# Staff Summary Report

Tempe

**Council Meeting Date: 05/28/2009** **Agenda Item Number: 38**

**SUBJECT:** Request approval of the executable contract with Medco Health Solutions the City's pharmacy benefits provider.

**DOCUMENT NAME:** 20090528fsta03 **PURCHASES (1004-01)**

**COMMENTS:** (T08-124-01) Total cost for this contract shall not exceed $7,000,000 during the initial two-year contract period.

**PREPARED BY:** Tony Allen, Procurement Officer, 480-350-8548

**REVIEWED BY:** Michael Greene, Central Services Administrator, 480-350-8516
Renie Brocerick, Human Resources Manger, 480-350-8407
Lynna Soller, Employee Benefits Administrator, 480-350-2975

**LEGAL REVIEW BY:** David Park, Assistant City Attorney, 480-350-8907

**DEPARTMENT APPROVAL:** Jerry Hart, CPA, Financial Services Manager, 480-350-8505

**FISCAL NOTE:** Sufficient Funds have been appropriated in the Health Fund for anticipated expenditures in the current fiscal year.

**RECOMMENDATION:** Approve the executable contract.

**ADDITIONAL INFO:** Background Information

In order to assure availability of Pharmacy Benefits Management services for current and retired City employees and their dependents, the Tempe City Council approved a contact award to Medco Health Solutions on May 15, 2008. The award was based upon City of Tempe terms and conditions and a Medco provided generic contract. Staff is now submitting the executable version of the Pharmacy Benefits Management contract for review by City Council.

The award recommendation was approved on May 15, 2008 for an initial two-year period with four, one-year renewal options which can be executed if the performance of Medco is satisfactory when renewal periods are reached.

A committee comprised of Human Resources staff, union representative and Procurement staff reviewed and scored the submissions from 10 firms and recommended award of a contract to Medco Health Solutions.

The submitted executable version of the contract required extensive negotiations between legal teams. This contract provides the City with a firm defendable legal base and clearly defined liquidated damages if performance of Medco does not meet contract minimums.

Contractor Performance

Contractor has performed satisfactorily since initiation of the contract.

EXECUTION COPY

# Pharmacy Benefits Manager – Agreement

**THIS AGREEMENT** is entered into as of the 1st day of July 2008 (the "Effective Date") between Medco Health Solutions, Inc. ("Medco"), located at 100 Parsons Pond Drive, Franklin Lakes, New Jersey 07417, through Systemed, a Medco business, and City of Tempe ("CITY OF TEMPE"), located at 20 E 6th Street, Tempe, AZ 85281.

**WHEREAS,** CITY OF TEMPE provides for the payment of prescription drugs and related services for persons eligible to receive such benefits through affiliation with a group that has a contract or other arrangement in effect with CITY OF TEMPE; and

**WHEREAS,** Medco, provides prescription drug benefits programs and, in connection therewith, has established networks of participating retail pharmacies and operates a system for the processing, fulfillment and payment of claims for prescription drugs furnished by such pharmacies; and

**WHEREAS,** Medco's Medco By Mail mail order pharmacy affiliates are licensed pharmacies which provide prescription drugs via a mail order service; and

**WHEREAS,** CITY OF TEMPE desires to retain the services of Medco and its subsidiaries and affiliates, including Medco Health, L.L.C., which holds TPA licenses in certain states, as applicable, to provide a prescription drug benefit program (the "Program") including, but not limited to, retail pharmacy and mail order pharmacy and specialty drug pharmacy services for eligible persons, point-of-care, physician office communications and cost containment initiatives developed and implemented by Medco, which may include communications with prescribers, patients and/or participating pharmacies, and financial incentives to participating pharmacies for their participation in such initiatives (collectively, "PBM Services").

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the parties hereto agree as follows:

## 1. Definitions

A. **AWP** means the average wholesale price of the Covered Drug, as set forth in the current price list in recognized sources such as First DataBank's National Drug Data File if available, or other nationally recognized source determined by Medco. Under the Retail Pharmacy Program, AWP is based on the package size submitted, and for Compound Prescriptions is 1.25 times the AWP of the submitted Covered Drug. Under the Mail Order Pharmacy Program, AWP is based on package sizes of 100 units for capsules and tablets, 16 oz. quantities for liquids, and the manufacturer's smallest available package size for injectable Covered Drugs (or the next closest package size if such quantities or sizes are not available), and all other Covered Drugs will be priced as individual units or smallest package size available (e.g., per vial, per suppository, etc.). If First DataBank or other applicable source changes the methodology for calculating AWP or ceases publishing or replaces AWP, or Medco utilizes another recognized pricing source or a pricing benchmark other than AWP, in a way that changes the economics of the Program, the parties agree to modify the Program Pricing Terms to preserve the parties' relative economics before such changed methodology or other event.

B. **Brand Name Drugs** means all single-sourced drugs and multisource brand drugs as set forth in First Databank's National Drug Data File or such other nationally recognized source, as reasonably determined by Medco.

C. **Business Days or business days** means all days except Saturdays, Sundays, and federal holidays. All references to "day(s)" are to calendar days unless "business day" is specified.

D. **Compound Prescription** means a prescription that meets the following criteria: two or more solid, semi-solid or liquid ingredients, at least one of which is a Covered Drug, that are weighed or measured then prepared according to the prescriber's order and the pharmacist's art.

E. **Contract Quarter** means the full three (3) month period commencing on the Effective Date, and each full consecutive three (3) month period thereafter that this Agreement remains in effect.

F. **Contract Year** means the full twelve (12) month period commencing on the Effective Date, and each full consecutive twelve (12) month period thereafter that this Agreement remains in effect.

G. **Copayment and/or Coinsurance** means the amount to be paid by an Eligible Person for each prescription or authorized refill as determined in accordance with the Plan Design(s).

H. **Covered Drugs** means drugs which, under state or federal law, require a prescription, including Compound prescriptions. Excluded from Covered Drugs are (i) cosmetic drugs, (ii) appliances, devices, bandages, heat lamps, braces, splints, and artificial appliances, (iii) health and beauty aids, cosmetics and dietary supplements and (iv) OTC products ("Exclusions"). Additional Covered Drugs and/or Exclusions applicable to any individual Group will be designated by CITY OF TEMPE in the applicable Plan Design.

I. **Dispensing Fee** means the amount payable by City of Tempe pursuant to Sections 1, 2 and 3 of Schedule A this Agreement for a Participating Pharmacy or Medco to dispense a prescription or authorized refill to an Eligible Person.

J. **Eligible Person** means each person who, through affiliation with a Group, is eligible for prescription drug benefits pursuant to this Agreement, and such person's qualified dependents.

K. **Generic Drug** means a multisource generic drug set forth in First Databank's National Drug Data File, or such other nationally recognized source, as reasonably determined by Medco that is available in sufficient supply from multiple FDA approved generic manufacturers of such drug.

L. **Group** means a group of Eligible Persons that have the same Plan Design as designated by the City of Tempe.

M. **Integrated Program** means a program in which Eligible Persons enrolled in such program may have prescriptions dispensed either (i) by a Participating Pharmacy under the Retail Pharmacy Program or (ii) by Medco under the Mail Order Pharmacy Program. Reference to the Retail Pharmacy Program and/or Mail Order Pharmacy Program herein will include services performed by Medco for Eligible Persons enrolled in the Integrated Program.

N. **MAC or the Maximum Allowable Cost** consists of a list of off-patent drugs subject to maximum allowable cost payment schedules developed or selected by Medco. The payment schedules specify the maximum unit ingredient cost payable by the City of Tempe for drugs on the MAC list. The MAC list and payment schedules are frequently updated.

O. **Mail Order Pharmacy Program** means the program described in Section 20 through which Eligible Persons may submit a prescription along with the applicable Copayment/Coinsurance to Medco for dispensing via mail order.

P. **Minimum Enrollment** means an enrollment of not less than 1,980 Primary Eligible Participants under the Program.

Q. **Participating Pharmacy** means a retail pharmacy that has entered into an arrangement with Medco that specifies the terms and conditions of the pharmacy's participation, including the rates that Medco will pay the pharmacy to participate in Medco's retail network(s) servicing the City of Tempe's Program including the rates that Medco will pay the pharmacy.

R. **Plan Design** means Program drug coverage, days supply limitation, Copayment/Coinsurance, Formulary (including Formulary drug selection and relative cost indication) and other Program specifications applicable to the Program designated by the City of Tempe as set forth in this Agreement or otherwise documented between the parties.

S. **Primary Eligible Participant** means each Eligible Person, excluding Eligible Persons who are qualified dependents.

T. **Program Pricing Terms** means the (i) financial or pricing terms, allowances and guarantees set forth in Schedule a of this Agreement and (ii) the performance standards and liquidated damages set forth in Section 21 of this Agreement

U. **Retail Pharmacy Program** means the program described in Section 19 in which Eligible Persons may purchase Covered Drugs from a Participating Pharmacy upon verification of Program eligibility and payment of the applicable Copayment/Coinsurance, and the claim is submitted by the Participating Pharmacy to Medco for payment in accordance with this Agreement and the applicable Medco Participating Pharmacy agreement.

