**EMERGENCY PROCUREMENT STATEMENT ATTACHED TO THE STANDARD CONTRACT FORM FOR THE OPTUM/MASSIT CONTRACT DATED SEPTEMBER 30, 2014.**

**The Law**. The Commonwealth’s Operational Services Division (OSD) issues regulations and adopts policies for state agencies procurement activities. State law requires that agencies engage in competitive procurement. As an exception to this general rule, in administering the law, OSD has adopted a regulation (801 CMR 21.05(3)) and a policy permitting agencies to engage in emergency procurements. Under the regulations and policy, agencies may engage in an emergency procurement when an unforeseen crisis or incident has arisen which requires or mandates the immediate acquisition of goods or services to avoid substantial harm to the functioning of government or the provision of necessary or mandated services or whenever the health, welfare or safety of a department’s clients or other persons or serious damage to property is threatened.

**The HIX/IES**. Following a competitive procurement, in 2012 the Commonwealth’s University of Massachusetts’ Medical School, on behalf of the Executive Office of Human Services’ Medicaid program, MassHealth, and the Commonwealth Health Insurance Connector Authority (the “Connector”), entered a contract with a systems integration vendor for the redevelopment of the state’s existing health insurance exchange (HIX), and the creation of an integrated eligibility system (IES), for the purpose of complying with the Affordable Care Act (ACA) and Massachusetts’ own health care laws.

The HIX/IES, launched in October of 2013, was troubled. It became clear that many residents who qualified for free or subsidized health insurance under the ACA or state law could not use the HIX/IES to apply, shop for and acquire health insurance, or be determined eligible for free or subsidized care.

**The Effort to Stabilize the HIX/IES.** The Connector hired OptumInsight[[1]](#footnote-1) (“Optum”) in February of 2014, under its own emergency procurement (not the subject of this document) for the purpose of, among other things, (a) analyzing the problems in the CGI HIX/IES and determining if they could be repaired and stabilized in whole or in part and (b) providing hands on support for processing of, and business process change management related to, Connector business operations that could not be conducted through the HIX/IES. Shortly after the Connector entered its contract with Optum, UMMS assigned the CGI contract to the Information Technology Division (now the Massachusetts Office of Information Technology or “MassIT”), and MassIT negotiated a settlement with CGI that would end their contract following a transition period during which the CGI HIX/IES was transferred to the state.

**Optum’s Work for the Connector through the Spring of 2014.** Optum worked under contract with the Connector from February through April of 2014, and thereafter worked at risk for the Commonwealth. Optum assisted MassIT In the transfer of the HIX/IES technology from the former systems integrator to the Commonwealth. Optum also analyzed the CGI HIX/IES and determined, in conjunction with the Commonwealth, that only the IES part of the CGI HIX could be salvaged, and then only with additional risky technology improvements and expensive support. Optum thereafter recommended that the state consider implementing New HIX based on software sold by a publisher called hCentive.

The Commonwealth was independently aware of the merits of the hCentive software because it had been bid by CGI in its response to UMMS’ competitive procurement. It was originally part of the CGI contract but was removed from the project by either the Connector or MassHealth before it was implemented. The Commonwealth also knew that hCentive had proven itself to be a sound base for similar exchanges in other states.

**Optum’s Qualifications**. In deciding whether to hire Optum, MassIT considered the fact that Optum had spent months analyzing the performance of the HIX/IES in light of the business needs that the HIX/IES had been created to address, and had developed familiarity with the HIX/IES, the Commonwealth’s operation of multiple health insurance programs, and the crisis created by the failure of the HIX/IES. Moreover, Optum, through its affiliate QSSI, had experience in the work that it proposed to perform for MA to set up a new HIX/IES by the Open Enrollment date, November 15, 2014. QSSI had helped to bail out the troubled Federal health insurance exchange, and QSSI and hCentive had been successful, separately and as a team, implementing exchanges for other states.

