[GPM Note: this Subcontractor Business Associate Agreement ("BAA") is written from the perspective of the HIPAA Covered Entity ("CE"). The idea is that CE's may require a Business Associate ("BA") that is going to use Subcontractors to enter into a particular form agreement, dictated by the CE. <u>This is not mandatory for CEs; rather, it is a way of ensuring that the BA uses certain provisions that are intended to protect the CE (e.g., insurance, indemnification, timing on breach notification, making CE a third party beneficiary of the Subcontractor BAA, etc.). Another option permitted under HIPAA is to simply permit the BA to contract with subcontractors on its own.</u> Throughout the document, you will find drafter's notes "[GPM Notes]" for the CE to consider in making decisions about important issues governing the relationship. Options and suggested language (*in bold italics)* is also included where appropriate. The <u>most important point</u> about the Subcontractor BAA is that the <u>BA cannot give the Subcontractor rights to use or disclose PHI that are more extensive than what the CE has given the BA in the BAA between the CE and BA</u> (referred to as the "Prime BAA" in this document). Accordingly, if the CE is dictating the terms of the Subcontractor BAA, the CE must ensure that any rights to use or disclose PHI granted by the BA to the Subcontractor under this BAA do not exceed what the CE has granted to the BA under the Prime BAA].

<u>EXHIBIT A</u>

SUBCONTRACTOR BUSINESS ASSOCIATE AGREEMENT

This Subcontractor Business Associate Agreement ("Agreement") is made and effective _____ ("Effective Date"), by and between _____ ("Business Associate") and _____ ("***Prime Subcontractor***") **[GPM Note: we have used the term 'Prime Subcontractor" so that references to the party signing this agreement are distinguishable from references to "subcontractors" with which that party might contract in the future and which would themselves be subject to HIPAA as a BA. It is anticipated that the actual name of the party would be used in lieu of "Prime Subcontractor" in this document.]** (each a "Party" and collectively the "Parties").

RECITALS

A. Pursuant to Sections 261 through 264 of the federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, ("HIPAA"), the Department of Health and Human Services ("HHS") has issued regulations at 45 C.F.R. Parts 160 and 164 (the HIPAA Security Rule, the HIPAA Privacy Rule, the HIPAA Enforcement Rule and the HIPAA Breach Notification Rule, referred to collectively herein as the "Regulations") to protect the security, confidentiality and integrity of health information.

B. Business Associate has been engaged to provide services to certain of its clients who are Covered Entities, as defined by HIPAA.

C. The Regulations obligate Business Associate, as a "business associate" defined by HIPAA to these Covered Entities, to ensure that its agents, including its Subcontractors, that create, receive, maintain or transmit Protected Health Information on behalf of the business associate, agree to the same restrictions and conditions that apply to Business Associate with respect to such Protected Health Information.

D. The Parties have entered into an arrangement whereby Prime Subcontractor will provide certain services, functions or activities to Business Associate related to services Business Associate is performing on behalf of Covered Entities involving Protected Health Information (the "Engagement"), and, as a result, Prime Subcontractor may create, receive, maintain or transmit Protected Health Information on behalf of Business Associate in fulfilling its obligations under the Engagement. As a result, Prime Subcontractor qualifies as a "Subcontractor" and as a business associate under the Regulations.

E. The Parties wish to enter into this Agreement that defines Prime Subcontractor's obligations with respect to Protected Health Information.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

I. Definitions

The following terms are defined as set forth below. Any terms used but not otherwise defined in this Agreement have the definitions set forth in the Regulations and the Health Information Technology for Economic and Clinical Health Act ("HITECH"), found in Title XIII of the American Recovery and Reinvestment Act of 2009, Public Law 111-005, and any regulations promulgated thereunder. **[GPM Note: the list of defined terms should be the same list as is included in the Prime BAA].**

a. "Breach" shall have the meaning set forth in 45 C.F.R. § 164.402.

b. "Designated Record Set" shall have the meaning set forth in 45 C.F.R. § 164.501 and shall include, but not be limited to, medical records and billing records about Individuals.

c. "Electronic Protected Health Information" or "EPHI" shall have the same meaning as the term "electronic protected health information" in 45 C.F.R. § 160.103.

d. "Individual" shall have the same meaning as the term "individual" in 45 C.F.R. § 160.103 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. § 164.502(g).

e. "Protected Health Information" or "PHI" means, subject to the definition provided at 45 C.F.R. § 160.103, individually identifiable health information that Business Associate receives from Covered Entity or creates, receives, transmits or maintains on behalf of Covered Entity for purposes of performing the services under the Engagement. Unless otherwise stated in this Agreement, any provision, restriction or obligation in this Agreement related to the use of PHI shall apply equally to EPHI.

f. "Required by Law" shall have the same meaning as the term "required by law" in 45 C.F.R. § 164.103.

g. "Secretary" shall mean the Secretary of the Department of Health and Human Services or their designee.

