



DEPARTMENT OF HEALTH AND HUMAN SERVICES

## OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



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**TO:** Marilyn Tavenner  
Administrator  
Centers for Medicare & Medicaid Services

Leon Rodriguez  
Director  
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/S/

**FROM:** Brian P. Ritchie  
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**SUBJECT:** Memorandum Report: *Offshore Outsourcing of Administrative Functions by State Medicaid Agencies*, OEI-09-12-00530

This memorandum report provides information about State Medicaid agencies' requirements for outsourcing administrative functions offshore. Outsourcing occurs when Medicaid agencies enter into agreements with contractors to perform administrative functions. Outsourcing can occur inside the United States (domestic outsourcing) or outside (offshore outsourcing). In 2011, an Office of Inspector General (OIG) review found that one Medicaid agency was unaware that a contractor had sent electronic copies of Medicaid claims offshore for processing. This Medicaid agency inquired whether OIG had information regarding how States regulate offshore outsourcing. In response, we initiated the current study, obtaining information from all 56 Medicaid agencies regarding their requirements and practices for outsourcing administrative functions offshore. This memorandum report summarizes the information we collected from those States.

### SUMMARY

Only fifteen of fifty-six Medicaid agencies have some form of State-specific requirement that addresses the outsourcing of administrative functions offshore. The remaining 41 Medicaid agencies reported no offshore outsourcing requirements and do not outsource administrative functions offshore. Among the 15 Medicaid agencies with requirements, 4 Medicaid agencies prohibit the outsourcing of administrative functions offshore and 11 Medicaid agencies allow it. The 11 Medicaid agencies that allow offshore outsourcing of administrative functions each maintained Business Associate Agreements (BAAs) with contractors, which is a requirement under the Health Insurance Portability and Accountability Act (HIPAA). Among other purposes, BAAs are intended to safeguard protected health information (PHI). These 11 Medicaid agencies do not have additional State requirements that specifically address safeguarding PHI.

Seven of the eleven Medicaid agencies that allow offshore outsourcing of administrative functions reported that they outsource offshore through subcontractors, but none reported sending PHI offshore. If Medicaid agencies engage in offshore outsourcing of administrative functions that involve PHI, it could present potential vulnerabilities. For example, Medicaid agencies or domestic contractors that send PHI offshore may have limited means of enforcing provisions of BAAs that are intended to safeguard PHI. Although some countries may have privacy protections greater than those in the United States, other countries may have limited or no privacy protections.

## **BACKGROUND**

### **The Medicaid Program**

Medicaid is a joint Federal and State program that provides health care coverage to low-income and medically needy populations, such as children, senior citizens, and people with disabilities. States administer the Medicaid program subject to Federal guidelines and policies established by the Centers for Medicare & Medicaid Services (CMS).<sup>1</sup> For example, States establish—within Federal parameters—their own eligibility requirements, health care benefit packages for beneficiaries, and provider reimbursement rates. Medicaid agencies must cover acute and long-term care services that include, but are not limited to, inpatient and outpatient hospital services; laboratory and x-ray services; and nursing home facilities and home health care.<sup>2</sup> In addition, Medicaid agencies may choose to cover optional services such as prescription drugs, durable medical equipment, and personal care services.<sup>3</sup>

### **Medicaid Agencies' Administrative Functions**

Medicaid agencies perform a variety of functions, usually through the integration of information technology (IT) or data systems, to support the administration of the Medicaid program. Medicaid administrative functions include, but are not limited to:<sup>4</sup>

- enrolling eligible individuals,
- determining what benefits the Medicaid agency will cover,
- determining how much the Medicaid agency will pay for covered benefits and from whom it will purchase services (i.e., fee-for-service and managed care plans),
- having a system for processing claims from fee-for-service providers and making capitation payments to managed care plans,
- monitoring the quality of the services that the Medicaid agency purchases,
- ensuring that State and Federal health care funds are not spent improperly or fraudulently,
- collecting program information and reporting it to CMS, and
- resolving grievances from applicants, beneficiaries, providers, and health plans.

