

**AGREEMENT BETWEEN THE COUNTY OF SAN MATEO AND DIAMETER HEALTH, INC.**

This Agreement is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, by and between the County of San Mateo, a political subdivision of the state of California, hereinafter called "County" and Diameter Health, Inc., hereinafter called "Contractor" or "Diameter Health."

\* \* \*

Whereas, pursuant to Section 31000 of the California Government Code, County may contract with independent contractors for the furnishing of such products and services to or for County or any Department thereof; and

Whereas, it is necessary and desirable that Contractor be retained for the purpose of the County licensing Contractor's standard software products in order to enhance healthcare data quality in San Mateo County Connected Care HIE and report on the quality of care metrics within the HIE.

**Now, therefore, it is agreed by the parties to this Agreement as follows:**

**1. Exhibits and Attachments**

The following exhibits and attachments are attached to this Agreement and incorporated into this Agreement by this reference:

Exhibit A—Services

Exhibit B—Payments and Rates

Exhibit C – Service Level Agreement

Attachment H—HIPAA Business Associate Requirements

**2. Services to be performed by Contractor**

In consideration of the payments set forth in this Agreement and in Exhibit B, Contractor shall perform services for County in accordance with the terms, conditions, and specifications set forth in this Agreement and in Exhibits A and C, and Attachment H as a Business Associate.

**3. Payments**

In consideration of the services provided by Contractor in accordance with all terms, conditions, and specifications set forth in this Agreement and in Exhibits A and C, and Attachment H, County shall make payment to Contractor based on the rates and in the manner specified in Exhibit B. In no event shall County's total fiscal obligation under this Agreement exceed Five Hundred and Ninety One Thousand Dollars \$591,000.00. In the event that the County makes any advance payments, Contractor agrees to refund any amounts in excess of the amount owed by the County at the time of contract termination or expiration. Contractor is not entitled to payment for work not performed as required by this agreement.

**4. Term**

Subject to compliance with all terms and conditions, the term of this Agreement shall be from August 1, 2019, through July 31, 2022.

## **5. Termination**

This Agreement may be terminated by Contractor or by the Chief of the Health Department or his/her designee at any time without a requirement of good cause upon thirty (30) days' advance written notice to the other party. Subject to availability of funding, Contractor shall be entitled to receive payment for work/services provided prior to termination of the Agreement. Such payment shall be that prorated portion of the full payment determined by comparing the work/services actually completed to the work/services required by the Agreement.

County may terminate this Agreement or a portion of the services referenced in the Attachments and Exhibits based upon the unavailability of Federal, State, or County funds by providing written notice to Contractor as soon as is reasonably possible after County learns of said unavailability of outside funding and in the event County does not believe in good faith that other funding sources are available or reasonably attainable within one-hundred eighty (180) days. Either party may terminate this Agreement for material breach. In order to terminate for material breach, non-breaching party must first give breaching party written notice of the alleged breach. Breaching party shall have five business days after receipt of such notice to respond and a total of thirty calendar days after receipt of such notice to cure the alleged breach. If breaching party fails to cure the breach within this period, non-breaching party may immediately terminate this Agreement without further action. The option available in this paragraph is separate from the ability to terminate without cause with appropriate notice described above. In the event that County provides notice of an alleged material breach pursuant to this section, County may, in extreme circumstances where the breach poses an imminent threat to County's business, immediately suspend performance of services and payment under this Agreement pending the resolution of the process described in this paragraph. County has sole discretion to determine what constitutes an extreme circumstance for purposes of this paragraph, and County shall use reasonable judgment in making that determination.

## **6. Confidentiality**

- a. Each party acknowledges that Confidential Information may be disclosed to the other Party during the course of this Agreement. "Confidential Information" means all nonpublic information concerning a party's business including, but not limited to: trade secrets; financial information, including technical information, including research, development, procedures, algorithms, data, designs, and know-how; and business information, including operations, planning, marketing interests, and products. Each party shall not (i) use the other party's Confidential Information for any reason other than to carry out its rights and obligations hereunder and (ii) disclose the other party's Confidential Information to any third party, other than to its employees or contractors who must have access to such Confidential Information for such party to exercise its rights and perform its obligations hereunder and who each agree to be bound by agreements with a duty of confidentiality no less protective of confidential information than provided herein.
- b. The parties' obligations set forth in this section shall not apply with respect to any portion of the Confidential Information that: (i) was in the public domain at the time it was communicated to the receiving party; (ii) enters the public domain through no fault of the receiving party; (iii) is rightfully received by the receiving party from a third party without a duty of confidentiality; (iv) is independently developed by the receiving party without use of the Confidential Information; (v) is disclosed under operation of law, except that the receiving party will disclose only such information as is legally required and will use reasonable efforts to obtain confidential treatment for any Confidential Information that is so disclosed and will

provide the other party prompt notice of such possible disclosure prior to disclosure in order to allow an opportunity to contest such disclosure; (vi) is disclosed with the other party's prior written approval; (v) disclosed pursuant to the Public Records Act or other law; or (vi) disclosed pursuant to court order, subpoena, or other legal process.

- c. Notwithstanding anything to the contrary, Diameter Health shall have the right to collect and analyze data and other information from County relating to the provision, use and performance of the Software (i) to use such information and data to improve and enhance the Software and for other development, diagnostic and corrective purposes in connection Diameter Health's products and services, and (ii) to disclose such data solely in aggregate or other anonymized form in connection with its business. For clarification, this paragraph does not give Diameter Health to right to use or disclose personally identifiable information or personal health information beyond the scope of this Agreement.
- d. The parties may also agree to issue a mutually agreed upon joint press release regarding this Agreement at a mutually agreeable time. Except for the foregoing, neither party may engage in any other publicity activities regarding this Agreement without the other party's prior written approval.

## **7. Relationship of Parties**

Contractor agrees and understands that the work/services performed under this Agreement are performed as an independent contractor and not as an employee of County and that neither Contractor nor its employees acquire any of the rights, privileges, powers, or advantages of County employees.

## **8. Hold Harmless and Indemnification**

### **a. General Hold Harmless and Indemnification**

Contractor shall indemnify and save harmless County and its officers, agents, employees, and servants from all claims, suits, or actions of every name, kind, and description brought by a third party, and all resulting damages, sanctions, penalties and costs awarded by a court or included as part of a final settlement, resulting from this Agreement, the performance of any work or services required of Contractor under this Agreement, or payments made pursuant to this Agreement brought for, or on account of, any of the following:

- (A) injuries to or death of any person, including Contractor or its employees/officers/agents;
- (B) damage to any tangible or real property of any kind whatsoever and to whomsoever belonging; or
- (C) Contractor's failure to comply, if applicable, with the requirements set forth in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and all Federal regulations promulgated thereunder, as amended.

However, Contractor's duty to indemnify and save harmless under this Section shall not apply to injuries or damage to the extent for which County has been found in a court of competent jurisdiction to be liable by reason of its own negligence or willful misconduct.

