

**STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES**

CENTRALIZED CONTRACT FOR THE ACQUISITION OF PROPRIETARY SOFTWARE & RELATED SERVICES

New York State Contract #

PT64366

Contractor Reference #

INTERNATIONAL BUSINESS MACHINES CORPORATION (IBM)

DESIGNATED CONTACTS: Team #12

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The bid must be fully and properly executed by an authorized person. By signing you certify your express authority to sign on behalf of yourself, your company, or other entity and full knowledge and acceptance of this INVITATION FOR BIDS, Appendix A (Standard Clauses For New York State Contracts), Appendix B (OGS General Specifications), and State Finance Law §139-j and §139-k (Procurement Lobbying), and that all information provided is complete, true and accurate. By signing, bidder affirms that it understands and agrees to comply with the OGS procedures relative to permissible contacts as required by State Finance Law §139-j (3) and §139-j (6) (b). Information may be accessed at:

Procurement Lobbying: <http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

THIS CONTRACT for the acquisition of proprietary software and related incidental services is made between the People of the State of New York, acting by and through the Commissioner of the Office of General Services (hereinafter "State" or "OGS") whose principal place of business is the 41st Floor, Corning Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242, pursuant to authority granted under New York State Finance Law, § 163, and International Business Machines Corporation (hereinafter "Contractor"), with its principal place of business at 1 New Orchard Road, Armonk, NY 10504.

SUMMARY OF POLICY AND PROHIBITIONS ON PROCUREMENT LOBBYING:

Pursuant to State Finance Law §§139-j and 139-k, this solicitation includes and imposes certain restrictions on communications between OGS and an Offerer/bidder during the procurement process. An Offerer/bidder is restricted from making contacts from the earliest notice of intent to solicit offers/bids through final award and approval of the Procurement Contract by OGS and, if applicable, the Office of the State Comptroller ("restricted period") to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in State Finance Law §139-j (3) (a). Designated staff, as of the date hereof, is identified on the first page of this solicitation. OGS employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the Offerer/bidder pursuant to these two statutes. Certain findings of non-responsibility can result in rejection for contract award and in the event of two findings within a four-year period, the Offerer/bidder is debarred from obtaining governmental Procurement Contracts. Further information about these requirements can be found on the OGS website:

<http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

NYS STANDARD VENDOR RESPONSIBILITY QUESTIONNAIRE (Appendix E, # 1):

Bidder agrees to fully and accurately complete the NYS Standard Vendor Responsibility Questionnaire, which is attached as Appendix E, # 1 (hereinafter the "Questionnaire"). The Bidder acknowledges that the State's execution of the Contract will be contingent upon the State's determination that the Bidder is responsible, and that the State will be relying upon the Bidder's responses to the Questionnaire in making that determination. The Bidder agrees that if it is found by the State that the Bidder's responses to the Questionnaire were intentionally false or intentionally incomplete, on such finding, OGS may terminate the Contract by providing ten (10) days written notification to the Contractor. 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.

TAX LAW 5-A AMENDED APRIL 26, 2006 (APPENDIX 2):

Section 5-a of the Tax Law, as amended, effective April 26, 2006, requires certain contractors awarded state contracts for commodities, services and technology valued at more than \$100,000 to certify to the Department of Taxation and Finance (DTF) that they are registered to collect New York State and local sales and compensating use taxes. The law applies to contracts where the total amount of such contractors' sales delivered into New York State are in excess of \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made, and with respect to any affiliates and subcontractors whose sales delivered into New York State exceeded \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made.

This law imposes upon certain contractors the obligation to certify whether or not the contractor, its affiliates, and its subcontractors are required to register to collect state sales and compensating use tax and contractors must certify to DTF that each affiliate and subcontractor exceeding such sales threshold is registered with DTF to collect New York State and local sales and compensating use taxes. The law prohibits the State Comptroller, or other approving agency, from approving a contract awarded to a contractor meeting the registration requirements but who is not so registered in accordance with the law. Contractor certification forms and instructions for completing the forms are attached to this bid. Form No. ST-220-TD must be filed with and returned directly to DTF. Unless the information upon which the ST-220-TD is based changes, this form only needs to be filed once with DTF. If the information changes for the contractor, its affiliate(s), or its subcontractor(s), a new Form No. ST-220-TD must be filed with DTF.

Form ST-220-CA must be filed with the bid and submitted to the procuring covered agency certifying that the contractor filed the ST-220-TD with DTF. Proposed contractors should complete and return the certification forms within two business days of request (if the forms are not completed and returned with bid submission). Failure to make either of these filings may render a bidder non-responsive and non-responsible. Bidders shall take the necessary steps to provide properly certified forms within a timely manner to ensure compliance with the law.

Vendors may call DTF at **1-800-698--2909** for any and all questions relating to Section 5-a of the Tax Law and relating to a company's registration status with the DTF. For additional information and frequently asked questions, please refer to the DTF web site: <http://www.nystax.gov>

INFORMATION SECURITY BREACH AND NOTIFICATION ACT

Contractor will comply with Section 899-aa of the General Business Law (GBL) to the extent that Contractor is required to maintain computerized data which includes private information which Contractor does not own in order to perform the Services. See GBL § 899-aa(4).

