

**NOTICE: THIS IS A TEMPLATE DOCUMENT, PROVIDED FOR REVIEW BY OFFEROR RESPONDING TO THE REQUEST FOR PROPOSAL UK-2246-22. IN ADDITION TO THE RFP REQUIREMENTS, TERMS, EXPECTATIONS, AND ACCEPTED ELEMENTS OF OFFEROR'S PROPOSAL, OFFEROR WILL ALSO BE REQUESTED TO ACCEPT THE FOLLOWING KHC TERMS & CONDITIONS FOR THOSE KHC PARTICIPANT(S) THAT ARE ALSO INVOLVED IN THE AWARD DECISION OF RFP UK-2246-22 TO FORMULATE THE ENTIRE AGREEMENT BETWEEN OFFEROR AND KHC PARTICIPANT(S). UPON AN AWARD DECISION, THE NECESSARY UPDATES – PER THE ELEMENTS OF OFFEROR'S PROPOSAL ACCEPTED BY KHC PARTICIPANT(S) – WILL BE INSERTED INTO THIS TEMPLATE TO FACILITATE THE EXPECTED CONTRACT LANGUAGE. THE KHC TERMS & CONDITIONS ARE IDENTIFIED AS AN ATTACHMENT TO THE REQUIRED DOCUMENTS OF THIS RFP UK-2246-22.**

**ATTACHMENT C**

**KENTUCKY HEALTH COLLABORATIVE**

**TERMS & CONDITIONS**

**Vendor Name:**

**Products and/or Services:**

**Effective Date:**

**Contract Number:**

**PURCHASING AGREEMENT**

This Agreement is entered into by Kentucky Health Collaborative, LLC, having its principal place of business at 651 Perimeter Drive, Suite 650, Lexington, Kentucky 40517(hereinafter referred to as “KHC”), and the following entity:

\_\_\_\_\_ (Company Name), a \_\_\_\_\_ (state of incorporation/organization) corporation/limited liability company, with the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(hereinafter referred to as “Vendor”), for the primary purpose of establishing the terms and conditions pursuant to which KHC member Facilities (defined below) may purchase certain products and services from Vendor in accordance with the terms and conditions set forth herein.

**1.0 Definitions**

- 1.1 “Affiliates” as applied to any particular entity, is defined as those entities, businesses, and facilities that are directly or indirectly controlled by, or under common control with a stated entity, including, without limitation, all parent corporations and their respective subsidiaries.
- 1.2 “Agreement” shall be defined as this Agreement, including all exhibits and other attachments expressly incorporated by reference herein, as may be amended from time to time.
- 1.3 “Confidential Information” shall be defined as information related to the business of KHC, a Purchaser, or any of their Affiliates, and shall include, but not be limited to, the list of Facilities, the terms of this Agreement (including the prices for Products and Services), any patient information, medical records, patient identifiers, personally identifiable information (PII), protected health information (PHI), policies, procedures, trade secrets, trade information, business practices, information systems, security passwords, financial information, and proprietary information. However, Confidential Information shall not include any information subject to Section 20.1 of this Agreement.
- 1.4 “Distributor(s)” shall be defined as any product distributor designated in Exhibit A.
- 1.5 “Effective Date” shall be defined as the date designated in Exhibit B.
- 1.6 “Equipment” shall be defined as those items of equipment, if any, set forth on Exhibit A hereto.

- 1.7 “Expiration Date” shall be defined as the date this Agreement terminates, which is designated in Exhibit B.
- 1.8 “Facility” or “Facilities” means any of the KHC members, the KHC member Affiliates as contemplated by the KHC governing documents, and each of their associated locations.
- 1.9 “Facility Service Agreement,” if attached to this Agreement at Exhibit D, shall be an agreement between Vendor and each Purchaser regarding Products and/or Services related to the applicable Facilities.
- 1.10 “Fill Rate” shall be defined as the average of the individual timely and completely filled order fill rates for all orders of a Product by stock keeping unit by an individual Purchaser during any calendar month.
- 1.11 “KHC” means Kentucky Health Collaborative, LLC, a Kentucky limited liability company. KHC is comprised of the following members, in addition to such members’ Affiliates as contemplated by the KHC governing documents and any future KHC members: Norton Healthcare, Inc., University of Kentucky (a/k/a UK HealthCare), Baptist Healthcare System, Inc., Appalachian Regional Healthcare, Inc., Bowling Green Warren County Community Hospital Corporation d/b/a The Medical Center, Ephraim McDowell Health, LifePoint Corporate Services, General Partnership, Owensboro Health, Inc., St. Claire HealthCare, and St. Elizabeth Medical Center, Inc. This list of members is subject to change due to any future new members or withdrawing members.
- 1.12 “Product(s)” shall be defined as those goods listed in Exhibit A to this Agreement.
- 1.13 “Purchaser” shall be defined as any Facility obtaining Products and/or Services from Vendor.
- 1.14 “Rebate” shall be defined as any amount paid by Vendor to KHC or directly to Purchasers pertaining specifically to the purchases of Products and/or Services by Purchasers.
- 1.15 “Services” shall be defined as those services listed in Exhibit A to this Agreement, as well as any services provided by Vendor in connection with any Purchaser’s purchase and/or use of Products.
- 1.16 “Software” shall be defined as firmware, internal code and an operating system’s software associated with a Product or Service, and other computer programs, including any updates, modifications, enhancements, or new release for the same.
- 1.17 “Term” shall be defined as the 3-year period during which this Agreement is in effect, commencing on the Effective Date and expiring on the Expiration Date. In addition, KHC may extend this Agreement for up to two additional one-year periods upon 30 days written notice to Vendor prior to the expiration of the then current Term.

- 1.18 “Technology Products and Services” shall be defined collectively as those Products or Services that include, in whole or in part, any technology services, Software, equipment and/or hardware (e.g., cloud/hosted services, Software-as-a-Service (“SaaS”), Platform-as-a-Service (“PaaS”), Infrastructure-as-a-Service (“IaaS”) or on-premise Software).

## **2.0 General Provisions**

- 2.1 Award Basis. KHC and Vendor agree that they are entering into this Agreement pursuant to the award basis designated in this Agreement.
- 2.2 Eligible Purchasers. Commencing on the Effective Date, all Facilities shall be eligible to obtain Products and/or Services from Vendor under this Agreement. However, unless otherwise specified in Exhibit A, no Facility shall be obligated to obtain Products and/or Services from Vendor under this Agreement. Eligible Facilities are listed in Exhibit C, which may be updated from time to time upon notice to Vendor. Upon receipt of an updated Exhibit C, Vendor agrees to update its records within five (5) business days to accurately reflect the name, address, and any other assigned identification code for each Facility. With respect to Purchasers that cease to be members of KHC during the Term, KHC will inform Vendor which of those Purchasers will either (i) continue to participate under this Agreement or (ii) cease participating under this Agreement. For any such Purchaser that will continue its participation under this Agreement, Vendor agrees to such Purchaser’s continuation. For any such Purchaser that will cease its participation under this Agreement, Vendor agrees to such Purchaser’s termination of participation under this Agreement without penalty to such Purchaser or KHC.
- 2.3 Termination of Facility-Specific Arrangements. Any Purchaser may at its option and without penalty or liability, terminate any existing contract or other arrangement with Vendor, in whole or in part, for the sole purpose of participating in the purchasing arrangement set forth in this Agreement, notwithstanding any provision to the contrary in any such existing contract or arrangement.
- 2.4 Purchaser Obligations. Payment for purchases made by Purchasers under this Agreement shall be the sole responsibility of the Purchaser; Vendor agrees that KHC shall have no responsibility and no obligation for such payments owed by Purchasers or for any other obligations of Purchasers under this Agreement.
- 2.5 Direct Purchases. If Products and/or Services may be obtained directly from Vendor as noted in Exhibit B, Vendor agrees to sell and deliver to Purchaser the Products and/or Services listed at the prices set forth in Exhibit A. No minimum quantity or dollar amount shall apply to any order. If Vendor charges a Purchaser, and such Purchaser pays, a higher price than stated in Exhibit A, Vendor shall issue such Purchaser a refund (not a credit) in the amount of such overcharge/overpayment promptly following the discovery, but in no event later

than thirty (30) days following such notice or, in the event the Purchaser has not yet paid the invoice containing the overcharge, the Purchaser may declare the invoice discrepant and request Vendor to promptly rebill Purchaser; payment terms will be enforced from date of receipt of revised invoice. If Vendor charges a lower price than stated in Exhibit A the Purchaser may declare the invoice discrepant and request Vendor to promptly rebill Purchaser or the Vendor may declare the invoice incorrect and promptly rebill the Purchaser, so long as the discrepancy is discovered and rebilled no later than thirty (30) days following the end of such Purchaser's fiscal year; in either circumstance payment terms will be enforced from date of receipt of revised invoice.

- 2.6 Purchases through Distributors. If any Product is available through a Distributor, as designated in Exhibit B, then the terms and conditions of this Agreement, excluding Product pricing, that apply to shipment directly from Vendor to a Purchaser shall not be applicable to purchases of such Products through a Distributor. Instead, the terms of the Distributor agreement, excluding Product pricing, between Purchaser and Distributor will control. The prices listed in Exhibit A shall be either net to Distributor or net to Purchaser, as designated in Exhibit B. Vendor agrees that, during the Term, it will not change its financial arrangements with any Distributor with respect to the Products in any manner which could result in an increase in the prices charged.
- 2.7 Effective Date and Firm Pricing. The obligation of Vendor to make Products and/or Services available hereunder shall commence as of the Effective Date. Prices for Products and/or Services may not be increased except pursuant to 90-days' advanced written notice to KHC and a mutually agreed upon written amendment to this Agreement pursuant to Section 15.0 below. KHC will provide all Purchasers with copies of any such notices.
- 2.8 Vendor Reports. At all times during the Term of the Agreement, Vendor shall provide Purchaser as well as KHC access to all Purchaser's data, purchase orders (P.O.), purchase history, billing, invoicing, utilization patterns, spend, savings estimates, optimization reports, meeting content, implementation and/or operational plans, and additional supporting documentation of Purchaser activity (collectively "Vendor Reports"), upon request. Additionally, as directed by Purchaser or KHC, Vendor shall provide Vendor Reports via electronic file in a machine-readable format such as Microsoft Excel (.XLSX) or Comma Separated Variable (.CSV), in the prescribed frequency (e.g. monthly) as requested by Purchaser or KHC. Alternate formats, other than electronic, machine-readable format, shall be reviewed and accepted by Purchaser or KHC on a case-by-case basis. Within such Vendor Reports, Vendor shall provide all necessary elements of detailed information and data – both Vendor information and Purchaser information - to facilitate a transparent and verifiable review of the reporting, invoicing, and any associated information of the Purchaser activity with Vendor in the provision of Products and/or Services as provided by Vendor under this Agreement. Should

preliminary version(s) of Vendor Reports not meet the requirements or expectations facilitating a transparent and verifiable review of the reporting, invoicing, charges, billing, and/or any associated information of the Purchaser activity with Vendor in the provision of Products and Services as provided by Vendor under this Agreement, Vendor shall actively and in good faith work with Purchaser and/or KHC to identify potential deficiencies and update such reports to meet such requirements or expectations. Access to Vendor Reports shall be limited by individual Purchaser, such that only the individual Purchaser may receive its Vendor Reports (example: Purchaser “A” may receive Vendor Reports of Purchaser “A”, but Purchaser “B” may not receive Vendor Reports of Purchaser “A”). KHC is an exception to this limitation in that KHC may access all Vendor Reports but at all times shall maintain the confidentiality of individual Purchaser Vendor Reports (if applicable). KHC may discuss Vendor Reports with any Purchaser, and from time to time discuss aggregated and/or de-identified (anonymized) Purchasers’ data with Purchasers to review the status, performance, and/or activity of the Purchasers which collectively reflect the business of the Purchasers under the Agreement. The purpose of access to Vendor Reports is to ensure at all times that Purchaser is receiving the expected, pricing, value, outcomes, and/or services in the provision of Products and Services as provided by Vendor under this Agreement. Failure of Vendor to deliver Vendor Reports in an effective, complete, and timely manner using commercially reasonable efforts may place Agreement at risk of termination, and KHC and/or Purchaser(s) reserve the right to terminate this Agreement under the section Termination with Cause (Termination for Non-performance).

