

Erie County Medical Center Corporation  
RFP # 21610  
Amendment Number 1

## **Erie County Medical Center Corporation**

Amendment Number 1 to RFP # 21610

### **PUBLIC AFFAIRS CONSULTING SERVICES**

The deadline for submission still remains:

**MONDAY, AUGUST 15, 2016 AT 11:00 A.M. EST.**

1. "Exhibit G"- Consulting Services Agreement, is attached and incorporated into the RFP documents.

Likewise, all references to "Exhibit G" in the original RFP will be in reference to the attached "Exhibit G" - Consulting Services Agreement.

**EXHIBIT G**

**CONSULTING SERVICES AGREEMENT**

**THIS CONSULTING SERVICES AGREEMENT** ("Agreement") is entered into on \_\_\_\_\_, 2016 ("Effective Date"), by and between **ERIE COUNTY MEDICAL CENTER CORPORATION**, a New York public benefit corporation with offices located at 462 Grider Street, Buffalo, NY 14215 ("ECMCC"), and \_\_\_\_\_, a \_\_\_\_\_ with offices located at \_\_\_\_\_ ("Contractor").

**WHEREAS**, ECMCC operates an Article 28 acute care hospital and seeks a contractor to provide public affairs consulting services on behalf of ECMCC;

**WHEREAS**, in accordance with applicable competitive bidding statutes, regulations, local laws and ECMCC policies, proposals were received and reviewed by ECMCC in response to Request for Proposals # 21610 for Public Affairs Consulting Services (the "RFP");

**WHEREAS**, Contractor's proposal was submitted in accordance with the RFP and Contractor was selected as the qualified, lowest cost providers of the required services; and

**WHEREAS**, ECMCC wishes to engage Contractor as an independent contractor to provide the Services as more particularly described in this Agreement.

**NOW, THEREFORE**, for and in consideration of the mutual promises and covenants set forth in this Agreement, the parties agree as follows:

1. **Incorporation of Recitals.** All recitals set forth above are material to this Agreement and are hereby incorporated and made a part of this Agreement.
2. **Engagement; Services to be Provided By Contractor.** ECMCC hereby engages Contractor to provide the consulting services as set forth in Exhibit A, incorporated herein by reference (the "Services").
3. **Personnel.**
  - 3.1 Contractor agrees to provide personnel who are acceptable to ECMCC and who have adequate education, training and experience in such subspecialties which are necessary to perform the Services (the "Professionals").
  - 3.2 ECMCC reserves the right to require the removal of any Professional whose practice or services are unacceptable to ECMCC, and Contractor shall promptly provide an acceptable substitute for such removed Professional.
  - 3.3 Contractor agrees to require each Professional to participate in and comply with ECMCC's rules, regulations, directives, policies and procedures, as amended from time to time.
4. **Independent Contractor Status.** The parties acknowledge and agree that Contractor is an independent contractor of ECMCC, and that this Agreement does not create an employment relationship between ECMCC and Contractor or between ECMCC and any person performing Services or by or on behalf of Contractor. None of the provisions of this Agreement shall be construed or be deemed to create a relationship of agency, partnership, joint venture, ownership,

control or employment between the parties other than that of independent parties contracting solely for the purpose of effectuating this Agreement.

5. **Contractor Representations and Warranties.** Contractor represents and warrants that at all times during the term of the Agreement:

5.1 All Professionals shall be employees or subcontractors of Contractor.

5.2 All Professionals are in full compliance with all pertinent Federal and State requirements, including but not limited to, immigration, licensing, certification, health and immunizations status, in order to perform the functions assigned to him or her in connection with Contractor's obligation under this Agreement.

5.3 Contractor is not subject to any legal or contractual impediment which would preclude its performance of this Agreement or render this Agreement unenforceable.

5.4 Contractor has all due legal authority and capacity and is entitled to enter into this Agreement and authorized to bind Contractor and Contractor's personnel to the terms and provisions of this Agreement.

5.5 Contractor acknowledges and agrees that ECMCC has relied upon the truthfulness and accuracy of the above representations and warranties in entering into this Agreement with Contractor, and shall continue to rely upon the completeness, truthfulness and accuracy of such representations and warranties throughout the term of this Agreement.

6. **Payment to Contractor for Services.** In consideration for the Services provided by Contractor pursuant to this Agreement, ECMCC shall pay Contractor as set forth in Exhibit B, attached to and made a part of this Agreement.

7. **Insurance and Indemnification.**

7.1 Contractor shall obtain and maintain, at its expense, adequate insurance coverage, as set forth in Exhibit C.

7.2 Contractor and ECMCC agree to defend, indemnify and hold harmless the other party, and their directors, officers, employees and agents, from and against any and all liabilities, losses, claims, damages, suits and expenses whatsoever, including costs of enforcement and reasonable attorneys' fees, arising out of such party's (including the acts of such party's directors, officers, employees and agents) negligent or wrongful acts, failure to act or conduct under this Agreement.

7.3 Contractor and ECMCC each agree to notify the other promptly in writing of any incident which may result in a claim pursuant to this Agreement.