h. "Security Incident" means the attempted or successful unauthorized access, use, disclosure, modification or destruction of information or interference with the system operations in an information system. Notwithstanding the foregoing, the Parties acknowledge and agree that Prime Subcontractor need not report all attempted but unsuccessful Security Incidents to Business Associate, and that this Agreement constitutes notice to Business Associate that such unsuccessful Security Incidents occur periodically. Unsuccessful Security Incidents include, but are not limited to, pings and other broadcast attacks on Prime Subcontractor's firewall, port scans, unsuccessful log-on attempts, denials of service, and any combination of the above, so long as such incidents do not result in actual unauthorized access, use, or disclosure of PHI.

i. "Subcontractor" means a person to whom a business associate delegates a function, activity or service, other than in the capacity of a member of the workforce of such business associate.

j. "Unsecured PHI" shall have the same meaning as the term "Unsecured PHI" in 45 C.F.R. § 164.402.

The services provided by Prime Subcontractor to Business Associate under the Engagement require that Prime Subcontractor may be given access to PHI. Prime Subcontractor acknowledges and agrees that all PHI that is created or received by Business Associate and disclosed or made available in any form by Business Associate to Prime Subcontractor, or is created, received, maintained or transmitted by Prime Subcontractor on Business Associate's behalf, will be subject to this Agreement. This Agreement will commence upon the Effective Date and will continue as long as Prime Subcontractor has use, custody or access to PHI subject to this Agreement, and thereafter for the period required by the Regulations.

II. <u>Obligations and Activities of Prime Subcontractor</u>

a. <u>Use and Disclosure</u>. Prime Subcontractor will not use or further disclose PHI other than to perform the services set forth in the Engagement, as permitted or required by this Agreement or as Required by Law. Prime Subcontractor will not use or disclose PHI in a manner that would violate the Regulations if done by a Covered Entity.

b. <u>Restrictions on Disclosures.</u> Prime Subcontractor will comply with any requests for restrictions on certain disclosures of PHI to which Covered Entity has agreed and of which Prime Subcontractor is notified by Business Associate. In addition, Prime Subcontractor will permit an Individual to make a reasonable request that PHI relating to the Individual be supplied at alternative locations and/or by alternative means, or to make a request for restriction of the use and/or disclosure of PHI in accordance with 45 C.F.R. § 164.522, and Prime Subcontractor will provide notice of such requests to Business Associate within ***[five (5)] [seven (7)]*** days. **[GPM Note: CE should ensure that it uses a notice period that is equal to or shorter than**

what is required of BA under the Prime BAA]. Prime Subcontractor agrees to comply with the requirements of 45 C.F.R. § 164.522(a)(vi) regarding requests for restriction on the disclosure of PHI to health plans for payment and health care operations purposes. Prime Subcontractor is prohibited from agreeing to any restriction on the use or disclosure of PHI or any alternative communication of PHI requested by an Individual without Business Associate's prior written approval.

c. Sale of PHI; Marketing; Fundraising; Research. Prime Subcontractor will not, except for payments from Business Associate for services performed pursuant to this Agreement or the Engagement, directly or indirectly receive remuneration, financial or otherwise, from or on behalf of the recipient in exchange for PHI. Prime Subcontractor will not use or disclose PHI for research or engage in any uses or disclosures that might be classified as marketing or fundraising without first obtaining prior written approval from Business Associate.

d. Minimum Necessary. **[GPM Note: If the Prime BAA obligates the BA to adhere to specific policies and procedures, then the Subcontractor BAA should likewise bind the Prime Subcontractor. We have included 2 options for addressing minimum necessary, based on what is agreed upon in the Prime BAA: (1) BAs permitting the Prime Subcontractor to follow its own policies on minimum necessary; or (2) requiring the Prime Subcontractor to comply with the minimum necessary policies the BA has passed down. The provision used in the Subcontractor BAA should be passed on to Prime Subcontractor based on what is used in the Prime BAA]. [Option 1]:** ***[Prime Subcontractor and its Subcontractors, if any, will only request, use and disclose the minimum amount of PHI necessary to accomplish the intended purpose of the request, use or disclosure.]*** **[Option 2]** ***[Prime Subcontractor will comply, and will ensure that its Subcontractors comply, with the specific policies and procedures on the minimum necessary rule, a copy of which is attached hereto and incorporated herein as Exhibit __].*** Prime Subcontractor agrees, and it will ensure that any of its agents or subcontractors who themselves qualify as Subcontractors under the Regulations and create, receive, maintain or transmit PHI on behalf of Prime Subcontractor agree, to comply with Section 13405(b) of HITECH, any regulations issued thereunder or any guidance from the Secretary regarding what constitutes the definition of minimum necessary.

e. HIPAA Security Rule. Prime Subcontractor will develop, implement, maintain and use appropriate safeguards, and comply with the Security Rule at Subpart C of 45 C.F.R. Part 164, with respect to EPHI, to prevent use or disclosure of the PHI other than as provided for by this Agreement.

f. HIPAA Privacy Rule. Prime Subcontractor will comply with all requirements of the Privacy Rule at Subpart E of 45 C.F.R. Part 164 that apply to business associates.

g. Mitigation. Prime Subcontractor will mitigate, to the extent practicable, any harmful effect that is known to Prime Subcontractor of a use or disclosure of PHI by Prime Subcontractor in violation of the requirements of this Agreement.