2.9 Acceptance. Vendor’s acknowledgment, commencement of performance or any other conduct by Vendor which indicates that this Agreement is in effect shall constitute acceptance by Vendor of this Agreement. Additional or different terms, provided by Vendor at any time, including but not limited to Vendor’s proposal(s) or Vendor’s own Terms and Conditions, shall not apply without the prior written consent of KHC and the applicable Purchaser.

2.10 Payment.

2.10.1 Undisputed Invoices. Purchaser shall pay undisputed invoices net sixty (60) days after receipt of the invoice or, if later, upon acceptance of the Products and/or Services. Purchaser may pay the undisputed invoice to receive the prompt payment discount set forth on Exhibit B hereto.

2.10.2 Disputed Invoices; Invoice Errors. In the event any portion of any invoice is in dispute, Purchaser shall have the right to reject the invoice and request a correction of errors or resubmission from Vendor (or a Distributor). If any

portion of the Products and/or Services do not conform to the requirements of this Agreement as determined by Purchaser, the invoice will be considered a disputed invoice and payment by Purchaser may be withheld by Purchaser until the nonconformity is corrected. If Purchaser returns any invoice for correction of errors, payment shall be due net sixty (60) days from receipt of the corrected invoice or, if later, upon acceptance of the Products and/or Services. If the parties are unable to resolve the dispute, either party may seek the remedies available to it pursuant to this Agreement at law or equity.

- 2.11 Operating and Capital Investments. Vendor assumes the full and complete risk of any operating and/or capital investment Vendor makes to enable or to enhance its capabilities to serve KHC and to provide Products and Services to Purchasers under this Agreement. In no event will KHC, any Facility, or any Purchaser assume any financial or other risk associated with any operating and/or capital investments made by Vendor as a result of or related to this Agreement.
- 2.12 Orders. The terms set forth in this Agreement shall apply to each order by a Purchaser, whether such order is communicated by a Purchaser's purchase order form, Electronic Data Interchange ("EDI"), internet e-commerce, facsimile, orally, or any other method, or whether reference is made to this Agreement.
- 2.13 Product Discontinuation. Vendor agrees to provide KHC at least six (6) months' written notice prior to discontinuation of any Product that is Equipment and at least three (3) months' written notice prior to discontinuation of any Product that is a supply item.
- 2.14 Consignment Inventory. Each Purchaser and Vendor shall mutually agree in writing upon the quantity of Product Vendor is to maintain in inventory on consignment at such Purchaser's Facility location (dependent on the type of Product). Vendor shall not charge any Purchaser a stocking fee or any other fee for such Purchaser to retain the Product in inventory. Vendor agrees to rotate Products into the inventory on a periodic basis to ensure that such inventory does not become out-of-date according to Vendor's standards. Title to all Product will remain with Vendor until such Product is utilized by the applicable Purchaser, and title to other Product will remain with Vendor until the earlier of (i) the time such Product is utilized or accepted by a Purchaser, whichever is later, or (ii) payment by the Purchaser for such Product. Further, Vendor shall replace, at no cost to any Purchaser, any Product in inventory that is opened but unused by such Purchaser.

The inventory level for the Products may be changed from time to time only by written amendment to the Letter of Participation and related Facility Service Agreement, executed by authorized signatories of Vendor and Purchaser.

Vendor will not overstock Products at a Purchaser's Facility(ies) in excess of the quantities set forth on a Purchaser's Facility Service Agreement. A Purchaser reserves the right to treat excess inventory stored by Vendor at such Purchaser's

Facility(ies) as abandoned property. Such Purchaser will give Vendor written notice of any Products it deems abandoned. A Purchaser reserves the right to remove or otherwise destroy abandoned property if not removed by Vendor from the Purchaser's Facility(ies) within seven (7) days of said notice.

Vendor may audit (including a physical inventory) the consignment arrangement during business hours upon 72 hours' notice to a Purchaser. All audits of the consigned inventory by a Purchaser shall only be conducted in the presence of a representative of such Purchaser's supply chain department (or similar department).

Vendor agrees to abide by other individual Purchaser policies that relate to consignment inventory, which such individual Purchasers shall supply notice of any such policies in writing to Vendor. The parties to this Agreement agree that the terms of this Section 2.13 only apply to Products provided on a consignment basis.

- 2.15 Failure to Supply. Vendor shall ensure at all times that each Purchaser has adequate Product for the needs of the Purchaser in accordance with this Agreement. The obligation of Vendor to maintain an adequate supply of Product, as agreed upon between each Purchaser and Vendor, is of the essence of this Agreement. In the event Vendor fails to provide adequate Product at any time and has to have Product shipped in an expedited manner, Vendor shall pay all costs for shipment, handling and delivery. No Purchaser shall be invoiced for any special or additional costs associated with expedited shipping and handling. In the event Vendor is unable to supply the Product a Purchaser may procure the Product from other vendors and may deduct from any monies due, or that may become due to Vendor, the difference between the contracted price set forth in this Agreement and the actual cost thereof. Vendor will use its best efforts to obtain for each Purchaser within a reasonable time any Product ordered by such Purchaser which for any reason is not in Vendor's inventory.
- 2.16 Instrumentation. All instrumentation (if any) required for use with the Products shall be provided and maintained by Vendor without charge to any Purchaser. Vendor shall maintain title to such instrumentation although the instrumentation will remain on the premises of the Purchaser and may not be leased and/or loaned by the Vendor to any other entity without the consent of the applicable Purchaser.
- 2.17 Training, Education, and In-Service. To the extent training, education or in-services are required in order to utilize Product, Vendor agrees to provide training in the amount and at the times mutually agreed upon in writing between the Vendor and a Purchaser. The cost of any and all training is included in the purchase price of the Product, including travel and lodging for Vendor's representatives who are providing such training, education and/or in-services. All training shall be done at the applicable Purchaser's place of business. Vendor shall, upon request by a Purchaser, provide the names and backgrounds of those persons Vendor is supplying to provide training, education and in-services. For specific Products identified by Purchasers, for purposes of education, Vendor shall supply to each



Purchaser all utilization criteria for the Products and any other information on programs offered by Vendor for the purposes of demand matching.

- 2.18 Documentation and Clinical Engineering Training. Vendor, when requested but no later than shipment, shall submit to Purchaser, at no cost, one complete set of installation, operation and technical service instructions and manuals (preferably in CD format) for each item of Equipment furnished. All instructions/manuals shall be specific and certified by the manufacturer as applicable to the Equipment furnished. A parts identification list shall be provided and shall include sectional and/or outline prints or illustrations marked to identify each numbered part and to locate it in relation to the Equipment as a whole. All records, test reports, quality documents, etc. which are produced by Vendor for, on behalf of, or at the direction of Purchaser, shall be furnished to Purchaser upon Purchaser's request. All correspondence, certificates, records, and similar documentation shall include the purchase order number and specification number/date if applicable. Vendor shall provide, at no cost, service training for one or more clinical engineering employees. Purchaser will be responsible for the cost of providing transportation, housing and all meals relative to such clinical engineering employees' attendance at such training, in accordance with such Purchaser's travel policies. Said training shall be scheduled within ninety (90) days of the receipt of the Equipment.
- 2.19 Liens. Vendor hereby waives all rights to encumber, shall not file, and shall take all actions necessary to prevent any subcontractors from filing any liens against a Purchaser or its property, including a Purchaser's Facility(ies). Vendor shall obtain a lien waiver from all subcontractors. In addition, Vendor shall defend, indemnify and hold harmless a Purchaser and any of its property, including a Purchaser's Facility(ies), from all demands, liabilities and liens which may arise in favor of Vendor or any subcontractors, and from all damages, costs and expenses (including reasonable attorneys' fees and expenses and the actual costs of litigation) resulting from such demands, liabilities or liens. If requested by a Purchaser, Vendor shall execute a Stipulation Against Liens Agreement (a form of which will be provided to Vendor by KHC) and shall file it in the appropriate governmental offices.
- 2.20 Changes. A Purchaser may, at any time by a written change order, make changes within the general scope of this Agreement. If any change results in a material increase or decrease in the cost of the Products and/or Services or otherwise materially affects this Agreement, the change order shall include an equitable adjustment in the price with respect to such Purchaser, the Schedule (as defined below) and/or any other affected provision, and any such change order must be approved in writing by the applicable Purchaser. Any objection by Vendor to the proposed equitable adjustment must be asserted by Vendor to the Purchaser within ten (10) days after receipt of the change order.
- 2.21 Delay, Suspension, or Interruption of Products and/or Services. A Purchaser may direct Vendor, in writing, to suspend or interrupt all or any part of the Products and/or Services for such period of time as such Purchaser may determine to be appropriate. Vendor shall mitigate the costs of such suspension or interruption.

Such Purchaser agrees to reimburse Vendor for all direct expenses necessarily incurred and pre-approved by the Purchaser as a result of such suspension or interruption, subject to the Purchaser's right to audit Vendor's books and records. Vendor shall notify the Purchaser immediately of any delay in milestone, delivery, or shipment dates, referred to herein as “**Schedule.**” If Vendor fails to meet any part of the Schedule, the Purchaser, without limiting its other rights or remedies, may either direct that the Products and/or Services be expedited or terminate all or part of this Agreement for cause in accordance with Section 13.0 Termination (but only with respect to such Purchaser’s participation under this Agreement). In such event, Vendor shall be liable to such Purchaser for all costs, losses and resulting expenses. In no event shall such Purchaser be liable for costs, losses and resulting expenses in connection with delays unless such delays are solely attributable to such Purchaser and cause the overall Schedule to be exceeded.

### **3.0 Rebates, Reporting, Prices, Payments**

- 3.1 Rebates. Vendor shall pay Rebates to a Purchaser based on purchases of Products and/or Services by such Purchaser in the amounts stated. Rebates shall be paid to a Purchaser for purchases under this Agreement made during each calendar quarter during the Term, and shall be paid within thirty (30) days after the expiration of each calendar quarter. The payment of Rebates is intended to be in compliance with the exception to the Federal Anti-kickback Statute (42 U.S.C. § 1320a-7b). Vendor shall provide an electronic quarterly report with each Rebate payment that contains sufficient detail to permit a Purchaser to accurately allocate the amounts (i.e., line item usage reports to each Purchaser).
- 3.2 Rebate Reports. The Rebate reports submitted pursuant to Section 3.1 shall include a listing of each applicable Purchaser associated with the “ship to” address. The Vendor reports shall be sent to each applicable Purchaser at the address set forth on Exhibit C, with a copy also sent by e-mail to KHC at: [KHCVendorReports@kentuckyhealthcollaborative.com](mailto:KHCVendorReports@kentuckyhealthcollaborative.com).
- 3.3 Electronic Reports. In addition to the Product pricing listed on or prior to the Effective Date, Vendor shall provide KHC with an electronic copy of Exhibit A in Microsoft Excel format and Vendor’s commercial price list.

### **4.0 EDI, EFT, and E-Commerce**

- 4.1 Transmission of Orders for Direct Purchases. Instructions for transmission of orders for any direct purchases will be set forth in each Facility Service Agreement which may be attached to this Agreement at Exhibit D.
- 4.2 Transaction Data. Vendor and KHC acknowledge and agree that, as to any transactions for Products and/or Services through any other e-commerce system, Vendor and the applicable Purchaser shall own all transaction data, and KHC shall have the right to access such transaction data for performance of its purchasing functions. Independent of whether EDI, EFT, or E-Commerce processes are used

by Vendor or Purchasers, Vendor will provide transaction data in a commercially reasonable format as requested by KHC and/or Purchasers, noting that Purchaser can only obtain its transaction data; the KHC may obtain transaction data for all Purchasers.