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<sup>1</sup> Social Security Act (SSA) §§ 1901–1936, 42 U.S.C. §§ 1396–1396v.

<sup>2</sup> 42 CFR § 440.210.

<sup>3</sup> 42 CFR § 440.220.

<sup>4</sup> See generally SSA § 1902(a), 42 U.S.C. § 1396a(a).

### **Outsourcing of Medicaid Administrative Functions**

Although Federal law requires that each State designate a single State agency to administer the State’s Medicaid program, Medicaid agencies have the authority to delegate or outsource their administrative functions to other State agencies and/or contractors.<sup>5,6</sup> Medicaid agencies may outsource by entering into agreements with contractors to perform specific administrative functions on a periodic or routine basis. These contractors may be private companies identified as covered entities,<sup>7</sup> business associates,<sup>8,9</sup> or trading partners.<sup>10</sup>

Medicaid agencies may outsource directly, i.e., through contractors, or indirectly, i.e., through subcontractors. Direct offshore outsourcing occurs when a Medicaid agency contracts with an offshore contractor. Indirect offshore outsourcing occurs when a Medicaid agency’s contractor subcontracts to an offshore contractor. In a 2006 report on 45 State Medicaid agencies, the Government Accountability Office (GAO) found that at least one Medicaid agency directly outsourced offshore and at least one Medicaid agency indirectly outsourced offshore. GAO stated that such reporting may be understated because many Federal contractors and agencies did not know whether their domestic vendors transferred personal health information to other locations or vendors.<sup>11</sup> Moreover, the GAO report did not assess States’ compliance with existing HIPAA regulations.

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<sup>5</sup> SSA § 1902(a)(5), 42 U.S.C. § 1396a(a)(5).

<sup>6</sup> 42 CFR § 431.10.

<sup>7</sup> Covered entities are health plans, clearinghouses, and providers that electronically transmit PHI. Examples of PHI include a beneficiary’s name, Medicaid number, billing transactions, and date of birth. PHI can be transmitted in electronic, oral, or paper formats. The HIPAA Privacy Rule provides Federal safeguards to maintain the privacy of PHI. Health plans, including Medicare and Medicaid, provide or pay for the cost of health care. Clearinghouses process and convert health information from one format to another. Health care providers include physicians and pharmacies that electronically submit PHI for financial or administrative transactions, such as beneficiary claims. 45 CFR § 150.103.

<sup>8</sup> Business associates are persons or organizations that perform certain functions involving the use or disclosure of PHI on behalf of a covered entity. Business associates are subject to the HIPAA Privacy Rule. 45 CFR § 150.103.

<sup>9</sup> Covered entities and business associates must have BAAs. Covered entities are required to have BAAs for “downstream” outsourcing—i.e., when the original outsourcing contract is followed by one or more subcontracting arrangements. In such cases, BAAs must establish the conditions under which downstream contractors may use and disclose PHI and must include the required privacy safeguards. 45 CFR §§ 150.103 and 165.504(e).

<sup>10</sup> Trading partners are entities that transmit electronic health data to covered entities, business associates, providers/suppliers, and software vendors, or that receive such data. Trading partners are subject to the HIPAA Privacy Rule.

<sup>11</sup> GAO, *Domestic and Offshore Outsourcing of Personal Information in Medicare, Medicaid, and TRICARE*, GAO-06-676, September 2006.