[GPM Note: the Omnibus rule obligates BAs to ensure that Prime Subcontractors (which are themselves considered business associates) enter into "subcontractor BAAs" with any of their own "subcontractors". These subcontractor BAAs must obligate the subcontractor to comply with the same terms/conditions of this Subcontractor BAA between the BA and the Prime Subcontractor and must be at least as restrictive (i.e., future subcontractors cannot be given greater rights to use and disclose PHI than those held by the Prime Subcontractor under this Agreement). With respect to offshoring of PHI, the most protective option is that subcontractors not be permitted to do this without securing permission from the BA (and that CE, in the Prime BAA, not permit the BA to offshore PHI without CE's permission). Of course, if offshoring is not permitted at all under the Prime BAA, then it cannot be permitted under this agreement.]

h. Subcontractors. In accordance with the requirements of the Regulations, Prime Subcontractor will ensure that any Subcontractor that creates, receives, maintains or transmits PHI on behalf of Prime Subcontractor agrees in writing to the same restrictions, requirements and conditions that apply to Prime Subcontractor with respect to that PHI, including the provisions outlined in this Agreement. Notwithstanding anything else in this Agreement that may be construed to the contrary, Prime Subcontractor agrees that it **[GPM Note: the option selected should be based on what is in the Prime BAA between CE and BA] [Option A]:** ***[will not permit any Subcontractor that is located outside of the United States to create, receive, maintain or transmit any PHI, without first securing prior written approval from the Business Associate.]*** **[Option B]:** ***[will permit a party that is located outside of the United States to create, receive, maintain or transmit PHI only if an affiliate of that party, located in the United States and subject to jurisdiction in the courts of the United States, is the Subcontractor with which Prime Subcontractor has entered into a written agreement under which that Subcontractor agrees to the same restrictions, requirements and conditions that apply to Prime Subcontractor with respect to that PHI].***

i. Reports of Impermissible Use or Disclosure of PHI; Security Incident. Prime Subcontractor will report to Business Associate any use or disclosure of PHI not provided for or permitted by this Agreement of which it becomes aware, or any Security Incident of EPHI of which it becomes aware, **[GPM note: The notice period used in this Agreement should be the same or shorter than the notice period used in the Prime BAA.]** within ***[two (2) days] [three (3) days]*** of the date on which Prime Subcontractor first discovers the use, disclosure or Security Incident. **[GPM Note: CE may want to require reports to go to someone at BA who is not the official designated to receive general notice under this BAA (i.e., if CE wants notice to go to BA's Security Officer so as to ensure notice goes to a particular official and not to general contracting department, CE might require BA to designate a specific contact to receive notification from Subcontractors). This should of course be decided based on CE's relationship with the BA]. [Option A]** ***[All such reports will be made by Prime Subcontractor to _____ at Business Associate].*** **[Option B]** ***[All such reports will be made by Prime***

Subcontractor to the Business Associate official designated in Section VII(c) of this Agreement.] In addition to its other obligations under this Agreement, Prime Subcontractor will take prompt action to correct any Security Incident or use or disclosure of PHI not permitted under this Agreement and any action pertaining to such Security Incident or unauthorized use or disclosure as required by applicable federal or state laws and regulations.

[GPM Note: the next 2 sections are options for addressing HIPAA breaches. The CE should use the same option it uses in its Prime BAA. Option 1 permits the Prime Subcontractor to do the analysis of whether a HIPAA breach has occurred and then provide notice to the BA within a defined period. The BA would then be required (under the Prime BAA) to report the same to CE. Option 2 obligates the Prime Subcontractor to inform BA of any "suspected breach" (within a defined period) but allows BA to do the analysis if whether what has occurred actually gives rise to a Breach. The BA would then be required under the Prime BAA to report the same to CE.]

[Option 1—if selected, delete option 2]

j. Breaches of Unsecured PHI. Prime Subcontractor will report to Business Associate any Breach of Unsecured PHI by Prime Subcontractor or any of its officers, directors, employees, Subcontractors or agents. **[GPM Note: CE may want to require breach reports to go to someone at BA who is not the official designated to receive general notice under this BAA (i.e., if CE wants notice to go to BA's Security Officer so as to ensure notice goes to a particular official and not to general contracting department, CE might require BA to designate a specific contact to receive breach notification from Subcontractors). The point is for CE to ensure that it receives notice ASAP from the BA, so designating a specific contact point at BA might be helpful in that regard. This should of course be decided based on CE's relationship with the BA]. [Option A]** ***[All notifications of Breach of Unsecured PHI will be made by Prime Subcontractor to _____ at Business Associate.]*** **[Option B]** ***[All notifications of Breach of Unsecured PHI will be made by Prime Subcontractor to the Business Associate official designated in Section VII(c) of this Agreement]***. **[GPM Note: if CE is dictating this agreement, CE has discretion to require a specific notice period and should make decision about appropriate timeframe within context of HIPAA breach notification standard of providing notice to individuals as soon as possible, but no later than 60 days after discovering breach. We would not generally recommend that the Prime Subcontractor have longer than 5 days to provide this notice. The notice period should not be longer than the period the BA has to notify the CE under the Prime BAA.]** All notifications required under this Section will be made by Prime Subcontractor without unreasonable delay and in no event later than ***[two (2) days] [three (3) days] [five (5) days]*** of discovery. Prime Subcontractor will use the standard at 45 C.F.R. § 164.410(a) to determine when the Breach is treated as discovered. All notifications will comply with the obligations of a business associate under, and include the information specified in, 45 C.F.R. § 164.410 and include any other available information that a Covered Entity is required to include in its

