

## ATTACHMENT A

### **Mandatory Terms & Conditions**

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

1) ***Notice and Acknowledgement; Eligibility.*** Recipient<sup>1</sup> 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.<sup>2</sup> 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, subgrantee, 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

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<sup>1</sup> "Recipient" as used herein refers to any health care provider operating in Delaware as of February 1, 2020 and any applicable agent or subgrantee receiving funds or reimbursements of approved expenses incurred responding to COVID-19.

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

of Justice, or any of their duly authorized representatives, including, any private firm of certified 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, subgrantee, 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, subgrantee, 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 subgrantee, 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.<sup>3</sup>

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

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<sup>3</sup> 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.

with intent that others rely upon such concealment, suppression or omission whether 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 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 and as set forth in Exhibit B hereto.

**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 located in New Castle County, 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) *Indemnification.*** 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.

**17) *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.