified period of time of not less than **(insert number of days)** days. If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period.

**OR**

**18.1 State Termination for Convenience.** State may, by written notice to Contractor, terminate this Contract without cause and without incurring liability to Contractor. State shall give notice of termination to Contractor at least **(insert numbers of days)** days before the effective date of termination. State shall pay Contractor only that amount, or prorated portion thereof, owed to Contractor up to the date State’s termination takes effect. This is Contractor’s sole remedy. State shall not be liable to Contractor for any other payments or damages arising from termination under this section, including but not limited to general, special, or consequential damages such as lost profits or revenues.

**18.2 Contractor Termination for Cause with Notice to Cure Requirement.** Contractor may terminate this Contract for State’s failure to perform any of its duties under this Contract after giving State written notice of the failure. The written notice must demand performance of the stated failure within a specified period of time of not less than **(insert number of days)** days. If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period.

**18.3 Reduction of Funding.** State must, by law, terminate this Contract if funds are not appropriated or otherwise made available to support State's continuation of performance of this Contract in a subsequent fiscal period. (Section 18-4-313(4), MCA). If State or federal government funds are not appropriated or otherwise made available through the state budgeting process to support continued performance of this Contract (whether at an initial contract payment level or any contract increases to that initial level) in subsequent fiscal periods, State shall terminate this Contract as required by law. State shall provide Contractor the date State’s termination shall take effect. State shall not be liable to Contractor for any payment that would have been payable had the Contract not been terminated under this provision. As stated above, State shall be liable to Contractor only for the payment, or prorated portion of that payment, owed to Contractor up to the date State's termination takes effect. This is Contractor's sole remedy. State shall not be liable to Contractor for any other payments or damages arising from termination under this section, including but not limited to general, special, or consequential damages such as lost profits or revenues.

**18.4 Noncompliance with Department of Administration Requirements.** The Department of Administration, under the provisions of § 2-17-514, MCA, retains the right to cancel or modify any contract, project, or activity that is not in compliance with the Department’s Plan for Information Technology, State Strategic Plan for Information Technology, or any Statewide IT policy or standard in effect as of the date of contract execution. In the event of such termination, State will pay for products and services delivered to date and any applicable termination fee specified in the statement of work or work order. Any modifications to this Contract must be mutually agreed to by the parties.

**19. EVENT OF BREACH – REMEDIES**

**19.1 Event of Breach by Contractor.** Any one or more of the following Contractor acts or omissions constitute an event of material breach under this Contract:

* Products or services furnished fail to conform to any requirement;
* Failure to submit any report required by this Contract; or
* Failure to perform any of the other terms and conditions of this Contract, including but not limited to beginning work under this Contract without prior State approval or breaching section 23.1, Technical or Contractual Problems, obligations
* Voluntary or involuntary bankruptcy or receivership

**19.2 Event of Breach by State.** State’s failure to perform any material terms or conditions of this Contract constitutes an event of breach.

**19.3 Actions in Event of Breach.** Upon Contractor’s material breach, State may:

* Terminate this Contract under Section 19.1, Termination for **[Cause or Convenience]** and pursue any of its remedies under this Contract, at law, or in equity; or
* Treat this Contract as materially breached and pursue any of its remedies under this Contract, at law, or in equity.

Upon State’s material breach, Contractor may:

* Terminate this Contract under section 19.2, Termination for Cause with Notice to Cure, and pursue any of its remedies under this Contract, at law, or in equity; or
* Treat this Contract as materially breached and, except as the remedy is limited in this Contract, pursue any of its remedies under this Contract, at law, or in equity.

**20. FORCE MAJEURE**

Neither party is responsible for failure to fulfill its obligations due to causes beyond its reasonable control, including without limitation, acts or omissions of government or military authority, acts of God, materials shortages, transportation delays, fires, floods, labor disturbances, riots, wars, terrorist acts, or any other causes, directly or indirectly beyond the reasonable control of the nonperforming party, so long as such party uses its best efforts to remedy such failure or delays. A party affected by a force majeure condition shall provide written notice to the other party within a reasonable time of the onset of the condition. In no event, however, shall the notice be provided later than five working days after the onset. If the notice is not provided within the five-day period, then a party may not claim a force majeure event. A force majeure condition suspends a party’s obligations under this Contract, unless the parties mutually agree that the obligation is excused because of the condition.

