Under the Section C. General Requirements, 16 (pg. 36). Offeror Terms and Conditions of RFP # 17-630-4000-0002 indicates offeror must propose specific, alternative language with submission of their proposal. The RFP also indicates that the Offeror must briefly describe the purpose and impact of the change. The agency has the right to accept or reject any alternative language. The full article is defined below:

16. Offeror Terms and Conditions

Should an Offeror object to any of the Agency's terms and conditions, as contained in this Section or in the appendices, the Offeror must propose specific, alternative language in writing and submit it with its proposal. Contract variations received after the award will not be considered. The Agency may or may not accept the alternative language. Offerors agree that requested language must be agreed to in writing by the Agency to be included in the contract. If any requested alternative language submitted is not so accepted by the Agency, the attached sample contract with appropriately accepted amendments shall become the contract between the parties. General references to the Offeror's terms and conditions or attempts at complete substitutions are not acceptable to the Agency and will result in disqualification of the Offeror's proposal.

Offerors must briefly describe the purpose and impact, if any, of each proposed change, followed by the specific proposed alternate wording. Offerors must submit with the proposal a complete set of any additional terms and conditions that they expect to have included in a contract negotiated with the Agency.

**Article 8 Indemnification**

**Original language in the sample contract (pg. 13 SI RFP)**

**General.** The Contractor shall defend, indemnify and hold harmless the HSD, the State of New Mexico and its employees from all actions, proceedings, claims, demands, costs, damages, attorneys’ fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, in each case for injury to person (including but not limited to death or sexual harassment) or damage to real or personal property, resulting from the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, during the time when the Contractor, its officer, agent, employee, servant or subcontractor thereof has or is performing Services pursuant to this Agreement. In the event that any action, suit or proceeding related to the Services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable, but no later than two (2) Business Days after it receives notice thereof, notify, by certified mail, the legal counsel of the HSD, the Risk Management Division of the New Mexico General Services Department, and the DoIT.
The indemnification obligation under this Agreement shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor, and shall survive the termination of this Agreement. Money due or to become due to the Contractor under this Agreement may be retained by the HSD, as necessary, to satisfy any outstanding claim that the HSD may have against the Contractor hereunder.

Vendor Proposal Response sent on April 19, 2017 (pg. 15 Deloitte_Vol1_12b_Appendix I_Sample Contract (redlines).pdf)

General. The Contractor shall defend, indemnify and hold harmless the HSD, the State of New Mexico and its employees from all actions, proceedings, claims, demands, costs, damages, attorneys’ fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, in each case for personal injury (including but not limited to death or sexual harassment) or damage to personal property to the extent directly resulting from the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, during the time when the Contractor, its officer, agent, employee, servant or subcontractor thereof has or is performing Services pursuant to this Agreement. In the event that any action, suit or proceeding related to the Services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable, but no later than two (2) Business Days after it receives notice thereof, notify, by certified mail, the legal counsel of the HSD, the Risk Management Division of the New Mexico General Services Department, and the DoIT.

The indemnification obligation under this Agreement shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor, and shall survive the termination of this Agreement. Money due or to become due to the Contractor under this Agreement may be retained by the HSD, as necessary, to satisfy any outstanding claim that the HSD may have against the Contractor hereunder.

Vendor Proposed Final Language for Article 8 as of 8/29

A. General. The Contractor shall defend, indemnify and hold harmless the HSD, the State of New Mexico and its employees from all actions, proceedings, claims, demands, costs, damages, attorneys’ fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this
Agreement, in each case for personal injury to person (including but not limited to death or sexual harassment) or damage to real or personal property, resulting from the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, during the time when the Contractor, its officer, agent, employee, servant or subcontractor thereof has or is performing Services pursuant to this Agreement.

B. The Contractor shall indemnify and hold harmless the HSD, the State of New Mexico and its employees from all actions, proceedings, claims, demands, costs, damages, attorneys’ fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, in each case for damage to any firm, corporation or other entity resulting from the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, during the time when the Contractor, its officer, agent, employee, servant or subcontractor thereof has or is performing Services pursuant to this Agreement. In the event that any action, suit or proceeding related to the Services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable, but no later than two (2) Business Days after it receives notice thereof, notify, by certified mail, the legal counsel of the HSD, the Risk Management Division of the New Mexico General Services Department, and the DoIT.

