

ATTACHMENT 10



Department of
Civil Service

Confidentiality and Non-Disclosure Agreement RFP entitled: "Pharmacy Benefit Services for The Empire Plan, Student Employee Health Plan, and NYS Insurance Fund Workers' Compensation Prescription Drug Programs"

THIS AGREEMENT is hereby executed between the State of New York (hereinafter "State"), acting by and through the New York State Department of Civil Service (hereinafter "DCS"), its successors and assigns, having its principal place of business at Empire State Plaza, Albany, NY 12239, and _____ <Vendor> _____, its successors and assigns, having a principal place of business at _____ (hereinafter "Vendor" or "Custodian"), executed by _____, an individual who is authorized to execute this document on behalf of the Vendor (hereinafter "Authorized Representative"), in relation to the above-referenced RFP. The foregoing are collectively referred to as the "Parties."

Certification & Affirmation

The Authorized Representative, by signing this Agreement in the name and on behalf of the Vendor, subscribes and affirms the following:

1. that he/she is the authorized representative of a Vendor which is qualified to respond to the above-referenced RFP;
2. that he/she is signing this Agreement on behalf of and as the act and deed of the Vendor named below intending to bind said Vendor to the representations made herein;
3. that the Vendor will comply with all requirements of this Agreement; and
4. that the Vendor will certify the return or destruction of Confidential Information received as specified in this Agreement.

PART 1. DEFINITIONS

A. Confidential Information

"Confidential Information" shall be defined to include:

- 1) RFP Attachments: Comparison of DCS Current Program Retail Network Pharmacies and the Offeror's Proposed Retail Network (Attachment 21), Enrollment by Zip Code & Geo Access Network Report File (Attachment 22), and Informational Claims Files – DCS and NYSIF (Attachment 86); and
- 2) any information that the Department or the State, regardless of form or medium of disclosure (e.g., verbal, hard copy, or electronic) or source of information (e.g.,

Department, other state agencies, state employees, electronic systems, or third party contractors) provides to Vendor, or which Vendor obtains, discovers, derives or otherwise becomes aware of solely as a result of this RFP other than:

- (a) information that is previously rightfully known to the Vendor without restriction on disclosure;
- (b) information that is or becomes, from no act or failure to act on the part of the Vendor, generally known in the relevant industry or in the public domain; and
- (c) information that is independently developed by Vendor without the use of Confidential Information.

Title to all Confidential Information remains the property of the State. Confidential Information is provided on an “as is” basis, and the State of New York makes no express or implied warranties or conditions, of any kind including warranties or conditions of merchantability and fitness for a particular purpose. Confidential Information shall include, but not be limited to, detailed claims data and enrollee demographic data.

B. Authorized Use

“Authorized Use” shall be defined as the use of Confidential Information by Vendor, its employees, consultants and subcontractors, solely for the purpose of submitting a good faith proposal to the RFP as now or hereafter modified or amended. Disclosure, display, use, duplication, storage or transmittal of Confidential Information, in any form, for any purpose other than that set forth in this Agreement, including extrapolation or retention of summary information, data or business processes, even if without specific identifiers, shall be deemed an “unauthorized use”.

C. Authorized Person

“Authorized Person” shall be defined as those persons within Vendor’s employ or control identified by Vendor to DCS in Attachment A “Vendor Contact and Authorized Persons List”, as having a need to receive, possess, store, access, or view Confidential Information for an Authorized Use.

PART 2. CONFIDENTIALITY & NON-DISCLOSURE REQUIREMENTS

A. Duty to Protect Confidential Information

Upon proper execution of this Agreement, Vendor will be granted a non-exclusive, non-transferable license to display, use, duplicate, store, and disclose Confidential Information only for an Authorized Use. Vendor shall safeguard all Confidential Information which is delivered from the State to the Vendor to ensure its authorized use and to protect and prevent its unauthorized use or disclosure.

“Safeguard all Confidential Information” shall be defined as Vendor taking either one, or a combination of the following security measures, whichever standard is higher:

- (1) Where Vendor has established security procedures for its own confidential, sensitive business information which impose security requirements for the

protection of its own trade secret, proprietary or confidential information, Vendor shall protect the Confidential Information using the same means; and/or

- (2) Where Vendor has not established such internal procedures, Vendor shall take the commercial measures, defined below, to protect the Confidential Information.

