

**EXHIBIT D
Sample Contract**

SOFTWARE AND SERVICES AGREEMENT

BETWEEN

TEXAS DEPARTMENT OF LICENSING & REGULATION

AND

[Selected Vendor]

Contract No. 452-0-0204

This Software and Services Agreement (“Contract”) is entered into by the Texas Department of Licensing and Regulation (“TDLR”), an agency of the State of Texas, and [Selected Vendor] (“Vendor”), located at [address information].

I. Recitals

Whereas, on September 1, 2009, TDLR issued a Request for Offers (“RFO”) from qualified, independent firms and individuals to provide Consulting Services to TDLR as set forth in the RFO;

Whereas, Vendor submitted an offer dated October 5, 2009 in response to TDLR’s RFO (“Offer”);

Whereas, Vendor was selected as the Selected Vendor.

The parties hereby agree as follows:

II. Services and Standards of Performance

Vendor shall provide to TDLR all of the Services and deliverables described in and in the manner required by all of the following documents:

This ___ (__) page document;

Exhibit A: TDLR’s RFO;

Exhibit B: Authorized Personnel and Compensation;

Exhibit C: Agreed Workplan;

Exhibit D: Vendor’s Offer; and

Exhibit E: HUB Subcontract Plan.

All of the above are attached to and incorporated as part of this Contract for all purposes. All terms and conditions of TDLR’s RFO shall apply.

In the case of conflicts between this ___ (__) page document and any of the above exhibits, the following shall control in this order of priority:

This ___ (__) page document;

Exhibit A: TDLR's RFO;

Exhibit B: Authorized Personnel and Compensation;

Exhibit C: Agreed Workplan;

Exhibit D: Vendor's Offer; and

Exhibit E: HUB Subcontract Plan.

Vendor represents and warrants that it has the requisite qualifications, experience, personnel and other resources to provide all of the required consulting services to TDLR in the manner required by this Contract.

III. Personnel

Vendor shall act as an independent contractor in providing services under this Contract. Vendor's employees shall not be construed as employees of TDLR in providing services under this Contract. Vendor shall assign to this Contract only those persons as employees who are approved by TDLR's project manager specified in the RFO. Vendor shall assign only qualified personnel to this Contract. As of the date of TDLR's execution of this Contract, TDLR's project manager has authorized the personnel listed in Exhibit B of this Contract to provide services under this Contract. Vendor shall not be reimbursed for any changes in staff or employees or their classifications, as approved by TDLR's project manager, unless previously approved by TDLR. Vendor represents and warrants that none of its employees, including, but not limited to, those authorized to provide services under this Contract, are present or former employees of TDLR. Vendor shall provide to TDLR prior written notice of any proposed change in personnel involved in providing services under this Contract. The actual change in personnel shall occur only after Vendor has received TDLR's prior written approval. The foregoing conditions relating to changes in personnel shall apply regardless of the reason for such proposed change in personnel.

IV. Evaluation and Written Acceptance

Prior to authorizing any invoices for payment under Paragraph VI of this Contract, TDLR shall evaluate Vendor's performance against the Standards of Performance and with all other requirements of this Contract. Prior to authorizing any such payments, TDLR shall evaluate and specifically reserves the right to provide written notice of TDLR's acceptance of Vendor's services under the procedures described in this Contract.

V. Payments

Vendor shall submit all statements for services as set out in the Agreed Workplan. In submitting these statements, Vendor acknowledges and by execution of this Contract certifies to the following: that invoices have been carefully reviewed for detailed description of the Services performed; that the Services have been performed in compliance with the Contract; that the amount of the invoice and all previous invoices together does not

exceed the contractual cap of the Contract, Vendor's Cost Offer, or negotiated fees; and that all appropriate and required supporting documentation is attached. TDLR may, in its sole discretion, require additional documentation to support payment and Vendor shall respond to any such requests within five (5) days of receipt. All payments hereunder shall be subject to the Texas Prompt Payment Act.