8. **Term and Termination.**

8.1 This Agreement shall commence on the Effective Date and remain in effect for three (3) years.

8.2 Either party may terminate this Agreement upon thirty (30) days prior written notice to the other if the other party materially breaches any representation, warranty, or material term or obligation hereunder, provided, however, that the party who has breached the Agreement shall have a period of thirty (30) days after written notice of breach is given within which to effect a cure to the non-breaching party's reasonable satisfaction, and in such event, this Agreement shall continue.

- 8.3 Any party shall have the right to terminate this Agreement, upon written notice of the reason therefore to the other party and the other party having a ten (10) day cure period, in the event one of the other parties:
- 8.3.1 dissolves or ceases to exist as an entity with the ability to perform under this Agreement; or
  - 8.3.2 becomes insolvent or upon the institution of proceedings for an order of relief against such party or the consent by the party to an order for relief against it, or the filing by it of a petition or answer or consent seeking reorganization or relief under the United States Bankruptcy Code or any other similar applicable federal or state law, or the consent by such party to the filing of a petition or to the appointment of a receiver, liquidator, custodian or trustee of such party or of any substantial part of its assets or the making by it of an assignment for the benefit of creditors or the admission by it in writing of its inability to pay debts generally as they become due.
- 8.4 ECMCC may terminate this Agreement at any time upon sixty (60) calendar days' prior written notice to Contractor. In the event of such termination, Contractor shall be entitled to compensation for Services performed as of the date of termination.
9. **Confidentiality; Ownership of Information.** All information which Contractor presently has or which may come into Contractor's possession during the term of this Agreement relative to the business activities of ECMCC which is of a secret or confidential nature is and shall remain the property of ECMCC. Contractor shall not, during the rendering of Services or thereafter, disclose to others or use for the benefit of others or itself any such information so long as such information is treated as secret or confidential by ECMCC.
10. **Compliance with Laws, Legislative or Regulatory Modification.**
- 10.1 Each of the parties represents and warrants to the other party that it will comply with all applicable laws, rules or regulations ("Applicable Laws"). Failure by either party to comply with any Applicable Law in a material respect shall be considered a material breach of this Agreement.
  - 10.2 To the extent any Protected Health Information (as defined by the Health Insurance Portability and Accountability Act of 1996, as codified at 42 U.S.C. § 1320d through d-8 ("HIPAA")) is exchanged between the parties, Contractor agrees to comply with all applicable HIPAA provisions and the requirements of any regulations promulgated there under, as well as the Business Associate Agreement attached to this Agreement as Exhibit D.
  - 10.3 Contractor agrees to comply with New York State Executive Law Article 15-A and 5 NYCRR Parts 142-144 ("MWBE Laws") as set forth in the MWBE and EEO Requirements attached as Exhibit E. Contractor acknowledges that the MWBE participation goal applicable to this Agreement is thirty percent (30%) and that at least twenty percent (20%) of the total Agreement value must be directed to minority-owned business enterprises ("MBEs") and at least ten percent (10%) of the total contract value must be directed to women-owned business enterprises ("WBEs"). Contractor agrees to comply with the MWBE Utilization Plan which has been approved by ECMCC's Office of MWBE Compliance and is attached as Exhibit F. In the event that Contractor willfully and intentionally fails to comply with the M/WBE Laws, the MWBE requirements set forth in Exhibit E and/or the MWBE Utilization Plan attached as Exhibit F, Contractor shall be obligated to pay liquidated damages, calculated as an amount equaling the difference between: (i) all sums identified for payment to MWBEs had Contractor achieved the

MWBE goals; and (ii) all sums actually paid to MWBEs for work performed or materials supplied under this Agreement.

Contractor shall submit a Monthly Payment Report in the form of Exhibit G with each of Contractor's monthly invoices as evidence of Contractor's ongoing compliance with the M/WBE Utilization Plan. Invoices that are not submitted with a Monthly Payment Report will not be accepted by ECMCC or processed for payment.

- 10.4 In the event any Applicable Laws or any interpretation thereof, at any time during the term of this Agreement, is modified, implemented or determined to prohibit, materially restrict or in any way materially change the material provisions under this Agreement, then the parties shall negotiate in good faith to amend this Agreement to conform to the changed requirements, and if they cannot promptly agree, Section 11.3 shall apply.