Contractor's duty to defend under this Section applies only provided that: (a) County notifies Contractor promptly in writing of any notice of any such third-party claim; (b) County cooperates with Contractor, at

Contractor's expense, in all reasonable respects in connection with the investigation and defense of any such third-party claim; and (c) Contractor retains control of the defense of any action on any such claim and all negotiations for its settlement or compromise (provided Contractor shall not have the right to settle any criminal action, suit, or proceeding without County's prior written consent, not to be unreasonably withheld, and provided further that any settlement permitted under this Section shall not impose any financial obligation on County or contain any stipulation, admission, or acknowledgement of wrongdoing on the part of County without County's prior written consent, not to be unreasonably withheld.

The duty of Contractor to indemnify and save harmless as set forth by this Section shall include the duty to defend as set forth in Section 2778 of the California Civil Code.

**b. Intellectual Property Indemnification**

Contractor hereby certifies that, to its knowledge, it owns, controls, and/or licenses, and Contractor retains all right, title, and/or interest in and to, any intellectual property it uses in relation to this Agreement, including the design, look, feel, features, source code, content, and/or other technology relating to any part of the products and services it provides under this Agreement and including all related patents, inventions, trademarks, and copyrights, all applications therefor, and all trade names, service marks, know how, and trade secrets (collectively referred to as "IP Rights") except as otherwise noted by this Agreement.

Contractor warrants that, to its knowledge, the products and services it provides under this Agreement do not infringe, violate, trespass, or constitute the unauthorized use or misappropriation of any IP Rights of any third party. Contractor shall defend, indemnify, and hold harmless County from and against all liabilities, costs, damages, losses, and expenses (including reasonable attorney fees) awarded by a court or included as part of a final settlement arising out of or related to any claim by a third party that the products or services provided under this Agreement infringe or violate any third-party's IP Rights provided any such right is enforceable in the United States. Contractor's duty to defend, indemnify, and hold harmless under this Section applies only provided that: (a) County notifies Contractor promptly in writing of any notice of any such third-party claim; (b) County cooperates with Contractor, at Contractor's expense, in all reasonable respects in connection with the investigation and defense of any such third-party claim; (c) Contractor retains sole control of the defense of any action on any such claim and all negotiations for its settlement or compromise (provided Contractor shall not have the right to settle any criminal action, suit, or proceeding without County's prior written consent, not to be unreasonably withheld, and provided further that any settlement permitted under this Section shall not impose any financial obligation on County or contain any stipulation, admission, or acknowledgement of wrongdoing on the part of County without County's prior written consent, not to be unreasonably withheld); and (d) should products or services under this Agreement become, or in Contractor's opinion be likely to become, the subject of such a claim such that County's reasonable use of the services under this Agreement to be seriously endangered or disrupted, Contractor shall, at Contractor's option and expense, use commercially reasonable efforts either to: (i) procure for County the right to continue using the products or services without infringement or (ii) replace or modify the products or services so that they become non-infringing but remain functionally equivalent. Contractor's obligations under this Section 8 are its sole obligations in the case of a third-party intellectual property infringement claim.

Notwithstanding anything in this Section to the contrary, Contractor will have no obligation or liability to County under this Section to the extent any otherwise covered claim is based upon: (a) any aspects of the products or services under this Agreement which have been modified by or for County (other than modification performed by, or at the direction of, Contractor) in such a way as to cause the alleged infringement at issue; (b) the combination of such products or services with products or services not

provided by Contractor, to the extent the claim would not have arisen but for such combination; (c) County's continued use of infringing products or services after notice from Contractor to cease using them; and/or (d) any aspects of the products or services under this Agreement which have been used by County in a manner prohibited by this Agreement. .

The duty of Contractor to indemnify and save harmless as set forth by this Section shall include the duty to defend as set forth in Section 2778 of the California Civil Code.

#### **9. Assignability and Subcontracting**

Contractor shall not assign this Agreement or any portion of it to a third party or subcontract with a third party to provide services required by Contractor under this Agreement without the prior written consent of County. Any such assignment or subcontract without County's prior written consent shall give County the right to automatically and immediately terminate this Agreement without penalty or advance notice. Contractor may assign this Agreement without such consent in connection with a merger or consolidation or the sale of all or substantially all of its assets or stock. Contractor may also utilize subcontractors under this Agreement without County's consent in connection with development, support or hosting activities, provided that Contractor will remain responsible for the acts and omissions of all such subcontractors.

#### **10. Insurance**

##### **a. General Requirements**

Contractor shall not commence work or be required to commence work under this Agreement unless and until all insurance required under this Section has been obtained and such insurance has been approved by County's Risk Management, and Contractor shall use diligence to obtain such insurance and to obtain such approval. Contractor shall furnish County with certificates of insurance evidencing the required coverage, and there shall be a specific contractual liability endorsement extending Contractor's coverage to include the contractual liability assumed by Contractor pursuant to this Agreement. These certificates shall specify or be endorsed to provide that thirty (30) days' notice must be given, in writing, to County of any pending change in the limits of liability or of any cancellation or modification of the policy.

##### **b. Workers' Compensation and Employer's Liability Insurance**

Contractor shall have in effect during the entire term of this Agreement workers' compensation and employer's liability insurance providing full statutory coverage. In signing this Agreement, Contractor certifies, as required by Section 1861 of the California Labor Code, that (a) it is aware of the provisions of Section 3700 of the California Labor Code, which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of the Labor Code, and (b) it will comply with such provisions before commencing the performance of work under this Agreement.

##### **c. Liability Insurance**

Contractor shall take out and maintain during the term of this Agreement such bodily injury liability and property damage liability insurance as shall protect Contractor and all of its employees/officers/agents while performing work covered by this Agreement from any and all claims for damages for bodily injury, including accidental death, as well as any and all claims for property damage which may arise from Contractor's operations under this Agreement, whether such operations be by Contractor, any subcontractor, anyone directly or indirectly employed by either of them, or an agent of either of them.

Such insurance shall be combined single limit bodily injury and property damage for each occurrence and shall not be less than the amounts specified below:

- i. Comprehensive General Liability... \$1,000,000
- ii. Motor Vehicle Liability Insurance... \$1,000,000
- iii. Professional Liability..... \$1,000,000

County and its officers, agents, employees, and servants shall be named as additional insured on any such policies of insurance, which shall also contain a provision that (a) the insurance afforded thereby to County and its officers, agents, employees, and servants shall be primary insurance to the full limits of liability of the policy and (b) if the County or its officers, agents, employees, and servants have other insurance against the loss covered by such a policy, such other insurance shall be excess insurance only.

In the event of the breach of any provision of this Section, or in the event any notice is received which indicates any required insurance coverage will be diminished or canceled, County, at its option, may, notwithstanding any other provision of this Agreement to the contrary, immediately declare a material breach of this Agreement and suspend all further work and payment pursuant to this Agreement.