1. CONTRACT SCOPE / TERM

This document (hereinafter "Contract") sets forth the terms and conditions governing the acquisition of Licensed Software and Maintenance. Terms used in this document shall have the meanings set forth in Appendix B. Except as specifically provided herein, amendments or modifications to the terms and conditions set forth herein may only be made with mutual written agreement of OGS and the Contractor and with the approval of the New York State Attorney General and Comptroller.

This Contract is to provide Licensed Software and Technical Support or Maintenance only. The following are not available for acquisition under this Contract: consulting services; hardware; operating system software for mainframes; any recurring charge software for mainframes; operating system software for storage systems; operating system software of PC/microcomputers; printing or accessories software; third party software (except as expressly set forth in Section 3.B below) and Enterprise Hardware Code. No

development or customization work may be provided under this Contract. Any Technical Support or Maintenance provided under this Contract MUST be related to the Licensed Software available hereunder or Licensed Software previously acquired by an Authorized User that, if acquired during the term of this Contract, could be acquired under this Contract. OGS and Contractor expressly agree that the Contract shall not be amended to add consulting services, hardware, operating system software for mainframes, any recurring charge software for mainframes, operating system software for storage systems, operating system software of PC/microcomputers, printing or accessories software, Enterprise Hardware Code, third party software (except as expressly set forth in Section 3.B below) or development or customization services as an offering. OGS and Contractor also agree that no public works or building services work can be provided by the Contractor under this Contract.

The term of this Contract shall be five (5) years commencing on the date of approval by the New York State Comptroller effective upon mailing by OGS (see Appendix B, Clause 38). The parties may renew the contract, upon approval of the NYS Comptroller, upon expiration of the original term for an additional five (5) year term. Upon termination of the Contract, all rights and obligations set forth herein shall survive in accordance with their terms as to procurements made or individual licenses granted to Authorized Users prior to such termination.

This Contract is available for use by all Authorized Users (See Appendix B, *Definitions*, and *Participation in Centralized Contracts*) and may be extended with the joint approval of the Contractor and the Commissioner for joint purchasing by any department, agency or instrumentality of the United States government and/or any state including political subdivisions thereof ("other authorized entities"). In the event that this Contract is so extended, such other authorized entities shall be solely responsible for liability and performance under the Contract, and Contractor agrees to hold them solely responsible for such liability and performance.

2. MERGER OF APPENDICES/CONFLICT OF CLAUSES

This Contract shall incorporate the following appendices as if set forth herein at length. Only documents expressly enumerated below shall be deemed a part of this Contract, and references contained in those documents to additional Contractor documents not enumerated below shall be of no force and effect. Conflicts between these documents shall be resolved in the following descending order of precedence, which supersedes the order of precedence stated in Appendix B:

Appendix A	<i>Standard Clauses for NYS Contracts</i>
Contract	(This Document)
Appendix B	OGS General Specifications
Appendix C	<u>Mandatory</u> : Contractor's Executive Law, Article 15-A (M/WBE) Requirements
Appendix D	Contract Update Form (For Product and Pricing Updates)
Appendix E	Required Contractor Submissions:
	# 1 Mandatory Contractor Questionnaire
	# 2 Contractor, Reseller & Distributor Information
	# 3 NYS Net Prices (Prices for Software and Technical Support or Maintenance)
	# 4 Maintenance (Description of Technical Support or Maintenance)
	a) Maintenance (Description of Services); Passport Advantage (distributed software)
	b) Maintenance (Description of Services); Acquisition of SWM (zSeries, iSeries, pSeries, xSeries, RSS and others)
	#5 Sub-Capacity Licensing
	a) Passport Advantage Sub-Capacity Licensing Terms (distributed software)
	b) Processor Value Unit (PVU) Licensing for Distributed Software (as of September 17, 2008)
	c) System z Programs Sub-Capacity Pricing
	d) Attachment for IBM System z Workload License Charges
	e) Attachment for EWLC, TWLC, zELC and z/OS.e License Charges
Appendix F	#1 License Agreement for the Evaluation of Programs
	#2 Addendum to International License Agreement for Evaluation of Programs

3. PRODUCT OFFERINGS

Products available under this Contract are set forth in Appendix E. These offerings may be updated during the Contract term to incorporate new Product offerings, and price revisions and to delete items.

A. Contractor's Software Product Line: Proprietary Product(s) developed by Contractor and offered either under Contractor's U.S. Commercial Price List or under a GSA Supply Schedule, may be included under this Contract. OGS and the Contractor agree that the rights to the Licensed Software may be obtained for a perpetual or a specific term. (Note: This Contract excludes the following software: operating system software for mainframes; any recurring charge software for mainframes; operating system software for storage systems; operating system software of PC/microcomputers; printing or accessories software; third party software except as expressly set forth below and Enterprise Hardware Code.)