### **Federal Requirements for Offshore Outsourcing**

There are no Federal regulations that prohibit the offshore outsourcing of Medicaid administrative functions. CMS requires that Medicare contractors or subcontractors obtain written approval prior to performing system functions<sup>12</sup> offshore.<sup>13</sup> Although there are no similar requirements from CMS for Medicaid, CMS has issued guidance in accordance with the Affordable Care Act (ACA) stating that Medicaid agencies are permitted to provide payments to contractors operating offshore for tasks—including administrative functions—that support the administration of the Medicaid program.<sup>14, 15</sup>

### **METHODOLOGY**

We conducted an electronic survey of all 56 Medicaid agencies.<sup>16</sup> In May 2013, we asked these agencies (1) whether they had any policies, Executive Orders, State laws, or contract requirements (collectively, “requirements”) that addressed the outsourcing of administrative functions offshore<sup>17</sup> and (2) whether they directly or indirectly outsourced administrative functions offshore.

For Medicaid agencies with outsourcing requirements, we asked whether the requirements included provisions specifically addressing PHI and whether the Medicaid agencies monitor contractors’ compliance with the outsourcing requirements. We requested their requirements and BAAs, and we reviewed the requirements to identify the type or form of the requirement. For the Medicaid agencies that outsource administrative functions offshore, we asked what types of administrative functions are outsourced offshore. In June 2013, we conducted telephone interviews, as needed, with selected Medicaid agencies to clarify survey responses, and in some cases, we clarified inconsistent survey responses via email.

This study was conducted in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency.

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<sup>12</sup> Medicare system functions include, but are not limited to, the transmission of electronic claims, receipt of remittance advice, or any system access to obtain beneficiary PHI and/or eligibility information.

<sup>13</sup> *Medicare Fee For Service Standard Companion Guide*, page 18. Accessed at <http://www.medicarehnic.com/edi/download/J14%20PART%20B%20Medicare%20FFS%205010A1%20Companion%20Guide.pdf> on May 25, 2012. *Appendix A, CMSR High Impact Level Data*, Section SA-9. Accessed at [http://www.cms.gov/informationsecurity/downloads/ARS\\_App\\_A-CMSR\\_HIGH.pdf](http://www.cms.gov/informationsecurity/downloads/ARS_App_A-CMSR_HIGH.pdf) on May 25, 2012.

<sup>14</sup> ACA, P.L. No. 111-148, § 6505.

<sup>15</sup> Although Medicaid agencies cannot pay for *health care benefits or services* to any entity located offshore or provided by offshore providers, payments for *administrative functions* are permitted. CMS, *State Medicaid Directors Letter #10-026*, December 2010.

<sup>16</sup> Medicaid agencies include those in the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

<sup>17</sup> We sent letters to each State Medicaid Director requesting contact information for the person or persons knowledgeable about whether the agency outsources administrative functions offshore. We then sent the survey to those contacts. In some cases, State Medicaid Directors identified themselves as the appropriate contact.

## RESULTS

### **Fifteen Medicaid agencies have requirements addressing the offshore outsourcing of administrative functions**

Only one-quarter (15 of 56) of Medicaid agencies reported having some form of requirement addressing the offshore outsourcing of Medicaid administrative functions. Of those 15 Medicaid agencies, 11 have requirements that allow such offshore outsourcing. Nine of the eleven Medicaid agencies have requirements that allow offshore outsourcing with very few restrictions, and 2 of the 11 have requirements that allow offshore outsourcing only under limited circumstances. The remaining 4 of the 15 Medicaid agencies have requirements that prohibit the offshore outsourcing of administrative functions. None of the 41 States without such requirements reported outsourcing Medicaid administrative functions offshore.

*Nine Medicaid agencies have requirements allowing offshore outsourcing with very few limitations.* Among the nine Medicaid agencies that allow offshore outsourcing with very few limitations, three agencies addressed offshore outsourcing through Executive Orders, State laws, or a Medicaid agency policy manual. The remaining six Medicaid agencies addressed offshore outsourcing through contract provisions. All nine Medicaid agencies allow indirect offshore outsourcing—i.e., they allow their direct contractors to have offshore subcontractors. Two of these Medicaid agencies also allow direct offshore outsourcing, in which the Medicaid agency contracts with offshore contractors for administrative functions. Two other Medicaid agencies allow indirect offshore outsourcing, but specifically prohibit direct offshore outsourcing. (Table 1 shows details on the nine agencies that allow offshore outsourcing with very few limitations.)

