

ATTACHMENT A

Mandatory Terms & Conditions

The following terms and conditions, or their substantial equivalents, must be included in all future transactions funded in whole or in part by funds provided to the Government through the CARES Act:

1) ***Notice and Acknowledgement; Eligibility.*** Recipient¹ acknowledges that Government's provision of funding or payment relating to this transaction is the result of an effort to stimulate the State of Delaware economy and assist the Government in recovering from the unprecedented global reaction to the coronavirus pandemic. By entering into the Grant, Recipient expressly acknowledges that it is receiving Federal, State, or County funds in each instance it accepts the payments required by the Grant. Further, Recipient acknowledges that its statements, disclosures and representations: 1) in arriving at the Grant, and 2) with respect to each of its communications to the Government required by the Grant, shall be certified by a person possessing the actual or apparent authority to bind the Recipient under oath and under penalty of criminal or civil prosecution.² Each Grant involving CARES Act funding shall explicitly state the legal basis for eligibility at an appropriate location within the highest priority transactional document.

2) ***Audit and Inspection.***

a) ***Government Auditing Rights.*** Recipient shall hold the Recipient's, and any applicable agent, subcontractor, or subconsultant's work and records open at all times for the inspection and/or audit by the Government, any applicable state or federal agency, the U.S. Inspector General, the Comptroller General of the United States, the State of Delaware Department of Justice, or any of their duly authorized representatives, including, any private firm of certified

¹ "Recipient" as used herein refers to any unit of local government in Kent and Sussex counties receiving funds reimbursements of approved expenses incurred responding to COVID-19.

² See 31 U.S.C. §§ 3729 – 3733; 6 Del. C. c. 12; 18 U.S.C. c. 96; 11 Del. C. c.15.

public accountants engaged by the entity, to any books, documents, papers, financial and accounting reports, schedules and records, and any other material of the Recipient and any applicable agent, subcontractor, or subconsultant which relate to this Grant. The location of the inspection and/or audit will be at the Government's discretion and the inspection may be preceded by the Government's demand for the production of documents to facilitate the performance of preliminary planning, analytic and examination procedures by the Government. Such access for an on-site inspection and/or audit shall be granted by Recipient during its normal business hours, after receipt by Recipient of at least ten (10) business days advance written notice of a request for such access, at its offices in the State of Delaware, or at such other place or places agreed to by Recipient and the requesting person; provided, however, that this notice provision shall not apply to the execution of any search warrants or subpoenas or where the Government has determined to conduct an unannounced site visit. Absent good cause for more frequent site visits, the Government agrees to conduct no more than one unannounced site visit per calendar year. The provisions of this section shall survive termination or cancellation of this Grant.

- b) *Mandatory Record Retention.* Recipient, and any applicable agent, subcontractor, or subconsultant retained by Recipient, must retain all books, documents, papers, financial and accounting reports, schedules and records, and any other material pertaining to costs incurred under this Grant for not less than 6 years after the Government makes final payment and all other pending matters are closed and shall make the material available upon request for inspection and/or audit by the Government or any of the entities provided for in this Grant. The entire Grant includes all tasks regardless of individual task completion date. The Recipient, or any applicable agent, subcontractor, or subconsultant, shall be liable for Government costs incurred for subsequent audit reviews requested by the Recipient.

- c) *Audited Financial Statements.* Recipient shall make available to the Government upon request annual, audited financial statements, including all footnotes, prepared in accordance with U.S. generally accepted accounting principles (GAAP) for the most recent two accounting years at the time of this

Grant. In addition, the Recipient has an ongoing obligation to make available upon request annual, audited financial statements for future accounting years within one hundred eighty (180) days after the end of the Recipient's accounting year and to provide financial statements for interim accounting periods upon the Government's request. The requirement to provide financial statements shall continue through the accounting year ending after the last payment is made by the Government.

d) *Tax Record Retention and Production.* Recipient agrees to provide the Government with any and all tax returns, employee or contractor tax documents and any other tax records upon the Government's request, for the Government's inspection and/or audit of the Recipient's use of the funds provided pursuant to this Grant. Such tax returns, employee or contractor tax documents and other tax records include, but are not limited to, annual tax returns, payroll tax returns, quarterly unemployment tax filings, and other employee or contractor tax related information.

e) *Cross-Government Sharing of Records.* Recipient specifically agrees to allow the sharing or exchange of any information or documents which relates to this Grant among the Government and its political subdivisions, as well as the Federal Government.

