

[Bidder Proposed]
Attachment A
Exceptions to NYSDOH's
RFP#17497

Section	Page	Exception
RFP Section 5.20	15	Is the State willing to accept the changes made to Section 5.20 as follows: <u>Subject to the restrictions set forth in the final contract, Any work product created pursuant to this agreement and any subcontract and delivered to the New York State Department of Health shall become the sole and exclusive property of the New York State Department of Health, which shall have all rights of ownership and authorship in such work product.</u>
NY State Agreement Section II.B.	2	Is the State willing to accept the changes made to this Section as follows: Payment of such invoices and/or vouchers by the State (NYS Department of Health) shall be made in accordance with Article XI-A of the New York State Finance Law. <u>CONTRACTOR reserves the right to stop work in the event any undisputed invoice goes unpaid for sixty (60) days.</u>
NY State Agreement Section III.	2	Is the State willing to accept the changes made to this Section as follows: A. Upon approval of the Office of the State Comptroller and the CONTRACTOR, this AGREEMENT shall be effective for the term as specified on the cover page. C. This Agreement may be terminated by the Department for cause upon the failure of the Contractor to comply with the terms and conditions of this Agreement, including the attachments hereto, provided that the Department shall give the contractor written notice via registered or certified mail, return receipt requested, or shall deliver same by hand-receiving Contractor's receipt therefor, such written notice to specify the Contractor's failure and the termination of this Agreement. Termination shall be effective ten ^{thirty} (30) business days from receipt of such notice, established by the receipt returned to the Department. The Contractor agrees to incur no new obligations nor to claim for any expenses made after receipt of the notification of termination. D. This Agreement may be deemed terminated immediately at the option of the Department upon the filing of a petition in bankruptcy or insolvency, by or against the Contractor. Such termination shall be immediate and complete, without termination costs or further obligations by the Department to the Contractor.
NY State Agreement Section V.	3	Is the State willing to accept the changes made to this Section as follows: The CONTRACTOR shall be solely responsible and answerable in damages for any and all accidents and/or injuries to persons (including death) or <u>tangible</u> property arising out of or related to the services to be rendered by the CONTRACTOR or its subcontractors pursuant to this AGREEMENT. The CONTRACTOR shall indemnify and hold harmless the STATE and its officers and employees from claims , suits, actions, damages and costs of every nature <u>for any third party claims brought against the STATE to the extent</u> arising out of the <u>CONTRACTOR's gross negligence, intentional fraud or willful misconduct in its provision of services pursuant to this AGREEMENT.</u>
NY State Agreement Section VI. *New Section	3	Is the State willing to incorporate a new Section VI as follows: Limitation of Liability In the event of any claim arising from services provided by the CONTRACTOR at any time, the total liability of the CONTRACTOR, its officers, directors, agents, and employees to the STATE shall not exceed five million dollars (\$5,000,000). This limit applies regardless of the theory of law under which a claim is brought, including negligence, tort, contract, or otherwise. In no event shall the CONTRACTOR be liable for lost profits of the STATE or any other type of incidental or consequential damages. The foregoing limitations shall not apply in the event of the gross negligence, intentional fraud, or willful misconduct of the CONTRACTOR, or for direct damages for personal injury, death, or damage to real property, tangible personal property, or intellectual property attributable to the negligence or other tort of the CONTRACTOR, its officers, directors, agents, or employees.
NY State Agreement Section VII. *New Section	3	Is the State willing to incorporate a new Section VII as follows: No Third Party Distribution The Deliverables (as defined in Appendix D) are prepared solely for the use and benefit of the STATE in accordance with its statutory and regulatory requirements. The CONTRACTOR recognizes that the Deliverables it delivers to the STATE may be public records subject to disclosure to third parties, however, the CONTRACTOR does not intend to benefit and assumes no duty or liability to any third parties who receive the Deliverables and may include disclaimer language on the Deliverables so stating. The STATE agrees not to remove any such disclaimer

		language from the Deliverables. To the extent that the Deliverables are not subject to disclosure under applicable public records laws, the STATE agrees that it shall not disclose the Deliverables to third parties without the CONTRACTOR's prior written consent; provided, however, that the STATE may distribute the Deliverables to (i) its professional service providers who are subject to a duty of confidentiality and who agree to not use the Deliverables for any purpose other than to provide services to the STATE, or (ii) any applicable regulatory or governmental agency, as required.