Commercial Measures to Protect Confidential Information

For purposes of this Agreement, “commercial measures” shall be defined to include all of the following responsibilities to be undertaken by the Vendor. Vendor shall take all of the following “commercial measures” to protect the Confidential Information:

I. Use Restriction

Confidential Information shall only be received, possessed, stored, accessed and/or viewed by Authorized Persons.

II. Access by Authorized Person(s)

- a. Vendor shall be required to take commercially reasonable steps to inform each Authorized Person of their individual obligation to protect the security of Confidential Information in accordance with the requirements of this Agreement.
- b. Vendor shall not permit Confidential Information to be received, possessed, stored, accessed, or viewed by any Authorized Person until such person has agreed to comply with the requirements of this Agreement.

III. Access by Subcontractors, Affiliates and Consultants

- a. Vendor shall be responsible for identifying to DCS those subcontractors, affiliates and consultants who have a need to receive, possess, store, access, or view Confidential Information for an authorized use.
- b. Vendor shall not permit Confidential Information to be received, possessed, stored, accessed, or viewed by any subcontractor, affiliate or consultant until such entity’s legal representative has been made aware of and has agreed to comply with the requirements of this Agreement.
- c. Subcontractors, affiliates and consultants shall not be allowed to further disseminate or distribute Confidential Information, other than to provide access by Authorized Person(s) within the subcontractor’s, affiliate’s, or consultant’s control and oversight.

IV. Security Obligations Regarding Confidential Information

Any person(s) who receive, possess, store, access, or view Confidential Information from either the Vendor or its approved subcontractor, affiliate or consultant (hereinafter “Custodian”) shall be subject to the following security obligations:

- a. Custodian is the SOLE entity authorized to duplicate, distribute or otherwise transmit Confidential Information.

- b. Custodian's legal representative must approve any process used to duplicate, distribute or otherwise transmit Confidential Information to Authorized Person(s), and may NOT approve or use any process which involves the use of any public internet or other non-secure medium.
- c. Unless otherwise authorized by Custodian's legal representative, Confidential Information may NOT be stored on personal (non-business) computing or other electronic devices. If the Confidential Information is taken or removed in any form outside of the physical premises of Custodian, it shall be subject to the protections set forth in this Agreement.
- d. Confidential Information may only be duplicated, distributed or otherwise transmitted "as is", without alteration of any kind. "Confidential" or "Copyright" notices, whether originally in physical or electronic medium, shall not be removed from and shall be duplicated on Confidential Information when such information is duplicated, distributed or otherwise transmitted pursuant to (b) above. Vendor may utilize the Confidential Information in different forms solely for Authorized Uses but shall maintain the "Confidential" or "Copyright" notices.
- e. Other than as set forth in (a-d), above, Confidential Information may not be duplicated, distributed, stored or otherwise transmitted or communicated to or by any person or system. Authorized Person(s) may not copy, re-duplicate, re-transmit or re-distribute Confidential Information, in any form, whether whole or in part, or in any medium, whether electronic or hard copy.
- f. Upon termination of employment, Authorized Person(s) shall be required to return Confidential Information to Custodian's legal representative, and/or to certify that all electronic, optical or other copies have been destroyed within any electronic storage or other medium.

V. Chain of Custody

Vendor shall be required to keep a record of all copies of the Confidential Information that have been made and distributed to those persons within the employ of Vendor, and to those subcontractors, affiliates or consultants who have a need to access Confidential Information for such authorized use.

Those subcontractors, affiliates or consultants which receive Confidential Information from the Vendor shall, as a condition of accessing such information, certify that such entity shall keep a record of all copies of the Confidential Information that have been made and distributed to those persons within the employ of such entity, and that such entity will provide its written certification of compliance with the provisions of this Agreement to the Vendor as provided in paragraph VI, below.

