Attachment 05

Contract Agreement Document

Invitation for Bids #22921

STATE OF NEW YORK
OFFICE OF GENERAL SERVICES
CONTRACT AGREEMENT FOR
BITUMINOUS CONCRETE
(HOT MIX ASPHALT - VPP)
(2015 NYSDOT SPECIFIC PROJECTS)
(FEDERAL AND STATE FUNDS)
WITH

_____

(*Contractor's Name*)

CONTRACT # PC_____

THIS AGREEMENT, made this ____ day of _____, 2015, by and between the People of the State of New York, acting by and through the Commissioner of General Services, whose office is on the 41st Floor, Corning Tower Building, the Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242 (hereinafter "Commissioner", "OGS" or "State"), and _____ (Company Name), (hereinafter "Contractor"), with an office at _____ (collectively, "the Parties")

W I T N E S S E T H:

WHEREAS, the OGS is responsible for establishing contracts for Hot Mix Asphalt VPP, for use by the New York State Department of Transportation ("NYSDOT" or "Authorized User"), and

WHEREAS, OGS has determined after having solicited bids from bidders willing to supply these materials, that the Contractor submitted the low bid meeting the conditions established under the method of award outlined in the Invitation for Bids #22921 and that the Contractor possesses the necessary capacity, experience and expertise for provision of the said road materials, and that Contractor is ready, willing and able to provide such road materials on the terms hereinafter set forth.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties do hereby agree as follows:

1. TERM

It is the intention of the State to establish an award(s) for the term as stated on the Invitation for Bids except that the commencement and termination dates appearing on the Invitation for Bids may be adjusted forward unilaterally by the State for any resulting contract for up to two calendar months, by indicating such change on the Contract Award Notification.

The contract dates may be adjusted forward beyond two months only with the approval of the successful bidder. If, however, the bidder is not willing to accept an adjustment of the contract dates beyond the two month period, the State reserves the right to proceed with an award to another bidder.

If mutually agreed between the New York State Procurement and the contractor, the contract may be renewed under the same terms and conditions for additional period(s) not to exceed a total contract term of five (5) years.

2. TERMINATION

This Agreement may be terminated in accordance with the termination provisions set forth in the solicitation attached hereto as Appendix B hereof.

3. REPORT OF CONTRACT PURCHASES

Contractor shall furnish a one-time final report containing total sales for the authorized state agency contract purchases no later than thirty (30) days after the end of the contract.

In addition to Contractor direct sales, Contractor shall submit sales information for all Authorized Resellers where such Contract sales are provided by other than the Contractor. Contractors shall specify if any Authorized Resellers are NYS Certified Minority and/or Women Owned Businesses Enterprises (MWBEs). Contractor shall verify such status through the Empire State Development directory of Minority and Women Owned Businesses at: http://www.esd.ny.gov/MWBE/directorySearch.html

The report is to be submitted electronically via e-mail in Microsoft Excel to the Office of General Services, NYS Procurement, to the attention of the individual listed on the front page of the Contract Award Notification and shall reference the Contract Group Number, Award Number, Contract Number, Sales Period, and Contractor's name.

The report in Attachment – *Report of Contract Purchases* is the **minimum** information required. Additional related sales information, such as monthly reports, and/or detailed user purchases may be required by OGS and must be supplied upon request. Failure to submit reports on a timely basis shall be considered poor performance in accordance with Section "*Poor Performance"* and may result in Contract cancellation and designation of Contractor as non-responsible.

4. INDEPENDENT CONTRACTOR

It is understood and agreed that the legal status of the Contractor, its subcontractors, agents, officers and employees is that of an independent contractor and in no manner shall they be deemed employees or agents of the State of New York and, therefore, are not entitled to any of the benefits associated with such employment or designation.

(Remainder of this page intentionally left blank.)

5. APPENDIX A

Appendix A, Standard Clauses for New York State Contracts, dated January 2014, attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein.

6. APPENDIX B

Appendix B, General Specifications, dated June 2014, attached hereto, is hereby expressly made a part of this Agreement as fully as if set forth at length herein.