B. Third Party Software: Third Party Software shall not be offered under this Contract, except as a component of Licensed Software.

C. Services: Authorized Users may acquire Technical Support or Maintenance under this Contract. No consulting services may be obtained under this Contract. The Parties agree no development or customization work can be provided under this Contract. Further, the Parties agree that no Materials may be provided under this Contract.

4. CONTRACT ADMINISTRATION

A. Contract Administrator: Contractor must provide a dedicated Contract administrator to support the updating and management of the Contract on a timely basis. Information regarding the administrator shall be set forth in Appendix E (Submission #2).

B. "Toll Free" Number: Contractor must provide a toll free telephone number for order tracking/delivery schedule information, Contract administration issues, as well as other questions by Authorized Users related to the day to day operation and use of the Contract other than Product support. The toll free number must be available Monday through Friday on State business days between the hours of 8 a.m. to 5 p.m., Eastern Time. The number shall be set forth in Appendix E (Submission #2).

Contractor may additionally offer an online e-mail or Internet site for order tracking/delivery schedule information for those customers who have electronic access.

C. Procedures for Updating Contract Price & Product Listings **NOTE: THE FOLLOWING PROCEDURES ARE NOT APPLICABLE TO CONTRACTOR PROPOSED CHANGES TO CONTRACT TERMS AND CONDITIONS.** *Any implied or express request for changes in or additions to existing Contract terms and conditions, including new terms and conditions associated with a specific Product line being added to the Contract for the first time, requires a formal Contract amendment and requires the approval of OGS, the NYS Attorney General and the NYS Comptroller. New or revised Contract terms and conditions are subject to the restrictions set forth in Appendix B, Section 40.*

The following guidelines and Appendix D, Contract Update Form attached to this Contract are subject to change at the discretion of OGS.

(1) TYPES OF CONTRACT UPDATES: In order to expedite processing of a change request, where proposed changes involve more than one category below, they should be submitted to OGS as totally separate requests.

a) AUTO ADDS / DELETIONS – "Auto Adds/Deletions" are Contract changes and updates made in accordance with the previously approved Contract pricing formula; e.g., a "discount from list" or pricing based on an approved GSA-based price Schedule. "Auto Adds" do not include any price increases. "Auto Adds/Deletions" include: i) adding new products within the established, previously approved pricing structure, ii) lowering pricing for Products previously incorporated under the Contract, and iii) deleting Products previously incorporated under the Contract. For categories (i) and (ii) Auto Adds: Contractor shall automatically update the Contract price list and may proceed with selling Products without prior approval of either OGS or the Comptroller. Contractor should note, however, that all "Auto Adds" approved by OGS are subject to a post audit by the Office of the State Comptroller. For category (iii) Auto Deletions, at the end of and subject to the period specified in Appendix B, Clause 84 ("Changes in Product or Service Offerings"), Contractor may automatically update the Contract price list by deleting the Product(s), without prior approval of either OGS or the Comptroller.

All "auto adds" must be immediately posted electronically by the Contractor at the Contract web site.

b) REGULAR ADD - “Regular Adds” are requests for i) price increases for Products which are already incorporated under the Contract, and ii) addition of new products to the Contract which do not fall under the previously established price structure or discounts for Product types previously approved under the Contract. Regular Adds include rebundled Products or Services. Regular Adds must be submitted to OGS for prior approval, and must be accompanied by a justification of reasonableness of price. Regular Adds are subject to pre-audit by the Comptroller. If approved, OGS staff will notify Contractor in writing. Price increases or new product offerings may not be electronically posted by Contractor until after receipt of OGS approval of the “Regular Add”.

When the Contract pricing is based on GSA prices, the revised prices or prices of new Products must reflect current GSA prices adjusted as necessary for any additional discounts.

c) SPECIAL ADD – Contract changes and updates that do not fall within either of the above categories, will be processed as “Special Adds”. Special Adds are changes that are not specifically covered by the terms of the Contract but inclusion is found to be in the best interest of the State. Contractor must provide a justification of reasonableness of the prices offered and a statement explaining why it is in the best interest of the State to approve the new Products. Special Adds are subject to pre-audit by the Office of the State Comptroller. If approved, OGS staff will notify Contractor in writing. New offerings may not be electronically posted by Contractor until after receipt of OGS approval of the “Special Add”.

(2) CONTRACTOR’S SUBMISSION OF CONTRACT UPDATES: In connection with any Contract update, OGS reserves the right to:

- request additional information
- reject Contract updates
- remove Products from Contracts
- remove Products from Contract updates
- request additional discounts for new or existing Products

(3) PRICE JUSTIFICATION – FORMAT: Contractor is required to submit the Product and price information for the update in an Excel spreadsheet format or PDF in hard copy in triplicate and on a floppy disk or electronically via e-mail to the OGS Purchasing Officer. The list must be dated and the format should be consistent with the format of the price list(s) included in the NYS Net Price appendix of this Contract. The price list should separately include and identify (e.g., by use of separate worksheets or by using italics, bold and/or color fonts):

- Price increases
- Products being added

The State reserves the right to require a revised NYS Net Price List at any time during the Contract period, and it will be requested if there have been numerous updates since the last complete update. Each updated price list must include the date the price list was prepared.