3) *Subcontracting and Assignments.* To the extent that subcontracting or assignments are authorized by a contract or other written Grant, Recipient agrees that each of its reporting, auditing, invoicing, and certification requirements shall be expressly required of any such subcontractor or assignee.

4) *Public Access to Audit Materials.* While confidential business information as defined by the State of Delaware Freedom of Information Act shall remain entitled to protection and shall not be disclosed to members of the public by the Government unless required by law or court order, Recipient, and its approved subcontractors and assignees, shall expect that invoices, reports, certifications, and any Government-generated audit report regarding Recipient's performance may be made available to the public.

5) ***Customized Reporting Obligations.*** Recipient shall issue certified reports regarding compliance with all terms and conditions of the Grant as may be requested by the Government. Such certified reports will allow for active transactional oversight by the Government and shall be tailored to the specific obligations relevant to the transaction. All reporting obligations shall be reduced to writing and included in the Grant.³

6) ***Certifications Required.*** All of Recipient's invoices and reports shall contain the following certification:

Recipient acknowledges that each of its requests for payment under this Grant constitutes an express true and correct certification that the goods or services for which payment is sought comply with all statutory, regulatory, and contractual requirements related to this Grant (including the "CARES Act"), and that the Recipient is not holding, billing, or otherwise requesting, any funds which the Government is entitled to possess. Recipient recognizes and agrees that the Government seeks to enter into this Grant, on an expedited basis and, as such, is explicitly relying on the truth and accuracy (including the lack of any material omissions) of each representation, warranty, certification, and other statement made by Recipient in connection with its entering into this Grant, including any boilerplate in this Grant, or related documents, as an express condition of the Government's Grant to provide payment pursuant to this Grant.

7) ***Misrepresentation Illegal.*** In connection with this Grant, Recipient agrees not to engage in any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission whether

³ Reports required pursuant to Mandatory Term and Condition No. 5 shall be negotiated by the Government based upon the specific purchase, deliverable, or service being supported by the distribution of CARES Act funds. Accordingly, other than the mandatory obligation that reports be certified, the form, content, and frequency of such reports shall be at the discretion of the Government.

or not any person has in fact been misled, deceived or damaged thereby (collectively, the ‘misrepresentation’), and agrees that any such misrepresentation shall be treated as an unlawful practice under § 2513 of Title 6 of the Delaware Code. Material misrepresentation(s) will be assessed on the basis of individual transactions and/or combined transactions at the Government’s discretion.

8) *Price Gouging Illegal.* Recipient agrees not to engage in price gouging as herein defined, and understands and agrees that any price gouging shall be treated as an unlawful practice under § 2513 of Title 6 of the Delaware Code and a violation of Subchapter II of Chapter 25 of Title 6. ‘Price gouging’ shall have the meaning set forth in paragraph 9 of Governor John C. Carney's Declaration of a State of Emergency dated March 12, 2020, as clarified by paragraph 3 of Governor Carney’s 9th Modification of the Declaration of a State of Emergency dated April 1, 2020.

9) *Non-Compliance is a Material Breach of Contract.* Recipient acknowledges that any failure to comply with the terms and conditions included by virtue of a Mandatory Term & Condition listed herein shall constitute a material breach of the Grant.

10) *Non-Compliance Tolls Government Payment Obligation.* Any payment obligation by the Government for services rendered or materials provided during a period of time in which a Recipient’s report was not timely delivered, or during which a defective report was delivered, shall be tolled until Recipient has fully complied with all of its outstanding and overdue reporting obligations.