**The Optum/MassIT Contract**. Optum worked at risk for the Commonwealth starting in May of 2014s. On September 30, 2014, MasssIT executed an emergency contract with Optum under which Optum would be compensated for past and future work related to:

* 1. Preparing MA to join the Federal exchange, an effort required of MA by the Federal Centers for Medicare and Medicaid until MA could demonstrate, as it did several weeks ago, that the use of hCentive would enable MA to stand up a successful HIX of its own;
  2. Assisting the Connector with business operations and management undertaken to compensate for the problems with the CGI HIX/IES.
  3. Helping MA transfer knowledge in connection with the transition of the HIX/IES from the prior systems integrator to the Commonwealth
  4. Keeping the HIX/IES running for several months so until MA could determine whether it could reuse part of it and its business rules
  5. Replacing the HIX/ IES with hCentive, by customizing and configuring the hCentive software to create the New HIX/IES
  6. Providing managed services, including hosting, security, and application operations, maintenance and support for the New HIX/IES.

**The Optum/MassIT Contract and the Emergency Procurement Rules**. The Commonwealth’s competitive IT procurements are lengthy. The time it takes to create them involves drafting requirements, posting a solicitation, responding to vendor bids, scoring vendor bids, interviewing vendors, and negotiating contracts. It is not uncommon for procurement of medium sized systems to take a year. The HIX/IES is by comparison enormously complicated. Conducting a credible competitive procurement for all of the work performed by Optum from May to September of 2014, and all of the work that it would perform under the Optum/MassIT contract, would have taken at a minimum a year from the time in the spring of 2014 when the Commonwealth determined that the HIX/IES needed to be replaced. A that time the Commonwealth had only seven months to stand up a new or improved system for the beginning of Open Enrollment on November 15, 2014.The gap between the time that the Commonwealth became aware that the HIX/IES needed to be replaced and the date of open enrollment was too short to permit MassIT to engage in a competitive procurement.

Had MassIT not entered an emergency contract with Optum to build a new HIX/IES, this turn of events could have precipitated a crisis because:

* The Commonwealth would have suffered serious financial loss because
  + 1. the Commonwealth is relying on temporary federal permission to protect subsidized health insurance coverage for eligible residents, by operating legacy programs or newly created temporary programs, but there is a significant risk that temporary federal permission will cease before a full procurement can be completed.
    2. the Commonwealth state was still  incurring obligations to CGI for system maintenance, operations, and hosting.  the mounting costs of the manual system and the resulting classification of residents as eligible for free or subsidized insurance.
    3. The Commonwealth would have struggled to remain compliant with both the ACA and MA’s more generous health insurance laws.
* Our residents’ access to health insurance, a life and death service to which they are entitled by law, would have been threatened because of the delays in processing their applications

OSD requires that agencies engaging in emergency procurements perform due diligence to ensure that they are entering as sound a contract as possible, and to keep the scope of the emergency contract limited to the scope of the emergency. MassIT has in this regard:

1. Performed due diligence in that it
   * 1. Interviewed other states that have used Optum and hCentive
     2. Researched contracts that Optum and hCentive have with other states
     3. Compared Optum hosting to the hosting of a private sector vendor
     4. Performed an onsite inspection of their data center hosting business
     5. Hired a consultant to analyze whether the hCentive software could perform
     6. Pushed Optum hard at every turn during a negotiation extending from May of 2014 to September of 2104 to give the Commonwealth the best deal possible.
2. Limited the scope of its relationship with Optum by building in “offramps” that allow MassIT to cancel the managed services relationship with Optum with known reasonable stranded costs.
3. Required Optum to sign most of the Commonwealth’s standard protective terms.

The failure of the CGI HIX/IES was unforeseen, and the Commonwealth‘s failure to respond to it quickly would have endangered not only the public fisc but also the many residents who rely on free, subsidized, or individual policies for their health, safety and wellbeing. The Commonwealth engaged in a thoughtful, informed consideration of alternatives before deciding to move ahead with an emergency procurement contract with Optum. In short MassIT had grounds to use an emergency procurement process, and once it did so, it conducted the process according to OSD’s regulation and rules.