(4) SUPPORTING DOCUMENTATION: Each update request must include the current U.S. commercial price list relevant to the Products included in the update. If the NYS Net Prices are based on a GSA Schedule, the current GSA Schedule must also be included with the update request. Requested price increases not based on an approved GSA schedule must also include a copy of the current National Consumer Price Index as described in the “Payments/Pricing” section of the Contract.

(5) COVER LETTERS: A Contract update must be accompanied by three (3) copies of the Contract Update Form set forth in Appendix D. Contractor should briefly describe the nature and purpose of the update (e.g., update requested in order to reflect a recently approved GSA schedule, to restructure the pricing to its Authorized Users generally, and/or for new Licensed Software or services which fall into a new group or category that did not exist at the time of approval of the Contract by the New York State Comptroller, etc.). Each of the three copies of the Contract Update Form must contain original signatures by an individual authorized to sign on behalf of Contractor, and an original corporate acknowledgment (see below).

D. Annual Review Process: In addition to the procedure for updating the contract price and product listing set forth above, the Contractor and OGS agree that on an annual basis or as needed, they shall review and amend, as appropriate, the following documents:

(1) Technical Support or Maintenance terms and policies set forth in Appendix E. These policies shall be updated with the Contractor's then-current Technical Support or Maintenance policies on each anniversary of this Contract. The Contractor agrees to discuss all material changes to these policies in the preceding year.

(2) NYS Net Prices set forth in Appendix E. Contractor and OGS shall meet at least once a year, at a mutually agreeable time and place, to discuss pricing and discount levels set forth in the appendices referenced herein and to determine whether any adjustments to those prices and discounts are merited.

(3) Subcapacity licensing terms and counting rules set forth in Appendix E. These terms and counting rules may be updated on annual basis. Contractor agrees to discuss all material changes to such terms and counting rules in the preceding year.

Changes that are beneficial to the State may be submitted for review and approval by OGS prior to the annual review date. The Contractor and OGS may identify additional elements of the Contract for review as appropriate.

Either party may initiate the annual review process. Any resulting revisions shall be processed in accordance with the terms of this Contract. Any disagreement between Contractor and OGS arising during the annual review may be submitted to the dispute resolution process detailed in section 15 herein.

5. USE OF RE-SELLERS/DISTRIBUTORS

Resellers/Distributors are not included in this Contract. OGS and Contractor reserve the right to amend the Contract to provide for a modified Reseller/Distributor model.

6. PAYMENTS/PRICING

Prices shall be calculated and paid in accordance with this section and Appendix E in effect at the time of order placement. Pricing set forth in Appendix E (Submission # 3) includes all applicable documentation, media, shipping, delivery and handling charges (hereinafter "NYS Net Price"). Contractor may, however, upon mutual agreement of the Authorized User, negotiate more advantageous pricing for particular orders.

A. Travel, Meals & Lodging Unless expressly set forth to the contrary in Appendix E, NYS net prices set forth in the Contract shall be deemed inclusive of travel, meals and lodging, wherever applicable. Where travel, meals and lodging are allowed over and above the NYS Net Prices, reimbursement to Contractor for such costs for employees who do not reside in the local commuting area for the work site, shall be made in accordance with the State's Travel Reimbursement Manual published by the New York State Office of the State Comptroller. It will be the responsibility of the Authorized User to provide Contractor the most recently published reimbursement guidelines and rates.

B. Subsequent Changes to Product Offerings All changes must be in accordance with the procedures set forth below and require the advance approval of OGS. The procedures set forth below are in addition to the Annual Review Process set forth in 4(D) above.

(1) Adding New Products: Where future Products become commercially available during the Contract term and are offered to New York State, the Contract may be updated to include such offerings.

(2) Deletion of Products: OGS reserves the right to delete any Product from the Contract at its discretion at any time.

(3) Price Decreases: Shall be calculated in accordance with Appendix B, Clause 24.

(4) Price Increases: (Pricing not Benchmarked to GSA Supply Schedule) Additionally, where pricing submitted for Products or services is **not** benchmarked to an approved GSA Supply Schedule:

a) First Twelve Months Fixed Pricing offered shall be fixed for the first twelve (12) months of the Contract term from the date of Comptroller approval.

b) Price Increase Requests Contractor may thereafter request an increase in the pricing contained in Appendix E a maximum of once in any twelve month period provided that Contractor certifies in writing that the price change for Product applies to its U.S. Commercial Price List, and that Contractor documents the request to the satisfaction of the State.

c) Escalation Cap Contractor has the sole responsibility to submit to OGS a rate adjustment request which must include a copy of the index or other supporting documentation necessary to support the request. If such adjustment exceeds the lesser of five (5%) percent or the percent increase in the latest copy of the "National Consumer Price Index for All Urban Consumers (CPI-U)", as published by the U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. 20212, then OGS reserves the right

to delete the Product from the Contract. In no event can prices exceed the Contractor's published U.S. Commercial List price.

d) Effective Date of Increase Price increases shall be effective upon final approval by the State, and may not be posted on the Internet prior to receipt of final approval.