## 11. **Miscellaneous.**

- 11.1 This Agreement, including all attached Exhibits, contains the entire agreement of the parties with respect to the subject matter hereof and supersedes any prior or contemporaneous representation, promise, condition, agreement or understanding related thereto, including the extensions of prior agreements between them. No amendment, modification or waiver of any portion hereof shall be valid unless it is in writing and signed by the parties. The parties agree that this Agreement, and/or any Exhibits, may be amended, at any time during the term of this Agreement, by mutual written consent of both parties.
- 11.2 Any written notice required to be given shall be sent by hand delivery, certified mail, return receipt requested, or by commercial overnight express carrier to the parties at the addresses listed above, or at such other address as a party specifies in writing in accordance with this section. Notice shall be deemed effective upon the date it is hand delivered, deposited in the U.S Mail or delivered by the commercial overnight express carrier.
- 11.3 This Agreement shall be governed by and construed in accordance with the laws of the State of New York. All headings are for convenience of reference only and are not of substantive effect. If any section or portion of this Agreement shall be determined to be invalid or unenforceable: (a) such determination shall not affect the enforceability or validity of the remainder of this Agreement that reasonably can be given effect apart from the invalid part; (b) the Parties shall negotiate as similar a provision as would be lawful and nevertheless acceptable to both Parties; and (c) if the effect of such ruling of invalidity and inability to agree upon a substitute provision is to deprive a party of material benefits hereunder, then either party may terminate this Agreement upon ten (10) days prior written notice to the other party. This Agreement shall be binding upon and inure to the benefit of permitted successors and assigns of the parties. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute one and the same instrument. The obligations specified in Sections 6 (Payment to Contractor for Services), 7 (Insurance and Indemnification) and 10 (Compliance with Laws, Legislative or Regulatory Modification) shall survive any termination or expiration of this Agreement.
- 11.4 Neither party may assign this Agreement in whole or in part without the prior written consent of the other party, except that ECMCC may freely assign this Agreement to any entity in which ECMCC owns or controls 50% or more of the shares or voting power, or to any entity arising through acquisition or merger involving ECMCC.
- 11.5 No failure or delay (in whole or in part) on the part of either party hereto to exercise any right or remedy hereunder shall impair its ability to later exercise any such right or

remedy, operate as a waiver thereof, or affect any other rights or remedies that may be available under the law or in equity, except to the extent it causes actual prejudice to the other party. No waiver by either party of any covenant, condition, term or provision of this Agreement shall be deemed to have been made by that party unless such waiver is in writing and signed by an authorized representative of the party.

- 11.6 Nothing in this Agreement shall be construed or deemed to create any right in any person or entity not a party to this Agreement, except any permitted successors and assigns, and this Agreement shall not be construed in any respect to be a contract in whole or in part for the benefit of any third party, including without limitation any Resident or any employee, representative or agent of Contractor or ECMCC.
- 11.7 ECMCC is an Equal Opportunity Employer maintaining an Affirmative Action Program. The parties agree that they will comply with the nondiscrimination and affirmative action clauses contained in: Executive Order 11246, as amended, relative to equal opportunity for all persons without regard to race, color, religion, sex or national origin; the Vietnam Era Veterans Readjustment Act of 1974, as amended, relative to the employment of disabled veterans and veterans of the Vietnam Era; the Vocational Rehabilitation Act of 1973, as amended, relative to the employment of qualified handicapped individuals without discrimination based upon their physical or mental handicaps; the 1964 Civil Rights Act, as amended; the Age Discrimination Act of 1975; the Omnibus Reconciliation Act of 1981; the Americans with Disabilities Act of 1990 and all other applicable Federal and State Laws which prohibit discrimination in the delivery of services on the basis of race, color, national origin, age, sex, handicap/disability or religious beliefs. Contractor shall not discriminate or otherwise violate any Federal, State, or local anti-discrimination law or regulation in the performance of the Services.
- 11.8 Pursuant to Section 109 of the General Municipal Law, Contractor may not assign, transfer, convey, sublet or otherwise dispose of this Agreement, or Contractor's right, title, or interest in this Agreement, or Contractor's power to execute this Agreement, to any other person or corporation without ECMCC's prior written consent. In the event that Contractor assigns, transfers, conveys, sublets or otherwise disposes of this Agreement, or Contractor's right, title or interest herein, or his power to execute this Agreement, to any other person or corporation without ECMCC's prior written consent as required by law, ECMCC shall revoke and annul this Agreement, and ECMCC shall be relieved and discharged from any and all liability and obligations arising out of this Agreement to Contractor and to the person or corporation to which this Agreement shall have been assigned, transferred, conveyed, sublet or otherwise disposed of, and Contractor, and his assignees, transferees or sublessees shall forfeit and lose all moneys, theretofore earned under this Agreement, except so much as may be required to pay Contractor's employees. The provisions of this section shall not hinder, prevent, or affect an assignment by Contractor for the benefit of his creditors made pursuant to New York State law.
- 11.9 ECMCC reserves the right to terminate this Agreement in the event it is found that the certification filed by Contractor, in accordance with New York State Finance Law §139-k, was intentionally false or intentionally incomplete. Upon such finding, ECMCC may exercise its termination right by providing written notification to Contractor.
12. **Confidentiality.** The parties acknowledge and agree that the existence of this Agreement, and its terms and conditions are strictly confidential. The parties agree that this Agreement and its terms and conditions may not be disclosed, in whole or in part, to any third party, except to each party's attorneys and professional advisors who have a need to know, provided that such attorneys and advisors also agree to be bound by this confidentiality and non-disclosure provision. Notwithstanding the foregoing, this Agreement may be disclosed (i) pursuant to a judicial subpoena or proper regulatory request for information from a governmental entity with

authority over the affairs of any signatory to this Agreement, and (ii) to the extent reasonably required by any party to perform, compel performance, or enforce any provision of this Agreement.