- 4.3 EDI and EFT Costs for Direct Purchases. Vendor agrees to provide all EDI and/or EFT exchanges at no additional cost to Purchasers. Any additional costs incurred by Vendor, including third party costs for these data and money transfers, will be absorbed by Vendor.

## **5.0 Price Warranty**

- 5.1 Price Decreases. If Vendor offers any general, “across the board” price decreases for Products and/or Services to a substantial number of its customers during the Term, Vendor shall notify KHC of such price decreases and make such decreases available to Purchasers promptly and in like amounts.
- 5.2 Price Competitiveness. Throughout the Term of this Agreement, KHC and/or Purchasers shall review Vendor’s pricing. Vendor will make a good faith effort to be responsive to Vendor’s respective marketplace price changes so that if marketplace pricing decreases, Vendor will extend such pricing decreases to KHC and the Purchasers. During the Term should KHC and/or Purchasers find Vendor’s pricing uncompetitive, KHC and Vendor will negotiate in good faith for price adjustments for the succeeding period. Should KHC and Purchasers not agree with the outcome of the negotiations, then this Agreement may be terminated upon 45 days’ written notice to Vendor by KHC or a Purchaser (with respect to such Purchaser’s participation under this Agreement).

## **6.0 State Sales or Use Taxes**

- 6.1 Tax Collection. Vendor shall be registered in all taxing jurisdictions where, as a Vendor of Products and/or Services hereunder, it is legally required to register. Any federal, state, or local sales, use, or other similar tax imposed on Vendor by virtue of this Agreement or the Products and/or Services provided by Vendor hereunder, or any such taxes imposed on a Purchaser, shall be collected from Purchaser by Vendor, and shall be paid to the appropriate taxing jurisdiction by Vendor. Each Vendor invoice to a Purchaser shall clearly and separately state the amount of such tax. Vendor shall pay any penalties or interest assessed by any taxing authority as a result of Vendor’s failure to comply. The Vendor shall pay any sales, use, personal property, and other taxes arising out of this Agreement and the transactions contemplated hereby. Any other taxes levied upon this Agreement, the Products, or the Services delivered pursuant hereto shall be the responsibility of the Vendor.
- 6.2 Tax Information. Upon request, Vendor shall furnish to KHC and each Purchaser a copy of Vendor’s registration certificate and number within each taxing jurisdiction prior to collecting such sales or use taxes. If a Purchaser is tax-exempt, such Purchaser shall, prior to purchase, furnish Vendor with any documents

necessary to demonstrate its tax-exempt status, and Vendor shall honor Purchaser's tax-exempt status as appropriate under applicable federal and state law. Upon request, Vendor shall also provide to each Purchaser Vendor's Federal Tax Identification number. Purchases made pursuant to this Agreement that involve a Purchaser who is tax-exempt shall be tax exempt and Vendor agrees to take all actions requested by such tax-exempt Purchaser to obtain the full benefit of any and all available exemptions. Upon a Purchaser's request, Vendor shall provide evidence satisfactory to such Purchaser of the payment of any taxes which Vendor is required to pay. Vendor shall provide to a Purchaser such additional information as such Purchaser may request to facilitate the determination of taxes for which a Purchaser is responsible.

## **7.0 Vendor Delivery Performance; Cancellation; Customer Service**

- 7.1 Delivery Performance Warranty for Direct Purchases. For purchases made directly from Vendor, Vendor represents and warrants to KHC and each Purchaser that it shall maintain in inventory at appropriate locations sufficient quantities of each Product and shall both choose a transportation mode and carrier and provide said carrier with appropriate instructions to ensure that any Purchaser ordering Products will receive delivery within seven (7) calendar days after the date the order is received by Vendor or other timeframe as established between a Purchaser and Vendor.
- 7.2 Cancellation of Orders. Any Purchaser may cancel any order arising out of this Agreement in whole or in part, without liability, if (i) Products have not been shipped as of the date of Vendor's receipt of notice of cancellation (unless Products are "major capital Equipment" and/or custom orders and manufacturing of such Product has begun and cannot be stopped or Products cannot be diverted to Vendor's other customers); (ii) Products (or the possession and use thereof) infringe, misappropriate or are alleged to infringe or misappropriate any third party patent, trademark, copyright, trade secret or other intellectual property right; or (iii) Products fail to comply with the terms of this Agreement or with any applicable law or regulation. In this Section 7.2, the term "major capital Equipment" means long-lasting goods a Purchaser acquires and owns that are not consumed in the normal course of business and each individual item having a value in excess of \$50,000.
- 7.3 Return of Products; Restocking Fee. Notwithstanding anything to the contrary herein, Purchaser shall have the right to return commodities (excluding expired Products) and Equipment to Vendor for full refund. In no event shall Vendor have the right to charge a restocking fee in connection with any returns of commodities and Equipment under this Agreement. Vendor's return goods policy, if any, is attached.
- 7.4 Fill Rate Requirements. Vendor represents and warrants that it shall meet or exceed a ninety-eight percent (98%) Fill Rate for each Product during the Term (the "Required Fill Rate"). Any failure by Vendor (or any Distributor, due to Vendor

supply problems) to maintain the Required Fill Rate for any Product that is not cured within thirty (30) days following written notice from KHC or any Purchaser shall be deemed a breach of this Agreement and shall give KHC or any Purchaser the right to immediately terminate this Agreement. Termination under this Section 7.4 by an individual Purchaser shall only apply as to that Purchaser's participation in this Agreement.

- a. Definitions. For purposes of this Section 7.4, the following definitions apply:

- (1) "Field Activity" shall mean each work order or pick-up pursuant to which Vendor provides service at a particular Purchaser location on a particular date.
- (2) "Perfect Order" shall mean a Field Activity that Vendor completes within twenty-four (24) hours of the day it is scheduled (applicable Mondays through Thursdays only), or within seventy-two (72) hours of the day it is scheduled (applicable Fridays and holidays only), and in full compliance with the terms and conditions of the Agreement.
- (3) "Perfect Order Percentage" shall mean, for a given time period, the number of Perfect Orders divided by the aggregate number of Field Activities.

- b. Standards. Vendor shall provide service at a Perfect Order Percentage each quarter of at least 98 percent. Purchaser may terminate this Agreement by written notice if Vendor fails to do so for two consecutive quarters. In addition, if the Perfect Order Percentage falls below 98 percent in any given quarter, Purchaser shall receive a credit relating to the fees for that quarter as follows, to be applied against Purchaser's next invoice, such credit shall be waived by Purchaser if Vendor performance is corrected within thirty (30) days:

- (1) If the Perfect Order Percentage is 95 percent or greater but less than 97.9 percent, Purchaser shall receive a 1 percent credit.
- (2) If the Perfect Order Percentage is at or below 94.9 percent, Purchaser shall receive a 5% credit.
- Any missed Field Activity must be made up within three (3) business days. Failure to do so shall be considered a breach of contract. Exclusions to this rule only include Holiday weeks, and severe weather occurrences.
- Purchaser must document the missed Field Activity date including the specific location in writing to Vendor.

- In the event Purchaser terminates its participation in this Agreement under this

section, Purchaser would have the option of buying the bins used at the Purchasers' facilities from Vendor according to the following depreciated schedule as measured in time from the Purchaser's effective Agreement start date:

New Bins

- 0-12 months = \$XX.00 each
- 12-24 months = \$XX.00 each
- 24 + months = \$XX.00 each

Bins Purchased from Former Suppliers

- 0-12 months = \$XX.00 each
- 12-24 months = \$XX.00 each
- 24 + months = \$XX.00 each

7.5 Vendor Customer Service. Vendor shall provide customer service support staff for receipt of telephone calls, e-mails and facsimiles from Purchasers and KHC for the purpose of resolving issues related to transactions under this Agreement. Vendor's customer service representatives shall be available between 8:00 A.M. and 8:00 P.M. (Eastern Time) Monday through Friday, except for holidays. Vendor will use all commercially reasonable efforts to resolve issues within a reasonable time, in no event to exceed five (5) business days.

**8.0 Shipping Terms for Direct Purchases**

8.1 Shipment Terms. For purchases directly from Vendor, terms for shipment of Product and freight payment responsibility shall all be in conformance with the provisions in this Section 8.0. If freight charges are prepaid by Vendor and added to invoices sent to Purchasers, the freight charges shall be for the net charge by the carrier and shall not include any up-charges. Exclusive of incidents of expedited shipping and other like circumstances contemplated under this Agreement, Vendor may invoice a Purchaser additional freight charges for any shipment if the Purchaser requests a delivery period shorter than that stated in this Agreement.

8.2 Shipping and Handling Charges. No "Handling" or "Shipping and Handling" charges shall be added to any invoice, and Purchasers shall have no obligation to pay "Handling" or "Shipping and Handling" charges for purchases under this Agreement.

8.3 Packaging. Vendor assumes all responsibility for proper packaging of Products for safe shipment to each Purchaser.

8.4 Risk of Loss. Unless otherwise specified by a Purchaser in the purchase order, delivery of all Products and/or Services shall be made at Vendor's expense F.O.B. Purchaser's Facility during the Purchaser's normal receiving hours. Purchaser reserves the right to designate the mode of transportation and carrier. C.O.D. shipments shall be returned to Vendor at Vendor's expense. Risk of loss or damage

shall pass to Purchaser F.O.B. Purchaser's Facility. Transfer of title to a Purchaser shall occur upon such Purchaser's acceptance of Products and/or Services which conform to this Agreement. Vendor shall promptly correct all nonconforming Products and/or Services at its sole expense. Acceptance or payment by a Purchaser shall not waive any of such Purchaser's rights and remedies or relieve Vendor from any of Vendor's duties or obligations under this Agreement.

If Products are shipped on an F.O.B. Origin basis, all such Products shall be shipped with title and risk of loss or damage passing to the ordering Purchaser upon Vendor's delivery of the Products to the carrier. Vendor shall procure on behalf of each ordering Purchaser and at Vendor's expense, insurance covering the Products in transit, which insurance shall not impose any financial liability upon any Purchaser. Vendor shall be responsible for submitting any damage-in-transit claims to the carrier on a Purchaser's behalf.

- 8.5 Third Party Freight Management Service. The terms of this Section 8.5 shall be applicable only if Products are obtained directly from Vendor. If a Purchaser notifies Vendor that it wishes to use a particular freight management service for delivery of Products for which freight is not included in the cost, Vendor agrees to ship the Products using the designated carrier. Delivery terms shall be F.O.B. Destination, billing the Purchaser or the Purchaser's carrier. The Purchaser shall pay the designated carrier directly, and no shipping or handling costs may be added to Vendor's invoice to such Purchaser. If Vendor fails to ship Products through the designated carrier, Vendor shall reimburse the Purchaser for the total freight charges incurred by the Purchaser.
- 8.6 Inspection. All Products shall be subject to inspection and approval upon receipt by a Purchaser. Any Products which do not comply with such Purchaser's purchase order, including quantities and delivery time; in any way fail to comply with the warranties provided under this Agreement or with applicable law; or are damaged in shipment, whether discovered at time of receipt or at a later time, may be rejected by the Purchaser, irrespective of the date of payment. Such final inspection shall take place within thirty (30) days from the latest of (i) the date of delivery (ii) the date of installation, or (iii) completion of services.

In addition to other remedies which may be available under law or in equity, a Purchaser at its option may return to the Vendor any nonconforming or defective item(s), at no cost and require correction or replacement of the item(s). If the Purchaser does not require correction or replacement of nonconforming or defective item(s), Vendor shall repay such portion of the contract price or such additional amount as is equitable under the circumstances. The rights of the Purchaser are in addition to and shall not be limited by Vendor's standard warranties.

