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TO: Legislative Finance Committee
FROM: Julie Johnson, Legal Services Office
RE: Overview of MMIS Contract with ACS

INTRODUCTION

I have been asked to review the Medicaid Management Information Systems (MMIS) Contract between the State of Montana and ACS State Healthcare, LLC, and to identify options available to the State regarding termination or suspension of the contract.

The following is simply an overview of the provisions regarding suspension, termination and some other key provisions regarding performance. This overview is not a comprehensive summary of the 63-page document.

MISCELLANEOUS CONTRACTUAL PROVISIONS

- I. Term of Agreement. The Contract runs from April 1, 2012 until February 28, 2019, unless otherwise terminated in accordance with the Contract. (p.3, Sec. 3A)
- II. Payments. The Department¹ shall pay invoices received by ACS within 30 days of receipt of an *acceptable* invoice. (p.6, Sec. 5D4)
- III. 10% Withholding Pending Completion. The Department withholds 10% from each payment made according to the Matrix on page 5-6 of the Contract, the sum of which is released after acceptance of the System by the Department and certification of the System by CMS. (p.9, Sec. 5I)
- IV. Funding. The Contract is dependent on available funding from the Department or federal funds. The Department has the sole discretion to terminate (per Section 33 of Contract) in whole or in part if available funding is reduced or delayed per § 18-4-313(4), MCA. (p.11, Sec. 5O)
- V. Contract Performance Security/Letter of Credit. ACS has provided an irrevocable letter of credit (sum unknown) to the State Procurement Bureau which is payable to the Department in event of breach or damage by ACS. (p.11, Sec. 6)
- VI. Withholding, Reduction or Offset in Payments. The Department may withhold or reduce payments made to ACS if ACS fails to deliver deliverables which satisfy the Department, subject

¹ All references to "the Department" are to the Department of Public Health and Human Services.

to a good faith effort to negotiate amongst senior management of the parties. (p.18, Sec. 12A, 12B: p.59, Sec. 39)

VII. Stop Work Order. The Department may order ACS to stop work on the project at any point. ACS must resume once stop work order is lifted. (p. 18, sec. 12D)

VIII. Liquidated Damages. Delay or failure of ACS to timely perform its obligations by the time set forth in Contract (Matrix on p.5) will constitute a loss to the Department. Damages may be up to \$350,000 monthly. (p.19, Sec. 12E)

IX. Contractor's Limitation of Liability. ACS's liability cannot exceed two times the total Contract value. (p. 27, Sec. 15C)

X. Contract Oversight. The CIO may require the issuance of a stop work order. (p.49, Sec. 29A)

XI. Right to Assurance. The CIO may request a written assurance of intent to perform by ASC. No response by ACS may constitute a basis for termination of the contract. (p.49, Sec. 29B)

PROVISIONS RELATED TO TERMINATION²

XII. Termination for Cause/Termination Remedies.

A. Failure to Pay ACS. ACS may terminate the Contract if the Department fails to make payments within 90 days of receipt of invoice. ACS shall not have the right to terminate the Contract for the Department's breach of the Contract except as provided in this section. (p.50, Sec. 33A)

B. Material Breach. The Department may terminate the contract for a material breach by ACS. One example of breach is where, after a 30 calendar day opportunity for correction has been provided to ACS, goods and services still do not conform to the requirements of the Contract. Another material breach is ACS's failure to perform any covenants or conditions of Contract. (p.50, Sec. 33A) ACS may be liable for the cost difference between this Contract and a future contract with another vender as well as administrative costs for securing a new contract. (p. 53, Sec. 33I).

² The MMIS Contract provides that prior to pursuing remedies available under the Contract or at law, the parties "shall attempt in good faith to promptly resolve any dispute, controversy or claim arising out of" the Contract "through negotiations between senior management of the parties and their designees." (p. 59, Sec. 39).

XIII. Termination in Whole or in Part. The Department may terminate the Contract in whole or in part. (p.51, Sec. 33B)

XIV. Termination for Rejection of Deliverable or Services. If ACS cannot correct deficiencies in a deliverable or services, the Department has the right to terminate the Contract either in whole or in part, immediately without penalty of liability to the Department. (p.51, Sec. 33C)

XV. Noncompliance with Department of Administration Requirements. The Department of Administration has the right to cancel, terminate or modify the Contract if it is not in compliance with the Department's plan for IT, the Department Strategic Plan for IT, or any department-wide IT policy or standard in effect. The Department will pay for deliverables accepted to the date of termination. (p.51, Sec. 33D)

XVI. Termination for Conflict of Interest. The Department can terminate if it determines ACS or one of its subcontractors has a conflict of interest. (p. 52, Sec. 33E)

XVII. Termination for Withdrawal of Authority. If the authority of the Department to perform any of its duties is withdrawn, reduced or limited, it can terminate the Contract. (p. 52, Sec. 33F)

XVIII. Termination for Non-Allocation. If funds are not allocated to continue the Contract, the Department must terminate the Contract. The Department may be obligated to pay for work in progress. (p. 52, Sec. 33G)

XIX. Termination for Convenience. The Department may terminate the Contract with a 30 days notice to ACS. The Department is liable for payment in accordance with the terms of this Contract for deliverables and services rendered in accordance with the requirement of this Contract prior to the effective date of termination, including:

1. Deliverables for which acceptance has been given by the Department;
2. Amounts for services provided prior to the date of termination for which no separate prices is the [sic] stated and which are not associated with or related to a specific deliverable for which acceptable has been given; and
3. Amounts for deliverables which are in development but which have not received acceptance. (p. 52, Sec. 33H)

XXI. Termination Procedures. After ACS has received a notice of termination, ACS must stop work, place no further orders or subcontracts and terminate existing ones, complete performance on portion of Contract that is not terminated, and transfer title of property to the Department.

XXII. Waiver of Breach. The failure by either party to enforce any provisions of this Contract after any event of breach shall not be deemed a waiver of its rights with regard to that event or any subsequent event. (p.54)