notification to individuals pursuant to 45 C.F.R. § 164.404(c). In the event of a Breach by Prime Subcontractor that is caused by the acts or omissions of Prime Subcontractor, its Subcontractors, officers, directors, employees or agents, Prime Subcontractor will cooperate with Business Associate as Business Associate may require to facilitate notification of, **[GPM Note: CE should consider whether to require Subcontractor to cover costs of notification due to a breach caused by Subcontractor]** ***[and at Prime Subcontractor's expense]***, (i) individuals whose Unsecured PHI has been, or is reasonably believed by Business Associate or Covered Entity to have been, accessed, acquired, used or disclosed, and (ii) the media, as required pursuant to 45 C.F.R. § 164.406, if the legal requirements for media notification are triggered by the circumstances of such Breach. **[GPM Note: following sentence relates to whether CE wants Prime Subcontractor to be responsible for costs of notification of breach caused by Prime Subcontractor. If not, this sentence can be deleted]** ***[Prime Subcontractor will indemnify Business Associate for any reasonable expenses Business Associate incurs in notifying individuals, the media and related expenses arising from a Breach, or assisting Covered Entity in such notification or mitigation related thereto, of a Breach caused by Prime Subcontractor or its officers, directors, employees, Subcontractors or agents.]*** Prime Subcontractor will cooperate in Business Associate's Breach analysis process and procedures, if requested.

[Option 2—if selected, delete option 1]

k. Breach of Unsecured PHI. Prime Subcontractor will report to Business Associate any suspected Breach of Unsecured PHI by Prime Subcontractor or any of its officers, directors, employees, Subcontractors or agents. **[GPM Note: if CE wants breach notification to go to someone at BA who is not the official designated to receive general notice under this BAA (i.e., if CE wants breach notice to go to BA Security Officer, CE can require that BAs designate a specific contact to receive breach notification from Subcontractor). This should of course be decided based on CE's relationship with the BA]. [Option A]** ***[All notifications of a suspected Breach of Unsecured PHI will be made by Prime Subcontractor to _____ at Business Associate.]*** **[Option B] [*All notifications of a suspected Breach of Unsecured PHI will be made by Prime Subcontractor to the Business Associate official designated in Section VII(c) of this Agreement].*** All notifications required under this Section will be made by Prime Subcontractor without unreasonable delay and in no event later than ***[one (1) day] [two (2) days]*** of discovery. **[GPM Note: this period should be relatively short and no longer than what is used in the Prime BAA]**. Prime Subcontractor will use the standard at 45 C.F.R. § 164.410(a) to determine when the suspected breach is treated as discovered. Business Associate will have discretion to determine whether a suspected Breach has given rise to a Breach. Prime Subcontractor will cooperate with Business Associate and provide such information as Business Associate reasonably requires in making this determination. In notifying Business Associate of a suspected Breach, Prime Subcontractor will provide, to the extent reasonably possible, as much of the information that would be required to be provided by a business associate in notifying a Covered Entity of a Breach, under 45 C.F.R. § 164.410. If Business Associate

determines that a Breach has occurred, Prime Subcontractor will provide any other available information that a Covered Entity is required to include in its notification to individuals pursuant to 45 C.F.R. § 164.404(c). In the event Business Associate determines a Breach has occurred that was caused by the acts or omissions of Prime Subcontractor, its Subcontractors, officers, directors, employees or agents, Prime Subcontractor will cooperate with Business Associate, as Business Associate may require, to facilitate notification of, **[GPM Note: CE should consider whether to require Subcontractor to cover BA's costs of notification due to a breach caused by BA. Because CE is ultimately responsible for handling notification, this would seem to give CE added protection]** ***[and at Prime Subcontractor's expense]***, (i) individuals whose Unsecured PHI has been, or is reasonably believed by Business Associate or Covered Entity to have been, accessed, acquired, used or disclosed, and (ii) the media, as required pursuant to 45 C.F.R. § 164.406, if the legal requirements for media notification are triggered by the circumstances of such Breach. **[GPM Note: following sentence relates to whether CE wants Subcontractor to be responsible for costs of notification. If not, this sentence can be deleted]** ***[Prime Subcontractor will indemnify Business Associate for any reasonable expenses Business Associate incurs in notifying individuals, the media and related expenses arising from a Breach, or assisting Covered Entity in such notification or mitigation related thereto, of a Breach caused by Prime Subcontractor or its officers, directors, employees, Subcontractors or agents.]*** Prime Subcontractor will cooperate in Business Associate's Breach analysis process and procedures, if requested.