According to the requirements that these nine Medicaid agencies have in place, the agencies must approve any contractor requests to outsource administrative functions offshore. Among the nine Medicaid agencies, views and practices regarding offshore outsourcing varied—some reported that they outsource offshore on a case-by-case basis, some reported giving preference to domestic contractors, and some reported that they generally do not view the offshore outsourcing of administrative functions any differently than they view domestic outsourcing.

**Table 1: Description of Nine Medicaid Agencies' Requirements Allowing Offshore Outsourcing of Administrative Functions with Very Few Restrictions**

State Medicaid agency	Form of requirement <sup>18</sup>	Description of the requirement for <i>direct</i> offshore outsourcing	Description of the requirement for <i>indirect</i> offshore outsourcing	Does the requirement specifically address PHI?	Does the State monitor contractor compliance with the requirement?
Florida	State law <sup>19</sup>	No requirement	Allows	No	Yes
Massachusetts	Contract provisions	No requirement	Allows	No	Yes
Mississippi	Contract provisions	No requirement	Allows	No	Yes
Montana	Contract provisions	Prohibits	Allows	No	Yes
New Mexico	Contract provisions	Prohibits	Allows	No	Yes
North Dakota	Contract provisions	No requirement	Allows	No	Yes
Pennsylvania	Executive Order <sup>20</sup>	Allows	Allows	No	Yes
Rhode Island	Contract provisions	No requirement	Allows	No	Yes
Tennessee	Medicaid Policy Manual	Allows	Allows	No	Yes

The nine Medicaid agencies did not have offshore outsourcing requirements that specifically addressed the safeguarding of PHI. Instead, these nine Medicaid agencies require contractors and subcontractors to have BAAs complying with HIPAA requirements for the protection of PHI. HIPAA requires that BAAs specify the contractor's responsibilities for safeguarding PHI, the circumstances under which PHI

<sup>18</sup> In their contract provisions, Medicaid agencies may reiterate and/or expand on the requirements they have already specified elsewhere (e.g., in Executive Orders, State law, and Medicaid policy manuals).

<sup>19</sup> The Medicaid agency allows indirect offshore outsourcing for managed care organizations and prepaid health plans; however, certain statutory and/or contractual restrictions exist. For example, contract provisions may require that some administrative functions be performed in a domestic location.

<sup>20</sup> Contractors must identify during the procurement process whether they or any subcontractor will perform administrative functions offshore. During the selection of contractors, the State may give additional consideration to contractors that will perform services within the United States.

may be used and disclosed, and the requirements for reporting PHI violations or breaches. However, for all nine agencies, BAAs did not specifically address the offshore outsourcing of administrative functions involving PHI. If Medicaid agencies engage in offshore outsourcing of administrative functions that involve PHI, it could present potential vulnerabilities. For example, Medicaid agencies or domestic contractors who send PHI offshore may have limited means of enforcing provisions of BAAs that are intended to safeguard PHI. Although some countries may have privacy protections greater than those in the United States, other countries may have limited or no privacy protections to support HIPAA compliance.

All nine Medicaid agencies reported that they monitored contractors to ensure compliance with the agencies' requirements on offshore outsourcing. Although some of these Medicaid agencies reported that they directly monitor subcontractors, other Medicaid agencies reported that they rely on contractors to monitor subcontractors. Examples of monitoring activities reported by the nine Medicaid agencies included approving contractors' requests to subcontract; conducting ongoing reviews of contractors' and/or subcontractors' policies and procedures; and requiring performance reports from contractors. These activities may vary based on the scope of the contract.