## 9.0 Warranties and Disclaimer of Liability

- 9.1 Product Warranties. Vendor represents and warrants to KHC and each Purchaser that the Products, when delivered:
- 9.1.1 are new and free from defects, whether patent or latent, in design, materials or workmanship and conform to all documentation, specifications, and literature, including, without limitation, advertising literature, relating to the Products;
  - 9.1.2 contain packaging, labeling, and inserts conforming to the requirements of all applicable industry, accreditation and regulatory standards and federal, state and local laws, regulations and ordinances, including FDA, Center for Disease Control and Prevention, and requirements imposed by the Joint Commission or such other accreditation organization(s) of any Purchaser or any Purchaser's Facility(ies);
  - 9.1.3 carry a safety mark, if required by OSHA, from a National Recognized Testing Laboratory for use of electrical Equipment in a public facility (as specified in the OSHA 29 CFR Standards, Part 1910, Subpart S-Electrical, Sec 1910.399);
  - 9.1.4 are listed with Underwriters Laboratory ("UL") or a nationally recognized testing laboratory as suitable for use in a healthcare facility, if such listing is available for Products;
  - 9.1.5 if the Products are electrically powered, such Product are provided with a heavy-duty grade power cord that meets the requirements of UL-544, UL 60601-1, or NFPA 99 § 8-4.1 (and subsets) or the then most current UL, NFPA 99, NFPA 70, Products will comply with such applicable NFPA standards;
  - 9.1.6 to the extent applicable, meet the requirements of NFPA 99 for Health Care Facilities, or other applicable standard/code that addresses the safety and marking requirements of electrical medical devices;
  - 9.1.7 if the Products are Equipment intended for use in an operating room environment or other location with anesthetizing Equipment, such Products are labeled in accordance with NFPA 99 § 9-2.1.8.3, FDA, or other applicable standard/code that addresses the safety and marking requirements of electrical medical devices;
  - 9.1.8 if the Products are Equipment, such Products are shipped with an operator or user manual that includes:
    - 9.1.8.1 Safety precautions (or considerations) in application and in servicing;



9.1.8.2 Power requirements, heat dissipation, weight, dimensions, output current, output voltage and other pertinent data for the Product; and

9.1.8.3 All other warnings and instructions necessary to operate the Equipment safely, effectively, and efficiently.

9.1.9 if the Products are Equipment, such Products contain:

9.1.9.1 Nameplates, warning signs, condensed operating instructions, labels, etc. that are legible and will remain so for the expected life of the Product;

9.1.9.2 Labeling in compliance with the medical device labeling requirements under the applicable FDA rules, regulations, and guidelines; and

9.1.9.3 Labeling that provides all other warnings and instructions necessary to operate the Equipment safely, effectively, and efficiently including, but not limited to, cleaning and maintenance warnings and instructions.

9.1.10 if the Products or Services are Technology Products and Services which contain Software, they will not contain any program, routine, device, code, or instructions or other undisclosed feature, including, without limitation, a time bomb, virus, software lock, drop-dead device, malicious logic, worm, Trojan horse, spyware, bug, error, defect or trap door, capable of accessing, modifying, deleting, damaging, disabling, deactivating, notifying, interfering with, or otherwise harming the Software, any of a Purchaser's computers, remote devices, systems, networks, data or other electronically stored information, or computer programs or systems.

## 9.2 Hazardous Materials.

9.2.1 Vendor shall provide KHC and each Purchaser with written notification if any of the Products when delivered contain any of the following:

- (i) PVC or polyvinyl chloride (PVC); or
- (ii) Latex.

9.2.2 Vendor represents and warrants to KHC and each Purchaser that the Products when delivered do not contain any of the following:

- (i) Carcinogens;
- (ii) DEHP or 2 di-ethyl hexyl phthalate;
- (iii) Halogenated Organic Flame Retardants;
- (iv) Mercury;
- (v) Persistent Bioaccumulative Toxins; or

(vi) Reproductive Toxins.

9.3 Intellectual Property Rights.

9.3.1 Vendor represents and warrants to KHC and each Purchaser that it has investigated the design and specifications for all Products, including any Technology Products and Services, to determine if any of the Products (or the possession or use thereof) infringe or misappropriate the patent, trade secret, trademark, copyright or other intellectual property rights of any third party, and has determined that, and hereby represents and warrants to KHC and each Purchaser that the Products, including Technology Products and Services, and the possession and use thereof by any Purchaser in the manner intended by Vendor do not infringe or misappropriate the patent, trade secret, trademark, copyright or other intellectual property rights of any third party.

9.3.2 Vendor, KHC and each Purchaser consider the results of the Services to be rendered by Vendor to be a work made for hire. Vendor acknowledges and agrees that the work and all rights therein, including, without limitation, copyright, belongs to and shall be the sole and exclusive property of the applicable Purchaser. For any work not considered a work made for hire under applicable law, title and copyright ownership shall be assigned to the applicable Purchaser.

9.4 Services. If Vendor is required to provide any Services under this Agreement, Vendor represents and warrants to KHC and each Purchaser that:

9.4.1 any Services provided conform to the requirements of all accreditation and regulatory standards and federal, state and local laws, regulations and ordinances, including, but not limited to, the FDA, Center for Disease Control and Prevention, regulations, guidelines and required approvals, requirements imposed by the Joint Commission or such other accreditation organization(s) of any Purchaser or any Purchaser's Facility(ies), Medicare/Medicaid conditions of participation, and any amendments thereto. Vendor shall promptly cooperate with any Purchaser's reasonable request for assistance and information in connection with such Purchaser's efforts to comply with these requirements and conform to all documentation, specifications, and literature, including, without limitation, advertising literature, relating to the Services;

9.4.2 such Services, including any Support Services or Professional Services set forth in a Statement of Work (as further detailed in Section 17 below), shall be performed timely, in a workmanlike manner, consistent with industry standards, or the applicable Support Service Level Agreement or Statement of Work;

- 9.4.3 Vendor shall obtain at its own cost all necessary consents, licenses, approvals, and permits required for the provision of Services;
- 9.4.4 Vendor's representatives visiting the premises of any Purchaser shall comply with such Purchaser's credentialing and other policies, including, but not limited to, policies requiring Vendor's representatives to register when visiting a Purchaser and demonstrating periodic receipt of required vaccinations and preventative medical exams, tests and/or procedures; and
- 9.4.5 Vendor will not employ or use any individual to perform Services under this Agreement who is not legally authorized to work in the United States in the capacity required to perform the Services. Vendor certifies that all employees and other individuals it assigns to perform Services under this Agreement are legally authorized to work in the United States in the capacity required to perform the Services and will provide upon request written documentation to support such certification. Vendor agrees to defend, indemnify and hold harmless KHC and each Purchaser if any claim were made against KHC or any Purchaser related to any alleged failure of Vendor to comply with its warranties, representations, and certifications.
- 9.5 Child Labor. Vendor represents and warrants that Vendor and its subcontractors and manufacturers of the Products comply with applicable labor and employment laws regarding, and prohibit, any form of child labor or other exploitation of children in the manufacturing and delivery of the Products, consistent with provisions of the International Labor Organization's (ILO) Minimum Age Convention. In addition, in connection with any International Organization for Standardization (ISO) certification, Vendor represents and warrants that it complies with a Social Accountability Guideline pursuant to which Vendor disqualifies any manufacturing site that uses unacceptable manufacturing practices, such as child labor, forced labor or unsafe or unsanitary working conditions.
- 9.6 Recalls. Vendor agrees to promptly notify KHC and each Purchaser after becoming aware of any patient safety issue involving the Products or Services. If any Product or any of its components are subject to recall or a voluntary recall by Vendor, or are subject to an FDA-initiated legal action for removing or correcting violative, distributed products or components (any of the foregoing being referred to as a "**Recall**"), Vendor shall notify KHC and each Purchaser within twenty-four (24) hours after becoming aware of any Recall.

Vendor agrees that it will comply with any process mandated by the FDA, if applicable, to address such Recall with each Purchaser. Each Purchaser shall have the right to return to Vendor or Distributor (if purchased from a Distributor) any Products where the Products or any components therein are subject to a Recall, regardless of whether actual return of the Products or components to Vendor or any Distributor is required, recommended, or suggested by the Recall, in which case Vendor shall pay all freight costs incurred for the return of each affected Product

and shall reimburse each Purchaser for such Purchaser's original costs, including freight, in acquiring each affected Product.

- 9.7 Disaster Recovery Plan. Vendor represents and warrants to KHC and each Purchaser that it has and shall maintain a disaster recovery and business continuity plan to enable delivery of the Products and Services upon the occurrence of any force majeure event (as further outlined in Section 20.5 below), and agrees to review such plan with KHC and/or the applicable Purchaser upon request. Such plan should be inclusive of a cyber incident response plan and if Vendor is considered a business associate with respect to HIPAA, such plan should also be inclusive of a HIPAA breach response plan.
- 9.8 Warranty of Non-exclusion. Vendor represents and warrants to KHC, each Purchaser, and their respective Affiliates that Vendor and its directors, managers, officers, and employees (i) are not currently excluded, debarred, or otherwise ineligible to participate in the Federal health care programs as defined in 42 U.S.C. §1320a-7b(f) (the “**Federal Healthcare Programs**,” information may be found at <https://oig.hhs.gov/exclusions/index.asp> and <https://chfs.ky.gov/agencies/dms/dpi/pe/Pages/terminated.aspx>); (ii) have not been convicted of a criminal offense related to the provision of healthcare items or services but have not yet been excluded, debarred, or otherwise declared ineligible to participate in the Federal Healthcare Programs; and (iii) are not under investigation or otherwise aware of any circumstances which may result in Vendor or its directors, managers, officers, or employee(s) being excluded from participation in the Federal Healthcare Programs. These representations and warranties shall be ongoing during the Term, and Vendor shall immediately notify KHC and each Purchaser of any change in the status of the representations and warranties set forth in this Section 9.8. Any breach of this Section 9.8, not cured, as determined by KHC or Purchaser, within 5 days of notice, shall give KHC or any Purchaser the right to immediately terminate this Agreement. Termination under this Section 9.8 by an individual Purchaser shall only apply as to that Purchaser's participation in this Agreement.

## **10.0 Indemnity and Limitation of Liability**

- 10.1 Vendor Indemnification. Vendor agrees to defend, indemnify, and hold harmless KHC, each Purchaser, and any of their Affiliates and their respective successors, assigns, agents and employees, officers, and directors (“**KHC Indemnified Parties**”) from and against any and all claims, losses, suits, damages, liabilities, costs (including attorneys' fees), expenses, and all liability of any nature or kind arising out of or relating to Vendor's performance under this Agreement. This clause shall survive the termination of this Agreement for as long as necessary to protect the KHC Indemnified Parties.
- 10.2 KHC and Certain Purchaser Indemnification. KHC and each Purchaser (subject to the exclusion below with respect to UK HealthCare) agree to defend, indemnify,

and hold harmless Vendor and each of its Affiliates and their respective successors, assigns, agents and employees, officers, and directors (“**Vendor Indemnified Parties**”) from and against any and all claims, losses, suits, damages, liabilities, costs (including attorneys’ fees), expenses, and all liability of any nature or kind arising out of or relating to KHC’s or a Purchaser’s performance under this Agreement. If such indemnification is related only to KHC’s or a particular Purchaser’s performance under this Agreement, the indemnification obligation set forth in this Section 10.2 is limited to KHC or the respective Purchaser, as applicable. This clause shall survive the termination of this Agreement for as long as necessary to protect the Vendor Indemnified Parties. This Section 10.2 shall not apply to UK HealthCare if UK HealthCare is a Purchaser under this Agreement.

Notwithstanding any agreement to the contrary, Vendor acknowledges and agrees that no Purchaser will be responsible for any acts, omissions or obligations of, or relating to, any other Purchaser, nor for acts, omissions, or obligations of, or relating to, KHC, nor shall KHC be responsible for any acts, omissions, or obligations of, or relating to, any Purchaser. No Purchaser shall have any indemnity obligation relating to KHC or any other Purchase.