In any event, total payments by TDLR to Vendor under this Contract shall not exceed [To be added before Contract signature] and no/100 Dollars (**\$XXXXXXXX**) **inclusive of all Vendor's fees and expenses whatsoever. No other amounts shall be paid.**

VI. Term and Termination

This Contract shall become effective on the date signed by TDLR, after having first been signed by Vendor, and shall terminate on August 31, 2010, unless otherwise sooner terminated as provided in this Contract. Further, TDLR reserves the right, in its sole judgment and discretion, to renew this Contract for one (1) additional one (1) year term, upon reasonable written notice to Vendor. Notwithstanding the termination or expiration of this Contract, the provisions of this Contract regarding confidentiality, indemnification, dispute resolution, right-to-audit, and records shall survive the termination or expiration dates of this Contract. Further, Vendor's obligation to provide legislative testimony and support under this Contract to TDLR shall survive the termination or expiration of this Contract.

In addition to the Contract termination provisions included in the RFO, TDLR may, in its sole discretion, terminate this Contract for cause or convenience upon thirty (30) days written notice to Vendor, with no further liability to any party whatsoever to TDLR upon such effective date of termination. Such notice may be provided by facsimile or certified mail; return receipt requested and is effective upon Vendor's receipt.

VII. Confidentiality and Open Records

Vendor shall comply with the provisions of the Nondisclosure Agreement, Exhibit A of the RFO. Vendor's personnel must also sign the Nondisclosure Agreement prior to beginning any work under this Contract. Notwithstanding any provisions of this Contract to the contrary, Vendor understands that TDLR is bound by the provisions of the Texas Public Information Act (formerly the Texas Open Records Act) and Attorney General Opinions issued under that statute. Within three (3) days of receipt, Vendor will refer to TDLR any third party requests, received directly by Vendor, for information to which Vendor has access as a result of or in the course of performance under this Contract.

VIII. Insurance

Vendor represents and warrants that it will, within five (5) business days of executing this Contract, provide TDLR with current certificates of insurance or other acceptable proof of the following insurance coverages for Vendor and Vendor's employees:

Standard Workers Compensation Insurance covering all personnel who will provide services under this Contract;

Commercial General Liability Insurance \$250,000 minimum each occurrence limit; \$500,000 minimum aggregate limit; and

Vendor represents and warrants that all of the above coverages are with companies licensed in the State of Texas, with “A” rating from Best, and authorized to provide the corresponding coverages. Vendor also represents and warrants that all policies contain endorsements prohibiting cancellation except upon at least thirty (30) days prior written notice to TDLR. Vendor represents and warrants that it shall maintain all of the above insurance coverages during the term of this Contract.

IX. Indemnification

VENDOR SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE STATE OF TEXAS, ITS OFFICERS, AND EMPLOYEES, AND TDLR, ITS OFFICERS, AND EMPLOYEES AND CONTRACTORS, FROM AND AGAINST ALL CLAIMS, ACTIONS, SUITS, DEMANDS, PROCEEDINGS, COSTS, DAMAGES, AND LIABILITIES, INCLUDING WITHOUT LIMITATION ATTORNEYS’ FEES AND COURT COSTS, ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM ANY ACTS OR OMISSIONS OF CONSULTANT OR ANY AGENT, EMPLOYEE, SUBCONTRACTOR, OR SUPPLIER OF VENDOR IN THE EXECUTION OR PERFORMANCE OF ANY CONTRACT WITH VENDOR RESULTING FROM THIS RFO. VENDOR SHALL COORDINATE ITS DEFENSE WITH THE TEXAS ATTORNEY GENERAL AS REQUESTED BY TDLR.

THIS SECTION IS NOT INTENDED TO AND SHALL NOT BE CONSTRUED TO REQUIRE VENDOR TO INDEMNIFY OR HOLD HARMLESS THE STATE OR TDLR FOR ANY CLAIMS OR LIABILITIES RESULTING FROM THE NEGLIGENT ACTS OR OMISSIONS OF TDLR OR ITS EMPLOYEES.