Two Medicaid agencies have requirements allowing offshore outsourcing only under limited circumstances. Two Medicaid agencies addressed offshore outsourcing through an Executive Order or a State law. As shown in Table 2, both of these Medicaid agencies allow offshore outsourcing directly and indirectly.

**Table 2: Description of Two Medicaid Agencies’ Requirements Allowing Offshore Outsourcing of Administrative Functions Only Under Limited Circumstances**

State Medicaid agency	Form of requirement <sup>21</sup>	Description of the requirement for <i>direct</i> offshore outsourcing	Description of the requirement for <i>indirect</i> offshore outsourcing	Examples of circumstances under which offshore outsourcing is allowed	Does the requirement specifically address PHI?	Does the State monitor contractor compliance with the requirement?
Missouri	Executive Order <sup>22</sup>	Allows	Allows	Contractor or subcontractor must meet one of four conditions, such as providing a unique service that is mandatory for the State to purchase	No	Yes
New Jersey	State law	Allows	Allows	The function or service cannot be provided by domestic contractor or subcontractor	No	Yes

Source: OIG analysis of State survey responses and regulations, 2013.

One Medicaid agency reported that State agencies must award contracts to domestic contractors unless certain circumstances exist—for example, the contractor or subcontractor provides a unique service that is mandatory for the State agency to purchase. The second Medicaid agency reported that all contracts awarded by the State must be performed domestically except when the contracted services cannot be provided within the United States. In such cases, the contractor and subcontractor must specify why these services cannot be performed domestically. Both Medicaid agencies reported that they must approve offshore outsourcing contracts. For more information about the two Medicaid agencies’ regulations, see the Appendix.

Similar to the nine Medicaid agencies that allow offshore outsourcing with very few limitations, these two Medicaid agencies do not have requirements that specifically address PHI. However, these two Medicaid agencies include requirements to protect PHI in BAAs with all contractors and subcontractors. In both States, the Medicaid agency contractors must also have BAAs with their respective subcontractors that include similar requirements for protecting PHI.

Both Medicaid agencies reported monitoring contractors and subcontractors. For example, one of the Medicaid agencies reported that all contract requirements are monitored for compliance by the contract administrator and by the State agency responsible for oversight of State contracts.

<sup>21</sup> As noted in Footnote 18, Medicaid agencies may use contract provisions to reiterate and/or expand on requirements they have already specified elsewhere.

<sup>22</sup> Contractors must disclose the location where all services are performed.

*Four Medicaid agencies have requirements prohibiting offshore outsourcing.* Of the four Medicaid agencies with requirements prohibiting the offshore outsourcing of administrative functions, three rely on Executive Orders that prohibit such outsourcing and one relies on contract provisions that prohibit it. All four Medicaid agencies reported monitoring contractors and subcontractors to ensure compliance with the agencies’ regulations. For example, contractors and subcontractors sign attestations of compliance with the Medicaid policies, disclose the location where all work is performed, and/or provide the primary place of business for the contractor or any subcontractor.

**Seven Medicaid agencies reported currently outsourcing Medicaid administrative functions offshore**

Seven of the fifty-six Medicaid agencies reported that they currently outsource administrative functions offshore; all seven of these have requirements allowing offshore outsourcing. As shown in Table 3, all seven Medicaid agencies indirectly outsource offshore, and one of the seven also directly outsources offshore.

**Table 3: Description of the Seven Medicaid Agencies’ Practices for Outsourcing Administrative Functions Offshore**

State Medicaid agency	Form of requirement	Examples of administrative functions outsourced offshore	Type(s) of offshore outsourcing
Florida	State law	IT	Indirect
Massachusetts	Contract provisions	IT	Indirect
Mississippi	Contract provisions	No specific types or examples	Indirect
Missouri	Executive Order	No specific types or examples	Direct and indirect
Montana	Contract provisions	No specific types or examples	Indirect
North Dakota	Contract provisions	IT	Indirect
Rhode Island	Contract provisions	IT	Indirect

Source: OIG analysis of State survey responses and regulations, 2013.