V. **Specialty Drugs** means pharmaceutical products that are generally biotechnological in nature, with many requiring injection or non-oral methods of administration, and that may have special shipping or handling requirements. Some of the disease categories currently in Medco's specialty pharmacy programs include cancer, multiple sclerosis, Hepatitis C, rheumatoid arthritis, cystic fibrosis, infertility, RSV prophylaxis, Gaucher disease, growth hormone deficiency, hemophilia and immune deficiency.

W. ***TelePAID*® System or "*TelePAID*®** means Medco's real time, on-line system for adjudicating prescription drug claims submitted by retail pharmacies.

2. **City of Tempe Furnished Information**

CITY OF TEMPE will promptly furnish, in a format acceptable to Medco, all information necessary for Medco to render the services set forth herein. Such information will include, but is not limited to:

A. A file of Eligible Persons, and subsequent timely additions and deletions to such file as changes occur. CITY OF TEMPE will pay for any Covered Drug dispensed to a person reported by CITY OF TEMPE as no longer an Eligible Person, if such notification is not received by Medco at least two (2) full business days prior to the dispensing date of such prescription.

B. Designation, in writing, of those Plan Design features to be determined by CITY OF TEMPE.

C. The reimbursement terms applicable to direct reimbursement claims submitted by Eligible Persons under the Retail Pharmacy Program.

D. The type, number, and description of Medco identification cards ("Identification Cards") required under the Retail Pharmacy Program.

## 3. Standard Terms and Conditions

**3.1 Certification:** By signing the "Vendor's Proposal Offer", form 201-B, Medco certified:

A. The submission of the proposal offer response did not involve collusion or other anti-competitive practices.

B. Medco shall not discriminate against any employee or applicant for employment in violation of Federal and Arizona State law and the Medco shall comply with the Americans with Disabilities Act (ADA). Suppliers of products and services to the City of Tempe shall operate as an equal opportunity employer and shall not discriminate against any employee or applicant for employment because of race, color, religion, age, sex, sexual orientation, national origin, or because he or she has a physical or mental disability or because he or she is a disabled veteran or a veteran of the Vietnam era, including, without limitation, with respect to employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship.

The City Procurement Office is committed to fair and equal procurement opportunities for all firms wishing to do business with the City and encourages the participation of small and disadvantaged businesses in all proposals and contracting activities conducted by the City.

C. Medco has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted offer. Failure to sign the "Vendor's Proposal Offer" or signing it with a false statement shall void the submitted proposal offer and/or any resulting contract. In addition, the vendor may be debarred from future proposal and bidding participation with the City and may be subject to such actions as permitted by law.

**3.2 Gratuities:** The City may, by written notice to Medco, cancel any resultant contract, if it is found that gratuities in any form were offered or given by Medco or agent or representative of the Medco, to any employee of the City or member of a City evaluation committee with a view toward securing an order, securing favorable treatment with respect to awarding, amending or making of any determinations with respect to performing such order. In event the contract is canceled by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover or withhold from contractor the amount of gratuity.

**3.3 Applicable Law:** This contract shall be governed in accordance with the laws of the State of Arizona and suits pertaining to this Agreement may only be brought in courts located in Maricopa County, Arizona.

However, all matters relating to the Mail Order Pharmacy Program operation of Medco will be governed by the laws of the state in which Medco's mail order pharmacy is located.

3.4 **Dispute Resolution:** Except for those matters subject to emergent or injunctive relief, this contract is subject to arbitration to the extent required by law. If arbitration is not required by law, the City and Medco will meet and/or consult with each other in good faith to resolve any disputes arising out of the contract. If good faith efforts fail, then the City and Medco may attempt to resolve any disputes through mediation. If mediation is utilized, the City and Medco mutually will agree upon a mediator whose fees will be shared equally by the City and Medco.

3.5 **Contract Modifications:** This contract may only be modified in writing by the parties.

3.6 **Severability:** The provisions of this contract are severable to the extent that any provision or application held to be invalid shall not affect any other provision or application of the contract, which may remain in effect without the invalid provision or application to the extent that the material provisions of this RFP and contract are not materially vitiated.

3.7 **Relationship of Parties:** It is clearly understood that each party to this contract will act in its individual capacity and not as an agent, employee, partner, joint venturer, or associate of the other party. An employee or agent of one party shall not be an employee or agent of the other party for any purpose whatsoever.

3.8 **Contract Assignment:** No right or interest in this contract shall be assigned by either party provided, however, that services to be performed by Medco hereunder may be performed by its subsidiaries, affiliates, divisions and/or designees. The duties and obligations of the parties will be binding upon, and inure to the benefit of, successors, assigns, or merged or consolidated entities of the parties.

3.9 **Rights and Remedies:** The waiver of any breach or violation of any term or provision hereof will not constitute a waiver of any subsequent breach or violation of the same or any other term or provision. No waiver or relinquishment by a party of any right or remedy under this Agreement will occur unless the waiver or relinquishment is in a written document signed by an officer of the party.

3.10 **Financial Responsibility** - If Medco has reasonable grounds to believe that CITY OF TEMPE may not meet its payment obligations under this Agreement as they become due, Medco may request information and/or reasonable assurances (including a deposit) from CITY OF TEMPE as to its financial responsibility. If the information or assurances are not furnished to Medco within five (5) days, or are not satisfactory in Medco's reasonable judgment, Medco may immediately terminate this Agreement or suspend performance pending receipt of the requested information or assurances.

3.11 **Plan Design** - The Program Pricing Terms set forth in this Agreement are based upon the Plan Designs, Minimum Enrollment and Program specifications agreed to between the parties as reflected in this Agreement and as otherwise hereafter agreed to by the parties in writing. The Program Pricing Terms are also based upon CITY OF TEMPE funding 50% or greater of the costs of Covered Drugs for its Eligible Persons. Any modification

of the Plan Design or Program specifications, failure to maintain Minimum Enrollment, or inclusion of Eligible Persons or Groups with Covered Drugs funded less than 50% by CITY OF TEMPE, may result in a retroactive modification by Medco of the Program Pricing Terms. CITY OF TEMPE will provide Eligible Persons with at least thirty (30) days' prior notice of approved Plan Design changes. If the number of CITY OF TEMPE's Eligible Persons eligible for Medicare is materially reduced or eliminated for any reason, Medco may communicate with those persons at Medco's expense regarding Part D options, including Medco Part D services, and the Program Pricing Terms may be modified to reflect the reduction or elimination.

**3.12 ERISA Claims and Appeals**

CITY OF TEMPE will not name or represent that Medco is, and Medco will not be, a Plan Administrator or, except as specifically set forth in this section, a fiduciary of any prescription drug benefit plan (the "Plan"), as those terms are used in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq., and the regulations promulgated under ERISA. CITY OF TEMPE will have complete discretionary, binding, and final authority to construe the terms of the Plan, to interpret ambiguous Plan language, to make factual determinations regarding the payment of claims or provisions of benefits, to review denied claims and to resolve complaints by Eligible Persons.

CITY OF TEMPE delegates to Medco the limited authority and discretion solely to undertake administrative and/or clinical initial determinations, first-level, second-level and urgent appeals of claims eligibility and benefit applications determinations filed by Eligible Persons with CITY OF TEMPE's Program. Medco will process and determine all filed administrative and/or clinical first-level, second-level and urgent appeals under the procedures and within the time frames specified in the Department of Labor claims processing regulations, 29 C.F.R. § 2560.503-1 (the "Claims Procedure Regulations"). For this purpose, Medco agrees that it shall be the appropriate named fiduciary in accordance with Section 2560.501-1 (h) of the Claims Procedure Regulations. Medco's decisions will be conclusive and binding and not subject to further review by CITY OF TEMPE.. If, however, with respect to a claim or appeal, any of the duties, whether delegated to Medco or not, are assumed or acted upon by CITY OF TEMPE, or by any agent or vendor of such entity ( e.g. utilization management vendor), then Medco will not have any fiduciary duties or discretionary authority with respect to such claim or appeal, and CITY OF TEMPE will be deemed to have such fiduciary duties and discretionary authority and will be solely liable for such claim or appeal. Notwithstanding the services of Medco under this section, all decisions concerning the rendering of health care services are determined by the Eligible Person's physician, hospital or other health care provider and the Eligible Person.

**3.13 Compliance with Law** – Medco and CITY OF TEMPE shall take all actions necessary and appropriate to assure that they comply with all applicable federal, state, and local laws and regulations, including, without limitation, the Anti-Kickback Statute, the Public Contracts Anti-Kickback Act, the Stark Law, and laws and regulations relating to disclosure or notification of plan benefits or the terms of rebate administration under this Agreement to CITY OF TEMPE's Groups. Medco's Code of Conduct and its policies and procedures relating to compliance with the above-named laws are available at www.medco.com.

8. **Licenses:** Medco shall maintain in current status all applicable Federal, State and Local licenses and permits required for the operation of the business conducted by the Contractor.