11) *Non-Waiver.* The delay or failure by the Government to exercise or enforce any of its rights under a contract, Grant, or other transaction shall not constitute or be deemed a waiver of the Government’s right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right.

12) *Severability.* If any term or provision included herein as a Mandatory Term and Condition is found by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable, the same shall not affect the other terms, conditions or provisions hereof, but such term, condition, or provision shall be deemed modified

to the extent necessary in the court's opinion to render such term, condition, or provision enforceable, and the rights and obligations of the parties shall be construed and enforced accordingly, preserving to the fullest permissible extent the intent and Grant(s) of the Government as set forth herein.

13) *No Third-Party Beneficiary Rights.* This Grant, is not intended to and shall not be construed to give any Third Party any interest or rights (including, without limitation, any third party beneficiary rights) with respect to or in connection with any Grant or provision contained herein or contemplated hereby, even if indirectly benefited by it.

14) *Jurisdiction and Venue.* Recipient irrevocably consents and submits to the exclusive jurisdiction of the State courts of the State of Delaware and the United States District Court for the District of Delaware and waives any objection based on venue or *forum non conveniens* with respect to any action instituted therein arising under this Grant, or any of the other Grant(s) or in any way connected with or related or incidental to the dealings of the parties hereto in respect of this Grant or the transactions related hereto or thereto, in each case whether now existing or hereafter arising, and whether in contract, tort, equity or otherwise, and agree that any dispute with respect to any such matters shall be heard only in the courts and geographic locations described above.

15) *Governing Law.* This Grant, and all claims or causes of action (whether in contract, tort or statute) that may be based upon, arise out of or relate to this Grant, or the negotiation, execution or performance of this Grant (including any claim or cause of action based upon, arising out of or related to any representation or warranty made in or in connection with this Grant, or as an inducement to enter into same), shall be governed by, and enforced in accordance with, the internal laws of the Government, including its statutes of limitations without regard to its rules of conflict of laws.

16) *Force Majeure; Applicability.* Neither the Recipient nor the Government shall be held liable for non-performance under the terms and conditions of this Grant due, but not limited to:

- a) Acts of God; labor disturbances; accidents; failure of a governmental entity to issue a permit or approval required for performance when the Contractor has filed proper and timely application with the appropriate government entity; civil disorders; acts of aggression; changes in any law or regulation adopted or issued by a governmental entity after the date of this Grant; a court order; explosions; failure of utilities; material shortages;
- b) Diseases, plagues, quarantine, epidemics or pandemics;
- c) Federal, state, or local work or travel restrictions to control, mitigate, or reduce transmission of diseases, plagues, epidemics or pandemics; or
- d) The State's need to occupy, utilize, or repurpose an active or prospective work area due to diseases, plagues, quarantine, epidemics, pandemics, work or travel restrictions, and the need to control, mitigate, or reduce transmission of diseases, plagues, epidemics or pandemics.

Each party shall notify the other in writing of any situation that may prevent performance under the terms and conditions of this contract within 2 business days of the party's knowledge of significant non-performance risk.

Notwithstanding the content of subparagraphs (A) through (D) of this paragraph, Recipient agrees that any event giving rise to *Force Majeure* as defined herein shall not relieve the Recipient of the obligation to perform and carry out any of the Mandatory Terms and Conditions set forth in this document.

17) *Warranty.* Recipient hereby warrants that:

- a) Any services and deliverables provided hereunder will be performed in a good and workmanlike manner, technically sound and in conformance with all applicable federal, state and local statutes, Executive Orders and Declarations, codes, ordinances, resolutions and other regulations applicable to the services. Recipient agrees to correct or re-perform any services not in compliance with this warranty.