### 10.3 Limitation of Liability.

10.3.1 No Consequential Damages. IN NO EVENT WILL KHC OR ANY PURCHASER BE LIABLE TO VENDOR FOR LOST PROFITS, SPECIAL, INCIDENTAL, PUNITIVE, CONSEQUENTIAL OR INDIRECT DAMAGES OF ANY KIND (INCLUDING, WITHOUT LIMITATION, COSTS OF COVER, LOST PROFITS OR LOSS OR DAMAGE TO DATA ARISING OUT OF THE USE, PARTIAL USE OR INABILITY TO USE THE RESULTS OF THE SERVICES) ARISING UNDER THIS AGREEMENT, WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), INTENDED CONDUCT OR OTHERWISE, EVEN IF KHC OR A PURCHASER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10.3.2 Aggregate Liability. KHC’S AGGREGATE LIABILITY OR A PURCHASER’S AGGREGATE LIABILITY TO VENDOR OR ANY THIRD PARTY FOR ANY CLAIMS, LOSSES, INJURIES, SUITS, DEMANDS, JUDGMENTS, LIABILITIES, COSTS, EXPENSES OR DAMAGES FOR ANY CAUSE WHATSOEVER (INCLUDING, BUT NOT LIMITED TO, THOSE ARISING OUT OF OR RELATED TO THIS AGREEMENT), REGARDLESS OF THE FORM OF ACTION OR LEGAL THEORY, WILL NOT EXCEED THE LESSER OF, (i) IN THE CASE OF KHC, THE AGGREGATE AMOUNTS PAID BY ALL PURCHASERS, OR, IN THE CASE OF A PURCHASER, THE AGGREGATE AMOUNT PAID BY SUCH PURCHASER, FOR THE RELEVANT PRODUCTS AND/OR SERVICES DURING THE 12

MONTHS PRIOR TO THE DATE THE CLAIM ARISES, OR  
(ii) \$1,000,000.

## **11.0 Confidentiality**

11.1 Confidentiality Obligations. During the Term and surviving its expiration or termination, except as set forth in Section 11.2, KHC, the Purchasers, and Vendor will regard and preserve as confidential and not disclose publicly or to any third party (or to any other Purchaser), KHC's, any Purchaser's or Vendor's Confidential Information. Subject to Section 11.2, KHC, the Purchasers and Vendor agree to use the Confidential Information solely for purposes of performing their respective obligations hereunder. All Confidential Information shall remain the property of KHC, the Purchasers or Vendor, as applicable. KHC, the Purchasers and Vendor shall further report to the applicable party any use or of Confidential Information that it becomes aware of and is not authorized by this Agreement. In the event that KHC, the Purchasers, or Vendor, or their employees or agents, fail to comply with this provision, KHC, the Purchasers, or Vendor, as applicable, may immediately terminate this Agreement, in addition to seeking other remedies available to it at law or equity. Upon completion or termination of this Agreement, the parties shall return any Confidential Information to the applicable party or make such other disposition thereof as may be directed or approved by the applicable party.

11.1.1 Vendor shall fully defend, indemnify and hold harmless the KHC Indemnified Parties from any and all claims, losses, suits, damages, liabilities, costs (including attorneys' fees), expenses, and all liability of any nature or kind which may result from violations of the duties of confidentiality contained in Section 11.1 by Vendor, its employees, or its agents.

11.1.2 KHC and each Purchaser (subject to the exclusion below with respect to UK HealthCare) shall fully defend, indemnify and hold harmless the Vendor Indemnified Parties from any and all claims, losses, suits, damages, liabilities, costs (including attorneys' fees), expenses, and all liability of any nature or kind which may result from violations of the duties of confidentiality contained in Section 11.1 by KHC, a Purchaser, or any of their respective employees or agents. If such indemnification is related only to KHC's or a particular Purchaser's violation of Section 11.1, the indemnification obligation set forth in this Section 11.1.2 is limited to KHC or the particular Purchaser, as applicable. This Section 11.1.2 shall not apply to UK HealthCare if UK HealthCare is a Purchaser under this Agreement.

11.2 Permitted Uses of Confidential Information. Notwithstanding the definition of Confidential Information or any provision to the contrary contained herein, (i) KHC and each Purchaser shall have the right to use Vendor pricing information on Products and Services for their internal analyses (including their materials

management functions), and (ii) KHC and each Purchaser shall have the right to disclose terms and pricing information and provide copies of this Agreement to their respective Affiliates, Facilities, potential purchasers of any Facility, potential Facilities, other associations or group purchasing organizations, attorneys, accountants, and other third parties retained by KHC or a Purchaser, respectively (collectively “**Consultants**”) provided any such Consultants agree to maintain the confidentiality of information consistent with the terms of this Agreement. Vendor agrees that it shall not enter into any agreement with any Purchaser that is contrary to the foregoing sentence, and agrees that this provision shall supersede any inconsistent provision or agreement between Vendor and a Purchaser with respect to the pricing and other terms of this Agreement. Any confidentiality agreement required by this Section 11.2 shall have terms that are at least as strict as those contained in Sections 11.1 and 11.2. Nothing in this Agreement shall restrict KHC’s, a Purchaser’s, or Vendor’s right to use or disclose any information which is or becomes generally known to the public without breach of this Agreement by KHC, a Purchaser, or Vendor, as applicable, or is rightfully obtained without restriction from other sources.

- 11.3 HIPAA and HITECH Requirements. Vendor acknowledges that many Purchasers are “covered entities,” as that term is defined at 45 C.F.R. §160.103. To the extent applicable to this Agreement, Vendor agrees to comply with the Health Information Technology for Economic and Clinical Health Act of 2009 (the “**HITECH Act**”), the Administrative Simplification Provisions of the Health Insurance Portability and Accountability Act of 1996, as codified at 42 U.S.C. § 1320d *et seq.* (“**HIPAA**”) and any current and future regulations promulgated under either the HITECH Act or HIPAA, including, without limitation, the federal privacy regulations contained in 45 C.F.R. Parts 160 and 164 (the “**Federal Privacy Regulations**”), the federal security standards contained in 45 C.F.R. Parts 160, 162 and 164 (the “**Federal Security Regulations**”), and the federal standards for electronic transactions contained in 45 C.F.R. Parts 160 and 162 (the “Federal Electronic Transactions Regulations”), all as may be amended and/or supplemented from time to time, and all collectively referred to herein as the “**HIPAA Requirements**”. Vendor agrees to not use or further disclose any “Protected Health Information”, including “Electronic Protected Health Information” (as such terms are defined in the HIPAA Requirements) other than as permitted by the HIPAA Requirements and the terms of any Business Associate Agreement. Vendor will make its internal practices, books, and records relating to the use and disclosure of Protected Health Information available to the Secretary of Health and Human Services (“**HHS**”) to the extent required for determining compliance with the HIPAA Requirements. Vendor agrees to execute and comply with any further agreements with a Purchaser as requested to facilitate compliance with the HIPAA Requirements, including, but not limited to, executing a Purchaser’s form of a Business Associate Agreement (BAA). If Vendor has access to a Purchaser’s sensitive information (but not PHI under HIPAA), a Purchaser may require a new information protection schedule (IPS).

#### 11.4 Data Security and Data Use.

11.4.1 Data Security. All data, documents, Purchaser Confidential Information, and other materials provided by or on behalf of KHC or a Purchaser to Vendor, or acquired or learned by Vendor from KHC's or a Purchaser's employees, representatives, agents or contractors (collectively, "**KHC/Purchaser Data**"), which is received, computed, developed, used, collected or stored pursuant to this Agreement shall be the exclusive property of KHC or a Purchaser, as applicable. Vendor may access and use such data solely as necessary to perform its obligations under this Agreement. KHC or a Purchaser shall be allowed to perform a cyber security/HIPAA security risk analysis of Vendor's administrative, physical, and technical security controls to qualitatively assess the likelihood and impact of risks due to cyber intrusions, cyber disruptions, data breach, data loss, or other related incidents. Vendor will be expected to provide evidence of security controls, policies and procedures, compliance with appropriate regulatory requirements and other information as deemed necessary by KHC or a Purchaser to assess its risks and Vendor will make a good faith effort to address gaps and recommendations that result from the security review, and in some cases, Purchaser may require an additional addendum or attachment to outline additional data security controls not referenced herein.

11.4.2 Data Use Restrictions. Absent KHC's or a Purchaser's (as applicable) prior written consent, KHC/Purchaser Data shall not be (i) monitored, analyzed, individualized, anonymized, aggregated, stored, copied or otherwise provided to third parties by Vendor, (ii) sold, assigned, or leased by Vendor, or (iii) commercially exploited in any form by or on behalf of Vendor. In the event of any actual or threatened breach of the security of KHC/Purchaser Data, Vendor will immediately notify KHC and the applicable Purchaser and fully cooperate with KHC and the applicable Purchaser to secure KHC/Purchaser Data. Vendor will not transfer KHC/Purchaser Data across a country border or to an offshore location unless Vendor obtains KHC's or the applicable Purchaser's prior written consent.

KHC or a Purchaser, as applicable, shall retain exclusive ownership rights to all data transferred to Vendor as part of this Agreement and transfer of data shall not be interpreted as a transfer of ownership. Upon termination of this Agreement for cause or convenience Vendor agrees it will not use any KHC or Purchaser data for purposes other than as specifically directed by KHC or a particular Purchaser, or as otherwise required by law.



## **12.0 Insurance**

Throughout the Term, Vendor shall maintain at its own expense Commercial General Liability insurance for bodily injury, death and property loss and damage (including coverages for product liability, completed operations, contractual liability and personal injury liability) covering Vendor for claims, lawsuits or damages arising out of its performance under this Agreement, and any negligent or otherwise wrongful acts or omissions by Vendor or any employee or agent of Vendor. All such policies of insurance may be provided on either an occurrence or claims-made basis. Vendor shall also maintain Automobile Liability insurance, Workers' Compensation insurance, and Employer's Liability insurance. Vendor agrees to furnish Certificates of Insurance and/or applicable endorsements for the above described coverages and limits to KHC and each Purchaser. Upon expiration or termination of this Agreement, to the extent that Vendor provides any of the insurance required hereunder on a claims-made basis, Vendor shall obtain and maintain, at Vendor's expense, tail/extended reporting coverage for such insurance and the same shall cover the period of time that comprised the Term of this Agreement.

KHC and each Purchaser, including their governing board members, officers, directors, and employees, must be added as Additional Insureds on the Commercial General Liability policy with regards to the scope of this Agreement. Additionally, if there may be involvement of, or exposure to, Protected Health Information, Vendor must purchase and maintain Cyber Liability Insurance, including first-party and third-party coverage. Any deductibles or self--insured retention in the above-described policies must be paid and are the sole responsibility of the Vendor. Coverage is to be primary and noncontributory with other coverage, if any, purchased by KHC or any Purchaser. All of these required policies must include a Waiver of Subrogation, except Workers' Compensation, in favor of KHC and each Purchaser, including their employees (and if the University of Kentucky is a Purchaser, also with respect to its trustees).

Requirements for policy limits with respect to Vendor's Commercial General Liability insurance, Automobile Liability insurance, Employer's Liability insurance, Cyber Liability Insurance, and other insurance liability policies may vary by Purchaser, with a list of required limits for KHC and each Purchaser set forth on Exhibit E hereto. Vendor's Workers' Compensation insurance shall have statutory limits as applicable.

## **13.0 Termination or Breach of Agreement**

13.1 Termination with Cause (Termination for Nonperformance). KHC and each Purchaser shall have the right to terminate this Agreement in its entirety or with respect to certain Products or Services for "Cause." Cause includes, but is not limited to:

13.1.1 Failing to provide satisfactory quality of service, including, failure to maintain adequate personnel, whether arising from labor disputes, or otherwise any substantial change in ownership or proprietorship of the Vendor, which in the opinion of KHC or the Purchaser is not in its best interest, or failure to comply with the terms of KHC or the Purchaser.