#### **11. Compliance With Laws**

All services to be performed by Contractor pursuant to this Agreement shall be performed in accordance with all applicable Federal, State, County, and municipal laws, ordinances, and regulations, including but not limited to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Federal Regulations promulgated thereunder, as amended (if applicable), the Business Associate requirements set forth in Attachment H (if attached), the Americans with Disabilities Act of 1990, as amended, and Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in programs and activities receiving any Federal or County financial assistance. Such services shall also be performed in accordance with all applicable ordinances and regulations, including but not limited to appropriate licensure, certification regulations, provisions pertaining to confidentiality of records, and applicable quality assurance regulations. In the event of a conflict between the terms of this Agreement and any applicable State, Federal, County, or municipal law or regulation, the requirements of the applicable law or regulation will take precedence over the requirements set forth in this Agreement.

Contractor will timely and accurately complete, sign, and submit all necessary documentation of compliance.

#### **12. Non-Discrimination and Other Requirements**

##### **a. General Non-discrimination**

No person shall be denied any services provided pursuant to this Agreement (except as limited by the scope of services) on the grounds of race, color, national origin, ancestry, age, disability (physical or mental), sex, sexual orientation, gender identity, marital or domestic partner status, religion, political beliefs or affiliation, familial or parental status (including pregnancy), medical condition (cancer-related), military service, or genetic information.

##### **b. Equal Employment Opportunity**

Contractor shall ensure equal employment opportunity based on objective standards of recruitment, classification, selection, promotion, compensation, performance evaluation, and management relations for all employees under this Agreement. Contractor's equal employment policies shall be made available to County upon request.

**c. Section 504 of the Rehabilitation Act of 1973**

Contractor shall comply with Section 504 of the Rehabilitation Act of 1973, as amended, which provides that no otherwise qualified individual with a disability shall, solely by reason of a disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in the performance of any services this Agreement. This Section applies only to contractors who are providing services to members of the public under this Agreement.

**d. Compliance with County's Equal Benefits Ordinance**

Contractor shall comply with all laws relating to the provision of benefits to its employees and their spouses or domestic partners, including, but not limited to, such laws prohibiting discrimination in the provision of such benefits on the basis that the spouse or domestic partner of the Contractor's employee is of the same or opposite sex as the employee.

**e. Discrimination Against Individuals with Disabilities**

The nondiscrimination requirements of 41 C.F.R. 60-741.5(a) are incorporated into this Agreement as if fully set forth here, and Contractor and any subcontractor 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.

**f. History of Discrimination**

Contractor certifies that no finding of discrimination has been issued in the past 365 days against Contractor by the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, or any other investigative entity. If any finding(s) of discrimination have been issued against Contractor within the past 365 days by the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, or other investigative entity, Contractor shall provide County with a written explanation of the outcome(s) or remedy for the discrimination prior to execution of this Agreement. Failure to comply with this Section shall constitute a material breach of this Agreement and subjects the Agreement to immediate termination at the sole option of the County.

**g. Reporting; Violation of Non-discrimination Provisions**

Contractor shall report to the County Manager the filing in any court or with any administrative agency of any complaint or allegation of discrimination on any of the bases prohibited by this Section of the Agreement or the Section titled "Compliance with Laws". Such duty shall include reporting of the filing of any and all charges with the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, or any other entity charged with the investigation or adjudication of allegations covered by this subsection within 30 days of such filing, provided that within such 30 days such entity has not notified Contractor that such charges are dismissed or otherwise unfounded. Such notification shall include a general description of the circumstances involved and a general description of the kind of discrimination alleged (for example, gender-, sexual orientation-, religion-, or race-based discrimination).

Violation of the non-discrimination provisions of this Agreement shall be considered a breach of this Agreement and subject the Contractor to penalties, to be determined by the County Manager, including but not limited to the following:

- i. termination of this Agreement;
- ii. disqualification of the Contractor from being considered for or being awarded a County contract for a period of up to 3 years;
- iii. liquidated damages of \$2,500 per violation; and/or
- iv. imposition of other appropriate contractual and civil remedies and sanctions, as determined by the County Manager.

To effectuate the provisions of this Section, the County Manager shall have the authority to offset all or any portion of the amount described in this Section against amounts due to Contractor under this Agreement or any other agreement between Contractor and County.

#### **h. Compliance with Living Wage Ordinance**

As required by Chapter 2.88 of the San Mateo County Ordinance Code, Contractor certifies all contractor(s) and subcontractor(s) obligated under this contract shall fully comply with the provisions of the County of San Mateo Living Wage Ordinance, including, but not limited to, paying all Covered Employees the current Living Wage and providing notice to all Covered Employees and Subcontractors as required under the Ordinance.

#### **13. Compliance with County Employee Jury Service Ordinance**

Contractor shall comply with Chapter 2.85 of the County's Ordinance Code, which states that Contractor shall have and adhere to a written policy providing that its employees, to the extent they are full-time employees and live in San Mateo County, shall receive from the Contractor, on an annual basis, no fewer than five days of regular pay for jury service in San Mateo County, with jury pay being provided only for each day of actual jury service. The policy may provide that such employees deposit any fees received for such jury service with Contractor or that the Contractor may deduct from an employee's regular pay the fees received for jury service in San Mateo County. By signing this Agreement, Contractor certifies that it has and adheres to a policy consistent with Chapter 2.85. For purposes of this Section, if Contractor has no employees in San Mateo County, it is sufficient for Contractor to provide the following written statement to County: "For purposes of San Mateo County's jury service ordinance, Contractor certifies that it has no full-time employees who live in San Mateo County. To the extent that it hires any such employees during the term of its Agreement with San Mateo County, Contractor shall adopt a policy that complies with Chapter 2.85 of the County's Ordinance Code." The requirements of Chapter 2.85 do not apply if this Agreement's total value listed in the Section titled "Payments", is less than one-hundred thousand dollars (\$100,000), but Contractor acknowledges that Chapter 2.85's requirements will apply if this Agreement is amended such that its total value meets or exceeds that threshold amount.

#### **14. Retention of Records; Right to Monitor and Audit**

(a) Contractor shall maintain all required records relating to services provided under this Agreement for three (3) years after County makes final payment and all other pending matters are closed, and Contractor shall be subject to the examination and/or audit by County, a Federal grantor agency, and the State of California.

(b) Contractor shall comply with all program and fiscal reporting requirements set forth by applicable Federal, State, and local agencies and as required by County.

(c) Contractor agrees upon reasonable notice to provide to County, to any Federal or State department having monitoring or review authority, to County's authorized representative, and/or to any of their respective audit agencies access to and the right to examine all records and documents necessary to determine compliance with relevant Federal, State, and local statutes, rules, and regulations, to determine compliance with this Agreement, and to evaluate the quality, appropriateness, and timeliness of services performed.

**15. Merger Clause; Amendments**

This Agreement, including the Exhibits and Attachments attached to this Agreement and incorporated by reference, constitutes the sole Agreement of the parties to this Agreement and correctly states the rights, duties, and obligations of each party as of this document's date. In the event that any term, condition, provision, requirement, or specification set forth in the body of this Agreement conflicts with or is inconsistent with any term, condition, provision, requirement, or specification in any Exhibit and/or Attachment to this Agreement, the provisions of the body of the Agreement shall prevail. Any prior agreement, promises, negotiations, or representations between the parties not expressly stated in this document are not binding. All subsequent modifications or amendments shall be in writing and signed by the parties.