**[SIGNATURES ON FOLLOWING PAGE]**

**IN WITNESS WHEREOF**, the parties have executed this Agreement as of the dates set forth below:

**ERIE COUNTY MEDICAL CENTER CORPORATION**

By: \_\_\_\_\_  
Thomas J. Quatroche Jr., Ph.D  
President and Chief Executive Officer

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

**Approved as to Form**

By: \_\_\_\_\_  
Anthony J. Colucci, III, ECMCC Counsel

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

**CONTRACTOR**

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

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

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



**EXHIBIT A**  
**SERVICES**

[To be finalized upon review and approval of proposals]

**EXHIBIT B**  
**COMPENSATION**

**1. Professional Fees**

[To be finalized upon receipt and approval of proposals]

**2. Expenses**

Miscellaneous expenses for which Contractor seeks reimbursement by ECMCC must be approved in advance by ECMCC. Travel expenses must comply with ECMCC's Travel Policy, which shall be available to Contractor upon request.

**3. Payment Terms**

In order to receive compensation, Contractor agrees to provide complete and accurate billing invoices to ECMCC on a monthly basis for the Services described in Exhibit A and Professional Fees outlined in Section 1 of this Exhibit B, and for the reimbursement of expenses incurred in performance of this contract in accordance with Subsection 2 of this Exhibit B. Invoices submitted must contain sufficient information and documentation to support the charges submitted. Documentation may include time sheets, expense vouchers and any other supportive documentation requested by ECMCC. Invoices submitted should be submitted no later than thirty (30) days following the end of the billing period. ECMCC will make payment within sixty (60) days of receipt of invoice, unless ECMCC reasonably disputes some or all of the invoice.

**EXHIBIT C**

**INSURANCE REQUIREMENTS**

**1. Insurance to be Maintained By Contractor.** Prior to providing services under this Agreement, Contractor, at its own cost and expense, shall procure and maintain insurance for the coverages listed below, written for not less than the limits specified for each coverage or required by law, whichever is greater (except that if Contractor procures any policy limits greater than the amounts required herein, then the higher limits shall apply as though stated and required herein) and including the provisions enumerated below:

1.1. Commercial General Liability

Bodily Injury and Property Damage Limit	\$1,000,000 each occurrence
Personal Injury Limit	\$1,000,000 each person
General Aggregate	\$3,000,000

Coverage is to apply on an occurrence basis only. No endorsement or modification of this policy limiting the scope of coverage for Contractual Liability, Products/Completed Operations, Pollution or Personal Injury shall be permitted. In addition, no designated Premises/Operations limitation shall be permitted.

1.2. Automobile Liability

Owned, Hired and Non-Owned Autos

Combined Single Limit for Bodily Injury and Property Damage	\$1,000,000 each accident
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1.3. Workers' Compensation & Employers' Liability and New York Disability Benefits

Statutory coverage complying with the law of each state in which Contractor's employees are headquartered, working, or domiciled with Employers' Liability limits of not less than \$500,000 Each Accident and \$500,000 Each Employee for Disease and \$500,000 Policy Limit for Disease, or the minimum level required by Contractor's Excess Umbrella Liability insurance company, whichever is greater and New York Disability Benefits Law.

1.4. Excess "Umbrella" Liability

Combined Single Limit for Bodily Injury and Property Damage	\$2,000,000 each occurrence \$2,000,000 aggregate
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Coverage is to apply on an occurrence basis only; in excess of the other Liability coverages required in 1.1, 1.2, and 1.3 above and shall be no more restrictive than such scheduled underlying insurance. **NOTE:** Any combination of primary and excess limits is acceptable as long as the total limits achieved are at least equal to the total limits achieved by the above described combination of primary and excess layers.

1.5. Additional Insureds

ECMCC and its respective officers, employees and agents shall be named as Additional Insureds under the policies required in 1.1, 1.2 and 1.4 providing coverage for both ongoing and completed operations. The insurance protection afforded to ECMCC under such policies shall apply on a primary basis and any insurance (or self-insurance

program) maintained by ECMCC shall not contribute with the insurance afforded to ECMCC as an Additional Insured.

1.6. Financial Rating of Insurers

The insurance companies providing the required coverages shall be licensed to do so in New York State, and shall be rated no lower than "A-" by the most recent Best's Key Rating Guide or Best's Agent's Guide, and shall have a Best's Financial Size Category of not less than VIII, unless otherwise agreed to by ECMCC.

1.7. Notice of Cancellation, etc.

Contractor is hereby obligated to e-mail or fax to ECMCC a copy of any cancellation or non-renewal notice received from the insurer for any policy affording the coverages required herein within five days of Contractor's receipt of same. Contractor further agrees to provide ECMCC with 30 days advance written notice of cancellation, non-renewal or material reduction in coverage initiated by Contractor with respect to any of the required insurance coverages. For the purpose of this provision, material reduction in coverage shall mean any change or reduction in the scope of insurance coverage that adversely affects the protection that would otherwise be available to ECMCC.

1.8. Deductibles or Self-Insured Retentions

Deductibles or self-insured retentions shall be permitted with the understanding that Contractor (and not ECMCC) shall be responsible for such deductible or self-insured retention.

1.9. General Provisions

**Cross-Liability.** If the Contractor's liability policies do not contain the standard ISO separation of insureds provision, or an equivalent clause, such policies shall be endorsed to provide cross-liability coverage.