NY State Agreement Section VIII. *New Section	4	Is the State willing to incorporate a new Section VIII as follows: Tool Development CONTRACTOR shall retain all rights, title and interest (including, without limitation, all copyrights, patents, service marks, trademarks, trade secret and other intellectual property rights) in and to all technical or internal designs, methods, ideas, concepts, know-how, techniques, generic documents and templates that have been previously developed by CONTRACTOR or such Tools developed during the course of the provision of the services provided hereunder ("Tools") provided such Tools do not contain and/or are not based upon or derived from any STATE Confidential Information or proprietary data. Rights and ownership by CONTRACTOR of its Tools shall not extend to or include all or any part of STATE's proprietary data or STATE Confidential Information. To the extent that CONTRACTOR may include in the Deliverables any Tools, CONTRACTOR agrees that STATE shall be deemed to have a fully paid up perpetual license to make copies of the Tools as part of this engagement for its internal business purposes and provided that such Tools cannot be modified or distributed outside the STATE without the written permission of CONTRACTOR or except as otherwise permitted herein under Section VIII (No Third Party Distribution).
Appendix D Section A.	1	Is the State willing to accept the changes made to this Section as follows: By signing the "Bid Form" each bidder attests to its express authority to sign on behalf of this company or other entity and acknowledges and accepts that all specifications, general and specific appendices, including Appendix-A, the Standard Clauses for all New York State contracts, and all schedules and forms contained herein will become part of any contract entered, resulting from the Request for Proposal. Anything which is not expressly set forth in the specifications, appendices and forms and resultant contract, but which is reasonable to be implied, shall be furnished and provided in the same manner as if specifically expressed.
Appendix D Section C.	1	Is the State willing to accept the changes made to this Section as follows: The Department reserves the right to stop the work covered by this proposal and the contract at any time that the Department deems the successful bidder to be unable or incapable of performing the work to the satisfaction of the Department, and in the event of such cessation of work, the Department shall have the right to arrange for the completion of the work in such manner as the Department may deem advisable, and if the cost thereof exceeds the amount of the bid, the successful bidder and its surety shall be liable to the State of New York for any excess cost on account thereof.
Appendix D Section F.	1	Is the State willing to accept the changes made to this Section as follows: The bid price is to cover the cost of furnishing all of the said services, materials, equipment, and labor to the satisfaction of the Department of Health in material compliance with the specifications set forth herein and the performance of all work set forth in said specifications.
Appendix D Section G.	1	Is the State willing to accept the changes made to this Section as follows: The successful bidder will be required to complete the entire work or any part thereof as the case may be, in material compliance to the satisfaction of the Department of Health in strict accordance with the specifications set forth herein and pursuant to a contract therefore.
Appendix D Section L.	2	Is the State willing to accept the changes made to this Section as follows: Any contract entered into resultant from this request for proposal will be considered a "Work for Hire Contract." Subject to the restrictions set forth in the contract, the Department will be the sole owner of all source code and any software which is developed for use in the application software provided to the Department as a part of this contract.
Appendix D Section M.3.	3	Is the State willing to accept the changes made to this Section as follows: Delete this subsection in its entirety.
Appendix D Section P.	3	Is the State willing to accept the changes made to this Section as follows: Superintendence by Contractor: The Contractor shall have a representative to provide supervision of the work which Contractor employees are performing to ensure complete and satisfactory performance with the terms of the Contract. This representative shall also be authorized to receive and put into effect promptly all orders, directions and instructions from the Department of Health. A confirmation in writing of such orders or directions will be given by the Department when so requested from the Contractor.
Appendix D	4	Is the State willing to accept the changes made to this Section as follows:

Section T.1.		In the event that the Contractor, through any cause, fails to perform any of the terms, covenants or promises of this agreement, the Department acting for and on behalf of the State, shall thereupon have the right to terminate this agreement by giving notice in writing of the fact and date of such termination to the Contractor. <u>If the Contractor fails to cure the default within thirty (30) business days of such notice, the Department may terminate this Agreement.</u>
Appendix D. Section U.	4	Is the State willing to accept the changes made to this Section as follows: 1. Contractor shall, <u>upon written request</u> , make available to the State for examination all data, records and reports relating to this Contract at a time and place mutually agreed by the parties; and 2. Except as otherwise provided in the Contract, the liability of the State for payments to the Contractor <u>with respect to incomplete services</u> and the liability of the Contractor for services hereunder shall cease.