X. Dispute Resolution

Chapter 2260 of the Texas Government Code (“Chapter 2260”) prescribes dispute resolution processes for certain breach of contract claims applicable to certain contracts for goods and services. As required by Chapter 2260, TDLR has adopted rules under Chapter 2260, codified at 34 Texas Administrative Code 55, and may adopt revisions to these throughout the term of this Contract, including any extensions. Vendor shall comply with such rules and amendments, if any.

The dispute resolution process provided for in Chapter 2260 of the Government Code shall be used, as further described herein, by TDLR and Vendor to attempt to resolve any claim for breach of Contract made by Vendor under this Contract.

XI. Representations, Warranties, and General Provisions

11.1 Family Code. Under Section 231.006 of the Texas Family Code (relating to child support), Vendor represents and warrants that Vendor is not ineligible to receive the specified payment and acknowledges that this Contract may be terminated and payment withheld if this representation and warranty is inaccurate.

11.2 Eligibility. Under Section 2155.004 of the Texas Government Code, Vendor represents and warrants that Vendor is not ineligible to receive this Contract and acknowledges that this Contract may be terminated and payment withheld if this representation and warranty is inaccurate.

11.3 Liability for Taxes. Vendor represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, but not limited to, any federal, state, or local income, sales or excise taxes of Vendor or its employees. TDLR shall not be liable for any such taxes resulting from this Contract.

11.4 HUBs. Vendor represents and warrants that it shall comply with the Historically Underutilized Business requirements of this Contract.

11.5 Amendments. Except as provided in Section 11.12 and 11.19 of this Contract, this Contract may be amended only upon written agreement between TDLR and Vendor; however, this Contract may not be amended so as to make it conflict with the laws of the State of Texas.

11.6 Applicable Law; Venue. This Contract shall be governed by and construed in accordance with the laws of the State of Texas. The venue of any suit brought for any breach of this Contract is fixed in any court of competent jurisdiction of Travis County, Texas.

11.7 Time Limits. Time is of the essence in the performance of this Contract. Vendor shall strictly comply with all of the deadlines, requirements, and Standards of Performance for this Contract.

11.8 Assignments. Vendor may not assign this Contract, in whole or in part, and may not assign any right or duty required under it.

11.9 Partially Completed Work. No later than the first calendar day after the termination of this Contract, or at TDLR's request, Vendor shall deliver to TDLR all completed, or partially completed, work and any and all documentation or other products and results of these services. Failure to timely deliver such work or any and all documentation or other products and results of the services shall be considered a material breach of this Contract. Vendor shall not make or retain any copies of the work or any and all documentation or other products and results of the services without the prior written consent of TDLR.

11.10 Federal, State, and Local Requirements. Vendor shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2's to common law employees. Vendor is responsible for both Federal and State Unemployment insurance coverage and standard Worker's Compensation Insurance coverage. Vendor shall comply with all Federal and State tax laws and withholding requirements. TDLR shall not be liable to Vendor or its employees for any Unemployment or Workers' Compensation coverage, or Federal or State withholding requirements. Vendor shall indemnify TDLR and pay to TDLR all costs, penalties, or losses resulting from Vendor's omission or breach of this Section.

11.11 Severability Clause. In the event that any provision of this Contract is later determined to be invalid, void, or unenforceable, then the remaining terms, provisions, covenants, and conditions of this Contract shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated.

11.12 Applicable Law and Conforming Amendments. Vendor must comply with all laws, regulations, requirements and guidelines applicable to a contractor providing services to the State of Texas and to a Vendor providing professional financial or similar services to TDLR, as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of this Contract. TDLR reserves the right, in its sole discretion, to unilaterally amend this Contract throughout its term to incorporate any modifications necessary for TDLR's or Vendor's compliance with all applicable state and federal laws, regulations, requirements and guidelines.