7. NYSDOT SPECIFICATIONS

New York State Department of Transportation, Standard Specifications, Construction and Materials, dated May 1, 2008, and all current addenda, are hereby expressly made a part of this Agreement as fully as if set forth at length herein.

8. NYSDOT CHAPTER 12 APPENDICES - "PACKAGE A"

Package A consisting of Appendices Nos. 12-1, 12-1.1, 12-1.2, 12-1.3, 12-1.4 and 12-1.5 setting forth certain federally required contract provisions dated May 2012.

9. LAW

This Agreement shall be governed by the laws of the State of New York.

10. ENTIRE AGREEMENT

This Agreement constitutes the entire Agreement between the parties hereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and this Agreement shall not be changed, modified or altered in any manner except by an instrument in writing executed by both parties hereto.

11. CONDITIONS PRECEDENT

This Agreement shall not be deemed executed, valid or binding unless and until approved in writing by the State Comptroller.

12. INCONSISTENCIES

In the event of any discrepancy, disagreement or ambiguity between this contract agreement and any of the Appendices, or between the Appendices themselves, the documents shall be given preference in the following order to interpret and to resolve such discrepancy, disagreement or ambiguity:

(i) Appendix A (January 2014), Standard Clauses for NYS Contracts;
(ii) Invitation for Bids #22921;
(iii) Appendix D - Chapter 12 - Appendices - “Package A”
(iv) This Agreement, including Group Specifications (SPEC 932);
(v) NYSDOT Specifications dated May 1, 2008 and all current addenda;
(vi) Appendix B (June 2014), General Specifications;
(vii) Other Appendices and attachments as deemed necessary; and
(viii) Appendix C1 – Contractor’s Bid.

The Parties understand and agree that any and all deviations or exceptions taken by Contractor to the State's Invitation for Bids are hereby withdrawn except only to the extent that such exceptions or deviations have been explicitly incorporated into this Agreement.

13. FORCE MAJEURE

Neither party hereto will be liable for losses, defaults, or damages under this Agreement which result from delays in performing, or inability to perform, all or any of the obligations or responsibilities imposed upon it pursuant to the terms and conditions of this Agreement, due to or because of acts of God, the public enemy, acts of government, earthquakes, floods, strikes, civil strife, fire or any other cause beyond the reasonable control of the party that was so delayed in performing or so unable to perform provided that such party was not negligent and shall have used reasonable efforts to avoid and overcome such cause. Such party will resume full performance of such obligations and responsibilities promptly upon removal of any such cause.

14. ASSIGNMENT BY STATE

The State agrees not to assign this Agreement without prior notice to and reasonable consent of the Contractor provided, however, that this Agreement may be assigned without such consent to another agency or subdivision of the State pursuant to a governmental reorganization or assignment of functions under which the pertinent functions of OGS as an agency are transferred to a successor agency or subdivision of the State.

15. NOTICES

All notices, demands, designations, certificates, requests, offers, consents, approvals and other instruments given pursuant to this Agreement shall be in writing and shall be validly given when mailed by registered or certified mail, overnight carrier or hand delivered, (i) if to the State, addressed to the State at its address set forth above, and (ii) if to Contractor, addressed to Contractor at its address set forth above. The parties may from time to time, specify any address in the United States as its address for purpose of notices under this Agreement by giving fifteen (15) days written notice to the other party. The parties agree to mutually designate individuals as their respective representatives for the purposes of this Agreement.

16. CAPTIONS

The captions contained in this Agreement are intended for convenience and reference purposes only and shall in no way be deemed to define or limit any provision thereof.

17. SEVERABILITY

In the event that any one or more of the provisions of this Agreement shall for any reason be declared unenforceable under the laws or regulations in force, such provision will not have any effect on the validity of the remainder of this Agreement, which shall then be construed as if such unenforceable provision had never been written or was never contained in this Agreement.