Appendix D Section V.	4	Is the State willing to accept the changes made to this Section as follows: Conflicts: If, in the opinion of the Department of Health, (1) the specifications conflict, or (2) if the specifications are not clear as to (a) the method of performing any part of the work, or as to (b) the types of materials or equipment necessary, or as to (c) the work required to be done in every such situation, the Contractor shall be deemed to have based his bid upon performing the work and furnishing materials or equipment in the most inexpensive and efficient manner. If such conflicts and/or ambiguities arise, the Department of Health <u>parties will negotiate</u> will furnish the Contractor supplementary information showing the manner in which the work is to be performed and the type or types of material or equipment that shall be used.
Appendix D Section W.1.	5	Is the State willing to accept the changes made to this Section as follows: The successful bidder must without expense to the State procure and maintain, until final acceptance by the Department of Health of the work covered by this proposal and the contract, insurance of the kinds and in the amounts hereinafter provided, in insurance companies authorized to do such business in the State of New York covering all operations under this proposal and the contract, whether performed by it or by subcontractors. Before commencing the work, the successful bidder shall furnish to the Department of Health a certificate or certificates, in a form satisfactory to the Department, showing that it has complied with the requirements of this section, which certificate or certificates shall state that the policies shall not be changed or canceled until thirty days written notice has been given to the Department. The kinds and amounts of required insurance are:
Appendix D Section X.1.d.	6	Is the State willing to accept the changes made to this Section as follows: The prospective lower tier participant shall provide immediate <u>prompt</u> written notice to the person to whom this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.
Appendix D Section Y.1.	6-7	Is the State willing to accept the changes made to this Section as follows: <u>Subject to Section VIII and IX of the contract, Any materials, articles, papers, etc., developed by the CONTRACTOR and delivered to the STATE under or in the course of performing this AGREEMENT ("Deliverables") shall contain the following, or similar acknowledgment: "Funded by the New York State Department of Health".</u>
Appendix D Section Y.2.	7	Is the State willing to accept the changes made to this Section as follows: <u>Subject to Section VIII and IX of the contract, Any publishable or otherwise reproducible material developed under or in the course of performing this AGREEMENT, dealing with any aspect of performance under this AGREEMENT, or of the results and accomplishments attained in such performance, Deliverable shall be the sole and exclusive property of the STATE, and shall not be published or otherwise disseminated by the CONTRACTOR to any other party unless prior written approval is secured from the STATE or under circumstances as indicated in paragraph 1 above. Any and all net proceeds obtained by the CONTRACTOR resulting from any such publication shall belong to and be paid over to the STATE. The STATE shall have a perpetual royalty-free, non-exclusive and irrevocable right to reproduce, publish or otherwise use, and to authorize others to use, any such material-Deliverable for governmental purposes.</u>
Appendix D Section Y.4.	7	Is the State willing to accept the changes made to this Section as follows: <u>Subject to Section VIII and IX of the contract, All reports, data sheets, documents, etc. generated under this contract Deliverables shall be the sole and exclusive property of the Department of Health. Upon completion or termination of this AGREEMENT the CONTRACTOR shall deliver to the Department of Health upon its demand all copies of materials relating to or pertaining Deliverables to created under this AGREEMENT. The CONTRACTOR shall have no right to disclose or use any of such material and documentation Deliverables for any purpose whatsoever, without the prior written approval of the Department of Health or its authorized agents.</u>

Appendix D Section Y.5.	7	<p>Is the State willing to accept the changes made to this Section as follows: The CONTRACTOR, its officers, agents and employees and subcontractors shall treat all information, which is obtained by it through its performance under this AGREEMENT, as confidential information to the extent required by the laws and regulations of the United States and laws and regulations of the State of New York. <u>For clarity, the confidentiality obligations of the Contractor set forth above shall not apply to any information which: (i) was in the public domain at the time of communication thereof to Contractor; (ii) enters the public domain through no breach of this provision subsequent to the time of communication thereof to Contractor; (iii) was in Contractor's possession free of any obligation of confidentiality at the time of communication thereof to Contractor; (iv) is developed by the Contractor completely independent from the information of the other party; or (v) is required by law or regulation to be disclosed.</u></p>
Appendix D Section CC.	8	<p>Is the State willing to accept the changes made to this Section as follows: Lead Guidelines: All products supplied pursuant to this agreement shall meet <u>applicable</u> local, state and federal regulations, guidelines and action levels for lead as they exist at the time of the State's acceptance of this contract.</p>