**16. Controlling Law; Venue**

The validity of this Agreement and of its terms, the rights and duties of the parties under this Agreement, the interpretation of this Agreement, the performance of this Agreement, and any other dispute of any nature arising out of this Agreement shall be governed by the laws of the State of California without regard to its choice of law or conflict of law rules.

**17. Limited Warranty.**

- a. The Software is warranted to conform substantially to Diameter Health's then-current published user documentation for a period of ninety (90) days from delivery to County. Diameter Health's sole liability, and County's sole and exclusive remedy, for any breach of the foregoing warranty is that Diameter Health shall, at its option, repair or replace the Software so that it conforms to the warranty set forth above or, if repair or replacement is not commercially feasible, then County may terminate this Agreement and the licenses granted hereunder and, upon County's return to Diameter Health of the Software (including all media and documentation), Diameter Health shall refund to County the price paid therefor. Diameter shall respond within seven (7) calendar days with a plan to repair or replace the Software. Replacement of Software shall be delivered within five (5) calendar days of a plan. Repair of Software shall be made within thirty (30) calendar days of Diameter's plan. Diameter Health will have no obligation hereunder (or to provide any technical support) if the alleged defect is due to (a) any use of the Software other than in accordance with its published specifications; (b) installation, maintenance or modification of the Software by anyone other than Diameter Health; (c) software, hardware, data or other materials provided by a third party; or (d) any condition resulting, in whole or in part, from County's negligence or abuse, accident, natural disaster, or any other causes not within Diameter Health's control.
- b. EXCEPT FOR THE FOREGOING WARRANTY, DIAMETER HEALTH MAKES NO WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, AS TO THE SOFTWARE OR ANY SERVICES AND ALL OTHER WARRANTIES AS TO QUALITY, CONDITION,

ACCURACY OR COMPLETENESS OF RESPONSES, RESULTS, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT ARE EXPRESSLY DISCLAIMED. The Software is not warranted to be error free. County will have sole responsibility for the adequate protection and backup of County data and/or equipment used with the Software.

**18. Limitation of Liability.**

NEITHER PARTY IS LIABLE FOR INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES OF ANY KIND (INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS, USE, DATA OR GOODWILL) IN CONNECTION WITH THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. DIAMETER HEALTH'S MAXIMUM LIABILITY TO COUNTY, OR COUNTY'S LIABILITY TO DIAMETER HEALTH WHETHER BASED ON WARRANTY, CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE, WILL NOT EXCEED THE PRICE PAID FOR THE AFFECTED SOFTWARE DURING THE TWELVE (12) MONTHS PRECEDING THE CLAIM IN QUESTION ("12 MONTHS' REVENUE"). THE FOREGOING SHALL NOT APPLY TO VIOLATIONS BY ONE PARTY OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS OR HIPAA VIOLATIONS, OR TO CLAIMS BY THIRD PARTIES AS COVERED BY THE INDEMNIFICATION PROVISIONS OF THIS AGREEMENT.

**19. Disentanglement**

Contractor shall reasonably cooperate with County and County's other contractors to ensure a smooth transition at the time of termination of this Agreement, regardless of the nature or timing of the termination. Contractor shall cooperate with County's efforts to effectuate such transition with the goal of minimizing or eliminating any interruption of work required under the Agreement and any adverse impact on the provision of services or the County's activities; provided, however, that County shall pay Contractor on a time and materials basis, at the then-applicable rates, for all additional services performed in connection with such cooperation. Contractor shall deliver to County or its designee, at County's request, all documentation and data related to County, including, but not limited to, patient files, held by Contractor, and after return of same, Contractor shall destroy all copies thereof still in Contractor's possession, at no charge to County. Such data delivery shall be in an electronic format to facilitate archiving or loading into a replacement application. County and Contractor shall mutually agree the specific electronic format. Upon any termination of the Agreement, regardless of the nature or timing of the termination, County shall have the right, for up to twelve (12) months (the "Transition Period"), at County's option and request, to continue to receive from Contractor all maintenance and support services, at the then-applicable rates provided, however, that the annual support and maintenance fee shall be prorated and paid in advance on a monthly basis during such time, and the amount of such support and maintenance fee shall remain subject to the limitations set forth in the Agreement regarding any increase in such fee.

**20. High Risk Use.**

The Software is not fault-tolerant and is not developed or intended for evaluation or trial or use as on-line control or monitor in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or control systems, air traffic control, direct life support machines or weapons systems, in which the failure of the Software could lead to death, personal

injury, or severe physical or environmental damages ("High Risk Activities"). Diameter Health specifically excludes any express or implied warranty of fitness for High Risk Activities.

#### **21. Injunctive Relief.**

Because of the proprietary nature of the Software, County's and Diameter Health's remedies at law for a breach by the other party's obligations hereunder will be inadequate and Diameter Health or County shall, in the event of such breach, be entitled to, in addition to any other remedy available to it, seek equitable relief, including injunctive relief, without the posting of any bond and in addition to all other remedies provided under this Agreement or available at law.

#### **22. Future Commitments.**

County acknowledges that Diameter Health has made no commitments or promises orally or in writing with respect to delivery of any future software features or functions except as explicitly stated herein. In relation to any future software features or functions, all presentations, RFP responses and/or product roadmap documents, information or discussions, either prior to or following the date herein, are for informational purposes only, and Diameter Health has no obligation to provide any future releases or upgrades or any features, enhancements or functions, unless specifically agreed to in writing by both parties. County acknowledges that no purchasing decisions are based upon any future software features or functions.

#### **23. General.**

- a. This Agreement (and any purchase orders) contains the entire agreement of the parties with respect to the transactions contemplated by this Agreement and supersedes all prior and contemporaneous agreements, representations and understandings, whether written or oral. No modification or waiver of any provision hereof is effective unless in writing and signed by each party. Any terms and conditions in a County purchase order that are in addition to, or conflict or are inconsistent with these terms will be of no effect. No failure or delay by either party in exercising any right or remedy hereunder will operate as a waiver of same.
- b. The failure of either party to enforce any of the terms hereof will not be construed as a waiver of future enforcement of that or any other term. Neither party is responsible for any delays or failure in performance due to any cause beyond the party's reasonable control. Section headings used in this Agreement are intended for convenience only and shall not affect the interpretation or construction of this Agreement
- c. The parties will comply with all applicable laws or regulations.

#### **24. Notices**

Any notice, request, demand, or other communication required or permitted under this Agreement shall be deemed to be properly given when both: (1) transmitted via facsimile to the telephone number listed below or transmitted via email to the email address listed below; and (2) sent to the physical address listed below by either being deposited in the United States mail, postage prepaid, or deposited for overnight delivery, charges prepaid, with an established overnight courier that provides a tracking number showing confirmation of receipt.