18. CONTRACTOR REQUIREMENTS AND PROCEDURES FOR EQUAL EMPLOYMENT AND BUSINESS PARTICIPATION OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND NEW YORK STATE CERTIFIED MINORITY-AND WOMEN-OWNED BUSINESS ENTERPRISES

I. General Provisions

A. OGS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 142-144 ("MWBE Regulations") for all State contracts as defined therein, with a value (1) in excess of $25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of $100,000 for real property renovations and construction.

B. The Contractor agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to OGS, to fully comply and cooperate with OGS in the implementation of New York State Executive Law Article 15-A. These requirements include equal employment opportunities for minority group members and women ("EEO") and contracting opportunities for New York State certified minority- and women-owned business enterprises ("MWBEs"). Contractor's demonstration of "good faith efforts" pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the "Human Rights Law") or other applicable federal, State or local laws.

C. The Contractor further agrees to be bound by the provisions of Article 15-A and the MWBE Regulations. If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.

D. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of contract, leading to the withholding of funds, suspension or termination of the Contract or such other actions or enforcement proceedings as allowed by the Contract.

II. Contract Goals

A. For purposes of this procurement, OGS conducted a comprehensive search and determined that this contract does **not** offer sufficient opportunities to set goals for participation by MWBEs as subcontractors, service providers and suppliers to Contractor. Contractor is however encouraged to make every good faith effort to promote and assist the participation of MWBEs who perform commercially useful functions on this Contract for the provision of services and materials. To locate MWBEs, the Directory of Certified Businesses can be viewed at: https://ny.newnycontracts.com/frontend/diversityusers.asp. Additionally, Contractor is encouraged to contact the Division of Minority and Women's Business Development ((518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

B. Commercially Useful Function

Pursuant to 5 NYCRR § 140.1(f), a MWBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, a MWBE must, where applicable and in accordance with any State Agency specifications, also be responsible, with respect to materials and supplies used on the contract, for ordering and negotiating price, determining quality and quantity and installing. A MWBE does not perform a commercially useful function if its role adds no substantive value and is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of participation. OGS will assess whether a MWBE is performing a commercially useful function by considering the following:

(1) the amount of work subcontracted;
(2) industry practices;
(3) whether the amount the MWBE is to be paid under the contract is commensurate with the work it is to perform;
(4) the credit claimed towards MWBE utilization goals for the performance of the work by the MWBE; and
(5) any other relevant factors.

C. Good Faith Efforts

Pursuant to 5 NYCRR § 142.8, evidence of good faith efforts shall include the following:

(1) A list of the general circulation, trade and MWBE-oriented publications and dates of publications soliciting for certified MWBE participation as a subcontractor/supplier and copies of such solicitation.

(2) A list of the certified MWBEs appearing in the Empire State Development MWBE directory that were solicited for this Contract. Provide proof of dates or copies of the solicitations and

copies of the responses made by the certified MWBEs. Describe specific reasons that responding certified MWBEs were not selected.
(3) Descriptions of the Contract documents/plans/specifications made available to certified MWBEs by the Contractor when soliciting their participation and steps taken to structure the scope of work for the purpose of subcontracting with or obtaining supplies from certified MWBEs.
(4) A description of the negotiations between the Contractor and certified MWBEs for the purposes of complying with the MWBE goals of this Contract.
(5) Dates of any pre-bid, pre-award or other meetings attended by Contractor, if any, scheduled by OGS with certified MWBEs whom OGS determined were capable of fulfilling the MWBE goals set in the Contract.
(6) Other information deemed relevant to the request.

III. Equal Employment Opportunity (EEO)

A. Contractor shall comply with the following provisions of Article 15-A:

1. Contractor and Subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
2. By entering into this Contract, Contractor certifies that the text set forth in clause 12 of Appendix A, attached hereto and made a part hereof, is Contractor's equal employment opportunity policy.

B. Form EEO 100 – Staffing Plan
To ensure compliance with this Section, the Contractor shall submit Form EEO 100- Staffing Plan to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and federal occupational categories. Contractor shall complete the Staffing plan form and submit it as part of their contract.