Appendix H Section I.C.	1	<p>Is the State willing to add a new Section C as follows: <u>"Protected Health Information" shall have the same meaning given to it under HIPAA (as defined below), limited to the information that is created or received by Business Associate in performing services for or on behalf of Covered Program pursuant to the Agreement.</u></p>
Appendix H Section II.	1-2	<p>Is the State willing to accept the changes made to this Section as follows:</p> <p>A. Business Associate agrees to not use or disclose Protected Health Information other than as permitted under this Appendix H, requested by the Covered Program or required by this AGREEMENT Appendix H or as Required by Law.</p> <p>B. Business Associate agrees to use the appropriate administrative, physical and technical safeguards to prevent use or disclosure of the Protected Health Information other than as provided for by this AGREEMENT Appendix H and to comply with the security standards for the protection of electronic protected health information in 45 CFR Part 164, Subpart C. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of Protected Health Information by Business Associate in violation of the requirements of this AGREEMENT Appendix H.</p> <p>C. Business Associate agrees to report to Covered Program as soon as reasonably practicable any use or disclosure of the Protected Health Information not provided for by this AGREEMENT Appendix H of which it becomes aware; provided, however, that the parties acknowledge and agree that this section constitutes notice by Business Associate to Covered Program of the ongoing existence and occurrence of attempted but Unsuccessful Security Incidents of which no additional notice to Covered Program shall be required. Unsuccessful Security Incidents shall include, but not be limited to, pings and other broadcast attacks on Business Associate's firewall, port scans, unsuccessful log-on attempts, denials of service and any combination of the above, so long as such incidents do not result in unauthorized access, use or disclosure of Covered Program's electronic Protected Health Information. Business Associate also agrees to report to Covered Program any Breach of Unsecured Protected Health Information of which it becomes aware. Such report shall include, to the extent possible:</p> <p>...</p> <p>3. Any steps Individuals should take to protect themselves from potential harm resulting from the breach;</p> <p>4. A description of what Business Associate is doing to investigate the Breach, to mitigate harm to Individuals, and to protect against any further Breaches; and</p> <p>D. Business Associate agrees, in accordance with 45 CFR § 164.502(e)(1)(ii), to ensure that any Subcontractors that create, receive, maintain, or transmit Protected Health Information on behalf of the Business Associate agree to the same restrictions and conditions <u>no less restrictive than those</u> that apply to Business Associate with respect to such information.</p> <p>E. Business Associate agrees to provide access, at the <u>written</u> request of Covered Program, and in the time and manner designated by Covered Program, to Protected Health Information in a Designated Record Set, to Covered Program in order for Covered Program to comply with 45 CFR § 164.524.</p> <p>F. Business Associate agrees to make any amendment(s) to Protected Health Information in a Designated Record Set that Covered Program directs in a <u>written</u> order for Covered Program to comply with 45 CFR § 164.526.</p> <p>G. Business Associate agrees to document such disclosures of Protected Health Information <u>made by Business Associate which are not excepted from the disclosure accounting requirements under the Privacy & Security Regulations</u> and information related to such disclosures as would be required for Covered Program to respond to a request by an Individual for an accounting of</p>

		<p>disclosures of Protected Health Information in accordance with 45 CFR § 164.528; and Business Associate agrees to provide to Covered Program, in time and manner designated by Covered Program <u>in a written request</u>, information collected in accordance with this AGREEMENT <u>Appendix H</u>, to permit Covered Program to comply with 45 CFR § 164.528.</p> <p>H. Business Associate agrees, to the extent the Business Associate is <u>engaged</u> to carry out Covered Program's obligation under 45 CFR Part 164, Subpart E, to comply with the requirements of 45 CFR Part 164, Subpart E that apply to Covered Program in the performance of such obligation.</p> <p>I. Business Associate agrees to make internal practices, books, and records, including policies and procedures and Protected Health Information, relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Program available to Covered Program, or to the Secretary of the federal Department of Health and Human Services, in a time and manner designated by Covered Program or the Secretary, for purposes of the Secretary determining Covered Program's compliance with HIPAA, HITECH and 45 CFR Parts 160 and 164.</p>
Appendix H Section III.	2	<p>Is the State willing to accept the changes made to this Section as follows:</p> <p>A. Except as otherwise limited in this AGREEMENT, Business Associate may only use or disclose Protected Health Information as necessary to perform functions, activities, or services for, or on behalf of, Covered Program as specified in this AGREEMENT <u>Appendix H</u>.</p> <p>...</p> <p><u>D. Business Associate may use Protected Health Information to provide Data Aggregation services to Covered Program as permitted by the Privacy Rule: de-identify Protected Health Information in accordance with the requirements of the Privacy Rule; provided that all identifiers are destroyed in accordance with this Appendix H; and/or create a Limited Data Set for the purpose of providing the services to Covered Program.</u></p>