In the case of County, to:

Name/Title: Viral Mehta, Interim CIO  
Address: 225 37<sup>th</sup> Ave, San Mateo, CA 94403  
Telephone: 650-573-2022  
Facsimile: [insert]  
Email: vmehta@smcgov.org

In the case of Contractor, to:

Name/Title: Scott Rich, Vice President Finance[insert]  
Address: 10 Executive Drive, Farmington, CT 06032Telephone: 860-595-6445  
Facsimile: [insert]  
Email: srich@diameterhealth.com

## **25. Electronic Signature**

Both County and Contractor wish to permit this Agreement and future documents relating to this Agreement to be digitally signed in accordance with California law and County's Electronic Signature Administrative Memo. Any party to this Agreement may revoke such agreement to permit electronic signatures at any time in relation to all future documents by providing notice pursuant to this Agreement.

\* \* \*

In witness of and in agreement with this Agreement's terms, the parties, by their duly authorized representatives, affix their respective signatures:

For Contractor: DIAMETER HEALTH, INC.

<u>Scott R Rich</u>	<u>June 13, 2019</u>	<u>Scott R Rich, VP of Finance</u>
Contractor Signature	Date	Contractor Name (please print)

---

COUNTY OF SAN MATEO

By:

President, Board of Supervisors, San Mateo County

Date:

ATTEST:

By:

Clerk of Said Board

## **Exhibit A**

In consideration of the payments set forth in Exhibit B, Contractor shall provide the following software and professional services:

### **A. Software Description:**

The software is described at the bottom of this Exhibit A.

### **B. Professional Services Description:**

#### **1. Project Summary**

Diameter Health will deploy the licensed products within its cloud hosted environment on behalf of the County.

Project specific timelines and milestones will be mutually agreed upon by Diameter Health and County upon project kick-off.

#### **2. Diameter Health Licensed Software Deployment Deliverables**

##### **Fusion Deployment**

Diameter Health will install the latest version of its Fusion software and perform the following:

- Install and configure the Mongo database and the Fusion API
- Provide the baseline connections to accept patient clinical documents (“CCDs”) in an XML format and HL7 results (“ORU”) messages in an HL7v2 format
- Create an administrator account, to be shared with County; configure the County logo
- Configure the EMPI mapping rules
- Provide support to perform a historical load of the County provided patient data; this process includes up to 5 million CCDs in XML format and up to 10 million HL7v2 ORU messages. **Please note that the HL7 data mapping service will have to be purchased in order to load historical HL7 messages**
- Perform functional testing of installed software and all configurations.

##### **Analyze Deployment**

Diameter Health will install the latest version of its Analyze software and perform the following:

- Install the baseline set of rules for establishing the Analyze Completeness and Syntax scores
- Confirm the display of document scores on the Analyze UI
- Perform functional testing of DH API workflow

#### **3. Diameter Health Licensed Software Training Deliverables**

Training is performed live using remote meeting software. For each product, training will be split into two sessions. One session will cover application administration tasks such as application configuration, user setup, and transaction auditing. The second session will cover the end user functions and interface. County will be given access to Diameter Health product documentation and training materials.

Standard training is performed once for each product licensed. County may have up to twelve participants in each session. Training sessions may be scheduled on different days to suit the schedules of the Diameter Health trainers and County participants.

Diameter Health delivers its training following the “train-the-trainer” approach and authorizes County to reproduce and use any materials provided for subsequent training of authorized users or administrators of the Diameter Health that the County has licensed. County is also authorized to record the remote training sessions conducted by Diameter Health and make the recordings available as above.

#### **4. County-Supplied Prerequisites**

County must provide a project manager, technical contacts, connection parameters, sample messages, and any other information required for Diameter Health to produce the deliverables identified at project kick-off or when required in the project schedule.

#### **5. Additional Terms and Conditions**

Diameter Health will provide consultative assistance to help County (or County’s technical partner) implement HL7v2 mapping to its JSON data model that is accessed through the Fusion Web Services API, which will require the purchase of the HL7 Data Mapping support service (in some cases a separate Statement-of-Work (SOW) document will be required). County is responsible to coordinate discussions with any 3<sup>rd</sup> party technical resources responsible for the required HL7v2 messaging mappings. It is outside of scope of Diameter Health’s services to perform the mapping of HLv2 data or to adjust any connections deployed on the County’s integration platform.

Clinical data received in a CCD format will be processed by Quality to provide eCQM analysis. HL7v2 transactions must minimally contain data for lab results, procedures, vital signs, encounters, medications, problems and immunizations to be successfully processed.

Diameter Health will perform system testing to validate the successful migration and implementation of the product configurations in the test environment. County will be responsible for acceptance testing of this software and for reporting issues to Diameter Health to be resolved. Diameter Health will migrate all licensed software and configurations to production upon confirmation from the County that the functionality has been tested.

#### **6. Project Schedule**

Project will begin with a kick-off meeting, the date to be mutually agreed upon, that introduces the teams, reviews the deployment & training plans, confirms project management methodologies, and receives County prerequisite information.

During the term of the Project Diameter Health will appoint a primary point of contact for project management. Issues not addressed by the primary contact may be escalated to the VP of Professional Services. Contact information will be provided during the kickoff meeting.

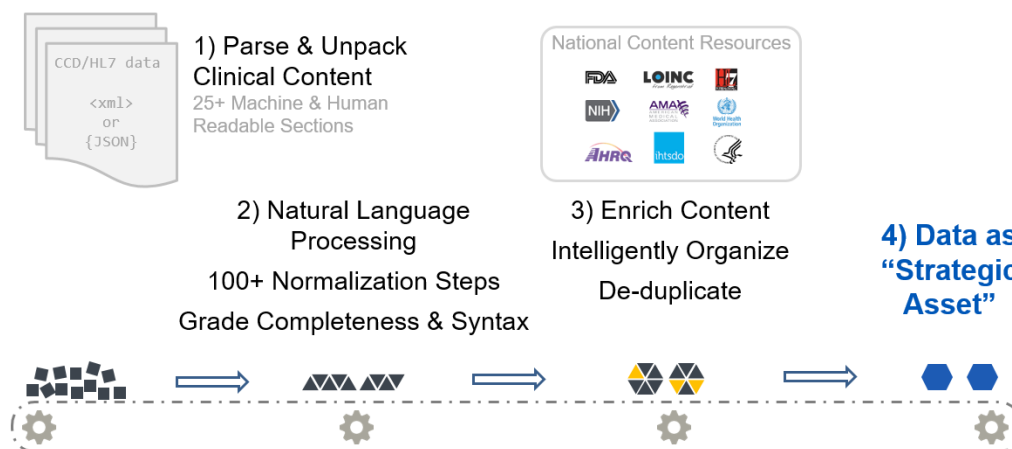
The role of the project manager is to coordinate the broader Diameter Health team and provide periodic reports to County by email on a weekly basis. The reports will include a summary of work completed, issues requiring resolution, identification of anticipated risks, and an assessment of progress as compared to the project schedule.

