

AMENDMENT #1

ATTACHMENT J – NON-DISCLOSURE AGREEMENT (POTENTIAL OFFEROR)

THIS NON-DISCLOSURE AGREEMENT (“the Agreement”) is made this _____ day of _____, 2013 by and between the State of Maryland (the “State”), acting by and through the Department of Budget and Management, Division of Procurement Policy and Administration, Employee Benefits Division (the “Department”), and _____ (the “POTENTIAL Offeror”).

RECITALS

WHEREAS, the POTENTIAL OFFEROR warrants and represents that it intends to submit a Technical Proposal in response to RFP # **F10B3400005**, the Request for Proposals for **DENTAL PLAN ADMINISTRATION AND INSURANCE SERVICES (DPPO, DHMO)**. In order for the POTENTIAL OFFEROR to submit a Proposal, it will be necessary for the State to provide the POTENTIAL OFFEROR with access to certain confidential information and/or protected health information including, but not limited to, demographic and identifying information on State employees and State retirees and information concerning plan utilization. All such information provided by the State shall be considered Confidential Information and/or protected health information regardless of the form, format, or media upon which or in which such information is contained or provided, regardless of whether it is oral, written, electronic, or any other form, and regardless of whether the information is marked as “Confidential Information”; and

WHEREAS, under the Health Insurance Portability and Accountability Act of 1996 (P.L. 104-191), 42 U.S.C. Section 1320d, et. seq., and regulations promulgated thereunder, as amended from time to time (statute and regulations hereafter collectively referred to as “HIPAA Rules”) a covered entity is required to obtain written assurances from its Business Associate that Business Associate will appropriately safeguard protected health information pursuant to 45 C.F.R. §164.502(e) and §164.504(e);

THEREFORE, ~~As~~ as a condition for its receipt and access to the Confidential Information and/or protected health information described in Section 1.37 ~~1-30~~ of the RFP, POTENTIAL OFFEROR agrees as follows:

Definitions

Catch-all definition:

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Business Associate, Covered Entity, Designated Record Set, Disclosure, Individual, Minimum Necessary, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

1. POTENTIAL OFFEROR will not copy, disclose, publish, release, transfer, disseminate or use for any purpose in any form any Confidential Information received under Section 1.37 ~~1-30~~, except in connection with the preparation of its Proposal. All Confidential Information and/or protected health information and copies thereof, shall be protected from disclosure by commercially reasonable means, including without limitation encryption, password protection, and secure transmission where appropriate. All protected health information shall be protected pursuant to the requirements of the HIPAA Rules as described in Paragraphs 4(a) & (b) of this Agreement.
2. Each employee or agent (including without limitation subcontractors) of the POTENTIAL OFFEROR who receives or has access to the Confidential Information or protected health information shall be notified of the confidentiality and nondisclosure requirements of this

Agreement and the confidential nature of the Confidential Information. Each employee or agent of the POTENTIAL OFFEROR who is provided access to or a copy of the Confidential Information shall be bound by confidentiality and nondisclosure obligations that are no less restrictive than the obligations set forth herein. The POTENTIAL OFFEROR shall be liable for any violations by any employees or agents who are provided or given access to Confidential Information. The POTENTIAL OFFEROR shall provide a list of all individuals, employees, and agents of the POTENTIAL OFFEROR who have or have had access to the Confidential Information, along with the certification required in section 3 of this Agreement. See also Paragraph 4(e) of this Agreement.

3. POTENTIAL OFFEROR shall return to the State the original and destroy (in a manner designed to prohibit reading of or reconstruction of the data) any copies of the Confidential Information remaining in its possession within five business days of the State's Notice of recommended award in connection with this procurement. **If the POTENTIAL OFFEROR does not submit a Proposal, the POTENTIAL OFFEROR shall return the Confidential Information and/or protected health information to the Procurement Officer identified in the RFP, Section 1.5 ~~1.7~~ on or before the due date for Proposals.** The POTENTIAL OFFEROR shall certify, in writing and signed by an individual with authority to bind the POTENTIAL OFFEROR, to the Procurement Officer that any and all Confidential Information and protected health information (in whatever format or media) has been destroyed or returned to the Procurement Officer within five business days of the notice of recommended award or notice that the POTENTIAL OFFEROR will not submit a proposal, whichever is earlier. Such certification may be in the form provided below or in another form. See also Paragraph 6 of this Agreement.