C. GSA Benchmarked Pricing Additionally, where the NYS Net Price is based upon an approved GSA Supply Schedule:

(1) Associated Discounts The State is entitled to all associated discounts enumerated in the GSA Supply Schedule (including, but not limited to, discounts for additional sites and volume discounts), as well as any other pricing or discount terms as are expressly enumerated in this NYS Contract or GSA schedule, when calculating the NYS Net Price; and

(2) Industrial Funding Fee GSA pricing incorporates a sum referred to as the "GSA Industrial Funding Fee". OGS reserves the right to require either that: the IFF is remitted directly to OGS, or the state contract prices be reduced, by an amount equivalent to the IFF. If the latter, the NYS Net Price shall be calculated by reducing the published GSA price, after the discounts, if any, set forth in paragraph (1), above, downward by the amount of the Industrial Funding Fee, currently set at .75%. Therefore, the "NYS Net Price" shall be calculated by multiplying 0.9925 times the GSA price, and

(3) Pricing Increases Price increases shall be effective upon final approval by the State, and may not be electronically posted by Contractor prior to receipt of final approval.

D. Pricing for Machine or Platform Migrations If such pricing is available, then calculations of software pricing shall be based on the size of the logical partition or, in the absence of partitions, machine size, on which the Software is installed and running, rather than the size of the entire machine on which the partition is resident in accordance with Appendix E, submission #5, Subcapacity Licensing.

In the event of a machine migration (only as expressly permitted in this Contract), Authorized User will not incur an increase in Technical Support or Maintenance or additional license fees provided that the total licensing requirement on which the Licensed Software is newly installed and running does not exceed the previously licensed capacity.

In the event of software migration involving a larger processor licensing capacity or a different operating platform, a fee shall be paid to Contractor for the difference between the then-current NYS Net Price for the original licensing capacity and the then-current NYS Net Price for the Licensed Software on the new licensing capacity or operating system.

7. DISTRIBUTION OF CONTRACTOR PRICE LIST AND CONTRACT APPENDICES Contractor shall bear the cost of and shall effect distribution of copies of the Contract, including price lists and appendices, upon request. Contractor shall not, however, distribute Contract information unless OGS has approved it in advance. The final approval of the Contract by the Office of the State Comptroller and OGS' signature on this Contract indicates its approval of the distribution of the information contained herein. Contractor shall also be required to furnish OGS with additional copies of the approved price lists (paper copy or diskette, at the State's discretion) upon request as may be necessary in the normal course of business.

7.1 CURRENT AGREEMENTS BETWEEN CONTRACTOR AND ELIGIBLE AUTHORIZED USERS

Eligible Authorized Users, including educational institutions of the State of New York, with independent contracts for Contractor's Licensed Software and Services may, at any time, convert any existing contract(s) with Contractor to participate under this Contract for future acquisitions. Contractor shall undertake good faith efforts to inform eligible Authorized Users, via e-mail or other formal communications, of the terms, conditions and pricing of this Contract at the earliest opportunity after approval of this Contract by all parties.

8. INTERNET ACCESS TO CONTRACT & PRICING INFORMATION

Access by Authorized Users to Contract terms and pricing information may be made available and posted on the Internet. To that end, the Contractor may be requested to host the complete Contract pricing and Product offerings at Contractor's Internet site, at Contractor's sole expense, including all subsequent changes in the Contract offerings (adds, deletes, price revisions) during the Contract term, in accordance with the following requirements:

A. Warranty Contractor warrants and represents that Contract and related information will be accurately and completely posted, maintained and displayed in an objective and timely manner which renders it clearly distinguishable from other, non-Contract offerings at Contractor's web site. Contractor shall indemnify the State and Contract users for damages resulting from errors or inaccuracies in such information, or from any failure to maintain or timely post Contract information in accordance with this paragraph.

B. Price Data Retention & Audit Information at web site should reflect the pricing information for the preceding twelve month period. At the end of each twelve month period, the Contractor shall either electronically archive the information at the web site in a manner which allows the State to access the information or electronically transmit the information to the State. This does not relieve the Contractor from any audit requirements imposed by Appendix A, Clause 10, nor does it shorten the retention periods for information stated therein. In addition, annual audits of the information posted at Contractor's web site may be conducted by OSC, or by an independent auditor at Contractor's expense.

C. Site Changes Contractor hereby consents to a link from the OGS web site to the Contractor's web site in order to facilitate access to Contract information. The establishment of the link is provided solely for convenience in carrying out the business operations of the State, and OGS reserves the right to terminate or remove a link at any time, in its sole discretion, without advance notice, or to deny a future request for a link. OGS will provide Contractor with subsequent notice of link termination or removal. Contractor shall provide OGS with timely written notice of any change in URL or other information needed to access the site and/or maintain the link.