11.13 No Waiver. This Contract shall not constitute or be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to TDLR as an agency of the State of Texas or otherwise available to TDLR. The failure to enforce or any delay in the enforcement of any privileges, rights, defenses, remedies, or immunities available to TDLR under this Contract or under applicable law shall not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel. TDLR does not waive any privileges, rights, defenses, or immunities available to TDLR as an agency of the State of Texas, or otherwise available to TDLR, by entering into this Contract or by its conduct prior to or subsequent to entering into this Contract. **The modification of any privileges, rights, defenses, remedies, or immunities available to TDLR must be in writing, must reference this section, and must be signed by TDLR to be effective, and such modification of any privileges, rights, defenses, remedies, or immunities available to TDLR shall not constitute waiver of any subsequent privileges, rights, defenses, remedies, or immunities under this contract or under applicable law.**

11.14 No Liability upon Termination. If this Contract is terminated for any reason, TDLR and the State of Texas shall not be liable to Vendor for any damages, claims, losses, or any other amounts arising from or related to any such termination.

11.15 Independent Contractor. Vendor shall serve as an independent contractor in providing services under this Contract. Vendor's employees are not and shall not be construed as employees of TDLR.

11.16 Limitation on Authority; No Other Obligations. Vendor shall have no authority to act for or on behalf of TDLR or the State of Texas except as expressly provided for in this Contract; no other authority, power or use is granted or implied. Vendor may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of TDLR or the State of Texas.

11.17 No Other Benefits. Vendor shall have no exclusive rights or benefits other than those set forth herein.

11.18 Patent, Trademark, Copyright and Other Infringement Claims. Vendor shall indemnify, save and hold harmless TDLR and the State of Texas from and against claims of patent, trademark, copyright, trade secret or other proprietary rights, violations or infringements arising from TDLR's or Vendor's use of or acquisition of any services or

other services provided to TDLR by Vendor or otherwise to which TDLR has access as a result of Vendor's performance under this Contract, provided that TDLR shall notify Vendor of any such claim within a reasonable time of TDLR's receiving notice of any such claim. Vendor shall pay all reasonable costs of TDLR's counsel. If Vendor is notified of any claim subject to this Section, Vendor shall notify TDLR of such claim within five (5) working days of such notice. If TDLR determines that a conflict exists between its interests and those of Vendor or if TDLR is required by applicable law to select separate counsel, TDLR shall be permitted to select separate counsel and the reasonable costs of such TDLR's counsel shall be paid by Vendor. No settlement of any such claim shall be made by Vendor without TDLR's prior written approval. Vendor shall reimburse TDLR and the State of Texas for any claims, damages, losses, costs, expenses, judgments or any other amounts, including, but not limited to, attorneys' fees and court costs, arising from any such claim. Vendor represents that it has determined what licenses, patents and permits are required under this Contract and has acquired all such licenses, patents and permits.

11.19 Supporting Documents; Right to Audit; Independent Audits. Vendor shall maintain and retain supporting fiscal documents adequate to ensure that claims for Contract funds are in accordance with applicable TDLR and State of Texas requirements. Vendor shall maintain all such documents and other records relating to this Contract and the state's property for a period of four (4) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. Vendor shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all information related to the State's property, such as work papers, reports, books, data, files, software, records, and other supporting documents pertaining to this Contract, for purposes of inspecting, monitoring, auditing, or evaluating by TDLR, the State of Texas or their authorized representatives. Vendor shall cooperate with auditors and other authorized TDLR and State of Texas representatives and shall provide them with prompt access to all of such State's property as requested by TDLR or the State of Texas.