9. **Insurance:** Prior to commencing any work or services under this contract, Medco shall procure and maintain for the duration of the contract insurance against claims for injuries to persons and damages to property, which may arise from or in connection with the performance of the work hereunder by the contractor, his agents, representatives, employees, or subcontractors.

A Contract Award Notice or Purchase Order will not be issued to Medco until receipt of all required insurance documents by the City Procurement Office and such documents must meet all requirements of this Insurance clause. In addition, before any contract is renewed for additional time periods, all required insurance must be in force and on file with the City Procurement Office. Medco must submit required insurance within 10 calendar days after request by the City Procurement Office or the award may be rescinded and another vendor selected for award.

Minimum Limits Of Insurance

Contractor shall maintain limits no less than:

1. Commercial General Liability: $5,000,000 combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products, completed operations, and product liability. The general aggregate limit shall apply separately to this project/location or the general aggregate shall be twice the required occurrence limit.

2. Automobile Liability: $1,000,000 combined single limit per accident for bodily injury and property damage, including coverage for owned, hired, and non-owned vehicles as applicable.

3. Workers' Compensation and Employers Liability: Workers' Compensation and Employers Liability statutory limits as required by the State of Arizona.

4. Professional Liability: The Consultant retained by the City, to provide the consulting services required by the Contract will maintain Professional Liability insurance covering errors and omissions arising out of the services performed by the Consultant or any person employed by him with a limit of not less than $5,000,000 all claims. In the event the insurance policy is written on a "Claims made" basis, coverage shall extend for two years past completion and acceptance of Services as evidenced by annual Certificates of Insurance.

5. Other Insurance: (If applicable, see supplement.)

**Other Insurance Provisions**

4. **Overcharges By Antitrust Violations:** The City maintains that, in actual practice, overcharges resulting from antitrust violations are borne by the City. Therefore, to the extent permitted by law, Medco hereby assigns to the City any and all claims for such overcharges as the goods and/or services used fulfill the contract.

5. **Force Majeure:** Except for payment of sums due, neither party shall be liable to the other nor deemed in default under the contract if and to the extent that such party's performance of the contract is prevented by reason of force majeure. Force majeure means an occurrence that is beyond the control of the party affected and occurs without its fault or negligence. Without limiting the foregoing, force majeure includes acts of God, acts of the public enemy, war, riots, mobilization, labor disputes, civil disorders, fire, floods, lockouts, injunctions, failures or refusal to act by government authority, and other similar occurrences beyond the control of the party declaring force majeure which such party is unable to prevent by exercising reasonable diligence.

   Force majeure shall not include the following occurrences:

   - Late delivery of equipment or materials caused by congestion at a manufacturer's plant or elsewhere, an oversold condition of the market, inefficiencies, or similar occurrences.
   - Late performance by a subcontractor unless the delay arises from a force majeure occurrence in accordance with this force majeure clause.
   - Any delay or failure in performance by either party shall not constitute default hereunder or give rise to any claim for damages or loss of anticipated profits if, and to the extent that such delay or failure is caused by force majeure.

   If either party is delayed at any time in the progress of the work by force majeure, then the delayed party shall notify the other party in writing of such delay within forty-eight (48) hours of the commencement thereof and shall specify the causes of such delay in the notice. Such notice shall be hand delivered or sent via Certified Mail - Return Receipt Requested and shall make a specific reference to this clause, thereby invoking its provisions. The delayed party shall cause such delay to cease as soon as practicable and shall notify the other party in writing by hand delivery or Certified Mail - Return Receipt Requested when it has done so. The time of completion shall be extended by contract modification for a period of time equal to the time that the results or effects of such delay prevent the delayed party from performing in accordance with the contract.

6. **Conflict of Interest:** This contract is subject to the cancellation provisions of A.R.S. Section 38.511.

7. **Exclusivity:** Medco will be the exclusive provider and administrator of PBM Services to CITY OF TEMPE and its subsidiaries while this Agreement is in effect. Nothing contained herein, however, will prohibit Medco or any affiliated entity from providing or administering PBM Services and related programs and services to any other entity while this Agreement is in effect

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverage:

   A. The City, its officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of activities performed by or on behalf of the contractor including the insured's general supervision of the contractor; products and completed operations of the contractor; premises owned, occupied or used by the contractor, or automobiles owned, leased, hired or borrowed by the contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, or volunteers.

   B. The Contractor's insurance coverage shall be primary as respects the City, its officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officials, employees, or volunteers shall be excess of the contractor's insurance and shall not contribute to it. The amount and type of insurance coverage required by this contract shall not limit the scope of the indemnity provided by this contract.

   C. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, or volunteers.

   D. Coverage shall state that the contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. Workers' Compensation and Employers Liability Coverage

   A. The insurer shall agree to waive all rights of subrogation against the City, its officials, employees and volunteers for losses arising from work performed by the contractor for the City.

3. All Coverages

   A. Each insurance policy required by this contract shall be endorsed to state the coverage shall not be suspended, voided, and/or canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.

**Other Insurance Requirements:**
Medco shall:

1. Prior to commencement of services, furnish the City with certificates of insurance, which shall clearly evidence all insurance required in this contract and provide that such insurance shall not be canceled, allowed to expire or be materially reduced in coverage except on 30 days prior written notice to the City, and in accord with stated insurance requirements of this Request For Proposal. City shall not be obligated, however, to review same or to advise contractor of any deficiencies in such policies and endorsements, and such receipt shall not relieve contractor from, or be deemed waiver of City's right to insist on, strict fulfillment of contractor's obligations under this contract.

2. Replace certificates, policies, and endorsements for any such insurance expiring prior to completion of services.

3. Maintain such insurance from the time services commence until services are completed. Should any required insurance lapse during the contract term, requests for payments originating after such lapse shall not be processed until the City receives satisfactory evidence of reinstated coverage as required by this contract, effective as of the lapse date. If insurance is not reinstated, City may at its sole option, terminate this contract effective on the date of such lapse of insurance.

4. Place such insurance with insurers and agents licensed and authorized to do business in Arizona and having a Best's rating of no less than A-VII.

5. Maintain such coverage continuously throughout the term of this contract and without lapse for a period of two years beyond the contract expiration, should any of the required insurance be provided under a claims-made form, to the extent that should occurrences during the contract term give rise to the claims made after expiration of the contract, such claims shall be covered by such claims-made policies. Such extension of coverage shall be evidenced by annual certificates of insurance.

**10. Subcontractors and Sub-Subcontractors**

Contractor shall include all subcontractors and sub-subcontractors as insured under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverage for subcontractors and sub-subcontractors shall be subject to all of the requirements stated herein for the contractor.

**11.** **Notices:** All notices required hereunder (for the purposes of this provision collectively called "Notices"), shall be in writing and shall be hand delivered or sent by overnight delivery by a nationally recognized service or sent by registered or certified United States mail, return receipt requested, postage prepaid, addressed to the party or parties to receive such notice as follows:

If intended for the City, to:

CITY PROCUREMENT OFFICE CITY OF TEMPE
20 E. 6th Street (Second Floor)
PO Box 5002
Tempe, Arizona 85280

If intended for the Medco, to:

Medco Health Solutions, Inc.
100 Parsons Pond Drive
Franklin Lakes, NJ 07417
Attention: Anthony Palmisano Jr.
Vice President Counsel
Customer Contracting

or to such other address as either party may from time to time furnish in writing to the other by notice hereunder.

12. **Key Personnel:** It is essential that the Medco provide adequate experienced personnel, capable of and devoted to the successful accomplishment of work to be performed under this contract. Medco must agree to assign specific individuals to the key positions.

A. Medco agrees that, once assigned to work under this contract, key personnel shall not be removed or replaced without written notice to the City.

B. If key personnel are not available for work under this contract for a continuous period exceeding 30 calendar days, or are expected to devote substantially less effort to the work than initially anticipated, the contractor shall immediately notify the City, and shall, subject to the concurrence of the City, replace each person with personnel of substantially equal ability and qualifications.

13. **Payments:**

Medco will provide the City of Tempe with a bi-weekly consolidated invoice for services provided by Medco under the Program, in accordance with the Program Pricing set forth in Schedule A. All invoices will be paid in full by CITY OF TEMPE within fifteen (15) calendar days of receipt by wire transfer, electronic debit, or other method approved by Medco in writing.

The City of Tempe will pay Medco for administrative products and services provided by Medco under the Program in accordance with the Administrative Fee provisions set forth in Schedule A. Medco will provide the City of Tempe with an Administrative Fee invoice in accordance with Medco's four (4) week Administrative Fee cycle. The City of Tempe will pay Administrative Fee invoices in full within fifteen (15) days of the invoice date.

Subject to whether payments due to Participating Pharmacies for Covered Drugs under this Agreement become subject to prompt payment related legislation or regulation, CITY OF TEMPE may be required to pay a deposit in an amount to be reasonably determined by Medco, which amount may be periodically modified by Medco based on CITY OF TEMPE's actual claims experience and enrollment. This deposit may be used by Medco to offset the failure by CITY OF TEMPE, for any reason, to make any payments pursuant to the terms of this Agreement and/or to make payments due in accordance with prompt payment legislation or regulation prior to Medco's billing and receipt of CITY OF TEMPE's payment due under Section 0, and does not, in any way, limit other remedies available to Medco. The deposit, to the extent not utilized to offset any payment default by CITY OF TEMPE under this Agreement, will be returned, without interest, to CITY OF TEMPE within the greater of one hundred eighty (180) days following termination of this Agreement or following any agreed upon date for extended services.