However, Vendor shall have thirty (30) days from the date which KHC or the Purchaser provide written notice by certified mail to Vendor of such failure and, if cured (as determined in KHC's or a particular Purchaser's discretion, as applicable), KHC and such Purchaser shall not have the termination rights allowed by this Section 13.1.1. If such failure by Vendor recurs, KHC or the Purchaser may terminate immediately by providing written notice by certified mail to Vendor of such recurring failure;

- 13.1.2 Failing to keep or perform, within the time period set forth herein, or violation of, any of the covenants, conditions, provisions or agreements herein contained. However, Vendor shall have thirty (30) days from the date which KHC or the Purchaser provide written notice by certified mail to Vendor of such failure to remedy the breach or violation of this Agreement and, if cured (as determined in KHC's or a particular Purchaser's discretion, as applicable), KHC and such Purchaser shall not have the termination rights allowed by this Section 13.1.2. If such failure by Vendor recurs, KHC or the Purchaser (with respect to such Purchaser's participation under this Agreement) may terminate immediately by providing written notice by certified mail to Vendor of such recurring failure;
- 13.1.3 Adjudication as voluntarily bankrupt, making a transfer in fraud of its creditors, filing a petition under any section from time to time, or under any similar law or statute of the United States or any state thereof, or if an order for relief shall be entered against the Vendor in any proceeding filed by or against Vendor thereunder. In the event of any such involuntary bankruptcy proceeding being instituted against the Vendor, the fact of such an involuntary petition being filed shall not be considered an event of default until the sooner of either (i) expiration of sixty (60) days after filing of said petition in order that Vendor might, during that sixty (60) day period, have the opportunity to seek dismissal of the involuntary petition or otherwise cure said potential default, or (ii) notification by Vendor that it will not oppose such petition (which shall be provided within thirty (30) days after the filing of such petition);
- 13.1.4 Making a general assignment for the benefit of its creditors, or taking the benefit of any insolvency act, or if a permanent receiver or trustee in bankruptcy shall be appointed for the Vendor; or
- 13.1.5 Any other circumstance or breach specifically set forth in this Agreement giving KHC and/or any Purchaser the right to terminate.

Termination under this Section 13.1 by an individual Purchaser shall apply only as to that Purchaser's participation in this Agreement and this Agreement shall

remain in full force and effect with respect to KHC and the non-terminating Purchasers. Upon termination by either KHC or a specific Purchaser, the Purchaser, after deducting any amount(s) previously paid, shall pay for all Services rendered or Products supplied by the Vendor pursuant to this Agreement up until the time of termination by KHC or such Purchaser. The cost of any agreed upon Services provided by the Vendor will be calculated at the agreed upon rate prior to “notice of termination” and any fixed fee contract will be pro-rated (as appropriate).

- 13.2 Demand for Assurances. In the event KHC or a Purchaser has reason to believe Vendor will be unable to perform under this Agreement, it may make a demand for reasonable assurances that Vendor will be able to timely perform all obligations under this Agreement. If Vendor is unable to provide such adequate assurances within two (2) business days from the demand for reasonable assurances, then such failure shall be an event of default and grounds for immediate termination of this Agreement by KHC or a Purchaser (with respect to such Purchaser’s participation under this Agreement).
- 13.3 Termination without Cause (Termination for Convenience). KHC and each Purchaser shall have the right, at any time during the Term, to terminate this Agreement in its entirety or with respect to certain Products or Services, or with respect to any Facility(ies), without Cause, by providing at least thirty (30) days’ prior written notice, without any liability to Vendor for such termination. Termination under this Section 13.3 by an individual Purchaser shall apply only as to that Purchaser’s participation in this Agreement and this Agreement shall remain in full force and effect with respect to KHC and the non-terminating Purchasers. Upon termination by either KHC or a specific Purchaser, the Purchaser, after deducting any amount(s) previously paid, shall pay for all Services rendered or Products supplied by the Vendor pursuant to this Agreement up until the time of termination by KHC or such Purchaser. The cost of any agreed upon Services provided by the Vendor will be calculated at the agreed upon rate prior to “notice of termination” and any fixed fee contract will be pro-rated (as appropriate).

In the event Purchaser terminates its participation in this Agreement under this section, Purchaser would have the option of buying the bins used at the Purchasers’ facilities from Vendor according to the following depreciated schedule as measured in time from the Purchaser’s effective Agreement start date:

New Bins

- 0-12 months = \$XX.00 each
- 12-24 months = \$XX.00 each
- 24 + months = \$XX.00 each

Bins Purchased  
from Former  
Suppliers

- 0-12 months = \$XX.00 each
- 12-24 months = \$XX.00 each
- 24 + months = \$XX.00 each

- 13.4 Purchase of Bins. In the event Purchaser terminates its participation in this Agreement at or after the first 36 months from the Effective Date of the Agreement and Purchaser requests Vendor to sell the bins to the next service provider (“Next Provider”), the cost of the bins will be at \$XX.00 per container. Furthermore, Purchaser will incur no cost and no additional charges associated with this provision and the necessary, requested transition activity between Vendor and Next Provider.
- 13.5 Attorneys’ Fees. In the event that any Purchaser deems it necessary to take legal action to enforce any provision of this Agreement, the Vendor agrees to pay all expenses of such action, including attorneys’ fees and costs at all stages of litigation.
- 13.6 Compensable Damages for Breach. The Vendor agrees that the following items shall be included as KHC’s or a Purchaser’s compensable damages for any breach of this Agreement with KHC or a Purchaser:
- 13.6.1 Replacement cost;
- 13.6.2 Costs of repeating the competitive bidding procedure, to include, but not be limited to, reasonable attorneys’ fees, employee compensation related to repeating the competitive bidding procedure, mailing expenses, and copy expenses;
- 13.6.3 Expenses incurred by the Purchaser as the result of delay in obtaining replacements, as will be specified by each applicable Purchaser; and
- 13.6.4 Reimbursement to such Purchaser in an amount equal to the difference between the purchase price it would have paid under this Agreement had Vendor not breached, and the price it had to pay in the open market.

The enumeration of compensable damage contained in this Section is not intended to be exclusive and will not operate to bar recovery by KHC or any Purchaser for any other damages occasioned by the Vendor’s breach of this Agreement. However, in cases where this Agreement provides for liquidated damages, said liquidated damages shall be in lieu of all other damages, including those enumerated above.

## **14.0 Books, Records and Compliance Requirements**

### **14.1 Access to Vendor Records.**

14.1.1 To the extent the requirements of 42 C.F.R. § 420.300 *et seq.* are applicable to the transactions contemplated by this Agreement, Vendor shall make available to the Secretary of HHS, the Comptroller General of the Government Accountability Office (“GAO”) and their authorized representatives all contracts, books, documents and records relating to the nature and extent of charges hereunder until the expiration of six (6) years after the Products and Services are furnished under this Agreement if the Products or Services are of the type reimbursable under Medicare or any other government healthcare program.

14.1.2 If Vendor subcontracts with an organization “related” to Vendor to fulfill Vendor’s obligations under this Agreement, and if said subcontract is worth Ten Thousand Dollars (\$10,000) or more over a consecutive twelve (12) month period, Vendor shall ensure that such subcontract contains a clause substantially identical to Section 14.1.1, which permits access by the HHS, GAO and their representatives to the “related” organization’s books and records.

### **14.2 Discount Laws and Regulations.**

14.2.1 When Vendor sends a Purchaser invoices listing charges that include a capital cost component (e.g., Equipment that must be either capitalized or reported as lease expense) and/or an operating cost component (e.g., services and/or supplies), Vendor shall separately list the prices, shipping fees and taxes applicable to Equipment, supplies and services. The price for all capital component items must be reported on the invoice at the net price, with no discount or Rebate to be received separately or at a later point in time.

### **14.3 Audit Rights.**

14.3.1 Right to Audit Vendor. KHC and each Purchaser (with respect to each Purchaser, only as it relates to that Purchaser’s Agreement-related information) shall have the right, to review Vendor’s books, documents and records (whether in hard copy, electronic or other form) that pertain directly to the accounts of KHC or such Purchaser, Vendor’s compliance with the terms of this Agreement, and the amounts payable to Vendor under this Agreement.

14.3.2 Audit Report and Payments. Upon completion of the audit, Vendor will be notified in writing of the audit results (an “**Audit Report**”), which will set forth any incorrect billings or improprieties. If no response to the Audit Report is received from Vendor within thirty (30) days following its issuance, the Audit Report shall be deemed accepted by Vendor, and KHC will issue an invoice to Vendor for any amounts due as a result of the incorrect billings or improprieties, as well as the cost of the audit. Vendor shall pay KHC or the applicable Purchaser for proper application and allocation, the amount of any overcharges and unapplied credits (as to Purchasers) and underpayments (as to KHC) determined by the audit within thirty (30) days from receipt of an invoice from KHC; Vendor shall not use the overcharges or underpayments as a set-off.

14.4 Background Checks. Vendor agrees to perform background checks on any Vendor employees, representatives, contractors, or agents hired on or otherwise retained after the Effective Date who have access to, or may have access to, any Purchaser’s premises for the purpose of delivering, maintaining, servicing, or removing Equipment and/or Products, to ensure such employees, representatives, contractors, or agents: (i) are not currently excluded, debarred or otherwise ineligible to participate in any Federal Healthcare Program or the healthcare program of any state in which such employee, representative, contractor, or agent will be providing services for a Purchaser; (ii) have not been convicted of a criminal offense related to the provision of healthcare items or services and have not yet been excluded; (iii) have not been convicted of any felony; (iv) as discovered through any background check or based upon Vendor’s knowledge, have not been terminated from employment by any employer or contractor for theft, misappropriation of property, or any other potentially illegal or unethical acts; and (v) have the appropriate I-9 documentation. Vendor agrees not to use any contractor, employee, representative, or agent, or potential such party failing to meet the above criteria to provide Services to any Purchaser under this Agreement. Any breach of this Section 14.4 not cured (as determined in KHC’s or a particular Purchaser’s discretion, as applicable), within 5 days of notice, shall give KHC or any Purchaser the right to immediately terminate this Agreement. Termination under this Section 14.4 by an individual Purchaser shall only apply as to that Purchaser’s participation in this Agreement.

14.5 Purchaser’s Policies and Procedures. Vendor shall ensure its employees, representatives, agents, and contractors abide by any applicable Purchaser’s policies and regulations concerning behavior/conduct. Vendor shall control all employee, representative, agent, or contractor misconduct while on the Purchaser’s premises. Any employee, representative, agent, or contractor under the influence of alcohol or controlled substances, other than prescribed prescription medications, shall not be allowed on the premises and shall no longer be part of the Vendor’s performance under this Agreement. Further, offensive language, sexual or other types of harassment of anyone at any Purchaser’s location may, in such Purchaser’s sole discretion, result in immediate and permanent dismissal of the offending

person(s) from the Purchaser's site and such offending person(s) shall be permanently dismissed from the premises of all other Purchasers under this Agreement.