At Project completion, the project manager will conduct a final meeting with County to review the project and deliverables.

## 7. Diameter Health Product Descriptions

### Fusion

The core of the Diameter Health platform is Fusion, which enables intelligent data exchange ingestion, and cleansing through sophisticated normalization and cleansing processes. Data originating from any certified Electronic Health Record (EHR) is transformed into clinical information optimized for use at the point of care or to be consumed as rich substrate for analytics.



Fusion automates the time consuming and tedious work of managing clinical data quality, and creates a strategic data asset to achieve clinical and operational goals.

## How Fusion Works

### Data Extraction

- Efficiency at scale: industry-leading processing speed with 99.98+% success rate
- Plug and Play: clinical documents from any certified EHR processed without modification. No mapping required for 20+ formats including HITSP C32, C-CDA 1.1, and C-CDA 2.1

- Proprietary context-sensitive information model produces more robust, consumable data than achieved with common parsing techniques (higher yield of clinical data elements)
- Best of both worlds approach extracts machine readable and human readable content

## Intelligent Normalization

- Automated terminology management for national standard vocabularies: CVX, CPT, HL7, ICD-9, ICD-10, LOINC, RxNorm, SNOMED, UCUM
- Normalizes data for all major clinical domains (Allergies, Encounters, Medications, Immunizations, Payers, Problems, Procedures, Results & Vital Signs)
- Error-fixing: automated correction of common vocabulary and syntax mistakes
- Selective Natural Language Processing (NLP) for multiple medical concepts
- Multi-factor EHR identification with brand-specific extraction, parsing and classification
- Code and unit translation to a common information model

## Data Enrichment

- Automated ontology and category assignment
- Infers missing medical concepts including
  - Core ingredient decomposition for combination medications
  - Medication dose form, dose strength, frequency, route and preconditions
  - Laboratory interpretation and reference ranges
  - Dates of services & type (ambulatory, emergency, inpatient)
  - Problem duration and resolution
- Addition of meta-data for streamlined analytics such as
  - Drug classes for medications
  - Laboratory result classification
  - Problem and diagnosis groupings
  - Procedure groupings
  - Allergy type classification (substance vs. food vs. medication)

## De-duplication & Organization

- Regroups inbound data into logical clinical categories (e.g. vaccinations with procedure codes reclassified as immunizations)
- Multiple codes are rationalized into unified clinical concepts providing intelligent de-duplication of all major clinical domains (Allergies, Encounters, Medications, Immunizations, Payers, Problems, Procedures, Results & Vital Signs)
- Clinician-friendly clinical document generation with configurable templates

## Modern, Web-Based Platform

- HTTP/HTTPS web standard RESTful application programming interface (API)
- Large-scale noSQL database with SSL and compression support

## Analyze

*Analyze* identifies opportunities to improve the quality and quantity of clinical data transmitted in clinical documents. This enables:

- Better patient care through more meaningful, usable data
- Improved patient safety by reducing data errors that jeopardize care
- Robust analytics from more structured and appropriately codified data elements



DH Analyze

Export as PDF

Document File Name: **BenBradstoneCCDA.xml**, processed as C-CDA document from GE

Completeness Score: 81%

- Completeness Rules Checks: 57
- Key Missing Sections: 0
- Significant Data Missing: 24
- Optional Data Missing: 17
- Not Examined Sections: 1

Syntax Score: 82%

- Syntax Rules Checked: 85
- Syntax Rules Violated: 18 (Unique Rules)
- Critical Mistakes: 13
- Significant Mistakes: 13
- Minor Mistakes: 5



There were 1 total violations (1 unique) that affect patient safety. Sections: **Medications**

Expand all

Show first rule violation only

Demographics	✓ 98%	🚩 88%
Allergies	✓ 100%	✓ 100%
Encounters	🚩 44%	🚩 81%
Immunizations	🚩 0%	NA %
Medications	🚩 88%	🚩 76%
Payers	NA %	NA %
Plan of Care	🚩 83%	🚩 80%

## How Analyze Works

- *Analyze* generates easy-to-interpret quality ratings using hundreds of rules covering dimensions of document completeness and syntax. This provides a one-stop-shop for detailed feedback needed to improve the interoperability of clinical documents (including C32, C-CDA 1.1 and C-CDA 2.1):
  - Designed for real-world data exchange & high volume processing
    - Automated evaluation during implementation and ongoing surveillance
    - Fully HIPAA compliant and easy-to-deploy platform
    - API for automated incorporation into downstream workflow and reporting
    - Dashboards display aggregated performance with drill-down capability
  - Actionable feedback to improve Interoperability
    - Configurable rules to meet each client's unique needs
    - On-demand code pop-ups for efficient problem investigation
    - Tips, guidance and links to national resources (HL7, LOINC, ICD-9/ICD-10, RxNorm, UCUM, SNOMED)

## **Exhibit B**

In consideration of the services provided by Contractor described in Exhibit A and subject to the terms of the Agreement, County shall pay Contractor based on the following fee schedule and terms:

1. **Pricing, Subscription Term and Payment Terms.** Diameter Health shall license the Software pursuant to the terms of this Agreement. Software is licensed on a subscription basis for the term set forth in Section 4 Term of the Agreement.
  - a. Diameter Health will invoice County annually in advance at the prices set forth in this Exhibit B. County will pay invoices within 30 days of each invoice date. Diameter Health may suspend County's license to the Software and/or cease providing support until past-due payments are made. Late payments are subject to a charge of the lesser of 1.5% per month or the maximum allowed by law during such time as any payment is late as well as collection costs, including reasonable collection.
  - b. Diameter Health fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including, for example, value-added, sales, use or withholding taxes, assessable by any jurisdiction whatsoever (collectively, "Taxes"). Customers are responsible for paying all Taxes associated with Customer purchases hereunder. If Diameter Health has the legal obligation to pay or collect Taxes for which County are responsible, Diameter Health will invoice County and County will pay that amount unless County provides Diameter Health with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, Diameter Health is solely responsible for taxes assessable against us based on our income, property and employees.
  - c. County may license additional Software products via an addendum to this Agreement.
2. **License Grant.** Subject to County's compliance with the terms of this Agreement (including payment of all applicable fees), Diameter Health grants County a nonexclusive, nontransferable license to use the Software solely for County's internal business purposes (which includes utilizing the Software to provide services to its customers) during the applicable Subscription Term. County may not permit use of the Software, or any portion thereof, by another party without Diameter Health's prior written consent, except for independent contractors or affiliated entities which use the Software solely for the benefit of County, provided that County shall remain responsible for their use of the Software and compliance with this Agreement. Diameter Health (and its licensors) retains all right, title and interest, including all intellectual property rights, in the Software, all related technology, and all improvements, enhancements and modifications to the foregoing. County may reproduce one copy of the Software solely for back-up purposes. County may not copy, translate, modify or adapt the Software (or any portion thereof), incorporate it, in whole or any part, in any other product, create derivative works based on the Software (or any portion thereof), or license others to reproduce any copies of the Software. County may not decompile, disassemble or reverse engineer the Software, or any component thereof.