[GPM Note: in the access, amendment and accounting provisions below, CE should be sure to use timeframes that are equivalent to, or shorter than, those CE imposes on the BA in the Prime BAA].

l. Access. In the event an Individual requests access to PHI in a Designated Record Set from Prime Subcontractor, Prime Subcontractor will provide Business Associate with notice of the same within ***[two (2)] [three (3)] [five (5)]*** days. Prime Subcontractor will provide access, within ***[two (2)] [three (3) [five (5)]*** days of a request of Business Associate and in the manner designated by Business Associate, to PHI in a Designated Record Set to Business Associate, or, as directed by Business Associate, to an Individual or an Individual's designee in order to meet the Covered Entity's obligations under 45 C.F.R. § 164.524 (Access). If the PHI that is the subject of a request is maintained by the Prime Subcontractor in a Designated Record Set electronically, Prime Subcontractor will provide an electronic copy of such information to Business Associate, or, as directed by Business Associate, to the Individual or the Individual's designee, in the format required by the Regulations and as directed by Business Associate, in order to meet the Covered Entity's obligations under 45 C.F.R. § 164.524.

m. Amendment. In the event Prime Subcontractor receives a request from an Individual for an amendment to PHI in a Designated Record Set, Prime Subcontractor will provide Business Associate with notice of the same within ***[two (2)] [three (3)] [five (5)]*** days. Prime Subcontractor will make any amendments to PHI in a Designated

Record Set that Business Associate directs or agrees to pursuant to 45 C.F.R. § 164.526 (Amendment) within ***[two (2)] [three (3)] [five (5)]*** days of a request of Covered Entity or an Individual and in the manner designated by Business Associate, in order to meet the Covered Entity's obligations under 45 C.F.R. § 164.526. Prime Subcontractor will incorporate any amendments to PHI it receives from Business Associate and will notify Business Associate of any amended PHI that it receives from third parties relating to the PHI.

n. Accounting of Disclosures. Prime Subcontractor will document such disclosures of PHI and information related to such disclosures as would be required for a Covered Entity to fulfill its obligations under the Regulations and HITECH, including, but not limited to, responding to a request by an Individual for an accounting of disclosures in accordance with 45 C.F.R. § 164.528, and will provide such information to Business Associate or an Individual, in the time and manner designated by Business Associate. Except in the case of a direct request from an Individual for an accounting related to treatment, payment or healthcare operations disclosures through an electronic health record, if the request for an accounting is delivered directly to Prime Subcontractor or its agents or Subcontractors, Prime Subcontractor will, within ***[two (2)] [three (3)] [five (5)]*** days of a request, notify Business Associate of the request. Business Associate will either inform Prime Subcontractor to provide such information directly to the Individual, or it will request the information to be immediately forwarded to Business Associate for compilation and distribution to such individual or the Covered Entity, and Prime Subcontractor will provide such information in its possession within ***[ten (10)]*** days of Business Associate's request. In the case of a direct request for an accounting from an Individual related to treatment, payment or healthcare operations disclosures through electronic health records, Prime Subcontractor will provide such accounting to the Individual in accordance with Section 13405(c) of HITECH and such regulations as are adopted thereunder. Business Associate and Prime Subcontractor agree that the provisions of this section related to accounting of disclosures for treatment, payment and healthcare operations purposes from an electronic health record will only be effective as of such date such accountings of disclosures are required under HITECH. Prime Subcontractor and any agent or Subcontractors will maintain the information required for purposes of complying with this section for such period of time as is required under the Regulations and HITECH.

o. Business Associate Obligations Under Privacy Rule. To the extent that Prime Subcontractor is to carry out one or more of Business Associate's or Covered Entity's obligations under Subpart E of 45 C.F.R. Part 164, Prime Subcontractor will comply with the requirements of Subpart E that apply to Covered Entity in the performance of such obligations.

p. Records. Prime Subcontractor will make its internal practices, books, and records relating to the use and disclosure of PHI available to Business Associate or to the Secretary for purposes of determining Business Associate's compliance with the Regulations. Prime Subcontractor will notify Business Associate regarding any PHI that Prime Subcontractor provides to the Secretary, to the extent permitted by law or

the Regulations, concurrently with providing such PHI to the Secretary, and upon request by Business Associate, will provide Business Associate with a duplicate copy of such PHI.