**Claims-Made Coverage.** For any liability coverages maintained on a claims-made basis, the following provisions apply unless otherwise agreed to by ECMCC:

- i. If the claims-made coverage terms designate a specific retroactive date, Contractor shall maintain a retroactive date which is not later than the earlier of (a) the date of the commencement of the term of this Agreement, or (b) the original coverage retroactive date for Contractor's first claims-made policy for each and every coverage provided on a claims-made basis;
- ii. For the duration of this Agreement, or any subsequent renewals, if the retroactive date is advanced or if the policy is materially changed, cancelled or not renewed, Contractor shall purchase, at its own expense, an extended reporting period endorsement. This endorsement must provide an extended reporting period ("tail" coverage) of three years or the minimum as prescribed by the Insurance Department of the State of New York, whichever is greater;
- iii. Upon termination of the services provided to ECMCC by Contractor, Contractor shall maintain such claims-made coverage without interruption for three years or a period of time equal to the length of any extended reporting period requirement as specified above, whichever is greater (the extended term of protection). If the retroactive date is advanced or if the policy is materially changed, cancelled or not renewed during this period of time, Contractor shall purchase, at its own expense, an extended reporting period endorsement covering a term of three years or the minimum as prescribed by the Insurance Department of the State of

New York, whichever is greater. It is understood that the length of this extended reporting period endorsement may be reduced to coincide with any time remaining in the extended term of protection.

- 1.10. Evidence of Insurance. Contractor shall deliver to ECMCC, prior to commencement of the work, Certificates of Insurance acceptable to ECMCC certifying that policies of insurance for the required coverages have been issued and are in effect and comply with the requirements herein. Upon expiration or cancellation of any policy during the period the coverages under such policy are required to be maintained, Contractor shall immediately deliver to ECMCC a Certificate of Insurance evidencing proper renewal or replacement of the policy.
  - 1.10.1 Certificates evidencing Liability coverage under which ECMCC is required to be named as an Additional Insured must state that "Erie County Medical Center Corporation and its respective officers, employees and agents are included as Additional Insureds on a primary and non-contributory basis with respect to any other insurance or self-insurance programs afforded to, or maintained by, Erie County Medical Center Corporation." The certificate must specify the policies under which such Additional Insured status has been granted and a copy of the Additional Insured Endorsement(s) or Policy Provision(s) that grant(s) the required Additional Insured status must be attached to the certificate. A Waiver of Subrogation in favor of ECMCC shall also be included under the General Liability, Workers Compensation, Automobile and Umbrella Liability coverages and evidence on the certificate of insurance.
  - 1.10.2 Certificates must specify the applicable retroactive date of any claims-made coverage being evidenced.
  - 1.10.3 Failure of ECMCC to demand such Certificate of Insurance or failure of ECMCC to identify a deficiency in a certificate that is provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance.
  - 1.10.4 Erie ECMCC shall have the right, but not the obligation, to prohibit Contractor from providing services/products/equipment and/or entering the premises until such certificate indicating full compliance with the requirements herein has been received and approved by ECMCC.
  - 1.10.5 Certificates of Insurance shall be issued and sent to Erie County Medical Center Corporation, Risk Management, 462 Grider Street, Buffalo, New York 14215.
- 1.11. Failure to Secure and Maintain Insurance. Contractor acknowledges that failure to secure the above-specified insurance constitutes a material breach of this Agreement and subjects Contractor to liability for damages and all other legal remedies available to ECMCC. Contractor further acknowledges that procurement of the insurance coverage and limits required herein shall not limit the extent of Contractor's other responsibilities and liabilities specified within the Agreement between ECMCC and Contractor or by law.
- 1.12 Adequacy of Insurance. ECMCC does not in any way represent that the insurance specified herein, whether in scope of coverage or limits of coverage, is adequate or sufficient to protect the business or interest of Contractor.

## EXHIBIT D

### BUSINESS ASSOCIATE AGREEMENT

THIS BUSINESS ASSOCIATE AGREEMENT (“Agreement”) is entered into as of \_\_\_\_\_ (“Effective Date”), by and between **ERIE COUNTY MEDICAL CENTER CORPORATION**, a New York public benefit corporation with its principal place of business at 462 Grider Street, Buffalo, New York 14215 (“Covered Entity”) and **BLOUNT CONSULTING SOLUTIONS, LLC**, a New York limited liability company with offices at 141 Wilmington, Tonawanda, NY 14150 (“Business Associate”). Each of Covered Entity and Business Associate may be referenced in this Agreement as a “Party” and collectively as the “Parties.”

**WHEREAS**, Business Associate has been engaged by Covered Entity to provide services to or on behalf of Covered Entity, which may involve Business Associate’s receipt, maintenance, creation or transmission of or access to Protected Health Information on behalf of Covered Entity.