Appendix H Section IV.	2-3	<p>Is the State willing to accept the changes made to this Section as follows:</p> <p>A. This AGREEMENT <u>Appendix H</u> shall be effective for the term as specified on the cover page of this AGREEMENT <u>Appendix H</u>, after which time all of the Protected Health Information provided by Covered Program to Business Associate, or created or received by Business Associate on behalf of Covered Program, shall be destroyed or returned to Covered Program; provided that, if it is infeasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in this Appendix H of this AGREEMENT.</p> <p>B. Termination for Cause. Upon Covered Program's knowledge of a material breach by Business Associate, Covered Program may provide an opportunity for Business Associate to cure the breach and end the violation or may terminate this AGREEMENT <u>Appendix H</u> if Business Associate does not cure the breach and end the violation within the time specified by Covered Program, or Covered Program may immediately terminate this AGREEMENT <u>Appendix H</u> if Business Associate has breached a material term of this AGREEMENT <u>Appendix H</u> and cure is not possible.</p> <p>C. Effect of Termination.</p> <p>Except as provided in paragraph (c)(2) below, upon termination of this AGREEMENT <u>Appendix H</u>, for any reason, Business Associate shall return or destroy all</p> <p>...</p> <p><u>2. In the event that returning or destroying the Protected Health Information is infeasible, Business Associate shall provide to Covered Program notification of the conditions that make return or destruction infeasible. Upon mutual agreement of Business Associate and Covered Program that return or destruction of Protected Health Information is infeasible, Business Associate shall extend the protections of this AGREEMENT <u>Appendix H</u> to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protected Health Information. Covered Program hereby acknowledges and agrees that infeasibility includes Business Associate's need to retain Protected Health Information for archival purposes, and that for such a retention, no further notification or approval of Covered Program is required.</u></p>
Appendix H Section V.	3	<p>Is the State willing to accept the changes made to this Section as follows:</p> <p>A. Any violation of this AGREEMENT <u>Appendix H</u> may cause irreparable harm to the STATE. Therefore, the STATE may seek any legal remedy, including an injunction or specific performance for such harm, without bond, security or necessity of demonstrating actual damages.</p> <p>B. Business Associate shall indemnify and hold the STATE harmless against all <u>third party</u> claims and costs resulting from acts/omissions of Business Associate in connection with Business Associate's <u>unauthorized use or disclosure of Protected Health Information obligations</u> under this</p>

	<p>AGREEMENT Appendix H. Business Associate shall be fully liable for the actions of its agents, employees, partners or subcontractors and shall fully indemnify and save harmless the STATE from suits, actions, damages and costs, of every name and description relating to breach notification required by 45 CFR Part 164 Subpart D, or State Technology Law § 208, caused by any intentional act or gross negligence of Business Associate, its agents, employees, partners or subcontractors, <u>without limitation</u>; provided, however, that Business Associate shall not indemnify for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the STATE.</p>
<p>Appendix H Section VI.</p>	<p>Is the State willing to accept the changes made to this Section as follows:</p> <p>A. Regulatory References. A reference in this AGREEMENT Appendix H to a section in the Code of Federal Regulations means the section as in effect or as amended, and for which compliance is required.</p> <p>B. Amendment. Business Associate and Covered Program agree to take such action as is necessary to amend this AGREEMENT Appendix H from time to time as is necessary for Covered Program to comply with the requirements of HIPAA, HITECH and 45 CFR Parts 160 and 164.</p> <p>C. Survival. The respective rights and obligations of Business Associate under (IV)(C) of this Appendix H of this AGREEMENT Appendix H shall survive the termination of this AGREEMENT Appendix H.</p> <p>D. Interpretation. Any ambiguity in this AGREEMENT Appendix H shall be resolved in favor of a meaning that permits Covered Program <u>the parties</u> to comply with HIPAA, HITECH and 45 CFR Parts 160 and 164.</p> <p>E. Independent Contractors. <u>Business Associate and Covered Program are independent contractors and this Appendix H will not establish any relationship of partnership, joint venture, employment, franchise or agency between Business Associate and Covered Program. Neither Business Associate nor Covered Program will have the power to bind the other or incur obligations on the other party's behalf without the other party's prior written consent, except as otherwise expressly provided in this Appendix H.</u></p> <p>F. Conflicts. <u>In the event that nay terms of this Appendix H are inconsistent with the terms of the AGREEMENT, then the terms of this Appendix H shall control with respect to Protected Health Information.</u></p>