4. Obligations and Activities of POTENTIAL OFFEROR.

POTENTIAL OFFEROR agrees to:

(a) Not use or disclose protected health information other than as permitted or required by this Agreement or as Required by Law;

(b) Use appropriate safeguards, and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by this Agreement;

(c) Implement and use appropriate and reasonable administrative, physical and technical safeguards to prevent use or disclosure of protected health information other than as permitted in this Agreement;

(d) Report to the State any use or disclosure of protected health information not provided for by Agreement of which it becomes aware, including breaches of unsecured protected health information as required at 45 CFR 164.410, and any security incident of which it becomes aware within five days;

(e) In accordance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors or agents that create, receive, maintain, or transmit protected health information on behalf of the POTENTIAL OFFEROR agree, through written agreement, to the same restrictions, conditions, and requirements that apply to the POTENTIAL OFFEROR with respect to such information;

(f) Make available protected health information in a designated record set to the covered entity as necessary to satisfy the State's obligations under 45 CFR 164.524;

(g) Make any amendment(s) to protected health information in a designated record set as directed or agreed to by the State pursuant to 45 CFR 164.526, or take other measures as necessary to satisfy the State's obligations under 45 CFR 164.526;

(i) Maintain and make available the information required to provide an accounting of disclosures to the State as necessary to satisfy the State's obligations under 45 CFR 164.528;

(j) To the extent the POTENTIAL OFFEROR is to carry out one or more of the State's obligation(s) under Subpart E of 45 CFR Part 164, comply with the requirements of Subpart E that apply to the State in the performance of such obligation(s); and

(k) Make its internal practices, books, and records available to the Secretary for purposes of determining compliance with the HIPAA Rules.

5. Permitted Uses and Disclosures by POTENTIAL OFFEROR

(a) POTENTIAL OFFEROR may only use or disclose protected health information as necessary in preparation of its Proposal as set forth in the RFP.

(b) POTENTIAL OFFEROR may use or disclose protected health information as Required by Law.

(c) POTENTIAL OFFEROR agrees to make uses and disclosures and requests for protected health information consistent with the State's minimum necessary policies and procedures, as set forth in this Agreement.

(d) POTENTIAL OFFEROR may not use or disclose protected health information in a manner that would violate Subpart E of 45 CFR Part 164 if done by the State.

6. Term and Termination

(a) Term. The Term of this Agreement shall be effective as of the date signed, and shall terminate on within five business days of the State's Notice of Recommended Award in connection with this procurement, or on the date the State terminates for cause as authorized in paragraph (b) of this Section, whichever is sooner.

(b) Termination for Cause. The Agreement shall be terminated, if the State determines POTENTIAL OFFEROR has violated a material term of this Agreement.

(c) Obligations of POTENTIAL OFFEROR Upon Termination.

Upon termination of this Agreement for any reason, POTENTIAL OFFEROR shall return to the State or, if agreed to by the State, destroy all protected health information received from the State, or created, maintained, or received by POTENTIAL OFFEROR on behalf of the State, that the POTENTIAL OFFEROR still maintains in any form. POTENTIAL OFFEROR shall retain no copies of the protected health information. This provision shall apply as well to protected health information that is in the possession of agents of POTENTIAL OFFEROR. Destruction must be by means or methods that render the protected health information unreadable, undecipherable, and unusable. The POTENTIAL OFFEROR shall provide to the Procurement Officer written notification confirming the return and/or describing the destruction of the protected health information.

(d) Survival. The obligations of POTENTIAL OFFEROR under this section on shall survive the termination of this Non-Disclosure Agreement.

7. Miscellaneous

(a) Regulatory References. A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or as amended.

(b) Interpretation. Any ambiguity in this Agreement shall be interpreted to permit compliance with the HIPAA Rules.

(c) POTENTIAL OFFEROR acknowledges that the disclosure of the Confidential Information may cause irreparable harm to the State and agrees that the State may obtain an injunction to prevent the disclosure, copying, or other impermissible use of the Confidential Information.

The State's rights and remedies hereunder are cumulative and the State expressly reserves any and all rights, remedies, claims and actions that it may have now or in the future to protect the Confidential Information and/or to seek damages for the POTENTIAL OFFEROR'S failure to comply with the requirements of this Agreement. The POTENTIAL OFFEROR consents to personal jurisdiction in the Maryland State Courts.