C. The indemnification obligations under this Agreement shall not be limited by the existence of any insurance policy or by any insurance policy’s limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor, but the indemnification obligation under Article 8(B) above shall be limited by the limitation of liability in Article 18(B) below, and all shall survive the termination of this Agreement. Money due or to become due to the Contractor under this Agreement may be retained by the HSD, as necessary, to satisfy any outstanding claim that the HSD may have against the Contractor hereunder.

**Article 18 Liability, A.**

Original language in the sample contract (pg. 182 SI RFP)

A. Contractor shall be liable for damages arising out of injury to persons and/or damage to real or tangible personal property at any time, in any way, if and to the extent that the injury or damage was caused by or due to the fault or negligence of the Contractor or a defect of any equipment provided or installed, provided in whole or in part by the Contractor pursuant to the Agreement. Contractor shall not be liable for damages arising out of, or caused by, alterations
made by the HSD to any equipment or its installation or for losses caused by the HSD’s fault or negligence.

Nothing in this Agreement shall limit the Contractor’s liability, if any, to third parties and/or employees of the HSD or the State of New Mexico, or any remedy that may exist under law or equity in the event a defect in the manufacture or installation of the equipment, or the negligent act or omission of the Contractor, its officers, employees, or agents, is the cause of injury to such person.

Nothing in this Agreement shall limit the Contractor’s liability, if any, related to any breach of privacy or security requirements related to Confidential Information.

Vendor Proposal Response sent on April 19, 2017 (pg. 12 Deloitte_Vol1_12b_Appendix I_Sample Contract (redlines).pdf)

A. Contractor shall be liable for damages arising out of personal injury to persons and/or damage to real or tangible personal property at any time, in any way, if and to the extent that the injury or damage was caused by or due to the fault or negligence of the Contractor or a defect of any equipment provided or installed, provided in whole or in part by the Contractor pursuant to the Agreement. Contractor shall not be liable for damages arising out of, or caused by, alterations made by the HSD to any equipment or its installation or for losses caused by the HSD’s fault or negligence.

Nothing in this Agreement shall limit the Contractor’s liability, if any, to third parties and/or employees of the HSD or the State of New Mexico, or any remedy that may exist under law or equity in the event a defect in the manufacture or installation of the equipment, or the negligent act or omission of the Contractor, its officers, employees, or agents, is the cause of injury to such person.

Nothing in this Agreement shall limit the Contractor’s liability, if any, related to any breach of privacy or security requirements related to Confidential Information.

Vendor Proposed Final Language for Article 18 as of 8/29

(A) In addition to and not in limitation of Contractor’s indemnification obligations under Article 8 above, Contractor shall be liable for damages arising out of personal injury to persons (including but not to limited death or sexual harassment) and/or damage to real or tangible personal property of persons at any time, in any way, if and to the extent that the injury or damage was caused by or due to the fault or negligence of the Contractor or a defect of any equipment provided or installed, provided in whole or in part by the Contractor pursuant to the Agreement. Contractor shall not be liable for damages or losses arising out of, or caused by, alterations made by the HSD to any equipment or its installation.

Nothing in this Agreement shall limit the Contractor’s liability, if any, to third parties and/or employees of the HSD or the State of New Mexico, or any remedy that may exist under law or equity in the event a defect in the manufacture or installation of the equipment, or the negligent act or omission of the Contractor, its officers, employees, or agents, is the cause of personal injury to such person (including but not limited to death or sexual harassment).
(B) The Contractor shall not be liable, in connection with this Agreement, for damages to the HSD or the State of New Mexico in excess of the amount equal to two times (2x) $44,856,226.00. This limitation of liability is irrespective of the form of action or theory of liability (whether in contract, tort, or otherwise).

(C) Neither party shall be liable to the other party hereunder for indirect or consequential damages, or loss of goodwill or profits in connection with this Agreement.

For clarification, the following shall be considered direct damages (not indirect or consequential damages) for purposes of this Article, and a party may seek their recovery as direct damages, subject to the limitation of liability in Article 18(B) above:

1. reasonable and verifiable replacement costs, defined as the difference between the reasonable and verifiable fees the HSD -pays to a replacement vendor to perform the services terminated and not yet performed by Contractor and to re-perform any services that Contractor failed to perform in a manner compliant with this Agreement, after termination of this Agreement by the HSD for cause, and the fees to be paid by Contractor under this Agreement for such Services; and
2. fines, penalties or sanctions assessed by a governmental entity against the HSD or loss of Federal funding, in each case to the extent assessed or lost, respectively, by the HSD as a result of Contractor’s breach of its obligations hereunder.