Four of the seven Medicaid agencies reported that the most common type of administrative function that is outsourced offshore relates to IT. For example, a Medicaid contractor in one State reported that it outsourced the Medicaid Management Information System (MMIS) implementation projects to offshore programmers and

software developers.<sup>23</sup> In another State, a domestic contractor used offshore subcontractors to help develop and design a new claims processing system for the Medicaid agency. In this instance, the offshore subcontractor designed programming and systems testing for this new system. The remaining three Medicaid agencies did not report any common type of administrative functions that are outsourced offshore.

All seven Medicaid agencies reported that they do not outsource offshore any administrative functions involving PHI. In fact, some of these seven Medicaid agencies reported that for administrative functions involving PHI, they strongly prefer to outsource only domestically. For example, one of the seven Medicaid agencies explicitly reported denying all requests to send offshore any administrative functions involving PHI.

## CONCLUSION

This memorandum report provides information about the current Medicaid environment for outsourcing administrative functions offshore. As of June 2013, 15 of 56 Medicaid agencies had some form of State-specific requirements that addressed offshore outsourcing. The remaining 41 Medicaid agencies reported no offshore outsourcing requirements and do not outsource administrative functions offshore. Among the 15 Medicaid agencies with requirements, 4 Medicaid agencies prohibit the outsourcing of administrative functions offshore and 11 Medicaid agencies allow it. The 11 Medicaid agencies that allow offshore outsourcing of administrative functions each maintain BAAs with contractors, which is a requirement under HIPAA. Among other things, BAAs are intended to safeguard PHI. These 11 Medicaid agencies do not have additional State requirements that specifically address the safeguarding of PHI. Seven of the eleven Medicaid agencies reported outsourcing offshore through subcontractors, but none reported sending PHI offshore. If Medicaid agencies engage in offshore outsourcing of administrative functions that involve PHI, it could present potential vulnerabilities. For example, Medicaid agencies or domestic contractors who send PHI offshore may have limited means of enforcing provisions of BAAs that are intended to safeguard PHI. Although some countries may have privacy protections greater than those in the United States, other countries may have limited or no privacy protections.

This report is being issued directly in final form because it contains no recommendations. If you have comments or questions about this report, please provide them within 60 days. Please refer to report number OEI-09-12-00530 in all correspondence.

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<sup>23</sup> MMIS is a claims processing and information retrieval system for Medicaid. All Medicaid agencies operate an MMIS to support program administration and maintain information, such as provider enrollment and claims processing. Medicaid agencies may use a contractor to operate their MMIS. 42 CFR pt. 433.

**APPENDIX: STATE REQUIREMENTS FOR TWO MEDICAID AGENCIES THAT ALLOW OFFSHORE OUTSOURCING OF ADMINISTRATIVE FUNCTIONS UNDER LIMITED CIRCUMSTANCES**

**State of Missouri's Executive Order**

RECEIVED & FILED

MAR 17 2004

Executive Order  
04-09

*Missouri*  
SECRETARY OF STATE

**WHEREAS**, Missouri state agencies and political subdivisions procure some goods and services, by contract, through public and private vendor corporations and businesses (collectively, "vendors"); and

**WHEREAS**, in a limited number of instances, vendors providing services may seek to subcontract or otherwise obtain some of these services from a location outside the United States; and

**WHEREAS**, such international outsourcing could aggravate unemployment and workforce dislocation of Missouri and United States residents, including industries and jobs this state has expended resources to attract; and

**WHEREAS**, international outsourcing potentially erodes revenues from the state of Missouri and the United States by drawing away jobs and income; and

**WHEREAS**, international outsourcing could provide fewer privacy protections for state residents whose personal information may, in the course of service delivery, be transmitted to locations outside the United States.