EXHIBIT 1

801 CMR 21.05

21.05:   Competitive Procurement Exceptions

A Procuring Department shall be authorized to procure Commodities or Services, or both, without a competitive Procurement under the following exceptions, and in accordance with policies and procedures issued by ANF, OSD and CTR. Any questions as to the existence of an exception under 801 CMR 21.05 shall be determined by ANF or OSD. All other provisions of 801 CMR 21.00 shall apply.

(1) Incidental Purchases. A one-time purchase, or multiple purchases, with a total dollar value that does not exceed the minimum amount established by law, ANF or OSD.

(2) Exemption from Competitive Procurement. A general law, special law or other existing legal obligation that specifically exempts or prohibits a Procuring Department or a specific Contract from being competitively procured or specifically names a particular Contractor(s) to be awarded a Contract.

(3) Emergency Contract. An emergency Contract shall be appropriate whenever a Procuring Department Head determines that an unforeseen crisis or incident has arisen which requires or mandates the immediate acquisition of Commodities or Services, or both, to avoid substantial harm to the functioning of government or the provision of necessary or mandated services or whenever the health, welfare or safety of Clients or other persons or serious damage to property is threatened. The Contract shall be effective only for the period necessary to cure the emergency or in accordance with policies and procedures issued by ANF, OSD and CTR. Each Secretariat may establish a policy for administering emergency Contracts.

EXHIBIT 2

Excerpt from OSD Policy “Exceptions to Competitive Procurement”

**2. Emergency Contracts**

Regulation 801 CMR 21.05(3) recognizes that unforeseen circumstances may require departments to procure commodities or services on an emergency basis. Some reasons for emergency procurements include:

* The avoidance of harm to the government
* The provision of mandated services
* The provision of services or commodities for the health, welfare or safety of persons
* The prevention of property damage

Whenever possible, departments should make an effort to shop around for competitive prices or quotes for the emergency procurement.

Departments should enter into emergency contracts for only the period necessary to alleviate the immediate risk of harm, damage or danger. In certain circumstances, removal of clients receiving services through emergency human and social service contracts may be clinically contraindicated or could negatively impact clients. In those cases, departments may establish emergency contracts for a period of time consistent with the needs of the individual(s) served.

Departments are cautioned that extending emergency contracts to include other items that are not related to the immediate solution of the emergency is not appropriate. For example, an emergency contract to repair or replace a broken pipe should not be extended to include fixing other pipes or plumbing unrelated to the emergency or which present no emergency threat. Non-emergency goods and services need to be covered under a standard competitive procurement.

While department heads must make this important determination, secretariats may also establish a policy for administering emergency contracts. Departments are encouraged to work with the relevant OSD Strategic Sourcing Services Team (“SSST” or “PMT”) group or with other departments to develop contingency plans for emergencies or to seek assistance when an emergency has arisen.

Departments are required to execute a contract with the entity selected to perform the contract. The department should execute the appropriate version of the *Commonwealth Terms and Conditions* as well as a *Standard Contract Form* as soon as possible after the need for the emergency commodity or service has arisen.

*Note:* OSD has compiled a reference guide of existing statewide contracts that could be used in an emergency that requires a specific commodity or service. That booklet, *Emergency Response Supplies, Services and Equipment,* is available on OSD's website under Publications and Reports.

1. Optum owns QSSI, which it acquired in 2012. Optum disclosed to MA early in 2014 that it would acquire an ownership interest in hCentive, and thereafter did acquire a 24% interest in hCentive in the spring of 2014. In 2014 Optum’s parent, United Health, also became a health insurer authorized to sell under the exchange. Optum has been candid and forthright with the Connector and MassIT with respect to its affiliations and ownership interests. [↑](#footnote-ref-1)