(D) Notwithstanding the above, the limitations of liability in Article 18(B) and 18(C) above shall not apply to:

1. Damages finally adjudicated to be a direct result from Contractor’s bad faith or willful misconduct; or
2. Contractor’s indemnification obligations under Articles 8(A) and 10.

Nothing in this Agreement shall limit the Contractor’s liability, if any, related to any breach of Contractor of privacy or security requirements related to Confidential Information under this Agreement or in violation of applicable law.
The Offeror never described this change or its impact, and it was rejected from negotiations prior to meeting the offeror for official negotiations. It was brought back up when counsels were discussing the Terms and Conditions. The negotiating team suggested no cap as it states in the sample contract. Deloitte proposed a cap, but a cap was never agreed upon.

The term “negligence” was never an issue for the vendor. In their proposal, they did not make changes to that portion of the article. It was not until 5 weeks into negotiations that the term negligence as an issue. Deloitte’s proposed change was to replace negligence with recklessness. Recklessness implies intent/purpose which our council (Lisa) deemed unacceptable. Now, so many changes occurred with Article 8 and 18. The team decided that the original language was most acceptable. Once we rejected recklessness, their second proposed language change was gross negligence with a cap. Again, or council deemed unacceptable.

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>9/19/17</td>
<td>Email to Vendor from HSD Procurement Manager</td>
</tr>
<tr>
<td></td>
<td>On Wednesday September 13, 2017, Deloitte Consulting communicated that the language proposed by Deloitte in Article 8 Indemnification and Article 18 Liability was no longer negotiable.</td>
</tr>
<tr>
<td></td>
<td>HSD has reviewed the language proposed and finds the language unacceptable. HSD requires that the language in the sample contract for these two articles remains in original form as it is prescribed in RFP #17-630-4000-0002.</td>
</tr>
<tr>
<td></td>
<td>HSD regrets that we are at an impasse. This communication is HSD’s final attempt at reaching out to Deloitte to confirm their position.</td>
</tr>
<tr>
<td>9/22/17</td>
<td>Response from Vendor</td>
</tr>
<tr>
<td></td>
<td>Many thanks for the below note and conveying HSD’s position. Thank you for the invitation to meet yesterday. On behalf of Umesh too, we believe that it was a very productive and promising exchange. We believe we have a vision for a path forward based on the discussions. To reiterate yesterday’s discussion, Deloitte does not believe we are at a stalemate on the terms related to Articles 8 and 18.</td>
</tr>
<tr>
<td></td>
<td>With that in mind, attached please find a next draft of the agreement, including Articles 8 and 18 (everything else is clean since finalized). To be clear, if this is not acceptable, we still see other options that we believe could be acceptable to other parties. This is submitted for HSD consideration based on the foundational assumption discussed in yesterday’s meeting - that the previously submitted redlined version of A8/A18 are acceptable as a basis for continued conversations (versus the generic Articles 8 &amp; 18 as discussed in your below email). A few high-level comments as HSD considers this next version:</td>
</tr>
</tbody>
</table>
- We understand the other 44 Articles that comprise the T&Cs portion of the contract are in agreement.

- In the attached Article 8 we have agreed to Lisa’s indemnity language. We only ask that the negligence indemnity be subject to the overall cap on liability. This aligns with Shilo’s prior drafting comment bubble and oral suggestion in the last group meeting that a cap on the indemnity may work, if we would agree to the negligence indemnity.

- In the attached Article 18 we have provided for loss of Federal funding, fines, penalties and sanctions to be clearly stated as recoverable directs, as requested. Just as a note, we have proposed a couple of language suggestions for “replacement costs” – we agree they, too, are recoverable as directs (both to finish and to go back and fix), so if the language still needs tweaking from HSD’s perspective, please do suggest and we will quickly respond. We also proposed a few ideas for aligning the first part of Article 18 with where we are landing on Article 8 (since it somewhat mirrors/overlaps the Article 8 indemnity). Again, if this does not work, please do let’s talk it out – we would not be in disagreement with the concept as desired by HSD- we are just endeavoring to line everything up as to wording.

We welcome HSDs feedback on these proposed terms and remain open to further refinement.