q. Inspections; Audits. Within five (5) days of a written request by Business Associate, Prime Subcontractor will allow Business Associate to conduct a reasonable inspection of the policies and procedures, agreements, facilities, books, records and systems relating to the use or disclosure of PHI pursuant to this Agreement for the purpose of determining whether Prime Subcontractor has complied with this Agreement and the requirements of the Regulations; provided, however, that Business Associate will protect the confidentiality of all proprietary information of Prime Subcontractor to which Business Associate has access during the course of such inspection. The costs of the audit will be covered by Business Associate in the event the audit determines that Business Associate is in compliance with this Agreement and the Regulations and covered by Prime Subcontractor in the event the audit determines that Prime Subcontractor has violated this Agreement or the Regulations. Business Associate is permitted to engage in the inspections and audits set forth in this Section no more often than one time during each calendar year during which this Agreement is in effect.

r. Workforce. Prime Subcontractor will ensure that its workforce members, employees and agents are aware of and agree to the same restrictions which apply to Prime Subcontractor with respect to the PHI.

s. Business Associate Status. Prime Subcontractor acknowledges and agrees that the Engagement and this Agreement result in Prime Subcontractor qualifying as a business associate (as defined in 45 C.F.R. § 160.103). As such, Prime Subcontractor will be regulated as a business associate pursuant to the Regulations and any Subcontractor relationships in which Prime Subcontractor engages.

t. Compliance with HITECH. Prime Subcontractor will comply with all requirements of Title XIII, Subtitle D of HITECH which are applicable to business associates, and will comply with all regulations issued by the Secretary to implement these referenced statutes, as of the date by which business associates are required to comply with such referenced statutes and regulations.

III. Permitted Uses and Disclosures by Prime Subcontractor

[GPM Note: if CE is going to dictate the terms of the Subcontractor BAA, the provisions in this section should be drafted so that they are consistent with the terms of the Prime BAA between CE and BA. The Prime Subcontractor cannot be given the ability to use/disclose PHI that is greater or more extensive than what the CE has given to the BA in the Prime BAA].

a. Required by Law. Prime Subcontractor may use or disclose PHI as Required by Law.

[GPM Note: if the Prime BAA only gives the BA the right to use/disclose PHI for a list of specific purposes, the Subcontractor BAA should likewise bind the

Prime Subcontractor to use/disclose PHI for a list of specific purposes, which are not more extensive than those given to the BA under the Prime BAA. If BA was given the rights to use/disclose PHI to carry out the Engagement, then Prime Subcontractor can be given the rights to use/disclose PHI to carry out Prime Subcontractor's Engagement with BA.]

[Option 1—specific purposes. If this is selected, delete option 2].

b. Specific Purposes. Prime Subcontractor may only use or disclose PHI for the following specific purposes: **[GPM Note: list will need to be included].**

[Option 2—to carry out the Engagement. If this is selected, delete option 1.]

c. To Carry Out Engagement. Except as otherwise limited in this Agreement, for purposes of the services provided as part of the Engagement, Prime Subcontractor may use or disclose PHI solely to perform functions, activities, or services for, or on behalf of, Business Associate, provided that such use or disclosure would not violate the Regulations if done by Business Associate or a Covered Entity.

[GPM Note: the provisions on management/administration can only be granted to the Prime Subcontractor if CE has given those rights to BA under the Prime BAA. If not, the provision below should be deleted].

d. Management and Administration. Except as otherwise limited in this Agreement, Prime Subcontractor may use PHI for the proper management and administration of Prime Subcontractor or to carry out the legal responsibilities of Prime Subcontractor, as provided in 45 C.F.R. § 164.504(e)(4). In addition, Prime Subcontractor may disclose PHI for the proper management and administration of Prime Subcontractor or to carry out the legal responsibilities of Prime Subcontractor, provided that such disclosures are Required by Law or Prime Subcontractor obtains, prior to the disclosure, reasonable assurances from the person to whom it is disclosed that such PHI will be held secure and confidential as provided pursuant to this Agreement and only disclosed as Required by Law or for the purposes for which it was disclosed to the third party, and that any breaches of confidentiality of the PHI which becomes known to such third party will be immediately reported to Prime Subcontractor.

[GPM Note: additional uses/disclosures that are sometimes part of a BAA may be relevant to a subcontractor BAA. The provisions below should only be included if they are part of the Prime BAA and Prime Subcontractor will be assisting the BA in these activities. To the extent the BA has these added rights under the Prime BAA, any services provided by Prime Subcontractor for BA will need to be consistent with, and no more extensive than, the rights given to the BA). If CE does not want Subcontractors assisting BA with this work, or if CE has not given rights to BA in the Prime BAA to perform these services, they should not be included in the Subcontractor BAA. We have not included certain other uses/disclosures that arise from time to time in Subcontractor BAAs (such as fundraising, research, limited data sets or marketing) because those activities typically require additional review by counsel.]

[Option—Data Aggregation (combining PHI from different CEs for analytical purposes). Delete if not intended to be part of the Subcontractor BAA].

e. Data Aggregation. Prime Subcontractor may use PHI to provide data aggregation services related to the health care operations of the Covered Entity as directed by Business Associate and as permitted by 45 C.F.R. § 164.504(e)(2)(i)(B).