VI. Certification by Vendor of Return of Confidential Information

The Vendor and its subcontractors, affiliates and consultants who have received Confidential Information shall certify the chain of custody of such

information as follows:

1. Of Vendor:

Upon Termination, Vendor shall independently certify, in writing its compliance with the terms of this Agreement, using the attached Certification of Return or Destruction of Confidential Information, and shall specifically certify:

(i) the documented chain of custody naming all Authorized Person(s), subcontractors, affiliates and consultants to whom the Confidential Information was duplicated, distributed or transmitted; and

(ii) as to Authorized Person(s) within the internal employment or control of Vendor, that all copies of Confidential Information have either been returned to the State or are certified by such person(s) as having been destroyed or permanently deleted from all forms of electronic storage, and Vendor shall attach the certifications of its subcontractors, affiliates and consultants.

2. Of Vendor's Subcontractors, Affiliates and Consultants:

Upon Termination, such entity shall independently certify, in writing its compliance with the terms of this Agreement, using the attached Certification of Return or Destruction of Confidential Information, and shall specifically certify:

(i) the documented chain of custody naming all Authorized Person(s) to whom the Confidential Information was duplicated, distributed or transmitted; and

(ii) as to such Authorized Person(s) within the internal employment or control of such entity, that all copies of Confidential Information have either been returned to the State or are certified by such person(s) as having been destroyed or permanently deleted from all forms of electronic storage.

Termination

The license to use Confidential Information terminates automatically upon the happening of any of the following: (a) breach of this Agreement; or (b) completion of contract approval process if Vendor is awarded a Contract pursuant to the RFP; or (c) notification of non-award of the contract pursuant to the RFP; or (d) exercise of the Department's right to not award a contract pursuant to the RFP or (e) Vendor's non-submission of a proposal in response to the RFP.

Compliance

The failure of Vendor to furnish the required certification and comply with the terms of this Agreement will be deemed a breach of the Agreement and, if applicable, grounds for non-payment. Breach of this Agreement may be considered by the State as an issue of responsibility as to such entity in future contracting opportunities with the State. Further, breach of this Agreement may result in disqualification for the Vendor from this procurement or the imposition of other sanctions determined by the Department or as required by law.

In addition to the foregoing, if Vendor breaches or threatens to breach this Agreement,

the State shall have all equitable and legal rights (including the right to obtain injunctive relief) to prevent such breach and/or to be fully compensated (including reasonable attorney's fees) for losses or damages resulting from such breach. Vendor is deemed to acknowledge that compensation for damages may not be sufficient and that injunctive relief to prevent or limit any breach of confidentiality may be the only viable remedy to fully protect the Confidential Information.

Governing Laws

This Agreement shall be governed by and construed in accordance with the laws of the State of New York. If any provision of Agreement is declared by a court of competent jurisdiction to be invalid, illegal, or unenforceable, the other provisions shall remain in full force and effect.

**CERTIFICATION OF RETURN OR DESTRUCTION OF CONFIDENTIAL
INFORMATION BY VENDOR.
PURSUANT TO CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT DATED**

Vendor, having a principal place of business at _____
(hereinafter _____), and having entered into a Confidentiality and Non-
Disclosure Agreement (hereinafter "NDA") with the NYS Department of Civil Service
(hereinafter "DCS") on _____ for the purpose of the Request For Proposal
Pharmacy Benefit Services for The Empire Plan, Student Employee Health Plan, and
NYS Insurance Fund Workers' Compensation Prescription Drug Programs, and having
been provided by DCS with Confidential Information in accordance with that NDA, now
certifies on behalf of itself and all Authorized Persons provided Confidential Information
under the RFP, as to the following:

- i. that the documented chain of custody, attached hereto, names all Authorized Person(s) to whom the Confidential Information was duplicated, distributed or transmitted; and
- ii. as to such Authorized Person(s), that the Confidential Information provided by the State has been returned to the State, and that all duplicates, regardless of format, have been destroyed or permanently deleted from all forms of electronic storage; and
- iii. Vendor has attached certifications of Authorized Person(s) to whom the Confidential Information was duplicated, distributed or transmitted, that all copies of Confidential Information have been returned to Vendor and that the Authorized Person has destroyed or permanently deleted all duplicates of Confidential Information from all forms of electronic storage.