Also per our discussions yesterday, we would be privileged to expedite the contracting discussions. With this in mind, Deloitte would like to offer HSD a ‘contracting sprint’ where all applicable Deloitte decision makers convene in Santa Fe to finalize the contract. We believe that all elements of contract – T&CS, SOW, LDs and BAA – can be finalized in a concentrated three day session. We believe we are this close to finalization. Please let us know of your openness to such a ‘sprint’ as we are within days of finalizing the contract.

9/22/17
Email to Vendor from HSD Procurement Manager

- Acknowledging receipt of your email.

By submission of the email below, HSD would like to confirm acceptance from all partners in your firm to proceed with the proposal below?

I will take this proposal back to the team and review for clarity. It will be a few days so we can review and discuss. You shall receive a response back no later than COB on Wednesday September 27th.
| Date       | Author/Recipient | Content                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
Our service to the State of New Mexico is truly among our most valued relationships. To that end, what we are proposing for indemnity and liability, combined with where the parties have already landed on the other terms, makes for a contract arguably as protective of the State as any of our similar large-scale public sector systems contracts. The reason why we pay particular attention to indemnity and liability is that we also have a responsibility to all of our clients, including our other State of New Mexico clients, to maintain our solid financial standing and overall risk profile, so that we can back our commitments and carry them out for all of our clients. A high limitation of liability and indemnification obligations are only as good as the wherewithal of the firm that commits to them.

We remain confident that an agreement can be reached given the many approaches that can be taken on indemnity. We look forward to a discussion to finalize the legal terms so that we can we can resume our work on the SOW. Our national public sector health care leader would like to engage in that discussion directly, to ensure that we explore all avenues toward finalization in hearing directly the State’s expressed concerns.

On September 28, 2017 HSD rejected the September 22, 2017 language and indicated that the language for Articles 8 and 18 are as originally prescribed in the RFP and are replicated here:

**ARTICLE 8 INDEMNIFICATION**

A. **General.** The Contractor shall defend, indemnify and hold harmless the HSD, the State of New Mexico and its employees from all actions, proceedings, claims, demands, costs, damages, attorneys’ fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, during the time when the Contractor, its officer, agent, employee, servant or subcontractor thereof has or is performing Services pursuant to this Agreement. In the event that any action, suit or proceeding related to the Services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable, but no later than two (2) Business Days after it receives notice thereof, notify, by certified mail, the legal counsel of
the HSD, the Risk Management Division of the New Mexico General Services Department, and the DoIT.

B. The indemnification obligation under this Agreement shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor, and shall survive the termination of this Agreement. Money due or to become due to the Contractor under this Agreement may be retained by the HSD, as necessary, to satisfy any outstanding claim that the HSD may have against the Contractor.

ARTICLE 18 LIABILITY

Contractor shall be liable for damages arising out of injury to persons and/or damage to real or tangible personal property at any time, in any way, if and to the extent that the injury or damage was caused by or due to the fault or negligence of the Contractor or a defect of any equipment provided or installed, provided in whole or in part by the Contractor pursuant to the Agreement. Contractor shall not be liable for damages arising out of, or caused by, alterations made by the HSD to any equipment or its installation or for losses caused by the HSD’s fault or negligence.

Nothing in this Agreement shall limit the Contractor’s liability, if any, to third parties and/or employees of the HSD or the State of New Mexico, or any remedy that may exist under law or equity in the event a defect in the manufacture or installation of the equipment, or the negligent act or omission of the Contractor, its officers, employees, or agents, is the cause of injury to such person.

Nothing in this Agreement shall limit the Contractor’s liability, if any, related to any breach of privacy or security requirements related to Confidential Information.

Your proposed language provides for uncapped indemnity based upon a gross negligence standard and does not conform to the language provided above which contains a negligence standard. The proposed language is rejected.

Please provide your response to our rejection of the proposed Deloitte language no later than October 13, 2017.
<table>
<thead>
<tr>
<th>Date</th>
<th>Response from Vendor</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/13/17</td>
<td>Many thanks for the opportunity to provide a response to HSD’s below rejection. I think that as opposed to a lengthy email, perhaps the attached letter from Mr. Pat Howard may be a better format for our reply. We welcome the opportunity to continue this dialogue toward a mutually agreeable contract at HSD’s earliest convenience. Don’t hesitate to reach out to me via email or cell (214.893.7253) if you would like to further discuss. We’re available 24/7 to move this forward.</td>
</tr>
</tbody>
</table>