Failure by CITY OF TEMPE to make any payments in accordance with the terms of this Agreement will constitute a payment default. Notwithstanding Section 16.2 of this Agreement, if CITY OF TEMPE fails to cure any such payment default within two (2) days, in addition to other available remedies, Medco may cease performing any or all of its obligations under, or may terminate this Agreement upon notice to CITY OF TEMPE. After the two (2) day grace period, there will be a late payment fee of 1% per month on the balance due, accruing as of the due date. CITY OF TEMPE will reimburse Medco for all collection costs incurred by Medco as a result of any payment default by CITY OF TEMPE under this Agreement.

## 14. Records

14.1 Medco will maintain all claims records relating to services performed under this Agreement as required by applicable law. Such claims records will be in their original form, on microfilm, microfiche or other form determined by Medco. CITY OF TEMPE claims records may be audited by CITY OF TEMPE or its representative reasonably acceptable to Medco, subject to execution of a confidentiality agreement, for a maximum period of twenty-four (24) months prior to the agreed upon audit date at no cost. CITY OF TEMPE may conduct an audit once annually from January through September on an agreed upon date. Subject to Section 14.3 Medco may retain copies of such claims records for its own use.

14.2 Any audit of Medco's agreements with pharmaceutical manufacturers may be conducted by a top 100 public accounting firm approved by Medco whose audit department is a separate stand alone function of its business and that carries insurance for professional malpractice of at least $2,000,000. The audit will include only those portions of the pharmaceutical manufacturer agreements as necessary to determine Medco's compliance with Section 22 above in respect to Total Rebates. The audit may be conducted once annually from January through September, at Medco's offices as scheduled by agreement of the parties, but not sooner than ninety (90) days after execution of a confidentiality agreement.

14.3 Any auditor performing an audit under this Section 14 will warrant and represent that it is not providing Litigation Services to any person or entity in connection with any lawsuit, investigation, or other proceeding that is pending or contemplated against Medco. "Litigation Services" include (a) examining pharmacy claims or any other documents or information, or (b) providing advice, analysis, and/or opinions as a disclosed or undisclosed expert or consultant. The auditor must agree that, for a period of one (1) year after completion of the audit, it will not provide Litigation Services in any lawsuit, investigation, or other proceeding brought against Medco, except for Litigation Services to CITY OF TEMPE in any proceeding against Medco.

14.4 Upon request, CITY OF TEMPE will furnish its most recent audited financial statement to Medco.

## 15. Confidential Information

15.1 The Confidential Information of a party (the "disclosing party") which is disclosed to the other party (the "receiving party") will be held by the receiving party in strictest confidence at all times and will not be used by the receiving party (or its affiliates, employees, officers, directors or limited liability company managers ("Representatives")) for any purpose not previously authorized by the disclosing party, except as necessary for Medco to perform the services under this Agreement. The Confidential Information of the disclosing party will not be disclosed or divulged by the receiving party to anyone, except with the prior written permission of the disclosing party and on the condition that the party to whom the Confidential Information is disclosed agrees in writing in advance to be bound by these terms and conditions. The receiving party may disclose the Confidential Information to those of its Representatives who need to review the Confidential Information for the purposes authorized by the disclosing party but only after the receiving party has informed them of the confidential nature of the Confidential Information and directs them to treat the Confidential Information in accordance with the

terms of this Agreement. The disclosing party retains all right, title and interest in and to its Confidential Information.

The term "Confidential Information " includes, but is not limited to, any information of either the receiving or disclosing party (whether oral, written, visual or fixed in any tangible medium of expression), relating to either party's services, operations, systems, programs, inventions, techniques, suppliers, customers and prospective customers, contractors, cost and pricing data, trade secrets, know-how, processes, plans, reports, designs and any other information of or relating to either party's business, including its therapeutic and disease management programs, but does not include information which (a) was known to the receiving party before it was disclosed to the receiving party by the disclosing party, (b) was or becomes available to the receiving party from a source other than the disclosing party, provided such fact is evidenced in writing and the source is not bound by a confidentiality obligation to the disclosing party, or (c) is developed by the receiving party independently of the disclosing party's Confidential Information, provided that such fact can be documented. Each party will also keep the terms of this Agreement confidential as Confidential Information, except as required by law or regulation.

15.2 If the receiving party is requested or required (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand, any informal or formal investigation by any government or governmental agency or authority, law or regulation, or otherwise) to disclose any of the Confidential Information, the receiving party will notify the disclosing party promptly in writing so that the disclosing party may seek a protective order or other appropriate remedy or, in its sole discretion, waive compliance with the terms of this Agreement. The receiving party agrees not to oppose any action by the disclosing party to obtain a protective order or other appropriate remedy. If no such protective order or other remedy is obtained, or the disclosing party waives compliance with the terms of this Agreement, the receiving party will furnish only that portion of the Confidential Information which it is advised by counsel is legally required and will exercise its reasonable best efforts to obtain reliable assurance that confidential treatment will be accorded the Confidential Information.

15.3 CITY OF TEMPE and Medco may not utilize the service marks, trademarks, or tradenames of any other party to this Agreement, or any service marks, trademarks, or tradenames so similar as likely to cause confusion, without express written approval of such other party. The programs implemented by Medco will remain the sole property of Medco and will only be used by CITY OF TEMPE in connection with the Program and so long as Medco administers the Program.

Medco and CITY OF TEMPE will comply with all applicable laws and regulations regarding patient confidentiality as provided in the Business Associate Agreement between the parties. Medco will not furnish any CITY OF TEMPE identifiable data or information to any third party without the written consent of CITY OF TEMPE, except as reasonably necessary to implement and operate the Program and fulfill its obligations pursuant to this Agreement or as required by applicable law. The restrictions set forth in this Section 15 will not apply to claims data or information which is not identifiable on a CITY OF TEMPE basis.

## 16. Indemnification/Limitation of Liability

a. Medco will indemnify and hold CITY OF TEMPE, its subsidiaries, affiliates, and their officers, directors and employees (each a "CITY OF TEMPE Indemnified Party") harmless from and against claims, suits, actions, or causes of action ("Actions") asserted against a CITY OF TEMPE Indemnified Party arising from services rendered by Medco pursuant to this Agreement to the extent the Action arises from Medco's negligence or willful misconduct, or breach of this Agreement, provided that (a) CITY OF TEMPE has given reasonable notice to Medco of the Action, and (b) no CITY OF TEMPE Indemnified Party has, by act or failure to act, compromised Medco's position with respect to the resolution or defense of the Action.

b. CITY OF TEMPE will indemnify and hold Medco, its subsidiaries and affiliates, and their respective officers, directors and employees (each a " Medco Indemnified Party") harmless from and against Actions asserted against a Medco Indemnified Party arising from (i) breach of this Agreement by CITY OF TEMPE, (ii) negligence or willful misconduct of CITY OF TEMPE, or (iii) the provision of patient identifiable or Program information or data by a Medco Indemnified Party to CITY OF TEMPE or CITY OF TEMPE's designees, or the subsequent use or disclosure of such information or data by CITY OF TEMPE or its designees, provided that (a) the Medco Indemnified Party has given reasonable notice to CITY OF TEMPE of the Action, and (b) no Medco Indemnified Party has, by act or failure to act, compromised CITY OF TEMPE's position with respect to the resolution or defense of the Action.

c. Medco will maintain, during the term of this Agreement, liability coverage with limits not less than $1,000,000 per occurrence and in the aggregate per policy year, with excess liability coverage in an amount not less than $5,000,000 per policy year. Evidence thereof will be furnished to CITY OF TEMPE upon request.

d. Except as provided in Section (a) above, neither Medco nor any subsidiary, affiliate, or any of their respective directors, officers or employees, will be responsible for any Action resulting from the provision of or failure to provide pharmaceutical goods or services or any other action or failure to act by any retail pharmacy, pharmaceutical manufacturer or other pharmaceutical providers in connection with this Agreement.

e. The liability of Medco to CITY OF TEMPE for any negligent or willful misconduct by Medco will be limited to the per occurrence liability insurance amount set forth in this Section (c).

f. Medco or CITY OF TEMPE will not be liable to each other for incidental, consequential, punitive, special, or exemplary damages.

17. **Term of Agreement**

17.1 This Agreement will remain in effect for an initial term of two (2) years from the Effective Date (the "Initial Term") unless terminated, canceled or extended as otherwise provided herein. Resultant contract is non-transferable and cannot be assigned by Medco without the approval of the City Procurement Office, and then only when all prices, discounts, terms and conditions of the original contract remain unchanged.