[Option—De-Identified Information (note that PHI that is de-identified is no longer subject to HIPAA. This information can have proprietary value, and because de-identified information is not subject to HIPAA, can be freely bought and sold. CE should consider ownership/control issues over this information in the Prime BAA if it permits the BA to engage in de-identification). Delete if not intended to be part of the Subcontractor BAA].

f. De-Identification. Prime Subcontractor may use PHI to create information that is de-identified. Any such de-identification by Prime Subcontractor will be done in compliance with 45 C.F.R. § 164.514(b). Prime Subcontractor agrees that it has no ownership interest in de-identified information and that de-identified information may only be used and disclosed by Prime Subcontractor on behalf of Business Associate and pursuant to the Engagement.

IV. Obligations of Business Associate

a. Notice of Privacy Practices. Business Associate will provide Prime Subcontractor, upon request, with Covered Entity's Notice of Privacy Practices in effect at the time of the request.

b. Revocation of Permission. Business Associate will provide Prime Subcontractor with any known changes in or revocation of permission by an Individual to use or disclose PHI to the extent such changes may affect Prime Subcontractor's permitted or required uses and disclosures.

c. Restrictions on Disclosure. Business Associate will notify Prime Subcontractor of any material restriction to the use or disclosure of PHI to which Covered Entity has agreed to in accordance with 45 C.F.R. § 164.522, to the extent such restrictions may affect Prime Subcontractor's use and disclosure of PHI.

d. Impermissible Uses and Disclosures. Business Associate will not request Prime Subcontractor to use or disclose PHI in any manner that would not be permissible under the Regulations if done by a Business Associate.

V. Termination

a. Termination for Cause by Business Associate. Notwithstanding any contrary termination provision of any other agreement between the Parties, Business Associate is authorized to terminate this Agreement and the Engagement as described in this Section if Business Associate determines that Prime Subcontractor has violated a material term of this Agreement. Upon Business Associate's knowledge

of a material breach of this Agreement by Prime Subcontractor, Business Associate will provide written notice of such breach to Prime Subcontractor and provide an opportunity for Prime Subcontractor to cure the breach or end the violation. If Prime Subcontractor does not cure the breach or end the violation within a reasonable time, then Business Associate may immediately terminate this Agreement; or Business Associate may terminate this Agreement if Prime Subcontractor has breached a material term of this Agreement and Business Associate reasonably determines that cure is not possible.

b. Effect of Termination.

1. Except as provided in paragraph (2) of this section, upon termination of the Engagement, Prime Subcontractor will return or destroy all PHI received from Business Associate or created, received, maintained or transmitted by Prime Subcontractor on behalf of Business Associate. This provision will apply to PHI that is in the possession of Subcontractors of Prime Subcontractor and Prime Subcontractor will ensure compliance with this requirement by its Subcontractors. Neither Prime Subcontractor nor Subcontractors will retain any copies of PHI.

2. In the event that Prime Subcontractor determines that returning or destroying the PHI is infeasible, Prime Subcontractor will provide to Business Associate notification of the conditions that make return or destruction infeasible. Upon mutual agreement of the Parties that return or destruction of PHI is infeasible; Prime Subcontractor will extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction infeasible for so long as Prime Subcontractor maintains such PHI.

VI. Indemnification

a. Indemnification of Business Associate. Prime Subcontractor will defend, hold harmless and indemnify Business Associate and Covered Entity against any and all third party claims brought against Business Associate or Covered Entity (including related liabilities, damages, judgments, costs and expenses, reasonable attorney's fees and costs) asserted against, imposed upon or incurred by Business Associate or Covered Entity that arises out of, or in connection with, Prime Subcontractor's default under or failure to perform any contractual or other obligation, commitment or undertaking under this Agreement, or the negligence of Prime Subcontractor or its Subcontractors, employees, agents or representatives in the discharge of its or their responsibilities or any other act or omission of Prime Subcontractor or its Subcontractors, employees, agents or representatives. This provision will survive termination of the Agreement with respect to any claim, action, or proceeding by a third party that relates to acts or omissions occurring during the term of this Agreement.

VII. Miscellaneous

a. Survival. The respective rights and obligations of Business Associate and Prime Subcontractor under Sections II, V, VI and VII of this Agreement will survive the termination of this Agreement.