- b) Recipient will not provide access to a portal or other software, or produce work product, that violates or infringes on any copyright, trademark, patent or other intellectual property rights. Recipient shall, without additional compensation, correct or revise any errors or omissions in the portal, software or work product.
- c) Third-party products within the scope of this Grant shall be governed by the terms and conditions of the licenses or other Grant(s) by which such products are governed. With respect to all third-party products and services purchased by Recipient for the Government in connection with the provision of the Services, Recipient shall pass through or assign to the Government the rights Recipient obtains from the manufacturers and/or Recipients of such products and services (including warranty and indemnification rights), all to the extent that such rights are assignable.

18) *Indemnification.*

- a) Recipient shall indemnify and hold harmless the Government, its agents and employees, from any and all liability, suits, actions or claims, together with all reasonable costs and expenses (including attorneys' fees), arising out of:
 - i) the negligence or other wrongful conduct of the Recipient, its agents or employees; or
 - ii) Recipient's breach of any material provision of this Grant that is not cured after notice and opportunity to cure.
- b) Subject to the exceptions stated in subparagraph (c) below, if the Government promptly notifies Recipient in writing of a third party claim against the Government that any deliverable infringes a copyright or a trade secret of any third party, Recipient shall (i) defend such claim at its expense and (ii) pay any costs or damages that may be finally awarded against the Government.
- c) Recipient shall not be required to indemnify Government, however, to the extent the claim of infringement stems from:

- i) Government's misuse or modification of the deliverable;
 - ii) Government's failure to use corrections or enhancements explicitly made available to Government by Recipient;
 - iii) Government's use of the deliverable in combination with any product or information not owned or developed by Recipient;
 - iv) Government's distribution, marketing or use for the benefit of third parties of the deliverable; or
 - v) Information, direction, specification or materials provided by Government.
- d) In addition to remedies stated in subparagraph a above, if any deliverable is, or in Recipient's opinion is likely to be, held to be infringing, Recipient shall at its expense and option either
- i. Procure the right for Government to continue using it;
 - ii. Replace it with a non-infringing equivalent; or
 - iii. Modify it to make it non-infringing.

19) *Insurance.* Recipient must obtain at its own cost and expense, and keep in force and effect during the term of this Grant (including during the term of all extensions), an insurance policy with the minimum coverage limits specified below issued by a carrier satisfactory to the Government. Recipient must carry one or more of the following insurance policies, as determined by the Government, depending on the type of service or product being delivered:

- a) Worker's Compensation and Employer's Liability Insurance in accordance with applicable law.
- b) Commercial General Liability (in amounts determined by the Government).

- c) Automotive Liability Insurance covering all automotive units used in the work (including all units leased from and/or provided by the Government to Recipient pursuant to this Grant as well as all units used by Recipient, regardless of the identity of the registered owner, used by Recipient for completing the Work required by this Grant to include but not limited to transporting Government clients or staff), providing the following types of coverage on a primary non-contributory basis, with limits as determined by the Government:
 - i) Combined single limit each accident, for bodily injury;
 - ii) Property damage to others;
 - iii) Per person per accident Uninsured/Underinsured Motorists coverage;
 - iv) \$25,000 per person, \$300,000 per accident Personal Injury Protection (PIP) benefits as provided for in 21 *Del. C.* § 2118; and
 - v) Comprehensive coverage for all leased vehicles, which shall cover the replacement cost of the vehicle in the event of collision, damage or other loss.

- d) In addition to the insurance coverages listed in the previous section, Recipient shall obtain at its own cost and expense, and keep in force and effect during the term of this Grant (including during the term of all extensions), at least one of the following insurance policies (as determined by the Government) with the minimum coverage limits as specified by the Government, issued by a carrier satisfactory to the Government, depending on the scope of work being performed:
 - i) Medical/Professional Liability - per occurrence / aggregate;
 - ii) Miscellaneous Errors and Omissions - per occurrence / aggregate;

iii) Product Liability - per occurrence / aggregate; or

iv) Cyber Liability Insurance. Data such as names, addresses, phone numbers, email addresses, social security numbers, tax return information, bank account information, dates of birth, driver's license numbers and other personally identifiable or other confidential information maintained by Recipient under the Grant (collectively, "PII") shall be encrypted at rest with validated cryptography standards as specified in National Institute of Standards and Technology FIPS140-2 Security Requirements. If Recipient cannot offer encryption at rest, Recipient must maintain cyber security liability insurance coverage for any loss resulting from a data breach. The policy, if required, shall remain in place in the amounts set forth below for the term of the Grant, inclusive of any extension(s), or for as long as the Recipient possesses or controls PII, whichever is longer.