**NOW THEREFORE**, the Parties, intending to be legally bound, hereby agree as follows:

1. **Definitions.** Except as otherwise defined in this Agreement, all capitalized terms used in this Agreement shall have the meanings set forth in HIPAA.
  - 1.1 “**Breach**” shall mean the acquisition, access, use or disclosure of Protected Health Information in a manner not permitted by the HIPAA Privacy Rule that compromises the security or privacy of the Protective Health Information as defined, and subject to the exceptions set forth, in 45 CFR § 164.402.
  - 1.2 “**Electronic Protected Health Information**” shall mean Protected Health Information that is transmitted or maintained in Electronic Media.
  - 1.3 “**HIPAA**” shall mean the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations, as amended and supplemented by the HITECH Act and its implementing regulations, as each is amended from time to time.
  - 1.4 “**HIPAA Breach Notification Rule**” shall mean the federal breach notification regulations, as amended from time to time, issued under HIPAA and set forth in 45 C.F.R. Parts 160 and 164 (Subpart D).
  - 1.5 “**HIPAA Privacy Rule**” shall mean the federal privacy regulations, as amended from time to time, issued under HIPAA and set forth in 45 C.F.R. Parts 160 and 164 (Subparts A & E).
  - 1.6 “**HIPAA Security Rule**” shall mean the federal security regulations, as amended from time to time, issued under HIPAA and set forth in 45 C.F.R. Parts 160 and 164 (Subparts A & C).
  - 1.7 “**HITECH Act**” shall mean Subtitle D of the Health Information Technology for Economic and Clinical Health Act provisions of the American Recovery and Reinvestment Act of 2009, 42 U.S.C. §§ 17921-17954, and all its implementing regulations, when and as each is effective and compliance is required.
  - 1.8 “**Protected Health Information or PHI**” shall mean Protected Health Information, as defined in 45 CFR § 160.103, and is limited to the Protected Health Information received, maintained, created or transmitted on behalf of, Covered Entity by Business Associate in performance of the Underlying Services.

- 1.9 **“Underlying Services”** shall mean, to the extent and only to the extent they involve the creation, maintenance, use, disclosure or transmission of Protected Health Information, the services performed by Business Associate for Covered Entity pursuant to the Underlying Service Agreement.
- 1.10 **“Underlying Service Agreement”** shall mean the written agreement(s) (other than this Agreement) by and between the Parties pursuant to which Business Associate access to, receives, maintains, creates or transmits PHI for or on behalf of Covered Entity in connection with the provision of the services described in that agreement(s) by Business Associate to Covered Entity or in performance of Business Associate’s obligations under such agreement(s).

## **2. Permitted and Required Uses and Disclosures of Protected Health Information by Business Associate.**

- 2.1 Business Associate may use or disclose Protected Health Information solely (1) as necessary to provide the Underlying Services to Covered Entity and in compliance with each applicable requirement of 45 CFR §164.504(e), (2) as Required by Law or (3) as expressly otherwise authorized under this Agreement or the Underlying Service Agreement. Business Associate shall not use or disclose Protected Health Information for any other purpose or in any other manner. In the event that Business Associate is authorized by Covered Entity to de-identify PHI, Business Associate must specify to Covered Entity the manner in which Business Associate will de-identify information.
- 2.2 Business Associate may, if necessary, use or disclose Protected Health Information for the proper management and administration of Business Associate or to carry out the legal responsibilities of Business Associate; provided, that (1) any disclosure is Required by Law or (2) Business Associate obtains reasonable advance written assurances from the person or party to whom the Protected Health Information is disclosed that (Y) the Protected Health Information will be held confidentially and used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person or party, and (Z) the person or party immediately notifies Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.

## **3. Obligations of Business Associate**

- 3.1 Business Associate shall use appropriate safeguards, and comply, where applicable, with the HIPAA Security Rule and Subpart C of 45 CFR §164 with respect to Electronic Protected Health Information, to prevent use or disclosure of the information other than as provided for by this Agreement.
- 3.2 Business Associate shall mitigate any harmful effect of a Use or Disclosure of Protected Health Information or a Security Incident caused by Business Associate in violation of the requirements of this Agreement.
- 3.3 Business Associate shall immediately report to Covered Entity: (i) any use or disclosure of Protected Health Information not provided for by this Agreement (including a use or disclosure of Unsecured Protected Health Information) of which it becomes aware in accordance with 45 CFR §164.410; and/or (ii) any Security Incident of which Business Associate becomes aware in accordance with 45 CFR §164.314(a)(2)(i)(C).
- 3.4 Business Associate shall provide to the Covered Entity the names and contact information of all individuals whose Protected Health Information was or is believed to have been involved, all other information reasonably requested by the Covered Entity to enable the Covered Entity to perform and document a risk assessment in accordance with the HIPAA Breach Notification Rule with respect to the incident to determine whether

a Breach occurred, and all other information reasonably necessary to provide notice to Individuals, the Department of Health and Human Services and/or the media in accordance with the HIPAA Breach Notification Rule. In the event of an incident that is required to be reported under this Section 3.4, Covered Entity shall elect in its sole discretion whether Covered Entity, Business Associate or a third party shall be responsible for conducting an investigation of that incident and providing any required notices as set forth in this Section 3.4. In accordance with this election, and notwithstanding anything to the contrary in this Agreement and without limiting in any way any other remedy available to Covered Entity at law, equity or contract, including but not limited to under Section 5.1 of this Agreement, Business Associate shall (i) conduct, or pay the costs of conducting, an investigation of any incident required to be reported under this Section 3.4, (ii) shall reimburse and pay Covered Entity for all expenses and costs incurred by Covered Entity that arise from an investigation of any incident required to be reported under this Section 3.4 and (iii) shall provide, and/or pay the costs of providing, the required notices as set forth in this Section III(d).