This Contract may be amended unilaterally by TDLR to comply with any rules and procedures of the State Auditor in the implementation and enforcement of Section 2262.003. Under procedures provided by the state auditor on September 5, 2003, in addition to the above, (1) Vendor understands that the acceptance of funds under this Contract acts as acceptance of the authority of the state auditor to conduct an audit or investigation in connection with those funds; (2) Vendor further agrees to cooperate fully with the state auditor in the conduct of the audit or investigation, including providing all records requested; and (3) Vendor shall ensure that this paragraph concerning the authority to audit funds received indirectly by subcontractors, if any, through Vendor and the requirement to cooperate is included in any subcontract it awards; and (4) the state auditor shall at any time have access to and the rights to examine, audit, excerpt, and transcribe any pertinent books, documents, working papers, and records of the Vendor relating to this Contract.

11.20 DTPA; Unfair Business Practices. Vendor represents and warrants that it has not been the subject of a Deceptive Trade Practices Act or any unfair business practice administrative hearing or court suit and that Vendor has not been found to be guilty of such practices in such proceedings. Vendor certifies that it has no officers who have served as officers of other entities who have been the subject of a Deceptive Trade Practices Act or any unfair business administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

11.21 Immigration. Vendor represents and warrants that it shall comply with the requirements of the Immigration Reform and Control Act of 1986 regarding employment verification and retention of verification forms for any individuals hired on or after November 6, 1986, who will perform any labor or services under this Contract.

11.22 Equal Opportunity. Vendor represents and warrants that it shall comply with the Civil Rights Act in giving equal opportunity without regard to race, color, creed, sex or national origin.

11.23 Antitrust. Vendor represents and warrants that neither Vendor nor any firm, corporation, partnership, or institution represented by Vendor, nor anyone acting for such firm, corporation or institution has violated the antitrust laws of Texas codified in 15.01, et. seq., Business and Commerce Code, or the federal antitrust laws, nor communicated directly or indirectly the proposal to any competitor or any other person engaged in such line of business.

11.24 No Conflicts. Vendor represents and warrants that Vendor has no actual or potential conflicts of interest in providing services to TDLR under this Contract and that Vendor's provision of services under this Contract would not reasonably create an appearance of impropriety.

11.25 Financial Interests; Gifts. Vendor represents and warrants that neither Vendor nor any person or entity that will participate financially in this Contract has received compensation from TDLR for participation in preparation of specifications for this Contract. Vendor represents and warrants that it has not given, offered to give, and does not intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to any public servant or employee in connection with this Contract.

11.26 ADA. Vendor represents and warrants that it shall comply with the requirements of the Americans with Disabilities Act (ADA).

11.27 Buy Texas. Vendor represents and warrants that it shall purchase products and materials produced in Texas when they are available at a comparable price and in a comparable period of time.

11.28 Felony Criminal Convictions. Vendor represents and warrants that Vendor has not and Vendor's employees have not been convicted of a felony criminal offense, or that, if such a conviction has occurred, Vendor has fully advised TDLR as to the facts and circumstances surrounding the conviction.

11.29 Notices. Any written notices required under this Contract will be by either hand delivery to Vendor's office address specified on Page 1 of this Contract or to TDLR's General Counsel, 920 Colorado Street, Austin, TX 78701, or by U.S. Mail, certified, return receipt requested, addressed to the appropriate foregoing address. Notice will be effective on receipt by the affected party. Either party may change the designated notice address in this Section by written notification to the other party.

11.30 False Statements; Breach of Representations. By signature to this Contract, Vendor makes all the representations, warranties, guarantees, certifications and

affirmations included in this Contract. If Vendor signed its proposal with a false statement or signs this Contract with a false statement or it is subsequently determined that Vendor has violated any of the representations, warranties, guarantees, certifications or affirmations included in this Contract, Vendor shall be in default under this Contract and TDLR may terminate or void this Contract for cause and pursue other remedies available to TDLR under this Contract and applicable law.

11.31 Force Majeure. Except as otherwise provided, neither Vendor nor TDLR shall be liable to the other for any delay in, or failure of performance, of any requirement contained in this Contract caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. Force majeure is defined as those causes generally recognized under Texas law as constituting impossible conditions. Each party must inform the other in writing with proof of receipt within three (3) business days of the existence of such force majeure or otherwise waive this right as a defense.