Levels of cyber liability insurance required are based on the number of records with PII anticipated to be possessed or controlled by Recipient in connection with the Grant. Should the actual number of PII records exceed the anticipated number, it is the Recipient's responsibility to ensure that sufficient coverage is obtained (see table below). In the event that Recipient fails to obtain sufficient coverage, Recipient shall be liable to cover damages and shall indemnify the Government for any damages, cost or expenses beyond the coverage amount.

Level	Number of PII records	Level of cyber liability insurance required (occurrence = data breach)
1	1-10,000	\$2,000,000 per occurrence
2	10,001 – 50,000	\$3,000,000 per occurrence
3	50,001 – 100,000	\$4,000,000 per occurrence
4	100,001 – 500,000	\$15,000,000 per occurrence
5	500,001 – 1,000,000	\$30,000,000 per occurrence
6	1,000,001 – 10,000,000	\$100,000,000 per occurrence

The insurance policy covering Cyber Liability shall include but not be limited to, coverage for liabilities relating to Recipient's or any independent contractor's or subcontractor's premises, operations, products, completed operations, or conduct relating to the Grant. At a minimum, the policy must include third-party coverage for credit

monitoring, notification costs to data breach victims, and regulatory penalties and fines. Recipient shall be responsible for any deductible or self-insured retention contained in the insurance policy. The coverage under the policy shall be primary, and not excess, to any other insurance carried by the Recipient.

- e) Any insurance policy required pursuant to this Grant shall contain a provision that requires the carrier to provide the Government with written notice of cancellation in the event that such policy is cancelled prior to its original expiration date thereof.
- f) Before any work is done pursuant to this Grant, the Certificate of Insurance and/or complete copies of all required insurance policies, referencing the contract number stated herein, shall be filed with the Government. The certificate holder shall be as follows:

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- g) Nothing contained herein shall restrict or limit the Recipient's right to procure insurance coverage in amounts higher than those required by this Grant. To the extent that the Recipient procures insurance coverage in amounts higher than the amounts required by this Grant, all said additionally procured coverages will be applicable to any loss suffered by, and claim made by, the Government pursuant to this Grant.
- h) To the extent that Recipient has complied with the terms of this Grant and has procured insurance coverage for all vehicles Leased and/or operated by Recipient as part of this Grant, the Government's self-insured insurance program shall not provide any coverage, regardless whether coverage is sought as primary, co-primary, excess or umbrella insurer or coverage for any loss of any nature.

- i) In no event shall the Government be named as an additional insured on any policy required under this Grant.

20) *Limitation of Liability.* Except for specifically identified fees and expenses that may be due and owing under the Grant, and notwithstanding anything to the contrary in this Grant, neither Government nor any officers, members, employees or attorneys of the foregoing, shall have any liability to Recipient or any other party for fees (including attorneys' fees), expenses, suits, actions, claims or damages, whether direct or indirect, compensatory or punitive, actual or consequential, in or for actions, claims, causes of action or rights, including indemnification rights, arising out of or related in any way to this Grant.

- a) Notwithstanding anything to the contrary herein, no provision of this Grant shall constitute a waiver or limitation of any right held by the Government or United States of America that may exist under applicable statutory or common law.
- b) Notwithstanding anything to the contrary herein, to the extent available under applicable law, Government and their respective officers, members, employees and attorneys, expressly reserve all rights, claims, arguments, defenses and immunities, including, without limitation, claims or defenses based on sovereign immunity, qualified immunity and other statutory or common law rights, claims, defenses or immunities; provided, however, that Recipient shall have the right to seek to enforce this Grant in the courts of this State.