17.2 The CITY OF TEMPE reserves the right to unilaterally extend the contact ninety (90) days beyond the stated expiration date. In addition, by mutual agreement in the form of a written Contract Modification, any resultant contract may be renewed for supplemental periods of up

to a maximum of fourth-eight (48) additional months. The period for any single renewal increment sall be determined by the City Procurement Office. Such increment shall not be for more than a period of twelve (12) months each, unless the CITY OF TEMPE is eligible to obtain significant cost and/or supply advantage by a longer contract renewal period.

17.3 Either party may give written notice, at least one hundred eighty (180) days prior to the end of any such term, to the other party of its intent to terminate this Agreement as of the end of the then current term. Notwithstanding the issuance of a termination notice, Medco agrees to continue to render services hereunder and CITY OF TEMPE agrees to pay for services of Medco in accordance with the terms of this Agreement for any claims incurred for prescription drug benefits by Eligible Persons while this Agreement was in force.

17.4 In the event of a material breach of this Agreement, the party alleging such breach will give written notice thereof to the other parties. If such breach is not cured within sixty (60) days of receipt of such notice, the non-breaching party may terminate this Agreement upon written notice to the other party.

18. **Taxes:** Any applicable sales, use, or other similarly assessed and administered tax imposed on items dispensed, or services provided hereunder, or any other amounts Medco may incur or be required to pay arising from our relating to Medco's performance of services as a third-party administrator in any jurisdiction, will be the sole responsibility of CITY OF TEMPE. If Medco is legally obligated to collect and remit sales, use, or other similarly assessed and administered tax in a particular jurisdiction, or to incur or pay any amount relating to third-party administrator services, the tax or other amount will be reflected on the applicable invoice or subsequently invoiced at such time as Medco becomes aware of such obligation or as such obligation becomes due.

19. **Unauthorized Firearms & Explosives:** No person conducting business on City property is to carry a firearm or explosive of any type. Any City bidder, contractor or subcontractor is to honor this requirement at all times and failure to honor this requirement will result in contract cancellation. This requirement also applies to persons who maintain a concealed weapon's permit. In addition to contract cancellation, anyone carrying a firearm or explosive device will be subject to police and legal action.

20. **Retail Pharmacy Program**

The specific features of the Retail Pharmacy Program are as follows:

a. **Program Coverage** - The Program coverage (Covered Drugs/Exclusions) and days supply limitation covered under the Retail Pharmacy Program will be as designated by CITY OF TEMPE. Up to a thirty (30) day supply of Covered Drugs per prescription or refill may be dispensed under the Retail Pharmacy Program.

b. **Participating Pharmacy Networks** - Medco will maintain a Participating Pharmacy Network reasonably necessary to provide services under the Retail Pharmacy Program. Medco will have the responsibility to contract with Participating Pharmacies. Medco will be responsible for any amounts that it owes to Participating Pharmacies that exceeds the reimbursement it receives from CITY OF TEMPE as specified in Section 1 of Schedule A. Medco will retain any reimbursement that it receives from CITY OF TEMPE as specified in Section 1 of Schedule A that is in excess of the amounts it is obligated to pay to Participating Pharmacies.

c. **Identification Cards** - Medco will (i) produce Identification Cards for those Eligible Persons designated by CITY OF TEMPE, with an accompanying explanatory brochure, and (ii) make direct reimbursement claim forms available through the www.medco.com internet site for use by Eligible Persons who have not received their Identification Cards, or have had them lost or stolen. Medco will distribute Identification Cards and claim forms to the designated Eligible Persons unless otherwise designated by the CITY OF TEMPE. All costs associated with distributing and/or mailing such materials are the responsibility of CITY OF TEMPE.

d. **Claim Adjudication** - Medco will adjudicate claims for prescription drug benefits in accordance with Medco's *TelePAID* System and the applicable Plan Design. Disapproved claims will be transmitted via *TelePAID* to the submitting pharmacy with a brief explanation of the cause or causes for disapproval. Should CITY OF TEMPE determine that a previously disapproved claim should be approved, and so direct Medco, adjudication of the claim will be accomplished promptly by Medco. Medco is obligated to pay Participating Pharmacies for all claims adjudicated through the *TelePAID* System. CITY OF TEMPE will pay Medco for these claims pursuant to Schedule A, Section 1. Medco will promptly refer to CITY OF TEMPE all non-routine inquiries by insurance departments, attorneys, claimants, or other persons following the denial of any claims.

e. **Administrative Services** – Medco will provide, as applicable, the Base Administrative Services and the Additional Administrative Services set forth in Schedule A.

f. **Pricing** - The Program Pricing Terms applicable to the Retail Pharmacy Program are set forth in Section 1, Schedule A, in addition to the performance standards and penalties set forth in this agreement.

## 21. Mail Order Pharmacy Program

### 1. Program Coverage

1. The Program coverage (Covered Drugs/Exclusions) and days supply limitation under the Mail Order Pharmacy Program will be as designated by CITY OF TEMPE in the applicable Plan Design.

2. Medco's mail order pharmacies will not be required to dispense prescriptions for greater than a ninety (90) day supply of Covered Drugs per prescription or refill, subject to the professional judgment of the dispensing pharmacist, limitations imposed on controlled substances and manufacturer's recommendations. Prescriptions may be refilled providing the prescription so states. Prescriptions will not be filled (i) more than twelve (12) months after issuance, (ii) more than six (6) months after issuance for controlled drug substances, or (iii) if prohibited by applicable law or regulation.

### 2. Dispensing Procedures

a. Medco's mail order pharmacies will dispense Covered Drugs to Eligible Persons, and dispense generic drugs when authorized, in accordance with (i) applicable law and regulations in the state in which Medco's mail order pharmacy is located, and

(ii) the terms of this Agreement and Plan Design(s). Any prescriptions that are not dispensed will be returned to the applicable Eligible Person with an explanation as to why it could not be dispensed in accordance with Medco's standard operating procedures.

b. All matters pertaining to the dispensing of Covered Drugs or the practice of pharmacy in general are subject to the professional judgment of the dispensing pharmacist.

c. Any drug which cannot be dispensed in accordance with Medco's mail order pharmacy dispensing protocols, or which requires special record-keeping procedures, may be excluded from coverage by Medco.

3. **Claim Adjudication** - Medco will adjudicate and pay approved claims for prescription drug benefits in accordance with Medco's *TelePAID* System and the applicable Plan Design. Should CITY OF TEMPE determine that a previously disapproved claim should be approved, and so direct Medco, adjudication of the claim will be accomplished promptly by Medco. CITY OF TEMPE will pay Medco for claims adjudicated through the *TelePAID* System, pursuant to Section 2, Schedule A. Medco will promptly refer to CITY OF TEMPE all non-routine inquiries by insurance departments, attorneys, claimants, or other persons following the denial of any claims.

4. **Pricing** - The Program Pricing Terms applicable to the Mail Order Pharmacy Program are set forth in Schedule A, in addition to the performance standards and penalties set forth in this agreement. Medco will have the responsibility to contract with drug wholesalers and manufacturers regarding Medco's purchase of drugs that are dispensed by it under the Mail Order Pharmacy Program. Medco will be responsible for any amounts that it owes drug wholesalers or manufacturers that exceeds the amounts it charges and receives from CITY OF TEMPE or Eligible Persons, as specified in Section 2, Schedule A. Medco will retain any payment that it receives from CITY OF TEMPE or Eligible Persons as specified in Section 2, Schedule A that is in excess of the amounts it is obligated to pay to drug wholesalers or manufacturers for the purchase of such drugs that are dispensed under the Mail Order Pharmacy Program.

22. **Performance Standards and Liquidate Damages**

1. The following performance standards will apply during the Initial Term of this Agreement:

a. The *TelePAID* System Availability Rate for each Contract Year will be 99.5% or greater. CITY OF TEMPE may assess liquidated damages against Medco in the amount of 15% of the total amount at risk for each Contract Year that the *TelePAID* System Availability Rate averages less than 99.5% for a Contract Year. "*TelePAID* System Availability Rate" means the percentage of normal operating hours that the *TelePAID* System is operational, excluding scheduled maintenance time, measured on an annual basis.

b. The Dispensing Accuracy Rate for each Contract Year will be 99.99% or greater. CITY OF TEMPE may assess liquidated damages against Medco in the amount of 15% of the total amount at risk for each Contract Year

that the Dispensing Accuracy Rate is less than 99.99% for a Contract Year. "Dispensing Accuracy Rate" means (i) the number of all mail order pharmacy prescriptions dispensed by Medco in a Contract Year less the number of those prescriptions dispensed by Medco in such Contract Year which are reported to Medco and verified by Medco as having been dispensed with the incorrect drug or strength, divided by (ii) the number of all mail order pharmacy prescriptions dispensed by Medco in such Contract Year.

c. Medco will dispense all Non-Protocol Prescriptions received each Contract Year under the Mail Order Pharmacy Program within an average of two (2) business days following receipt. All other Mail Order Pharmacy Program prescriptions received each Contract Year will be dispensed within an average of four (4) business days following receipt by Medco. CITY OF TEMPE may assess liquidated damages against Medco in the amount of 5% of the total amount at risk for each Contract Year that Medco fails to meet either one of these dispensing time period standards. This Section c is subject to a maximum penalty of 5% of the total amount at risk per Contract Year. "Non-Protocol Prescriptions" means Mail Order Pharmacy Program prescriptions for Covered Drugs received by Medco that are in stock and which do not require physician or patient contact or other non-standard procedures prior to dispensing by Medco.