**NOW, THEREFORE, I, BOB HOLDEN, GOVERNOR OF THE STATE OF MISSOURI**, by virtue of the authority vested in me as governor of the State of Missouri, do hereby order as follows:

1. Each vendor submitting a bid to the State of Missouri shall be required to provide certification of the location where the contracted services are to be performed, and whether the vendor contemplates any of the work necessary to provide the contracted services being performed offshore.
2. The Office of Administration shall direct all current contractors to disclose whether any work pursuant to existing contracts is being performed offshore.
3. If during the term of the contract, the contractor or subcontractor has certified that work will be performed in the United States and proceeds to shift work outside of the United States, the contractor shall be deemed in breach of contract, unless the Office of Administration shall first have determined in writing that extraordinary circumstances require the shift of work or that a failure to shift the work would result in economic hardship to the State of Missouri.
4. No state agency shall award a contract to a vendor who contemplates performing work (or having a subcontractor perform work) pursuant to the contract at a site outside the United States, or does not provide disclosures as required above, unless one of the following conditions is met:
  - a. The vendor or its subcontractor provides a unique good or service; the particular good or service is deemed mandatory for the purposes of the purchasing agency; and no comparable domestically-provided good or service can adequately duplicate the unique features of the good or service provided by the vendor or its subcontractor; or
  - b. The vendor or its subcontractor is a foreign firm hired to market Missouri services or products to a foreign country; or
  - c. A significant and substantial economic cost factor exists that outweighs the economic impact of providing the function or professional services within the United States, such that a failure to use the vendor or subcontractor's services would result in economic hardship to the State of Missouri; or

**APPENDIX (continued)**

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- d. The vendor or its subcontractor maintains a significant business presence in the United States and only performs a trivial portion of work under the contract outside of the United States.



**ATTEST:**

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, on this 17<sup>th</sup> day of March 2004.

  
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**Bob Holden**  
Governor

  
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**Matt Blunt**  
Secretary of State

## APPENDIX (continued)

### State of New Jersey's State Law

**New Jersey Statutes Annotated 52:34-13.2: State contracts, services performed within U.S.; exceptions.**

1. a. Every State contract primarily for the performance of services shall include provisions which specify that all services performed under the contract or performed under any subcontract awarded under the contract shall be performed within the United States.

b. The provision of subsection a. of this section shall not apply whenever:

(1) the Director of the Division of Purchase and Property or the Director of the Division of Property Management and Construction, as appropriate, certifies in writing a finding that a service is required by the Executive Branch of the State and that the service cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the State Treasurer;

(2) the contracting officer for the Legislature or for any office, board, bureau or commission within or created by the Legislative Branch certifies in writing a finding that a service is required by the Legislature or the office, board, bureau or commission within or created thereby and that the service cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the appropriate legislative authority;

(3) the contracting officer of any independent State authority, commission, instrumentality or agency certifies in writing a finding that the service required by the independent State authority, commission, instrumentality or agency cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the executive director or other equivalent authority of that authority, commission, instrumentality or agency; or

(4) any of the directors or contracting officers in paragraphs (1) through (3) of this subsection b., as may be applicable, certifies in writing a finding that inclusion in the State contract of a provision as described in subsection a. of this section with respect to the performance of a service required by their contracting entity under the State contract would violate the terms, conditions, or limitations of any grant, funding or financial assistance from the federal government or any agency thereof, and the certification is approved by the appropriate approval officer.

As used in this section, "State contract" means every contract entered into by (1) the Governor, the head of any of the principal departments in the Executive Branch of the State Government, and the head of any division, board, bureau, office, commission or other instrumentality within or created by such department, (2) the contracting officer of the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch, and (3) the head or contracting officer of any independent State authority, commission, instrumentality or agency within or created by such an authority, who is authorized to enter into contracts that include the performance of services. A county, municipality or school district shall not be deemed an agency or instrumentality of the State for the purpose of this section. L.2005,c.92,s.1.