D. Use of Access Data Prohibited If Contractor stores, collects or maintains data electronically as a condition of accessing State Contract information, such data shall only be used internally by Contractor for the purpose of implementing or marketing the State Contract, and shall not be disseminated to third parties or used for other marketing purposes. This Contract constitutes a public document under the laws of the State of New York and Contractor cannot restrict access to the Contract terms and conditions including pricing, i.e., through use of restrictive technology or passwords.

E. Responsibility for Content Contractor is solely responsible for administration, content, intellectual property rights and all materials at Contractor's web site. Contractor is solely responsible for its actions and those of its agents, employees, resellers, subcontractors or assigns, and agrees that neither Contractor nor any of the foregoing has any authority to act or speak on behalf of the State. As applicable, Contractor agrees to comply with Office for Technology policy on "Accessibility of Web-Based Information and Applications", effective August 1, 2008, the stated purpose of which is to make state agency web-based intranet and Internet information accessible for persons with disabilities. In accordance with such policy, and to the extent applicable to Contractor and its web site, the following language is incorporated into this Agreement:

Any web-based intranet and Internet information and applications development, or programming delivered pursuant to the contract or procurement will comply with New York State Enterprise IT Policy NYS-P08-005, Accessibility Web-Based Information and Applications, and New York State Enterprise IT Standard NYS-S08-005, Accessibility of Web-Based Information Applications, as such policy or standard may be amended, modified or superseded, which requires that state agency web-based intranet and Internet information and applications are accessible to persons with disabilities. Web content must conform to New York State Enterprise IT Standard NYS-S08-005, as determined by quality assurance testing. Such quality assurance testing will be conducted by the Authorized User or its designee and the results of such testing must be satisfactory to the Authorized User before web content will be considered a qualified deliverable under the contract or procurement.

F. On-line Price Configurator Contractor may be requested to make available an on-line configurator at its Contract web site. Directions and assistance in using the configurator and web site in general must be available at entry. This configurator must enable Authorized Users to:

- (1) view the options available for the type Product requested;
- (2) search and find Products under the approved Contract list;
- (3) calculate complete acquisition costs

Information about payment, shipping, delivery terms and special pricing should be available. Authorized Users should have the option of printing their "shopping cart" choices; and for those users, who are positioned to use it, an option for on-line secure ordering should also be available.

9. REPORTING/MONITORING CONTRACT PERFORMANCE

Contractor shall electronically provide the State with verified semi-annual reports in the format required by the State showing the dollar volume of any and all sales under this Contract for the prior six-month period. Said report shall include a break out of participation by individual Authorized Users, including State and non-State governmental entities and others authorized by law. The Industrial Funding Fee payable to the New York State Office of General Services Finance Office will also be due on the same schedule. Reports and Industrial Funding Fee payments shall be delivered within thirty (30) days of the close of the semi-annual period. Semi-annual periods will end on

December 31st and June 30th. If the contract period begins or ends in a fractional portion of a reporting period only the actual contract sales for this fractional period should be reported in that semi-annual report. Similarly the Industrial Funding Fee payable to the New York State Office of General Services Finance Office will only be due for the actual contract sales reported in that reporting period. The amount of the Industrial Funding Fee Payment shall match the contract sales contained in the semi-annual report based on the percentage established by the GSA. This percentage is currently set at .75%. In the event that this Contract is amended by OGS and Contractor to allow Contractor to utilize resellers, Contractor will then also include all Contract revenues from these participants in the semi-annual report.

Subject to the Dispute Resolution process, the State shall have the right to verify said report and Industrial Funding Fee payments and to take any action(s) necessary to enforce its rights under this paragraph, including but not limited to the right to stop payments until such reports or Industrial Funding Fee payments are received, audit Contractor's applicable Contract books, to substitute, in its sole judgment, a good faith estimate of Contract usage upon failure of Contractor to deliver said report as required where pricing is based upon aggregate volume, or to terminate the Contract for cause or seek other judicial relief. In the event the Contractor fails to submit reports the Industrial Funding Fee will become due based on the State's good faith estimate of sales.

10. TRAINING AND IMPLEMENTATION

Contractor is required at no extra charge to assist the Office of General Services and Authorized Users with training and implementation in use of the Contract in the same manner that is provided to other similarly situated customers. Training shall be limited to that information necessary for Authorized Users to properly understand contract terms and conditions, and pricing of products, etc. Any informational materials developed will be subject to approval by OGS. Contractor and OGS will jointly implement use of materials.

11. ENTIRE AGREEMENT

This Contract and the referenced appendices constitute the entire agreement between the parties thereto 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 the Contract shall not be changed, modified or altered in any manner except by an instrument in writing executed by OGS and the Contractor hereto, with the approval of the Attorney General and the Comptroller for the State of New York, except as otherwise provided herein. Authorized Users shall not have the authority to modify the terms of the Contract, except as to better terms and pricing for a particular procurement than those set forth herein. No preprinted terms or conditions on a Purchase Order issued by an Authorized User, which seek to vary the terms of this Contract or impose new duties or obligations on the Contractor, shall have any force or effect.