- 14.6 Tobacco-Free Requirements. Any Purchaser that has a tobacco-free policy shall provide a copy of such policy to Vendor and Vendor shall comply with such tobacco-free policy. Any employee or contractor in violation of this policy shall not be allowed on the premises and shall no longer be part of the Vendor's performance under this Agreement. With respect to the University of Kentucky, the University of Kentucky's policy prohibits the use of tobacco in or around its facilities including UK HealthCare. Additional information on the University's policy is available at: <http://www.uky.edu/TobaccoFree/>.
- 14.7 Non-discrimination and Equal Opportunity. Vendor acknowledges and agrees it is subject to, and shall comply with, all applicable federal, state and local laws and regulations governing equal employment opportunity and affirmative action including, but not limited to, the Kentucky Equal Employment Act of 1978 (KRS 45.550 et seq. of the Kentucky Revised Statutes) and the Federal requirements set forth in Titles VI and VII of Civil Rights Act of 1964, as amended; Sections 503 and 504 of the Rehabilitation Act of 1973, as amended; the Americans with Disabilities Act of 1990, as amended; Executive Order 11246 as amended; The Age Discrimination in Employment Act of 1967, as amended; the Age Discrimination Act of 1975, as amended; The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; and all regulations and administrative rules established pursuant to the foregoing laws.
- 14.8 Vendor and Subcontractor Responsibility with Federally Funded Contracts.
- 14.8.1 Section 503: Disabilities. The Vendor and any subcontractor approved by a Purchaser shall abide by the requirements of 41 C.F.R. § 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.
- 14.8.2 VEVRAA. The Vendor and any subcontractor approved by the Purchaser shall abide by the requirements of 41 C.F.R. § 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans and requires affirmative action by covered prime vendors and subcontractors to employ and advance in employment qualified protected veterans.
- 14.9 Conflicts. If any conflict arises between the terms herein and the terms of any Exhibit hereto, Vendor quotes, or purchase orders, the priority for control, from first to last priority, shall be Exhibit B, Exhibit A, the terms herein, and then any other Exhibit. The terms of this Agreement shall take priority over any conflicting terms contained in any Vendor Product warranty, whether referenced herein, attached to this Agreement, included with any Product sold by Vendor, or included

as part of any facility agreement between Vendor and a Purchaser. The terms of this Agreement shall take priority over the terms of any facility agreement, commitment form, standardization incentive program acknowledgment, or other similar form signed by a Purchaser, unless such document expressly states otherwise and has been approved in writing by KHC. Notwithstanding any agreement to the contrary, in the event of any conflict between this Agreement or any Exhibit and a BAA between Vendor and a Purchaser, the terms of the BAA shall govern as between the Vendor and the applicable Purchaser.

Vendor affirms that, to the best of Vendor's knowledge, no conflicts of interest exist among Vendor, KHC, any of the Purchasers, or any of their respective employees as defined by all applicable Kentucky Revised Statutes, or any Purchaser's ethics and compliance policies and procedures. In the event of change in Vendor's interests, Vendor shall inform KHC and each Purchaser regarding any conflicts of interest that are likely to arise as a result of such change. Vendor hereby represents that it has not participated in any illegal or unethical conduct in connection with this Agreement. Any breach of this Section 14.9, not cured within 5 days of notice (as determined in KHC's or a particular Purchaser's discretion, as applicable), shall give KHC or any Purchaser the right to immediately terminate this Agreement. Termination under this Section 14.9 by an individual Purchaser shall only apply as to that Purchaser's participation in this Agreement.

#### **15.0 Modifications of Terms**

This Agreement, as executed and approved, shall not be modified except by written amendment signed by KHC and the Vendor expressly stating the extent to which they agree to modify the terms of this Agreement and setting forth an updated list of Purchasers that will continue to participate under the terms of this Agreement, as being amended. Any Purchaser that does not agree to such amended terms of this Agreement may, effective as of the effective date of the applicable amendment, terminate its participation hereunder and Vendor shall not be entitled to any penalty or fee from KHC or any Purchaser due to a Purchaser that is no longer included on the list of Purchasers participating under the terms of this Agreement following an amendment as contemplated by this Section.

#### **16.0 Notices**

Notices under this Agreement shall all be in writing, shall be effective upon receipt and shall be sent by any of the following methods (i) United States Postal Service certified or registered mail with return receipt showing receipt; (ii) courier delivery service with proof of delivery; or (iii) personal delivery. Vendor, KHC, or any Purchaser may change the name and address of any of its designated recipients of notices by giving notice as provided for herein. Notices to Vendor shall be sent to the person at the address listed in Exhibit B and notices to a Purchaser shall be sent to the person at the address listed in Exhibit C. Unless stated otherwise in this Agreement, notices to KHC shall be sent to 2264 Executive Drive, Lexington, Kentucky 40505, Attention Executive Director.

#### **17.0 Technology Products and Services Terms and Conditions**



- 17.1 Software Products and Services License Agreements. To the extent a Purchaser purchases any Technology Products and Services, the Purchaser and Vendor shall enter into a mutually agreed upon license, services or subscription agreement (each, a “**License Agreement**,” and collectively, “**License Agreements**”), as applicable.
- 17.2 Hosted/Cloud Services. To the extent a Purchaser and Vendor enter into a License Agreement for cloud services, SaaS or hosted services (“**Hosted Services**”), Vendor shall make available such Hosted Services to the Purchaser pursuant to a Hosted Service Level Agreement which, if applicable, will be provided to Vendor by KHC or in another form mutually agreed upon among KHC, the Purchaser, and Vendor.
- 17.3 Professional Services. To the extent a Purchaser purchases professional services (e.g., installation or implementation services) in connection with a License Agreement (“**Professional Services**”), the parties’ responsibilities, specific milestones, fees and deliverables shall be set forth in a Statement of Work provided by KHC to Vendor or in another form mutually agreed upon among KHC, the Purchaser, and Vendor.
- 17.4 Support Services. To the extent the Product and/or Services purchased by Purchaser pursuant to a License Agreement requires support and maintenance services (“**Support Services**”), Vendor will provide such Support Services in accordance with the Support Service Level Agreement which, if applicable, will be provided to Vendor by KHC or in another form mutually agreed upon among KHC, the Purchaser, and Vendor.
- 17.5 New Technology. Vendor shall immediately make available to each Purchaser during the Term of this Agreement, upon FDA approval, any new Technology Products and Services related to or similar to or replacing the Technology Products and Services, if any. New Technology Products and Services shall be provided to each Purchaser under the terms and conditions of this Agreement including, by way of example and not limitation, the consignment inventory, training, education, in-service and instrumentation provisions. Vendor shall provide written notice to each Purchaser when new Technology Products and Services become available and prior to placing such new technology into consignment inventory at any Purchaser location. New Technology Products and Services shall be priced in accordance with the product and pricing information listed in this Agreement.
- 17.6 [RESERVED – ADDITIONAL TERMS AND CONDITIONS TO BE INSERTED HERE IN RESPONSE TO SPECIFIC TYPE OF TECHNOLOGY PRODUCTS AND SERVICES PURCHASED AND TAKING INTO CONSIDERATION EACH PURCHASER’S TECHNOLOGY POLICIES AND/OR GUIDELINES].

## 18.0 New Products and Services

Vendor shall immediately make available to each Purchaser during the Term of this Agreement, upon FDA approval, any New Products and Services related to, similar to, or replacing the Products and Services, if any. New Products and Services shall be provided to each Purchaser under the terms and conditions of this Agreement including, by way of example and not limitation, the consignment inventory, training, education, in-service and instrumentation provisions. Vendor shall provide written notice to each Purchaser when such New Products and Services becomes available and prior to placing such New Products and Services into consignment inventory at any Purchaser location. New Products and Services shall be priced in accordance with the product and pricing information listed in this Agreement. Vendor shall not provide New Products and Services to any Purchaser until such New Products and Services are added to this Agreement by written amendment signed by both Vendor and KHC. New Products and Services provided to any Purchasers prior to being added to this Agreement by said written amendment will be at no charge to Purchasers or KHC.

While each Purchaser shall obtain access to the New Products and Services, Vendor shall adhere to Purchaser's local value analysis and supply approval processes. Furthermore, Purchaser(s), at their discretion, either through their supply approval processes, through market share commitments within the context of KHC agreements, or for other reasons, may limit access to some or all New Products and Services. Vendor is advised that Purchaser(s) reserves the right at all times during the Term of the Agreement to limit and/or disallow use of specific Products and Services from Vendor, keeping in alignment with Purchaser's local value analysis and supply approval processes (which may be updated from time to time).

## **19.0 Group Purchasing Organization Reporting**

In the event Vendor has a Group Purchasing Organization ("GPO") contract with any or all of the Purchaser's GPOs, Vendor will report spend and pay associated GPO administrative fees to the respective GPO on behalf of the respective Purchaser(s).

## **20.0 Miscellaneous**

20.1 Open Records. If a Purchaser is a public agency, as defined in KRS 61.870, this Agreement and all related information and documentation may be subject to public disclosure under the Kentucky Open Records Act, KRS 61.870 et seq. Vendor is hereby notified that any such Purchaser strictly adheres to the statutes and the unchallenged interpretations thereof rendered by the courts and the Kentucky Attorney General. Vendor shall be deemed to have knowledge of this law and the means of protecting Vendor's legitimate interests.

20.2 Nonexclusive Agreement. This Agreement is not exclusive. Accordingly, KHC and each Purchaser shall have the right to enter into one or more agreements relating to the same or similar matters as covered by this Agreement, and execution by KHC or a Purchaser of such agreements shall not constitute a breach of this Agreement.

- 20.3 Entire Agreement. Except as otherwise stated herein, this Agreement is the complete and exclusive statement of the mutual understanding of KHC, the Purchasers, and Vendor and supersedes all prior and contemporaneous proposals, amend statements, sales materials or presentations and agreements, oral and written.
- 20.4 Subcontracting Rights. Without KHC's prior written consent, Vendor will not subcontract any portion of its rights or obligations hereunder. In the event KHC provides consent to subcontract any of Vendor's rights or obligations, Vendor may subcontract all or a portion of its obligations under this Agreement, provided the third-party subcontractor agrees in writing to the terms, conditions and provisions of this Agreement. In such event, Vendor will remain jointly and severally liable for any and all of its obligations pursuant to this Agreement and any performance of the Services performed hereunder or any provision of the Products delivered hereunder.
- 20.5 Force Majeure. Each party shall be excused from performance under this Agreement and shall have no liability to the other party to the extent it is prevented from performing any of its obligations, in whole or in part, as a result of delays caused by an act of God, war, civil disturbance, court order, or other cause beyond its reasonable control, including failures or fluctuations in electrical power, heat, light, or telecommunications, and such nonperformance shall not be a default under this Agreement. Purchaser and Vendor shall make reasonable efforts to avoid the adverse impacts of a force majeure and to resolve the event or occurrence once it has occurred in order to resume performance. In the event of such delay, the date of delivery or performance of Products and/or Services shall be extended for a period not to exceed the time lost by reason of the delay. Purchaser has the right to terminate this Agreement if such delay materially interferes with its business. Except for Purchaser's right to terminate, such time extension shall be the sole and exclusive remedy of Purchaser and Vendor. Purchaser shall have no obligation to make any payments to Vendor during or as a result of the period of delay. Neither party shall be entitled to the benefit of the provisions of force majeure to the extent performance is affected by the claiming party's failure to remedy the condition and to resume the performance of such covenants and obligations as soon as reasonably practical. Notwithstanding anything to the contrary herein, the parties agree that the settlement of strikes, lockouts or other industrial disturbances shall be entirely within the sole discretion of the party experiencing such disturbance. The party whose performance is prevented by force majeure must provide notice to the other party. Initial notice may be given orally, however, written notification with reasonably full particulars of the event or occurrence is required as soon as reasonably possible.
- 20.6 Publicity. No advertisement, solicitation, or public announcement of the existence of this Agreement or the relationship created hereby may be made by Vendor, KHC, or any Purchaser, unless such party is required by law to do so, or the parties mutually agree to do so in writing.