- 3.5 In accordance with 45 CFR 164.502(e)(1)(ii) and 45 CFR 164.308(b)(2), Business Associate shall ensure that any Subcontractors that create, receive, maintain, or transmit Protected Health Information on behalf of Business Associate, agree to the same restrictions and conditions, in writing, that apply through this Agreement to Business Associate with respect to such Protected Health Information, including but not limited to the condition that, to the extent that Subcontractor creates, receives, maintains, or transmits Electronic Protected Health Information on behalf of the Business Associate, Subcontractor shall comply with the HIPAA Security Rule.
- 3.6 To the extent Business Associate is to carry out Covered Entity's obligations under the HIPAA Privacy Rule, Business Associate shall comply with the requirements of the HIPAA Privacy Rule that apply to Covered Entity in the performance of such obligations.
- 3.7 Business Associate shall provide access to Covered Entity, no later than ten (10) calendar days after receipt of a request from Covered Entity, to an Individual, all in accordance with the requirements under 45 CFR §164.524 and New York Public Health Law § 18, including providing or sending a copy to a designated third party and providing or sending a copy in electronic format, to the extent that the Protected Health Information in Business Associate's possession constitutes a Designated Record Set.
- 3.8 Business Associate shall make available and make any amendment(s) to Protected Health Information in a Designated Record Set within fifteen (15) days after receipt of a request from Covered Entity or an Individual, all in accordance with the requirements of 45 CFR § 164.526. If any Individual requests an amendment of PHI directly from Business Associate or its Subcontractors, Business Associate must notify Covered Entity in writing within five (5) business days of the request. Any denial of amendment of PHI maintained by Business Associate or its Subcontractors shall be the responsibility of Covered Entity.
- 3.9 Business Associate shall document disclosures of Protected Health Information and information related to such disclosures as would be required for Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 CFR §164.528 and, as of the date compliance is required by final regulations, 42 U.S.C. §17935(c).
- 3.10 Business Associate shall make available to Covered Entity, within fifteen (15) calendar days after receipt of a request, information collected in accordance with Section 3.9 of this Agreement to permit Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information, or make that information



available directly to an Individual, all in accordance with 45 CFR § 164.528 and, as of the date compliance is required by final regulations, 42 U.S.C. § 17935(c).

- 3.11 Business Associate shall notify Covered Entity in writing within three (3) days after Business Associate's receipt directly from an Individual of any request for access to or amendment of Protected Health Information, or an accounting of disclosures, as contemplated in Sections 3.7, 3.8 and 3.10 of this Agreement.
- 3.12 Business Associate agrees to make its internal practices, books, and records, including policies and procedures and Protected Health Information, relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Entity available to the Covered Entity or to the Secretary, for purposes of the Secretary determining Covered Entity's compliance with HIPAA.
- 3.13 Business Associate shall request, use and/or disclose only the minimum amount of Protected Health Information necessary to accomplish the purpose of the request, use or disclosure; provided, that Business Associate shall comply with 45 CFR §§ 164.502(b) and 164.514(d).
- 3.14 Business Associate shall not directly or indirectly receive remuneration in exchange for any Protected Health Information as prohibited by 45 CFR § 164.502(a)(5)(ii).
- 3.15 Business Associate shall not make or cause to be made any communication about a product or service that is prohibited by 45 CFR §§ 164.501 and 164.508(a)(3).
- 3.16 Business Associate shall not make or cause to be made any written fundraising communication that is prohibited 45 CFR §164.514(f).
- 3.17 Business Associate shall take all necessary steps, at the request of Covered Entity, to comply with requests by Individuals not to send Protected Health Information to a Health Plan in accordance with 45 CFR § 164.522(a).
- 3.18 Business Associate shall take reasonable steps to ensure that its employees' actions or omissions do not cause Business Associate to breach the terms of this Agreement or violate provisions of HIPAA that apply to Business Associate.
- 3.19 To the extent the Business Associate is to carry out one or more of Covered Entity's obligations under Subpart E of 45 CFR § 164, Business Associate will comply with the requirements of Subpart E that apply to the Covered Entity in the performance of such obligations. Business Associate may not Use or Disclose PHI in a manner that would violate Subpart E of 45 CFR § 164 if done by Covered Entity.
- 3.20 Business Associate acknowledges that Business Associate has no ownership rights with respect to the PHI.

#### **4. Term and Termination**

- 4.1 The term of this Agreement shall commence as of the Effective Date and shall terminate concurrently with the Underlying Services Agreement unless earlier terminated, by mutual written agreement of the Parties, or in accordance with this Section 4.
- 4.2 In the event that Covered Entity determines that Business Associate has violated a material term of this Agreement, or becomes aware of a pattern of activity or practice of Business Associate that would constitute a material breach or violation of this Agreement, Covered Entity shall provide written notice of the breach or violation to Business

Associate specifying the nature of the breach or violation and the timeframe within which Business Associate must cure the breach or end the violation. In the event that Business Associate fails to cure the breach or violation to Covered Entity's reasonable satisfaction within the specified timeframe, Covered Entity may terminate this Agreement and the Underlying Service Agreement. Notwithstanding the foregoing, in the event that a breach or violation is reasonably incapable of cure, or Covered Entity possesses a reasonable belief of imminent harm, Covered Entity may terminate this Agreement and the Underlying Agreement without providing Business Associate with an opportunity to cure.