C. Form EEO 101 - Workforce Employment Utilization Report ("Workforce Report")
(Bidders: You must STRIKE one of the following clauses--but not both--for the final contract)
EITHER: Contractor agrees it is responsible for updating and providing notice to the OGS of any changes to the previously submitted Staffing Plan. This information is to be submitted on a quarterly basis during the term of the Contract to report the actual workforce utilized in the performance of the Contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The Workforce Report must be submitted to report this information.
OR: Contractor and OGS agree that Contractor is unable to separate out the workforce utilized in the performance of the Contract from Contractor's and/or subcontractor's total workforce and that the information provided on the previously submitted Staffing Plan is Contractor's total workforce during the subject time frame, not limited to work specifically under the contract.

D. Contractor shall comply with the provisions of the Human Rights Law, all other State and federal statutory and constitutional non-discrimination provisions. Contractor and subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal and conviction and prior arrest.

ALL FORMS ARE AVAILABLE AT: http://www.ogs.ny.gov/MWBE/Forms.asp

19. CONTRACTOR RESPONSIBILITY

The Contractor shall at all times during the Contract term remain responsible. The Contractor agrees, if requested by the Commissioner of OGS or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

The Commissioner of OGS or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the Commissioner of OGS or her designee issues a written notice authorizing a resumption of performance under the Contract.

Upon written notice to the Contractor, and a reasonable opportunity to be heard with appropriate OGS officials or staff, the Contract may be terminated by the Commissioner of OGS or her designee at the Contractor's expense where the Contractor is determined by the Commissioner of OGS or her designee to be non-responsible. In such event, the Commissioner of OGS or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.

In no case shall such termination of the Contract by the State be deemed a breach thereof, nor shall the State be liable for any damages for lost profits or otherwise, which may be sustained by the Contractor as a result of such termination.

(Remainder of this page intentionally left blank.)

CONTRACT NO. PC_____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

Agency Certification
"In addition to the acceptance of this Contract, I also certify that original copies of this signature page will be attached to all other exact copies of this contract."

_____
(Company Name)

By: _____

Name: _____

Title: _____

Date: _____

Federal I.D. No.: _____

THE PEOPLE OF THE STATE OF NEW YORK

By: _____

Name: _____

Title: _____

Date: _____

OFFICE OF THE STATE COMPTROLLER:

_____

Thomas DiNapoli,
NYS Comptroller

INDIVIDUAL, CORPORATION, PARTNERSHIP, OR LLC ACKNOWLEDGMENT

STATE OF }

: SS.:

COUNTY OF }

On the ____ day of _____ in the year 20 __ , before me personally appeared _____ , known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that _he resides at _____,

Town of _____ ,

County of _____ , State of _____ ; and further that:

[Check One]

(☐ **If an individual):** _he executed the foregoing instrument in his/her name and on his/her own behalf.

(☐ **If a corporation):** _he is the _____ of _____ , the corporation described in said instrument; that, by authority of the Board of Directors of said corporation, _he is authorized to execute the foregoing instrument on behalf of the corporation for purposes set forth therein; and that, pursuant to that authority, _he executed the foregoing instrument in the name of and on behalf of said corporation as the act and deed of said corporation.

(☐ **If a partnership):** _he is the _____ of _____, the partnership described in said instrument; that, by the terms of said partnership, _he is authorized to execute the foregoing instrument on behalf of the partnership for purposes set forth therein; and that, pursuant to that authority, _he executed the foregoing instrument in the name of and on behalf of said partnership as the act and deed of said partnership.

(☐ **If a limited liability company):** _he is a duly authorized member of _____, LLC, the limited liability company described in said instrument; that _he is authorized to execute the foregoing instrument on behalf of the limited liability company for purposes set forth therein; and that, pursuant to that authority, _he executed the foregoing instrument in the name of and on behalf of said limited liability company as the act and deed of said limited liability company.

_____

Notary Public

Registration No._____ **State of:_____**

Appendix A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

[Text not included at this time because it is included elsewhere in the solicitation. Will be added when contract is finalized]

Appendix B

Office of General Services
General Specifications

SAMPLE

Appendix C1

Contractor's Proposal

SAMPLE

Appendix D

Chapter 12 – Appendices
"Package A"

SAMPLE