d. Prescription Drug Plan reporting package will be made available online to CITY OF TEMPE within thirty (30) business days of the end of the billing cycle that includes the last calendar day of the reporting quarter for quarterly reports. CITY OF TEMPE may assess liquidated damages against Medco in the amount of 5% of the total amount at risk for each report series which is not made available within the applicable time periods, subject to a maximum penalty of 5% of the total amount at risk per Contract Year.

e. At least 98% of all Maintenance Identification Cards issued by Medco each Contract Year will be mailed within an average of four (4) business days following Medco 's receipt and update of a processable eligibility tape or transmission identifying the applicable Eligible Person(s). CITY OF TEMPE may assess liquidated damages against Medco in the amount of 5% of the total amount at risk for each Contract Year that this standard is not met measured on a Contract Year basis. "Maintenance Identification Cards" means new Identification Cards issued to individuals who first become Eligible Persons after the Effective Date (exclusive of new Groups or Group re-enrollments) and replacement Identification Cards for Eligible Persons who have lost or had their Identification Cards stolen.

f. Processable maintenance eligibility transactions received by Medco via host to host, tape or floppy disc before 12:00 p.m. E.T. on any business day will be processed by Medco within an average of two (2) business days of receipt each Contract Year. CITY OF TEMPE may assess liquidated damages against Medco in the amount of $100 for each

processable host to host, tape or floppy disc not processed by Medco within this time period, subject to a maximum penalty of 5% of the total amount at risk per Contract Year.

g. Medco will respond to at least 95% of written inquiries received each Contract Year from an Eligible Person which requires a response (excluding appeals) within an average of five (5) business days following receipt. CITY OF TEMPE may assess liquidated damages against Medco in the amount of 10% of the total amount at risk for each Contract Year that this standard is not met measured on a Contract Year basis.

h. Medco will make available a toll-free member service telephone line for use by Eligible Persons. The target Average Speed of Answer ("ASA") of the member service telephone line each Contract Year will be thirty (30) seconds or less from the time the Eligible Person selects either the IVRU (Interactive Voice Response Unit) option or Member Service Representative option. This ASA standard excludes calls to the toll-free telephone line separately established for Specialty Drugs. CITY OF TEMPE may assess liquidated damages against Medco for failure to meet this standard in the amount of 10% of the total amount at risk for each Contract Year that this standard is not met measured on a Contract Year basis.

i. The Telephone Abandonment Rate of the member service telephone line will be 5% or less of all incoming calls received during each Contract Year. This standard excludes calls to the toll-free telephone line separately established for Specialty Drugs. CITY OF TEMPE may assess liquidated damages against Medco in the amount of 10% of the total amount at risk for each Contract Year that this standard is not met measured on a Contract Year basis. "Telephone Abandonment Rate" means (i) the number of incoming telephone calls received by the customer service telephone line during a Contract Year which are abandoned by the caller after a selection is made either to the IVRU (Interactive Voice Response Unit) system or a Member Services Representative, divided by (ii) the total number of incoming telephone calls received by the customer service telephone line during such Contract Year.

j. Medco will respond to (process a check or reject notice) at least 97% of direct reimbursement paper claims received at the address designated by Medco for such claims each Contract Year from Eligible Persons within an average of five (5) business days following receipt, and all claims will be responded to within ten (10) business days (response means either a check or reject notice has been mailed). CITY OF TEMPE may assess liquidated damages against Medco in the amount of 5% of the total amount at risk for each Contract Year that this rate is not met measured on a Contract Year basis. This Section j is subject to a maximum penalty of 5% of the total amount at risk per Contract Year.

k. The Claims Adjudication Accuracy Rate for each Contract Year will be 98.5% or greater. CITY OF TEMPE may assess liquidated damages

against Medco in the amount of 5% of the total amount at risk for each Contract Year that this standard is not met measured on a Contract Year basis. "Claims Adjudication Accuracy Rate" means (i) the number of retail claims, mail order claims and directly submitted paper claims, adjudicated by Medco in a Contract Year that do not contain a material adjudication error, divided by (ii) the number of all such claims adjudicated by Medco in such Contract Year.

l. The Member Satisfaction Rate for each Contract Year will be 90% or greater. Liquidated damages of 10% of the total amount at risk per Contract Year may be assessed against Medco for failure to meet this standard. "Member Satisfaction Rate" means (i) the number of Eligible Persons responding to Medco's annual standard Patient Satisfaction Survey as being satisfied with the overall performance under the Integrated Program divided by (ii) the number of Eligible Persons responding to such annual Patient Satisfaction Survey; CITY OF TEMPE must provide timely approvals and responses, and a minimum of 20% of surveys must be returned for the performance standard in this Section l to be applicable.

m. CITY OF TEMPE may assess liquidated damages in the amount of $10.00 per household if, three (3) months after the Effective Date, those CITY OF TEMPE employees who are members of the CITY OF TEMPE Program implementation team do not rate Medco's performance in implementing the Program an average of 3 or better on a scale of 1 to 5 (5 being the best), provided CITY OF TEMPE and any applicable third party has fully complied with all CITY OF TEMPE implementation requirements established pursuant to this Section m.

n. CITY OF TEMPE may assess liquidated damages in the amount of $8.00 per household per Contract Year if, after the first Contract Year and each successive Contract Year, those CITY OF TEMPE employees who are members of the CITY OF TEMPE benefits staff do not rate the Medco account team's performance for such Contract Year an average of 3 or better on a scale of 1 to 5 (5 being the best) based on a range of performance criteria agreed to between CITY OF TEMPE and Medco at the beginning of such Contract Year. Additional CITY OF TEMPE staff members may be included in the survey at the request of Medco.

2. Notwithstanding anything to the contrary, Medco's maximum liability under this Section 21 (excluding the Implementation and Account Management guarantees set forth in sub-section (m) and (n) above) for any Contract Year will not exceed $20.00 per household during such Contract Year without no more than 20% on any one guarantee. Any amounts paid by Medco on account of performance guarantees shall not bar recovery of any other approriate remedy recovery by the CITY OF TEMPE.

3. CITY OF TEMPE will give Medco written notice pursuant to Section 10 any facts giving rise to CITY OF TEMPE's right to assess liquidated damages against Medco pursuant to Section 1 above, within ten (10) business days after CITY OF TEMPE becomes aware of such fact, and within thirty (30) days thereafter, of

CITY OF TEMPE's election to assess such penalty against Medco. Any penalties assessed against Medco pursuant to this Agreement, will be credited against future billings to CITY OF TEMPE under the CITY OF TEMPE Program in accordance with Medco's standard procedures.

**23. Formulary**

CITY OF TEMPE will be a participating plan sponsor in Medco's *Preferred Prescriptions* Formulary as set forth below for the term of this Agreement. CITY OF TEMPE will provide Medco with advance notice of each Group that will participate in the *Preferred Prescriptions* Formulary.

1. ***Preferred Prescriptions* Formulary** - The *Preferred Prescriptions* Formulary is a prescription drug formulary administered by Medco which lists FDA approved drugs that have been evaluated for inclusion on the *Preferred Prescriptions* Formulary. The drugs included on the *Preferred Prescriptions* Formulary will be modified by Medco from time to time as a result of factors including, but not limited to, medical appropriateness, manufacturer rebate arrangements, and patent expirations. Medco will implement Medco's formulary management programs, which may include cost containment initiatives, therapeutic interchange programs, communications with Eligible Persons, Participating Pharmacies and/or physicians (including communications regarding generic substitution programs), and financial incentives to Participating Pharmacies for their participation. Compliance with the *Preferred Prescriptions* Formulary and Medco's formulary management program will result in Formulary Rebates as set forth below. Medco reserves the right to modify or replace the *Preferred Prescriptions* Formulary (including any modification or replacement, the "Formulary") and formulary compliance methods and cost containment initiatives consistent with good pharmacy practice. CITY OF TEMPE agrees that Medco will be the exclusive formulary administrator for CITY OF TEMPE's prescription drug benefit programs during the term of the Agreement. CITY OF TEMPE is authorized to use the Formulary only for its own Eligible Persons and only as long as the Program is in effect and administered by Medco.