[GPM Note: CE may seek to require that BA obligate its subcontractors to have insurance coverage that will protect BA from subcontractor's violations of the BAA/HIPAA, to the greatest extent possible. BAs may push back on this because subcontractors' existing insurance may not cover HIPAA issues and subcontractors may not want to acquire additional insurance. Note that the $1 million/$3 million amounts in the provision below reflect what is often seen in health care services agreement, but could be made higher or lower as agreed upon by the parties. Delete if not intended to be part of the BAA].

b. Insurance. Prime Subcontractor will maintain insurance in the minimum amounts of $1,000,000 per occurrence and $3,000,000 annual aggregate covering the acts and omissions of Prime Subcontractor under this Agreement. Prime Subcontractor will ensure that Business Associate is named an additional insured under this insurance policy. Prime Subcontractor will provide Business Associate with proof of such insurance upon request. Prime Subcontractor will notify Business Associate no later than ten (10) days of any actual or threatened claim, action, or proceeding related to activities undertaken pursuant to this Agreement and will cooperate in all respects with Business Associate in the defense of any such claim, action, or proceeding. Prime Subcontractor will provide Business Associate with notice within ten (10) days of any cancellation, termination or material alteration of any such insurance policies. Prior to the expiration or cancellation of any such policies, Prime Subcontractor will secure replacement of such insurance coverage upon the same terms and shall furnish Business Associate with a certificate of insurance. Failure of Prime Subcontractor to secure replacement coverage in the event of such cancellation, termination or material alteration of any such insurance policies will be a default hereunder, and Business Associate shall have the option to terminate this Agreement pursuant to Section VI.

c. Notification. Except as otherwise agreed to in this Agreement, any notice required or permitted under this Agreement will be given in writing and delivered personally or sent by certified mail, return receipt requested, or by reputable overnight delivery service, such as Federal Express, to the following addresses:

Business Associate	Prime Subcontractor
_____	_____
_____	_____
_____	_____
_____	_____

Such addresses may be changed by either Party by written advice as to the new address given as above provided.

d. Interpretation. Any ambiguity in this Agreement will be resolved in favor of a meaning that permits Business Associate (and Covered Entities to which Business Associate is a business associate) to comply with HIPAA, the Regulations, and other applicable law, including HITECH and all regulations promulgated thereunder.

[GPM Note: CE may want the Subcontractor BAA to expressly state that CE is a third party beneficiary of the Agreement. This would permit the CE to enforce the Subcontractor BAA directly against the Prime Subcontractor. A provision in this regard is included as Option 1. Option 2 provides that there are no third party beneficiaries].

[Option 1—delete option 2 if used]

e. Covered Entity is a Third Party Beneficiary. Business Associate and Prime Subcontractor expressly agree and acknowledge that this Agreement is intended for the benefit of Covered Entity and that Covered Entity has third party beneficiary rights under this Agreement to enforce the Business Associate's rights and obligations against Prime Subcontractor.

[Option 2—delete option 1 if used]

f. No Third Party Beneficiaries. This Agreement is intended for the sole benefit of the Business Associate and Prime Subcontractor and does not create any third party beneficiary rights.

g. Waiver. No waiver or discharge of any liability or obligation hereunder by Business Associate or Covered Entity on any one or more occasions will be deemed a waiver of any continuing or other liabilities or obligations; nor shall they prohibit enforcement by Business Associate or Covered Entity of any liabilities or obligations on any other occasions.

h. Unenforceability. 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 will remain in full force and effect. In addition, in the event Business Associate believes in good faith that any provision of the Agreement fails to comply with the then-current requirements of HIPAA, the Regulations, and other applicable law, including but not limited to HITECH and all regulations promulgated thereunder, Business Associate will notify Prime Subcontractor in writing. For a period of up to thirty (30) days, the Parties will address in good faith such concern and will amend the terms of this Agreement if necessary to bring it into compliance. If after such thirty (30) day period Business Associate believes that this Agreement fails to comply with HIPAA, the Regulations, and other applicable law, including but not limited to HITECH and all regulations promulgated thereunder, then Business Associate has the right to terminate this Agreement upon written notice to Prime Subcontractor.

i. Independent Subcontractors. Prime Subcontractor is not the agent of Business Associate and Business Associate does not control, supervise or instruct Prime

Subcontractor or any Subcontractors. The Parties are independent Subcontractors and nothing in this Agreement will be deemed to make them partners or joint venturers or make Prime Subcontractor an agent of Business Associate.

j. No Assignment. Prime Subcontractor may not subcontract any services or assign any rights, nor may it delegate any of its duties, under this Agreement, without the express written consent of Business Associate.

k. Entire Agreement. This Agreement represents the parties' sole and entire agreement concerning the subject matter herein and supersedes and replaces all previous drafts, understandings and communications.

l. Remedies. Prime Subcontractor acknowledges and agrees that any breach of this Agreement by Prime Subcontractor may cause irreparable harm to Business Associate, the amount of which may be difficult to ascertain. Prime Subcontractor agrees that Business Associate may seek any legal remedy, including injunctive or specific performance for such harm, without bond, security or necessity of demonstrating actual damages. Such right of Business Associate is in addition to the remedies otherwise available to Business Associate at law or in equity. Prime Subcontractor expressly waives the defense that a remedy in damages will be adequate.

m. Representations and Warranties. Prime Subcontractor warrants and represents that it is in compliance with the Security Rule and the provisions of the Privacy Rule that apply to business associates.

IN WITNESS WHEREOF, the Parties have executed this Agreement to be effective as of the Effective Date.

BUSINESS ASSOCIATE:	**PRIME SUBCONTRACTOR:**
_____	_____
By:_____	By:_____
Title: _____	Title:_____