**21. WAIVER OF BREACH**

Either party’s failure to enforce any Contract provisions after any event of breach is not a waiver of its right to enforce the provisions and exercise appropriate remedies if the breach occurs again. Neither party may assert the defense of waiver in these situations.

**22. LIAISONS AND SERVICE OF NOTICES**

**22.1 Contract Manager.** State’s Contract Manager identified below is State's single point of contact and shall perform all contract management under § 2-17-512, MCA, on State’s behalf. Written notices, requests, complaints, or any other issues regarding this Contract should be directed to State’s Contract Manager.

(Insert State Contract Manager Name) is State's Contract Manager

(Address):

(City, State, ZIP):

Telephone:

Cell Phone:

Fax:

E-mail:

(Insert Contractor’s Contract Manager Name) is Contractor’s Contract Manager

(Address):

(City, State, ZIP):

Telephone:

Cell Phone:

Fax:

E-mail:

**22.2 Notifications.** State’s Contract Manager and Contractor's Contract Manager may be changed by written notice to the other party. Written notices, requests, or complaints must first be directed to the Contract Manager . Notice may be provided by personal service, mail, facsimile, or scanned and emailed. If notice is provided by personal service,facsimile, or email, the notice is effective upon receipt; if notice is provided by mail, the notice is effective within three business days of mailing.

**22.3 Identification/Substitution of Personnel.** The personnel identified or described in Contractor's proposal shall perform the services provided for State under this Contract. Contractor agrees that any personnel substituted during the term of this Contract must be able to conduct the required work to industry standards and be equally or better qualified than the personnel originally assigned. State reserves the right to approve Contractor personnel assigned to work under this Contract and any changes or substitutions to such personnel. State’s approval of a substitution will not be unreasonably withheld. This approval or disapproval shall not relieve Contractor to perform and be responsible for its obligations under this Contract. State reserves the right to require Contractor personnel replacement. If Contractor personnel become unavailable, Contractor shall provide an equally qualified replacement in time to avoid delays to the work plan.

**23. MEETINGS**

**23.1 Technical or Contractual Problems.** Contractor shall meet with State’s personnel, or designated representatives, to resolve technical or contractual problems occurring during the Contract term or to discuss the progress made by Contractor and State in the performance of their respective obligations, at no additional cost to the State. State may request the meetings as problems arise and will be coordinated by State. State shall provide Contractor a minimum of three full working days’ notice of meeting date, time, and location. Face-to-face meetings, either physical or virtual, are desired; however, at Contractor's option and expense, a conference call meeting may be substituted. Contractor’s consistent failure to participate in problem resolution meetings, Contractor missing or rescheduling two consecutive meetings, or Contractor’s failure to make a good faith effort to resolve problems may result in termination of the Contract.

**NOTE TO AGENCIES: Sections 22.2-22.4 are optional based on project.**

**23.2 Progress Meetings.** During the term of this Contract, State’s Project Manager shall plan and schedule progress meetings with Contractor to discuss Contractor’s and State’s progress in the performance of their respective obligations. These progress meetings will include State’s Project Manager, Contractor’s Project Manager, and any other additional personnel involved in the performance of this Contract as required. At each meeting, Contractor shall provide State with a written status report that identifies any problem or circumstance encountered by Contractor, or of which Contractor gained knowledge during the period since the last such status report, which may prevent Contractor from completing any of its obligations or may generate charges in excess of those previously agreed to by the parties. This may include the failure or inadequacy of State to perform its obligation under this Contract. Contractor shall identify the amount of excess charges, if any, and the cause of any identified problem or circumstance and the steps taken to remedy the same.

**23.3 Failure to Notify.** If Contractor fails to specify in writing any problem or circumstance that materially affects the costs of its delivery of services or products, including a material breach by State, about which Contractor knew or reasonably should have known with respect to the period during the term covered by Contractor’s status report, Contractor shall not be entitled to rely upon such problem or circumstance as a purported justification for an increase in the price for the agreed upon scope.

**23.4 State’s Failure or Delay.** For a problem or circumstance identified in Contractor’s status report in which Contractor claims was the result of State’s failure or delay in discharging any State obligation, State shall review same and determine if such problem or circumstance was in fact the result of such failure or delay. If State agrees as to the cause of such problem or circumstance, then the parties shall extend any deadlines or due dates affected thereby and provide for any additional charges by Contractor. This is Contractor’s sole remedy. If State does not agree as to the cause of such problem or circumstance, the parties shall each attempt to resolve the problem or circumstance in a manner satisfactory to both parties.