- 4.3 Within thirty (30) days after termination or expiration of this Agreement and/or the Underlying Service Agreement, Business Associate shall return (or destroy, if authorized by Covered Entity) to Covered Entity all Protected Health Information received from Covered Entity, or otherwise created, maintained or received by Business Associate (including all Protected Health Information in possession of Business Associate's agents or subcontractors), on behalf of Covered Entity. To the extent that return (or destruction, if applicable) of Protected Health Information is not feasible, Business Associate shall notify Covered Entity in writing of the reasons return or destruction is not feasible and, if Covered Entity agrees, may retain the Protected Health Information subject to this Section. Under any circumstances, Business Associate shall extend any and all protections, limitations and restrictions contained in this Agreement to Business Associate's use and/or disclosure of any Protected Health Information retained after the expiration or termination of this Agreement, and shall limit further uses and disclosures to those purposes that make the return or destruction of the information not feasible.
- 4.4 The obligations of Business Associate under this Section shall survive the termination of this agreement.

## **5. Miscellaneous.**

- 5.1 Business Associate shall defend, hold harmless and indemnify Covered Entity, its trustees, officers, faculty employees, students, against all expenses, liabilities, damages, claims, costs, fines, penalties and losses (including attorneys' and consultant fees) (Collectively, "Losses") reasonably incurred by Covered Entity in connection with, related to or arising from (i) the negligent or fraudulent act or omission of Business Associate, its agents, delegates, representatives or Subcontractors; (ii) a violation of HIPAA by Business Associate, its agents, delegates, representatives or Subcontractors; and (iii) a breach of this Agreement by Business Associate, its agents, representatives or Subcontractors. Upon demand by Covered Entity, Business Associate shall defend any investigation, claim, litigation or other proceeding brought or threatened against Covered Entity, at Business Associate's expense, by counsel acceptable to Covered Entity. Business Associate shall not enter into any settlement without the written consent of Covered Entity. This Article 5.1 shall survive the expiration or termination of this Agreement for any reason.
- 5.2 The Parties to this Agreement do not intend to create any rights in any third parties. The obligations of Business Associate under this Section and Section 4.3 of this Agreement shall survive the expiration, termination, or cancellation of this Agreement, the Service Agreement, and/or the business relationship of the Parties, and shall continue to bind Business Associate, its agents, employees, contractors, successors, and assigns as set forth herein.
- 5.3 This Agreement may be amended or modified only in a writing signed by the Parties, No Party may assign its respective rights and obligations under this Agreement without the prior written consent of the other Party. None of the provisions of this Agreement are intended to create, nor will they be deemed to create any relationship between the

Parties other than that of independent parties contracting with each other solely for the purposes of effective the provisions of this Agreement and any other agreements between the Parties evidencing their business relationship. This Agreement shall be governed by the laws of the State of New York. No change, waiver or discharge of any liability or obligation hereunder on any one or more occasions shall be deemed a waiver of performance of any continuing or other obligation, or shall prohibit enforcement of any obligation, on any other occasion. The Parties agree that, in the event that any documentation of the arrangement pursuant to which Business Associate provides Underlying Services to Covered Entity contains provisions relating to the use or disclosure of Protected Health Information which are more restrictive than the provisions of this Agreement, the provisions of the more restrictive documentation will control. The provisions of this Agreement are intended to establish the minimum requirements regarding Business Associate's use and disclosure of Protected Health Information. This Agreement, together with the Underlying Services Agreement, constitutes the entire agreement of the Parties relating to Business Associate's use or disclosure of Protected Health Information.

- 5.4 The terms of this Agreement to the extent they are unclear, shall be construed to allow for compliance by Covered Entity with HIPAA and the HITECH Act. In the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of the provisions of this Agreement with remain in full force and effect. In addition, in the event Covered Entity believes in good faith that any provision of this Agreement fails to comply with the then-current requirements of HIPAA, Covered Entity shall notify Business Associate in writing. For a period of up to thirty (30) days, the Parties shall address in good faith such concern and amend the terms of this Agreement, if necessary to bring it into compliance. If, after such thirty-day period, the Agreement fails to comply with the requirements of HIPAA, then Covered Entity has the right to terminate upon written notice to the Business Associate.
- 5.5 Business Associate understands and agrees that it will not assign, delegate, or subcontract any of its rights or obligations under this Agreement to individuals or entities residing outside the United States.
- 5.6 This Agreement may be executed in counterparts, each of which will constitute an original and all of which will be one and same document.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the Effective Date.

**BUSINESS ASSOCIATE**

**ERIE COUNTY MEDICAL CENTER CORPORATION**

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

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

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

Thomas J. Quatroche Jr., Ph.D  
President and Chief Executive Officer

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

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

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

**Approved as to Form:**

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

Anthony J. Colucci, III, ECECMCC Counsel

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

**EXHIBIT E**  
**MWBE AND EEO REQUIREMENTS**

**EXHIBIT F**  
**M/WBE UTILIZATION PLAN**

**EXHIBIT G**  
**M/WBE MONTHLY REPORT TEMPLATE**