**Software Subscription.** . If the MPI License Limitation is exceeded (whether as a result of growth within County's enterprise or a merger, acquisition or other corporate transaction), County will immediately notify Diameter Health and purchase an upgraded license. The parties will prepare an

exhibit addendum to this Agreement in the event County wishes to increase their MPI limitation and/or license additional products from Diameter Health.

### 3. Licensing and Services Costs

The following pricing is based on an MPI limitation of 750,000. If the MPI count exceeds 750,000, Diameter Health will quote revised annual fees for all products licensed.

Item	Annual Cost	Years	Total Cost
Hosting – Small	\$30,000*	3	\$90,000
Analyze software	\$32,000	3	\$96,000
Fusion software	\$80,000	3	\$240,000
Implementation	\$20,000	1	\$20,000
HL7 Mapping	\$20,000	1	\$20,000
			\$466,000
Contingency			\$125,000
Not To Exceed			\$591,000

\*This will be monitored on a quarterly basis and will be adjusted based on County's data requirements and usage.

**4. Contingency.** Contingency can pay for additional software products, professional services, increases in MPI counts that bump up our support needs from Small to Medium. If the County elects to add Diameter Health's Quality and Subscribe Products at the current MPI limitation, the annual subscription license fee will be \$104,000 for both Products.

### 5. Annual Payments

Payment in full for Year 1 shall be due within 30 days after the later to occur of fifteen days after the signing of this contract or the date on which the County completes its initial data load; subsequent annual payments are due in 30 days from the anniversary of the date of the signing of this contract .

Year 1 payment \$182,000

Year 2 payment \$142,000

Year 3 payment \$142,000

## **Exhibit C**

### **Diameter Health Service Level Agreement – Maintenance and Support Services**

Maintenance & Support includes the following:

- (a) Telephone and online technical support during standard business hours (Monday – Friday, 9 am – 5 pm ET). Diameter Health will provide the name, title and telephone number of the individual within its technical support organization responsible for problem response escalation by County.
- (b) Maintenance releases, including all upgrades, updates and fixes, which Diameter Health makes generally available (at no additional charge) to its Maintenance & Support customers. New software features and functionality offered in major new releases, if priced separately, are not included in Software Maintenance & Support.
- (c) Software problem diagnosis and resolution.
- (d) Telephone, remote support and/or e-mail assistance to support the implementation of the Software for installation of significant maintenance releases of software versions, updates or upgrades
- (e) Prompt feedback and guidelines necessary for tracking reported Software maintenance and technical support issues.
- (f) A tracking number if resolution cannot be completed over the telephone. Diameter Health shall respond to each call (and escalate, if necessary) based on the priority level assigned to the problem/issue and in accordance with Maintenance & Support/Escalation Matrix, below.
- (g) Based upon the problem severity, as further defined in Maintenance & Support/Escalation Matrix, or earlier if practicable, Diameter Health will use commercially reasonable efforts to respond to County and initiate problem restoration or work around.

### **Service Level Agreement**

Diameter Health applications will be available 95% of the time in a given month during regularly scheduled business hours (Monday through Friday, 9am to 8pm ET), excluding scheduled maintenance. Application uptime includes the functioning of the Diameter Health software but does not include application downtime related to County hardware, software, network connectivity, or password resets. Application downtime is measured from 1) the time the application is inaccessible (or the beginning of the next business day, if the trouble ticket is opened after business hours) to 2) the time the application is once again accessible by the County (including regularly scheduled business hours only).

### Maintenance & Support/Escalation Matrix:

Priority	Description	Targeted First Response	Targeted Workaround	Targeted Status Report	Management Notification	Management Contacts
Priority 1	High, Critical, Fatal: details below	Within 4 business hours	Within 1 business day	By mutual agreement	Within 1 business day	Company Management
Priority 2	Production Severely Impacted: details below	Within 1 business days	Within 2 business days	Every working day	Within 2 business days	Company Management
Priority 3	Degraded Operations: details below	Within 5 business days	N/A	Once every 5 working days	Within 5 business days	Customer Support
Priority 4	Minimal Impact: details below	Mutual agreement subject to standard release schedule	N/A	N/A	N/A	Customer Support

**Priority Level 1** – Errors or other problems that cause the Software to be completely inoperative or create service-affecting problems that have a critical impact on County's operations; problems prevent useful work from being performed; no workaround available.

**Priority Level 2** – Errors or other problems disable major functions required to do productive work or Software is partially inoperative and is considered as severely restrictive by Diameter Health.

**Priority Level 3** – Reported errors or other problems that disable specific non-essential functions; error condition is not critical to continuing operation and/or Diameter Health has determined a work-around for the error condition.

**Priority Level 4** – Cosmetic problems with no immediate consequence, with Software functionality being usable.

### County Responsibilities:

County is responsible for:

- Designating a qualified single point of contact and a backup for support-related issues;
- Providing all information and documentation requested by Diameter Health for diagnosis and trouble-shooting purposes;
- Providing remote access as necessary; and
- Coordinating third-party resources as needed.

**EXHIBIT H - BUSINESS ASSOCIATE AGREEMENT BETWEEN  
THE COUNTY OF SAN MATEO AND  
DIAMETER HEALTH, INC.**

THIS AGREEMENT, entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the COUNTY OF SAN MATEO, hereinafter called "County," and Diameter Health, Inc., located at 10 Executive Drive, Farmington, CT 06032Address hereinafter called "Business Associate" , "Associate" or "Contractor";

W I T N E S S E I H:

WHEREAS, San Mateo Medical Center (SMMC), part of the County, is a 509-bed public hospital and clinic system fully accredited by The Joint Commission which operates outpatient clinics throughout San Mateo County, an acute-care hospital, and long-term care facilities in San Mateo and Burlingame; and

WHEREAS, SMMC, in providing patient care, occasionally needs to share Protected Health Information with certain vendors who assist in providing services that relate to patient care; and

WHEREAS, pursuant to State and Federal law, such information may only be shared when certain contractual protections are in place; and

WHEREAS, Associate will be working with or providing services to SMMC whereby it will be required to access the Protected Health Information of patients at SMMC; and

WHEREAS, it is necessary and desirable that Associate be permitted to fulfill these tasks so long as the Protected Health Information of SMMC's patients is protected as required by law.

**NOW, THEREFORE, IT IS HEREBY AGREED BY THE PARTIES HERETO AS FOLLOWS:**

## **Definitions**

Terms used, but not otherwise defined, in this Agreement shall have the same meaning as those terms are defined in 45 Code of Federal Regulations (CFR) section 160.103, 164.304, and 164.501. All regulatory references in this Agreement are to Title 45 of the CFR unless otherwise specified.