**24. TRANSITION ASSISTANCE**

If this Contract is not renewed at the end of this term, if the Contract is otherwise terminated before project completion, or if particular work on a project is terminated for any reason, Contractor shall provide transition assistance for a reasonable, mutually agreed period of time after the expiration or termination of this Contract or particular work under this Contract. The purpose of this assistance is to allow for the expired or terminated portion of the services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such services to State or its designees. The parties agree that such transition assistance is governed by the terms and conditions of this Contract, except for those terms or conditions that do not reasonably apply to such transition assistance. State shall pay Contractor for any resources utilized in performing such transition assistance at the most current Contract rates. If State terminates a project or this Contract for cause, then State may offset the cost of paying Contractor for the additional resources Contractor utilized in providing transition assistance with any damages State may have sustained as a result of Contractor’s breach.

**25. CHOICE OF LAW AND VENUE**

Montana law governs this Contract. The parties agree that any litigation concerning this bid, proposal, or this Contract must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees, except as provided in Section 8, Defense, Indemnification/Hold Harmless.

**26.** **TAX EXEMPTION**

State of Montana is exempt from Federal Excise Taxes (#81-0302402) except as otherwise provided in the federal Patient Protection and Affordable Care Act [P.L. 111-148, 124 Stat. 119].

**27. PERSONAL PROPERTY TAX**

All personal property taxes will be paid by Contractor.

**28. AUTHORITY**

This Contract is issued under authority of Title 18, Montana Code Annotated, and the Administrative Rules of Montana, Title 2, chapter 5.

**29. SEVERABILITY.**

A declaration by any court or any other binding legal source that any provision of the Contract is illegal and void, shall not affect the legality and enforceability of any other provision of the Contract, unless the provisions are mutually and materially dependent.

**30. SCOPE, AMENDMENT, AND INTERPRETATION**

**30.1 Contract.** This contract consists of [*insert number*] numbered pages, any Attachments as required ***if applicable:*** , RFP# [*insert RFP number*], and the Contractor’s RFP response as amended ***if applicable:*** , SOW, DP, and Sole Source Justification**.** In the case of dispute or ambiguity about the minimum levels of performance by the Contractor the order of precedence of document interpretation is as follows: 1) amendments to this contract; 2) this contract; 3) the applicable statement of work, ***if applicable;*** #) Contractor’s RFP response as amended; and #) RFP # [*insert RFP number*] ***if applicable:***; and #) Sole Source Justification.

**30.2 Entire Agreement.** These documents contain the entire agreement of the parties. Any enlargement, alteration, or modification requires a written amendment signed by both parties.

**31. WAIVER**

State’s waiver of any Contractor obligation or responsibility in a specific situation is not a waiver in a future similar situation or is not a waiver of any other Contractor obligation or responsibility.

**32. EXECUTION**

The parties through their authorized agents have executed this Contract on the dates set out below.

|  |  |
| --- | --- |
| **STATE OF MONTANA** | **(INSERT CONTRACTOR’S NAME)**  |
| **(Insert Agency Name)** | **(Insert Address)** |
| **(Insert Address)** | **(Insert City, State, Zip)** |
| **(Insert City, State, Zip)** | **FEDERAL ID #**  |
|  |  |
|  |  |
| BY:  | BY:  |
| (Name/Title) | (Name/Title) |
|  |  |
|  |  |
|   |   |
| (Signature) | (Signature) |
|  |  |
| DATE:  | DATE:  |
|  |  |
|  |  |
| Approved as to Legal Content: |  |
|  |  |
|  |  |
|   |  |
| DOA Legal Counsel (Date) |  |
|  |  |
| Approved as to Form: |  |
|  |  |
|  |  |
|   |  |
| Procurement Officer (Date) |  |
| State Procurement Bureau |  |

Chief Information Officer Approval:

Contractor is notified that, under the provisions of § 2-17-514, MCA, the Department of Administration retains the right to cancel or modify any contract, project, or activity that is not in compliance with the Agency’s Plan for Information Technology, the State Strategic Plan for Information Technology, or any statewide IT policy or standard.

Chief Information Officer (Date)

Department of Administration