2. **Rebates** - Medco and its subsidiaries receive formulary rebates from certain drug manufacturers as a result of the inclusion of those manufacturers' branded products on the Formulary ("Formulary Rebates"). Medco also receives additional rebates and/or fees from certain manufacturers for such products, which may take into account various factors, including the utilization of certain drugs within their respective therapeutic categories for Medco's book of business in aggregate as a result of various commitments, services, and programs including, but not limited to, formularies, but excluding payments or fees from certain manufacturers related to drug-specific dispensing, shipping, and handling and other commitments, services and programs associated with Specialty Drugs dispensed by Medco ("Additional Rebates and Fees") Formulary Rebates and Additional Rebates and Fees are jointly referred to as "Total Rebates." Medco will provide CITY OF TEMPE with the greater of (i) 100% of the Total Rebates received by Medco based on the dispensing of each manufacturer's formulary drugs under CITY OF TEMPE's Program, less a Formulary management fee equal to 20% of the Total Rebates received by Medco under the Program or (ii) the Guaranteed Rebates (as defined below) less a Formulary management fee equal to 20% of the Guaranteed Rebates. This management fee will be retained by Medco under the Program. Guarantee Rebates (as defined below) less a formulary management fee will be credited against future billings to CITY OF TEMPE under the Program ninety days (90) days after the end of each calendar quarter, provided

CITY OF TEMPE has executed this Agreement. Total Rebates due CITY OF TEMPE under this Agreement that are received by Medco within eighteen (18) months after termination or expiration of this Agreement will be paid to CITY OF TEMPE. Total Rebates received thereafter will be retained by Medco.

3. **Guaranteed Rebates** - Medco will credit CITY OF TEMPE, within ninety (90) days following the end of each calendar quarter the sum of (i) $3.80 times the total number of Covered Drug prescriptions billed and paid for under CITY OF TEMPE's Retail Pharmacy Program during such Contract Year, plus (ii) $15.00 times the total number of Covered Drug prescriptions billed and paid for under CITY OF TEMPE's Mail Order Pharmacy Program during the same Contract Year (collectively the "Guaranteed Rebates"). Medco will calculate CITY OF TEMPE's Total Rebates during such Contract Year. Provided CITY OF TEMPE complies fully with the Formulary and with the Formulary management programs implemented by Medco, if Total Rebates (less the formulary management fee) for any Contract Year during the Initial Term are greater than the Guaranteed Rebates (less the formulary management fee), Medco will credit such difference against future billings to CITY OF TEMPE under the Program one hundred eighty (180) days after the end of each Contract Year The Guaranteed Formulary Rebates are contingent upon CITY OF TEMPE implementing a three tier formulary whose differential in copayment or its reasonably equivalent value for coinsurance between formulary and non-formulary drugs is not less than $15.00.

4. If a government action, change in law or regulation, change in the interpretation of law or regulation or action by any drug manufacturer or by CITY OF TEMPE has an adverse effect on the availability of Total Rebates or the Program Pricing Terms, Medco may modify, as applicable, the Total Rebates due CITY OF TEMPE or the Guaranteed Rebates or the Program Pricing Terms.

5. Any lines of CITY OF TEMPE's business, or any Group of Eligible Persons, for which CITY OF TEMPE funds less than 50% of the costs of Covered Drugs under the Plan Design will not be entitled to Formulary Rebates and Additional Rebates and Fees. Calculations and guarantees under Sections 2 and 3 will not include prescriptions dispensed for any such lines of business or Groups

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, this the _____ day of _____, 2009.

**CITY OF TEMPE**

By:_____
Hugh Hallman, Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

**MEDCO HEALTH SOLUTIONS, INC.**

By: _____
Anthony Palmisano Jr.
Vice President and Counsel Customer Contracting

83164.4 (5/15/09) nmb

# SCHEDULE A
# PROGRAM PRICING TERMS

The City of Tempe will pay Medco for services provided under the Program as follows:

## 1. RETAIL PHARMACY PROGRAM CLAIMS

The City of Tempe will pay Medco for Covered Drugs dispensed and submitted by Participating Pharmacies under the Retail Pharmacy Program in an amount equal to the lowest of (i) the pharmacy's usual and customary price, as submitted ("U&C") plus applicable taxes, (ii) the maximum allowable cost ("MAC"), where applicable, plus the Dispensing Fee, or (iii) Discounted AWP and Dispensing Fee plus applicable taxes. The guaranteed average annual AWP discount for Brand Drugs will be AWP minus (-) 16.50% and the guaranteed average annual AWP discount for Generic Drugs will be AWP minus (-)61.5% for the first Contract Year and AWP minus (-) 63% for the second Contract Year during the Initial Term[1]. The guaranteed Dispensing Fee per prescription or authorized refill will be $1.50. The guarantees set forth herein exclude Specialty Drugs, Compound Prescriptions and claims dispensed and submitted by non-traditional providers such as Long-Term Care, Home Infusion, Veteran, Military, and I/T/U (Indian/Tribal/Indian Urban) providers. Medco will prepare a true up within one hundred eighty (180) days following the end of such Contract Year. Any net shortfall (i.e. shortfalls offset by surpluses across the three components) in the aggregate guaranteed savings will be matched dollar for dollar by Medco. In the event of an increase or decrease in the total number of Participating Pharmacies by greater than five (5) percent, or a change in ownership of five (5) percent or more of Participating Pharmacies in the Broad National Network, Medco may modify the guarantee for Ingredient Costs and Dispensing Fees on an equitable basis. Payment by CITY OF TEMPE is subject to the applicable Copayment/Coinsurance amount set forth below:

**1.1.** **Copayment/Coinsurance** - The Copayment/Coinsurance amount for each prescription or refill dispensed by a Participating Pharmacy under the Retail Pharmacy Program will be as designated for each Group in the applicable Plan Design(s).

**1.2.** **Direct Claims** - The reimbursement terms applicable to direct reimbursement claims submitted by Eligible Persons under the Retail Pharmacy Program will be the same as the terms set forth in this Section 1, unless otherwise provided in writing by CITY OF TEMPE to Medco.

## 2. MAIL ORDER PHARMACY PROGRAM CLAIMS

The City of Tempe will pay Medco for Covered Drugs dispensed by a Medco mail order pharmacy under the Mail Order Pharmacy Program in an amount equal to an Ingredient Cost plus Dispensing Fee for each Covered Drug dispensed, less the applicable Copayment/Coinsurance amount, as such terms are defined below:

---

[1] The guarantee will apply to existing generics as well as new generics that come to the market during the term of this agreement.

2.1. **Ingredient Cost** - The Ingredient Cost is the lower of the discounted AWP or MAC for Brand Name Drugs and Generic Drugs. The guaranteed average annual AWP discount for Brand Drugs will be AwP minus (-) 24.50% and the guaranteed overall pricing for Generic Drugs will be AWP minus (-) 66.50% for the first Contract Year and AWP minus (-) 68% for the second Contract Year[1]. The guarantees set forth herein exclude Specialty Drugs, Compound Prescriptions and claims dispensed and submitted by non-traditional providers such as Long-Term Care, Home Infusion, Veteran, Military, and I/T/U (Indian/Tribal/Indian Urban) providers. Medco will prepare a true up one hundred eighty (180) days following the end of such Contract Year. Any net shortfall (i.e. shortfalls offset by surpluses across the three components) in the aggregate guaranteed savings will be matched dollar for dollar by Medco.

2.2. **Dispensing Fee** - The Dispensing Fee per prescription or authorized refill is $0.00. Dispensing Fees are inclusive of postage. If postage rates (i.e., U.S. mail and/or applicable commercial courier services) increase during the term of this Agreement, the pricing will be increased to reflect such increase(s).

2.3. **Copayment/Coinsurance** - The Copayment/Coinsurance amount for each prescription or refill dispensed by a Medco mail order pharmacy under the Mail Order Pharmacy Program shall be as designated for each Group in the applicable Plan Design(s). If the amount of the applicable Copayment/Coinsurance paid by an Eligible Person for a prescription or refill dispensed by Medco exceeds the Ingredient Cost (as defined in 2.1 above) plus Dispensing Fee (as defined in Section 2.2 above) plus any applicable taxes, then Medco shall return to the Eligible Person an amount equal to the Copayment/Coinsurance amount, less the sum of the applicable Ingredient Cost plus Dispensing Fee plus any applicable taxes, for the prescription or refill. Eligible Persons must pay the applicable Copayment or Coinsurance amount to Medco for each prescription or authorized refill under the Mail Order Pharmacy Program. Medco may suspend Mail Order Pharmacy Program services to an Eligible Person who is in default of any Copayment or Coinsurance amount due Medco. CITY OF TEMPE will be responsible for any unpaid Eligible Person Copayment or Coinsurance amounts, in accordance with Medco's standard credit policy, if payment has not been received from the Eligible Person within one hundred twenty (120) days of dispensing. CITY OF TEMPE will be billed following the one hundred twenty (120) day collection period, with payment due in accordance with the payment terms set forth in Section 0 of this Agreement.