11.32 Debts or Delinquencies to State. Vendor acknowledges and agrees that, to the extent Vendor owes any debt or delinquent taxes to the State of Texas, any payments or other amounts Vendor is otherwise owed under or related to the Contract may be applied by TDLR toward any debt or delinquent taxes the Vendor owes the State of Texas until the debt or delinquent taxes are paid in full. These provisions are effective at any time Vendor owes any such debt or delinquency. Vendor shall comply with all applicable laws and regulations regarding satisfaction of debts and delinquencies to the State of Texas.

11.33 Prohibited Use of Appropriated or other Funds under Control of State Agency; Lobbying. Vendor represents and warrants that TDLR's payments to Vendor and Vendor's receipt of appropriated or other funds under any of this or any resulting agreement are not prohibited by §556.005 or §556.008, Tex. Gov't. Code.

XII. Signatories

The undersigned signatories represent and warrant that they have full authority to enter into this Contract on behalf of the respective parties.

XIII. Entire Agreement

This Contract contains the entire agreement between Vendor and TDLR relating to the rights granted and the obligations assumed in it. Any oral representations or modifications concerning this Contract shall be of no force or effect unless contained in a subsequent writing, signed by both parties.

XIV. Funding

TDLR's performance of its obligations under this Contract is contingent upon and subject to the availability of and actual receipt by TDLR of sufficient and adequate funds from the sources contemplated by this Contract. This Contract is subject to immediate cancellation or termination, without penalty to TDLR or the State of Texas, subject to the availability and receipt of these funds. In addition, TDLR is a state agency whose authority and appropriations are subject to the actions of the Texas Legislature. If TDLR becomes subject to a legislative change, revocation of statutory authority or lack of funds that would render the services to be provided under this Contract impossible or unnecessary, TDLR

may terminate this Agreement without penalty to TDLR or the State of Texas. In the event of a termination or cancellation under this Section, TDLR shall not be required to give notice and shall not be liable for any damages or losses caused or associated with such termination or cancellation.

**Texas Department of
Licensing and Regulation**

[Selected Vendor]

By: _____
William H. Kuntz, Jr.
Executive Director

By: _____
Name: _____
Title: _____

Date: _____

Date: _____

**EXHIBIT D
SAMPLE CONTRACT
Exhibit 1**

**Contract Exhibit 1
TDLR's RFO**

TDLR's RFO, issued September 1, 2009, TDLR's official responses to questions dated [insert date] (collectively "RFO"), are incorporated by reference into this Contract as Contract Exhibit 1.

**EXHIBIT D
SAMPLE CONTRACT**

**Contract Exhibit 2
Authorized Personnel and Compensation**

Vendor's authorized personnel are those individuals specified in the "Proposed Personnel" portion of its Offer; however, Vendor may not use in its performance of this Contract any individuals whose services are prohibited by the following standard exceptions arising under State of Texas procurement law:

- (1) Vendor understands that it may not use personnel in its performance of this Contract any individual previously employed by TDLR within the past twelve months. Section 2252.901, Texas Government Code
- (2) Vendor understands that it may not use personnel in its performance of this Contract any individual previously employed by TDLR within the two years prior to its proposal without making the disclosures required by law. Section 2254.033, Texas Government Code

Compensation:

Vendor's sole compensation under this Contract shall be determined as described in Section V of this Contract.

**EXHIBIT D
SAMPLE CONTRACT**

**Contract Exhibit 3
Final Workplan**

Upon final written approval of TDLR's Project Manager, the final agreed Project Workplan shall be incorporated by reference into this Contract as Contract Exhibit 3.

Initial for identification:

**Lee Parham
Project Manager**

[The Successful Vendor]

Date: _____

Date: _____

**EXHIBIT D
SAMPLE CONTRACT**

**Contract Exhibit 4
Vendor's Offer**

Vendor's Offer dated _____ is incorporated by reference into this Contract as Contract Exhibit 4.