(d) In the event the State suffers any losses, damages, liabilities, expenses, or costs (including, by way of example only, attorneys' fees and disbursements) that are attributable, in whole or in part to any failure by the POTENTIAL OFFEROR or any employee or agent of the POTENTIAL OFFEROR to comply with the requirements of this Agreement, POTENTIAL OFFEROR and such employees and agents of POTENTIAL OFFEROR shall hold harmless and indemnify the State from and against any such losses, damages, liabilities, expenses, and/or costs.

(e) This Agreement shall be governed by the laws of the State of Maryland.

(f) POTENTIAL OFFEROR acknowledges that pursuant to Section 11-205.1 of the State Finance and Procurement Article of the Annotated Code of Maryland, a person may not willfully make a false or fraudulent statement or representation of a material fact in connection with a procurement contract. Persons making such statements are guilty of a felony and on conviction subject to a fine of not more than \$20,000 and/or imprisonment not exceeding 5 years or both. POTENTIAL OFFEROR further acknowledges that this Agreement is a statement made in connection with a procurement contract.

- ~~4. POTENTIAL OFFEROR acknowledges that the disclosure of the Confidential Information may cause irreparable harm to the State and agrees that the State may obtain an injunction to prevent the disclosure, copying, or other impermissible use of the Confidential Information. The State's rights and remedies hereunder are cumulative and the State expressly reserves any and all rights, remedies, claims and actions that it may have now or in the future to protect the Confidential Information and/or to seek damages for the POTENTIAL OFFEROR'S failure to comply with the requirements of this Agreement. The POTENTIAL OFFEROR consents to personal jurisdiction in the Maryland State Courts.~~
- ~~5. In the event the State suffers any losses, damages, liabilities, expenses, or costs (including, by way of example only, attorneys' fees and disbursements) that are attributable, in whole or in part to any failure by the POTENTIAL OFFEROR or any employee or agent of the POTENTIAL OFFEROR to comply with the requirements of this Agreement, POTENTIAL OFFEROR and such employees and agents of POTENTIAL OFFEROR shall hold harmless and indemnify the State from and against any such losses, damages, liabilities, expenses, and/or costs.~~
- ~~6. This Agreement shall be governed by the laws of the State of Maryland.~~
- ~~7. POTENTIAL OFFEROR acknowledges that pursuant to Section 11-205.1 of the State Finance and Procurement Article of the Annotated Code of Maryland, a person may not willfully make a false or fraudulent statement or representation of a material fact in connection with a procurement contract. Persons making such statements are guilty of a felony and on conviction subject to a fine of not more than \$20,000 and/or imprisonment not exceeding 5 years or both. POTENTIAL OFFEROR further acknowledges that this Agreement is a statement made in connection with a procurement contract.~~
8. The individual signing below warrants and represents that they are fully authorized to bind the POTENTIAL OFFEROR to the terms and conditions specified in this Agreement.

POTENTIAL OFFEROR: _____

BY: _____ [signature]

NAME: _____ **[print name]**

TITLE: _____

ADDRESS: _____

**POTENTIAL OFFEROR'S EMPLOYEES AND AGENTS
WHO WILL BE GIVEN ACCESS TO THE CONFIDENTIAL INFORMATION**

**Printed Name and
Address of Individual/Agent**

**Employee (E)
or Agent (A)**

| | |
|-------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

CERTIFICATION

I CERTIFY, on behalf of _____ (“POTENTIAL OFFEROR”) that the original and any and all copies of the Confidential Information **and/or protected health information** provided by the State in connection with RFP # F10B3400005 have been returned to the Procurement Officer or destroyed in a manner designed to prevent reconstruction of or reading of the data **and consistent with the requirements of the HIPAA Rules**. Below is a list of the individuals, employees and/or agents to whom copies of or access to the Confidential Information **and/or protected health information** have been provided.

I warrant and represent that I am fully authorized to bind the POTENTIAL OFFEROR to the terms and conditions specified in this Agreement.

POTENTIAL OFFEROR: _____

BY: _____ [signature]

NAME: _____ [print name]

TITLE: _____

ADDRESS: _____

DATE: _____

WITNESS: _____

POTENTIAL OFFEROR’S EMPLOYEES AND AGENTS WHO WERE GIVEN ACCESS TO THE CONFIDENTIAL INFORMATION

| | |
|---|--------------------------------------|
| Printed Name and Address of Individual/Agent | Employee (E) or Agent (A) |
|---|--------------------------------------|