- 20.7 Assignment. Except as permitted by the terms of this Section 20.7, Vendor shall not assign, directly or indirectly, this Agreement or any of its rights or obligations under this Agreement, either voluntarily or involuntarily (whether by merger, acquisition, consolidation, dissolution, operation of law, change of control, or otherwise), without the prior written consent of KHC and the applicable Purchaser(s) hereunder, such consent not to be unreasonably withheld. In the event that Vendor wishes to assign this Agreement, Vendor agrees to provide KHC and the applicable Purchaser(s) hereunder at least one hundred twenty (120) days' advance written notice (the "**Notice Period**") of its desire to assign this Agreement and such notice shall include the name of the proposed assignee and its corporate affiliates, if any. In the event that KHC and/or any Purchaser(s) do not consent to such assignment (each a "**Non-Consenting Party**"), such Non-Consenting Party(ies) may terminate this Agreement on or before expiration of the Notice Period with no further responsibility hereunder; provided, however that such Non-Consenting Party(ies) shall pay Vendor, per the terms of this Agreement, for any Services provided through the effective date of any such termination. Any purported assignment in violation of this Section 20.7 will be void.
- 20.8 Independent Contractor. The sole relationship of Purchaser to Vendor with respect to this Agreement shall be that of independent contractor. Nothing contained in this Agreement is to be construed to constitute Vendor and Purchaser as partners or joint venturers of each other, or to constitute the employees, agents, or representatives of either party as the employees, agents or representatives of the other party, it being intended that the relationship between Vendor and Purchaser shall at all times be that of independent contractors. Neither party hereto shall have any express or implied right or authority to assume or create any obligations on behalf of, or in the name of, or to bind the other party to any contract agreement, or undertaking of any third party.
- 20.9 Severability. If any provision of this Agreement should for any reason be held invalid, unenforceable or contrary to public policy, the remainder of this Agreement shall remain in full force and effect notwithstanding.
- 20.10 Survival. Except as otherwise expressly provided in this Agreement, all covenants, agreements, representations and warranties, express and implied, shall survive the execution of this Agreement and shall remain in effect and binding upon the parties until they have fulfilled all of their obligations hereunder, and the statute of limitations shall not commence to run until the time such obligations have been fulfilled. Any terms of this Agreement that must survive the expiration or termination of this Agreement in order to have their intended effect shall survive the expiration or termination of this Agreement whether or not expressly stated.
- 20.11 Waiver. No waiver of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver is sought to be enforced. No failure or delay by either party in exercising any right, power or remedy under this Agreement shall operate as a waiver of any such right, power or remedy. The express waiver of any right or default hereunder shall be effective only in the

instance given and shall not operate as or imply a waiver of any similar right or default on any subsequent occasion.

20.12 Governing Law. This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Kentucky.

20.13 Venue/Dispute Resolution.

20.13.1. Any claim, action, suit, or proceeding between the University of Kentucky as the Purchaser and the Vendor that arises from or relates to this Agreement shall be brought in the Franklin Circuit Court in accordance with Kentucky Revised Statutes (KRS 45A.245). Pursuant to KRS 45A.230, any dispute arising under this Agreement where the University of Kentucky is the Purchaser shall be submitted to the University of Kentucky's Executive Vice President for Finance and Administration.

20.13.2. Any claim, action, suit, or proceeding between KHC and the Vendor that arises from or relates to this Agreement shall be brought in the court where KHC has its principle place of business. Any dispute under this Agreement involving KHC where the Purchaser is not the University of Kentucky shall be submitted to KHC's Chair.

20.13.3. Any claim, action, suit, or proceeding between a Purchaser and the Vendor that arises from or relates to this Agreement shall be brought in the court where such Purchaser has its principle place of business. Any dispute under this Agreement involving a Purchaser that is not the University of Kentucky shall be submitted to such Purchaser at the address, and to the attention of the contact person, set forth on Exhibit C.

20.14 Authority. Each party represents and warrants that it has full power and authority to enter into and perform this Agreement. Each party acknowledges that it has thoroughly considered the terms and conditions of this Agreement and had the opportunity to review it with legal counsel. Thus, the rule of construction that ambiguities are to be construed against the drafting party shall not be employed in the interpretation of this Agreement to favor one party over the other.

20.15 Counterparts. This Agreement may be executed in multiple counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument

*[Signature Page Follows]*

**IN WITNESS WHEREOF**, the Parties hereby indicate their acceptance of the terms of this Agreement by the signatures of their duly authorized representatives.

**KHC:**

Kentucky Health Collaborative, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Vendor:**

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Vendor Federal Tax ID No.: \_\_\_\_\_

## **Exhibits List**

- A. Products and/or Services with Prices
- B. Specific Purchasing Terms
- C. Participating Purchaser List
- D. Facility Service Agreement (as needed, if applicable for Services / Equipment / Products)
- E. Insurance Limits

**Products, Equipment, and/or Services with Prices**

Products:

Prices: (net to Distributor or net from Distributor)

Rebates:

Other Incentives:

Direct: (Yes or No)

Distributor(s):

Inventory Level(s):

Equipment:

Items of Equipment:

Prices: (net to Distributor or net from Distributor)

Other Incentives:

Rebates:

Direct: (Yes or No)

Distributor(s):

Services:

Prices: (net to Distributor or net from Distributor)

Other Incentives:

Rebates:

Direct: (Yes or No)

Distributor(s):



**Specific Purchasing Terms**

**Effective Date:** \_\_\_\_\_

**Expiration Date:** \_\_\_\_\_

In addition, KHC may extend this Agreement for one or two additional one-year periods upon 90 days written notice to Vendor prior to the expiration of the then current Term.

**Product Warranty Duration: BAA Execution Required:** (Yes or No)

**Possible Ordering Processes:**

- Internet
- EDI
- Purchase Order
- Facsimile
- Not applicable - Product only available from Distributors

**Possible Ordering Points:**

- Vendor Direct only
- Distributor only
- Either Vendor Direct or Distributor

**Available Distributors:**

**F.O.B. Designation:**

Shipments as a result of orders filled by Vendor shall be:

F.O. B. Destination

**Delivery Time related to Products:**

\_\_\_\_\_ (XX) calendar days from receipt of order.

**Required Fill Rate:**

Ninety-eight percent (98%)

**Payment Terms; Prompt Payment Discount:**

Net due sixty (60) days from the latter of receipt of invoice or receipt of Product. Purchasers will receive an additional two percent (2%) off the pricing if full payment is made to Vendor within ten (10) days following the latter of the receipt of Product or receipt of invoice.

**Freight / Shipping Charges:**

Freight/shipping charges are not included in the Product price and shall be “prepaid” by Vendor and added to the invoice as a separate line item that is identified as either a “freight” or “shipping” charge.

Freight/shipping charges are included in the Product price

Freight collect via carrier designated by Purchaser or KHC

If Purchaser chooses to use a third-party freight management service for the delivery of Products, and if the freight/shipping charges are not included in the price of the Product, then the delivery terms for all such Products shall be FOB Destination, Bill Third Party. Vendor shall be responsible for complying with the freight management program requested by Purchaser.

N/A

**Performance Requirements:**

Vendor agrees that all Products identified in Exhibit A have been included based upon requirements and Product specifications agreed upon by the parties to this Agreement as of the Effective Date. Vendor will not change either the manufacturer or source of any Product components, or the Product specifications that would materially affect the specifications or

functionality of the Product as of the Effective Date. If Vendor fails to obtain such consent upon any such change, Vendor agrees to the following:

- 1) Contracted pricing for the identified Product(s) will not be increased under any circumstances; and
- 2) Each Purchaser shall have the right to procure the identified Product(s) from another source without any penalty and will continue to be in compliance under this Agreement.

**Training, Repair, Safety:**

Operator Training to be provided to each Purchaser by Vendor

Repair and replacement parts lists, ordering instructions, and alternative sources of parts to be supplied to each Purchaser by Vendor: \_\_\_\_\_

Material Safety Data Sheets for all material/chemical Product purchases in compliance with OSHA standards regulation to be provided to each Purchaser by Vendor or made available to each Purchaser by Vendor through Purchaser’s web-based MSDS service provider.

**Vendor Contacts for Notices:**

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**Additional Terms and Conditions** (excerpted from Vendor’s response to the Request for Proposal. Additional information pertinent to the requirements of this Agreement is provided in the Excel Workbook titled, \_\_\_\_\_, and are made a part of this Agreement and incorporated herein by this reference.)

**List of Eligible Purchasers****(Inclusive of all locations and affiliates independent of whether they are leased, owned, or managed)**

<u>Name</u>	<u>Address</u>	<u>Contact Person</u>
<u>Appalachian Regional Healthcare, Inc.</u>	<u>2260 Executive Drive Lexington, KY 40505</u>	[REDACTED]
<u>Baptist Healthcare System, Inc.</u>	<u>2701 Eastpoint Parkway Louisville, KY 40223</u>	[REDACTED]
<u>Ephraim McDowell Health, Inc.</u>	<u>217 South Third Street Danville, KY 40422</u>	[REDACTED]
<u>Norton Healthcare, Inc.</u>	<u>4967 US Highway 42 Louisville, KY 40222</u>	[REDACTED]
<u>Norton Medical Group</u>	<u>4967 US Highway 42 Louisville, KY 40222</u>	[REDACTED]
<u>St. Claire HealthCare</u>	<u>222 Medical Circle Morehead, KY 40351</u>	[REDACTED]
<u>St. Elizabeth Medical Center, Inc.</u>	<u>1 Medical Village Dr. Edgewood, KY 41017</u>	[REDACTED]
<u>University of Kentucky</u>	<u>900 South Limestone Charles T. Wethington Bldg., Ste. 317 Lexington, KY 40536</u>	[REDACTED]

LETTER OF PARTICIPATION

TO:

RE: Contract Number KHC-XXXX-XXXX

FOR:

The below Participating KHC Member chooses to use the services of \_\_\_\_\_, ("Vendor") covered under the Contract Number KHC-XXXX-XXXX ("Purchasing Agreement"). The below Participating KHC Member shall receive correct pricing and all other value-added services and benefits related to the Purchasing Agreement. Vendor is solely responsible for invoicing the Participating KHC Member for the services provided pursuant to the Purchasing Agreement.

Start date for Participating KHC Member related to the Purchasing Agreement: \_\_\_\_\_

This Letter of Participation is covered by the terms and conditions specified in the Purchasing Agreement, dated XXXXXX, 20XX. Additional terms, if any, related to the Participating KHC Member's participation under Purchasing Agreement are included in Attachment A - Facility Service Agreement.

Contact for notices:

Vendor:
\_\_\_\_\_  
Attn: \_\_\_\_\_  
Tele: \_\_\_\_\_

Participating KHC Member:
\_\_\_\_\_  
Attn: \_\_\_\_\_  
Tele: \_\_\_\_\_

Acknowledged and Agreed:

Vendor:
\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Participating KHC Member:
\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**Attachment A - Facility Service Agreement**

This Facility Service Agreement is governed by the terms and conditions set forth in the Purchasing Agreement (Contract Number KHC **XXXX-XXXX**) dated \_\_\_\_\_, 20\_\_\_\_, by and between Vendor and KHC.

Purchaser Name: \_\_\_\_\_ Attention: \_\_\_\_\_

Address: \_\_\_\_\_ Date: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ Phone: \_\_\_\_\_

Vendor Name: \_\_\_\_\_ Attention: \_\_\_\_\_

Address: \_\_\_\_\_ Date: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ Phone: \_\_\_\_\_

Items/Service Provided by Vendor:

Locations included:

Frequency:

Quantity (if applicable):

Ordering Process:

Ordering Point:

**Insurance Limits**

**Commercial General Liability** - minimum amount of one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) in the annual aggregate.

**Automobile Liability** - one million dollars (\$1,000,000) per accident

**Workers' Compensation** - statutory limits as applicable

**Employer's Liability** - five hundred thousand dollars (\$500,000).

**Cyber Liability Insurance**, including first-party and third-party coverage

- (i) if there is involvement of, or exposure to, Protected Health Information - minimum ten million US dollars (\$10,000,000.00) per occurrence and ten million US dollars (\$10,000,000.00) in the aggregate for all claims each policy year, or
- (ii) if there is no involvement of, or exposure to, Protected Health Information - minimum five million US dollars (\$5,000,000.00) per occurrence and five million US dollars (\$5,000,000.00) in the aggregate for all claims each policy year

**Other Liability Policies as required**