12. NOTICES

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

James Jasiewicz
Procurement Services Group
38th Floor, Corning Tower
Empire State Plaza
Albany, New York 12242
Phone: (518) 486-5238
Fax: (518) 486-6867
Email: James.Jasiewicz@ogs.state.ny.us

13. CAPTIONS

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

14. SEVERABILITY

If any provision of this Contract is deemed invalid or unenforceable, such determination shall have no effect on the balance of the Contract, which shall be enforced and interpreted as if such provision was never included in the Contract.

15. DISPUTE RESOLUTION POLICY

A. It is the policy of the Office of General Services Procurement Services Group (PSG) to provide vendors with an opportunity to administratively resolve disputes, complaints or inquiries related to PSG bid solicitations or contract awards. If the parties are not able to resolve their dispute between themselves as set forth below, PSG encourages vendors to seek resolution of disputes through consultation with PSG staff. All such matters will be accorded impartial and timely consideration. Interested parties may also file formal written disputes. A copy of PSG's Dispute Resolution Procedures for Vendors may be obtained by contacting the person shown above under "Notices" or through the OGS website (www.ogs.state.ny.us).

B. 1. In the event there is a dispute or controversy under this Contract, the parties agree to exercise their best efforts to resolve the dispute in accordance with this provision as soon as possible. The parties shall, without delay, continue to perform their respective obligations under this Contract which are not affected by the dispute. Primary responsibility for resolving any dispute arising under this Contract shall rest with the Authorized User's Contractor Coordinators and the Contractor's designated representative.

2. In the event the Authorized User is dissatisfied with the Contractor's Licensed Software or Services provided under this Contract, the Authorized User shall notify the Contractor in writing. In the event the Contractor has any disputes with the Authorized User, the Contractor shall so notify the Authorized User in writing. If either party notifies the other of such dispute or controversy, the other party shall then make good faith efforts to solve the problem or settle the dispute amicably, including meeting with the party's representatives to attempt diligently to reach a satisfactory result.

3. If negotiations between such persons fails to resolve any such dispute to the satisfaction of the parties within 14 business days (or as otherwise agreed to by the parties) of such notice, then the matter shall be submitted to the State's Contract Administrator and the Contractor's Managing Director as its representative. Such representatives shall meet in person and shall attempt in good faith to resolve the dispute within the next 14 business days or as otherwise agreed to by the parties. This meeting must be held before either party may seek any other method of dispute resolution, including judicial or governmental resolutions. Notwithstanding the foregoing, this section shall not be construed to prevent either party from seeking and obtaining temporary equitable remedies, including injunctive relief.

4. The Contractor shall extend the dispute resolution period for so long as the Authorized User continues to make reasonable efforts to cure the breach, except with respect to disputes about the breach of payment of fees or infringement of its or its licensors' intellectual property rights.

C. This Section 15 does not apply to any breach by an Authorized User of Contractor's or its licensor's intellectual property rights.

16. CLAUSES RESERVED IN APPENDIX B

The Parties agree to reserve the following clauses from Appendix B:

4. Conflict of Terms
7. Bid Opening
8. Bid Submission
9. Facsimile Submissions
10. Authentication of Facsimile Bids
11. Late Bids
12. Bid Contents
13. Extraneous Terms
15. Release of Bid Evaluation Materials
16. Freedom of Information Law
17. Prevailing Wage Rates – Public Works and Building Services Contracts
21. Product References
25. Drawings
26. Site Inspections
28. Samples
29. Bid Evaluation

- 30. Conditional Bid
- 31. Clarifications/Revisions
- 32. Prompt Payment Discounts
- 33. Equivalent or Identical Bids
- 36. Quantity Changes Prior to Award
- 37. Timeframe for Offers
- 41. Scope Changes
- 46. Weekend and Holiday Deliveries
- 48. Title and Risk of Loss
- 49. Re-weighing Product
- 50. Product Substitution
- 51. Rejected Product
- 52. Installation
- 53. Repaired or Replaced Parts/Components
- 54. On-site Storage
- 58. Performance/Bid Bond
- 59. Suspension of Work
- 67. Toxic Substances
- 77. Insurance and
- 83. Product Version.

17. AMENDMENTS TO APPENDIX B

The parties agree that Appendix B, setting forth the General Specifications for Centralized Contracts is amended as follows:

A. Section 5 (*Definitions*) is hereby replaced in its entirety with the following language:

5. DEFINITIONS Terms used in this Appendix B shall have the following meanings:

AFFILIATE Any individual or other legal entity, (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) that effectively controls another company in which (a) the Bidder owns more than 50% of the ownership; or (b) any individual or other legal entity which owns more than 50% of the ownership of the Bidder. In addition, if a Bidder owns less than 50% of the ownership of another legal entity, but directs or has the right to direct such entity's daily operations, that entity will be an Affiliate.

AGENCY OR AGENCIES The State of New York, acting by or through one or more departments, boards, commissions, offices or institutions of the State of New York.