## 3. SPECIALTY DRUG CLAIMS

Notwithstanding anything to the contrary in Section 2 above and elsewhere in the Agreement, the City of Tempe will pay Medco for Covered Drugs designated as Specialty Drugs under the Mail Order Pharmacy Program on a separate ingredient cost basis plus applicable Dispensing Fee, subject to the Copayment/Coinsurance in the applicable Plan Design. Under the Retail Pharmacy Program, CITY OF TEMPE will pay Medco for Specialty Drugs according to the pricing set forth in Section 1 of Schedule A. A Specialty Drug of limited or exclusive distribution through specific retail pharmacies ("Limited Distribution Specialty Drug") is not subject to terms of Schedule A, Section 1. The City of Tempe shall pay Medco for Limited Distribution Specialty Drugs in the same amount that Medco reimburses the retail pharmacy for such drug, including Ingredient Cost and Dispensing Fee. Medco will be the exclusive administrator and provider of Specialty Drugs to CITY OF TEMPE while this Agreement is in effect. Specialty Drugs may be provided by Medco or other third-party specialty pharmacy that has a written arrangement with Medco. Medco may add or delete products, or modify pricing terms during the term of this Agreement. Specialty Drugs are excluded from calculations, guarantees, credits and payments regarding Total Rebates under the Mail Order Pharmacy Program and the Retail Pharmacy

Program set forth in this Agreement. The terms and pricing set forth in this section apply only to CITY OF TEMPE's pharmacy benefit and not to CITY OF TEMPE's medical benefit. Medco will provide a current list of Specialty Drugs and associated prices upon CITY OF TEMPE's written request.

## 4. ADMINISTRATIVE FEES

**4.1.** The City of Tempe will pay to Medco a Base Administrative Fee in the amount of $0.00 per paid claim processed by Medco under the Retail Pharmacy Program/Mail Order Pharmacy Program and Specialty Pharmacy Program for the following Base Administrative Services, as applicable:

- Administration of eligibility submitted via tape or telecommunication in a Medco standard format
- Eligibility maintenance (minimum of weekly updates)
- Dependent Eligibility Certification System (DECS)
- Medco's client support system (e-SD) for on-line access to current eligibility (equipment, installation and line charges are responsibility of CITY OF TEMPE)
- Administration of CITY OF TEMPE's Plan Design in Medco format
- In-network claims adjudication via *TelePAID* on-line claims adjudication system
- Coordination of Benefits Level I (when flagged on eligibility records)
- Twelve (12) months on-line claims history retention (for use in claims processing)
- Processing associated with Medco by Mail Pharmacy Program prescriptions
- Designated Systemed Account Team
- Client clinical and plan consulting, analysis and cost projections
- Annual analysis of program utilization and impact of plan design and managed care interventions
- Processing of prescriptions received via Internet, fax, phone or mail
- Refill orders received by phone or Internet 24 hours a day, 7 days a week
- Handling and postage expense of mail-order prescriptions
- Braille prescription labels for visually impaired
- Communication/educational materials included in medication packages
- General communications regarding utilization of mail-order
- Medco Welcome Package and ID Cards for new members (two per family)
- Medco standard member communications
- Standard member web site capabilities including:
  - online prescription ordering and status
  - prescription pricing information
  - coverage and benefit plan information
- health news information
- Explanation of Benefits (EOB) for out-of-network claims
- Direct reimbursement claim form (also available via www.medcohealth.com)
- Coordination of benefits (COB) claim form
- Benefit denial letters for instances where Eligible Person/drug are not covered
- TDD-TTY services for hearing impaired to access Customer Service Department
- Integrated Concurrent Drug Utilization Review (DUR) via *TelePAID*

- Physician Profiling Program
- Prescription Drug Plan Report Package
- Semi-Annual Performance Summaries
- Establish, maintain, credential, and contract an adequate panel of Participating Pharmacies
- Development and distribution of communication materials to Participating Pharmacies regarding the Program
- Toll-free access to Help Desk for eligibility/claims processing assistance
- Toll-free access to Participating Pharmacies for DUR assistance
- Monitor Participating Pharmacy compliance, including submission of U&C, generic dispensing rates, formulary program conformance, DUR intervention conformance, patient utilization, and drug mix and managed through the Coordinated Rx[SM] Program
- Toll-free telephone access to voice response unit for location of Participating Pharmacies in zip code area
- Medco Pharmacy Audit Program[2]
- Toll-free telephone access to Customer Service for the program for use by Eligible Persons, CITY OF TEMPE benefits personnel and physicians
- Gatekeeper program – Medco's assistance program for older adults
- 24-hour access to a Medco pharmacist via toll-free telephone service

**4.2** CITY OF TEMPE will also pay for Additional Administrative Services requested by CITY OF TEMPE and provided by Medco under the Program as follows:

| | |
|---|---|
| • Extra Identification Cards | $0.35 per card |
| • Direct reimbursement/out-of-network claims adjudication (including check and EOB to Eligible Person) | $1.75 per claim |
| • Hard copy eligibility submission | Data entry charges |
| • Mailings direct to Eligible Persons or CITY OF TEMPE location | Postage charges |
| • Reviews and Appeals Management | |
| – Includes all initial determinations and first level appeals and, if selected by CITY OF TEMPE, all second level and urgent appeals | $55.00 per case[3] |
| • Second level and urgent appeals (Final and Binding Appeals) Reviews and Management for Medco's Coverage Authorization Programs | $5.00 per case (incremental to Coverage Authorization Program charge) |
| | |
| • Coordination of Benefits Level II | $2.50 per claim |

2 Medco will retain 15% of any audit recoveries to offset expenses of this program.

3 Additional charges may be incurred for non-standard CITY OF TEMPE specific requirements, processing, and/or communications.

| | |
|---|---|
| • Retail Refill Allowance Program Member Communications Materials | Quoted upon request |
| • Claims Detail Layout (CDL) recreate files | Quoted upon request |

Note: Charge for additional services not listed above will be determined by Medco and quoted upon request.

## 5. UTILIZATION MANAGEMENT PROGRAM

Medco will provide to the City of Tempe Utilization Management Programs, which will be outlined in a Utilization Management Program Document (the "UMP Document") to be entered into at a date determined by the parties. The UMP Document will be effective as of the Effective Date of this Agreement and when executed, will be entered into contemporaneously with this Agreement. The UMP Document at such time that it is entered into by both parties, is incorporated by reference herein. The UMP Document may be modified in the form of a new UMP Document agreed upon by the parties in writing.

## 6. IMPLEMENTATION ALLOWANCE

After ninety (90) days following full implementation of the City of Tempe's Integrated Program and for the Initial Term of this Agreement, Medco will credit up to $4.00 per Primary Eligible Participant against future billings under the City of Tempe's Program for documented expenses incurred and submitted by CITY OF TEMPE to Medco for the preparation and/or implementation of te City of Tempe's Integrated Program (e.g., consulting fees, RFP preparation, or special communications associated with the Integrated Program roll-out). This credit will not be offset by any expenses incurred by Medco for the implementation of the City of Tempe's Program.

## 7. CLINICAL ALLOWANCE

Medco will provide a clinical program allowance of up to $4.00 per household over the Initial Term of this Agreement that will be credited to CITY OF TEMPE for documented expenses incurred and submitted by CITY OF TEMPE to Medco to defray the costs of clinical resources offered by Medco and chosen by CITY OF TEMPE, including *EXPERxT* software (excluding equipment, installation and line charges), utilization and coverage review programs, and customized Physician Practice Summaries.

## 8. GENERIC DISPENSING RATE GUARANTEE

"Generic Dispensing Rate" or "GDR" means, with respect to each of the Retail Pharmacy Program and the Mail Order Program, the percentage obtained by dividing (i) the total number of prescriptions dispensed in a Contract Year which are billed as Generic Drugs under such Program, by (ii) the total number of prescriptions for Covered Drugs dispensed and billed under such program in such Contract Year.

In accordance with accepted pharmacy procedures, Medco shall encourage the use of Generic Drugs over Brand Drugs by Covered Persons and their prescribers by engaging in activities including explaining the benefits of using Generic Drugs in brochures and informing Covered Persons when Generic Drugs become available as a substitute for Brand Drugs.

CITY OF TEMPE agrees to assist Medco in communicating to Covered Persons the benefits of

using appropriate and available Generic Drugs, and permits Medco to implement, from time-to-time, reasonable generic dispensing programs designed to increase CITY OF TEMPE's GDR. Such programs may include, but are not limited to, developing a physician contact program in which, for prescriptions written for Brand Drugs in which a Generic Drug is available, a Medco pharmacist may contact the prescribing physician to obtain authorization to dispense a Generic Drug.

Medco shall achieve the following target Generic Dispensing Rates:

| | **Contract Year 1** | **Contract Year 2** |
|---|---|---|
| **Retail** | 63% | 64% |
| **Mail** | 50% | 51% |

If the actual GDR is less than the target GDR in the chart above, Medco will pay CITY OF TEMPE for any shortfall no later than ninety (90) days after the end of the applicable Contract Year. Any shortfall on either the Mail Order or Retail GDR in any Contract Year may be offset by any surplus on the other GDR in the same Contract Year.

If government actions or acts or omissions by any drug manufacturer or CITY OF TEMPE (including a material change in Plan Design) has a material adverse effect on the prescribing of Generic Drugs, CITY OF TEMPE, and Medco will modify the target GDRs and/or penalty provisions set forth in this Section on an equitable basis. The guarantees set forth herein exclude Specialty Drugs, Compound Prescriptions and claims dispensed and submitted by non-traditional providers such as Long-Term Care, Home Infusion, Veteran, Military, and I/T/U (Indian/Tribal/Indian Urban) providers.