- a. **Agreement.** “Agreement” means this Business Associate Agreement.
- b. **Business Associate.** “Business Associate” shall generally have the same meaning as the term “business associate” at 45 CFR 160.103, and in reference to the parties to this Agreement shall mean Contractor.
- c. **Covered Entity.** “Covered Entity” shall generally have the same meaning as the term “covered entity” at 45 CFR 160.103, and in reference to the party to this agreement shall mean County.
- d. **HIPAA Rules.** “HIPAA Rules” shall mean the Privacy, Security, Breach Notification and Enforcement Rules at 45 CFR part 160 and part 164, as amended and supplemented by Subtitle D of the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009.
- e. **Designated Record Set.** “Designated Record Set” shall have the same meaning as the term “designated record set” in Section 164.501.
- f. **Electronic Protected Health Information.** “Electronic Protected Health Information” or “EPHI” means individually identifiable health information that is transmitted or maintained in electronic media; it is limited to the information created, received, maintained or transmitted by Contractor from or on behalf of Covered Entity.
- g. **Individual.** “Individual” shall have the same meaning as the term “individual” in Section 164.501 and shall include a person who qualifies as a personal representative in accordance with Section 164.502(g).
- h. **Privacy Rule.** “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A and E.
- i. **Protected Health Information.** “Protected Health Information” (PHI) shall have the same meaning as the term “protected health information” in Section 164.503 and is limited to the information created or received by Contractor from or on behalf of County.

- j. **Required By Law.** “Required by law” shall have the same meaning as the term “required by law” in Section 164.103.
- k. **Secretary.** “Secretary” shall mean the Secretary of the United States Department of Health and Human Services or his or her designee.
- l. **Breach.** “The acquisition, access, use, or disclosure of PHI in violation of the Privacy Rule that compromises the security or privacy of the PHI and subject to the exclusions set forth in Section 164.402. Unless an exception applies, an impermissible use or disclosure of PHI is *presumed* to be a breach, unless it can be demonstrated there is a low probability that the PHI has been compromised based upon, at minimum, a four part risk assessment:
  - 1. Nature and extent of PHI included, identifiers and likelihood of re-identification;
  - 2. Identity of the unauthorized person or to whom impermissible disclosure was made;
  - 3. Whether PHI was actually viewed or only the opportunity to do so existed;
  - 4. The extent to which the risk has been mitigated.
- m. **Security Rule.** “Security Rule” shall mean the Security Standards for the Protection of Electronic Protected Health Information at 45 CFR Part 160 and Part 164, Subparts A and C.
- n. **Unsecured PHI.** “Unsecured PHI” as set forth at 45 CFR 164.402, is protected health information that is not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary in relevant HHS guidance.
- o. **Security Incident.** “Security Incident” as set forth at 45 CFR 164.304, shall mean the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with systems operations in an information system, but does not include minor incidents that occur on a daily basis, such as scans, “pings”, or unsuccessful random attempts to penetrate computer networks or servers maintained by Contractor. “Security Incident” includes all incidents that constitute breaches of unsecured protected health information.

## Obligations and Activities of Contractor

- a. Contractor agrees to not use or further disclose Protected Health Information other than as permitted or required by the Agreement, the Scope of Engagement, or as required by law.

- b. Contractor agrees to use appropriate safeguards to comply with Subpart C of 45 CFR part 164 with respect to EPHI and PHI, and to prevent the use or disclosure of the Protected Health Information other than as provided for by this Agreement and the Scope of Engagement.
- c. Contractor agrees to make uses and disclosures requests for Protected Health Information consistent with minimum necessary policy and procedures. See 45 CFR 164.502(b), 45 CFR 164.514(d).
- d. Contractor may not use or disclose protected health information in a manner that would violate subpart E of 45 CFR part 164.504 if used or disclosed by County.
- e. Contractor agrees to mitigate, to the extent practicable, any harmful effect that is known to Contractor of a use or disclosure of Protected Health Information by Contractor in violation of the requirements of this Agreement and the Scope of Engagement.
- f. Contractor agrees to report to County any use or disclosure of the Protected Health Information not authorized by this Agreement and the Scope of Engagement.
- g. Contractor agrees to ensure that any agent, including a subcontractor, to whom it provides Protected Health Information received from, or created or received by Contractor on behalf of County, agrees to adhere to the same restrictions and conditions that apply through this Agreement to Contractor with respect to such information.
- h. If Contractor has Protected Health Information in a designated record set, Contractor agrees to provide access, at the request of County, and in the time and manner designated by County, to Protected Health Information in a Designated Record Set, to County or, as directed by County, to an Individual in order to meet the requirements under Section 164.524.
- i. If Contractor has Protected Health Information in a designated record set, Contractor agrees to make any amendment(s) to Protected Health Information in the Designated Record Set that the County directs or agrees to make pursuant to Section 164.526 at the request of County or an Individual, and in the time and manner designed by County.
- j. Contractor agrees to make internal practices, books, and records relating to the use and disclosure of Protected Health Information received from, or created or received by Contractor on behalf of County, available to the County at the request of the County or the Secretary, in a time and manner designated by the County or the Secretary, for purposes of the Secretary determining County's compliance with the Privacy Rule.

- k. Contractor agrees to document such disclosures of Protected Health Information and information related to such disclosures as would be required for County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with Section 164.528.
- l. Contractor agrees to provide to County or an Individual in the time and manner designated by County, information collected in accordance with Section (k) of this Agreement, in order to permit County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with Section 164.528.
- m. Contractor shall implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of EPHI that Contractor creates, receives, maintains, or transmits on behalf of County.
- n. Contractor shall conform to generally accepted system security principles and the requirements of the final HIPAA rule pertaining to the security of health information.
- o. Contractor shall ensure that any agent to whom it provides EPHI, including a subcontractor, agrees to implement reasonable and appropriate safeguards to protect such EPHI.
- p. Contractor shall report to County any Security Incident within three (3) business days of becoming aware of such incident. Contractor shall also facilitate breach notification(s) to the appropriate governing body (i.e. HHS, OCR, etc.) as required by law. As appropriate and after consulting with County, Contractor shall also notify affected individuals and the media of a qualifying breach.
- q. Contractor understands that it is directly liable under the HIPAA rules and subject to civil and, in some cases, criminal penalties for making uses and disclosures of Protected Health Information that are not authorized by this Agreement and the Scope of Engagement, the underlying contract as or required by law.

## Permitted Uses and Disclosures by Contractor

Except as otherwise limited in this Agreement, Contractor may use or disclose Protected Health Information to perform functions, activities, or services for, or on behalf of, County as specified in this Agreement and the Scope of Engagement, provided that such use or disclosure would not violate the Privacy Rule if done by County.

## Obligations of County

- a. County shall provide Contractor with the notice of privacy practices that County produces in accordance with Section 164.520, as well as any changes to such notice.
- b. County shall provide Contractor with any changes in, or revocation of, permission by Individual to use or disclose Protected Health Information, if such changes affect Contractor's permitted or required uses and disclosures.
- c. County shall notify Contractor of any restriction to the use or disclosure of Protected Health Information that County has agreed to in accordance with Section 164.522.