ATTORNEY GENERAL Attorney General of the State of New York.

AUTHORIZED USER(S) Agencies, or any other entity authorized by the laws of the State of New York to participate in NYS centralized contracts (including but not limited to political subdivisions, public authorities, public benefit corporations and certain other entities set forth in law), or the State of New York acting on behalf of one or more such Agencies or other entities, provided that each such Agency or other entity shall be held solely responsible for liabilities or payments due as a result of its participation.

BID OR BID PROPOSAL An offer or proposal submitted by a Bidder to furnish Licensed Software, perform services or means of achieving a practical end, at a stated price for the stated Contract term. As required by the Bid Documents, the Bid or proposal may be subject to modification through the solicitation by the Agency of best and final offers during the evaluation process prior to recommendation for award of the Contract.

BIDDER/OFFERER Bidder shall refer to the "Contractor."

BID DOCUMENTS The term "Bid Documents" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

BID SPECIFICATION The term "Bid Specifications" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

COMMISSIONER Commissioner of OGS.

COMPTROLLER Comptroller of the State of New York.

CONTRACT The writing(s) which contain the agreement of the Commissioner and the Contractor setting forth the total legal obligation between the parties as determined by applicable rules of law.

CONTRACT AWARD NOTIFICATION An announcement to Authorized Users that a Contract has been established.

CONTRACTOR Any successful Bidder(s) to whom a Contract has been awarded by the Commissioner.

DOCUMENTATION Refers to the Program user manual(s) and the Program installation manual(s). Documentation also includes the license information documents for Contractor Licensed Software and Programs which are available at <http://www.ibm.com/software/sla/>. Documentation shall not be considered "shrink wrap" terms. For purposes of Sections 72(b) and 78(c) of this Contract, Documentation shall mean only the license information for Contractor Licensed Software.

EMERGENCY An urgent and unexpected requirement where health and public safety or the conservation of public resources is at risk.

ENTERPRISE HARDWARE CODE Enterprise Hardware Code includes, but is not limited to, machine code, micro code, basic input/output system code, utility programs, device drivers, diagnostics and other code delivered with Enterprise Systems Server and Mainframe hardware (collectively, "Enterprise Hardware") for the purpose of enabling the Enterprise Hardware's function as stated in the Documentation. Enterprise Hardware Code also includes, but is not limited to, operating system software that controls the execution of programs and that may provide services such as resource allocation, scheduling, input/output control and data management. The foregoing definition also includes error corrections, upgrades, enhancements or new releases, and any deliverables due under a technical support or maintenance contract (e.g., patches, fixes, PTFs, programs, or code or data conversion).

ERROR CORRECTIONS Machine executable software code furnished by Contractor which corrects the Licensed Software so as to conform to the applicable Documentation of the Contractor.

GROUP A classification of Product, services or technology which is designated by OGS.

LICENSED SOFTWARE or PROGRAMS Software acquired under the terms and conditions set forth in the Contract. "Licensed Software" includes error corrections, upgrades, enhancements, new releases, and updates to such Licensed Software. This term also includes the original and all whole or partial copies of the Licensed Software: (1) machine-readable instructions and data; (2) components; (3) audio-visual content (such as images, text, recordings or pictures); (4) related licensed materials; and (5) license use documents or keys, and documentation.

LICENSEE One or more Authorized Users who acquire Licensed Software from Contractor by issuing a Purchase Order in accordance with the terms and conditions of the Contract; provided that, for purposes of compliance with an individual license, the term "Licensee" shall be deemed to refer separately to the individual Authorized User(s) who took receipt of and who is using the Licensed Software, and who shall be solely responsible for performance and liabilities incurred.

LICENSE EFFECTIVE DATE The date Licensed Software is shipped to or made available for electronic download by an Authorized User. Where a License involves Software which was previously licensed by the Authorized User, the license effective date for the additional licenses shall be deemed to be the date on which the Purchase Order is executed.

LICENSOR A Contractor who transfers license rights in Licensed Software to Authorized Users in accordance with the rights and obligations specified in the Contract.

MATERIAL is defined as literary works or other works of authorship that are created by Contractor under a consulting services engagement. The term "Material" does not include Licensed Software or Documentation. No Materials shall be delivered under this Contract.

NEW LICENSED SOFTWARE RELEASES (Licensed Software Revisions) Any commercially released revisions to the licensed version of Licensed Software as may be generally offered and available to Authorized Users who are current on technical support and maintenance. New releases involve a substantial revision of functionality from a previously released version of the Licensed Software. Updates are provided when available, and Contractor is under no obligation to develop any future Programs or functionality.

OGS The New York State Office of General Services.

PROCUREMENT RECORD Documentation by the Authorized User of the decisions made and approach taken during the procurement process and during the contract term.

PRODUCT A deliverable under any Bid or Contract which may include commodities, services and/or technology. The term "Product" includes Licensed Software.

PROPRIETARY Created and/or owned by the Contractor, which may be protected by confidentiality, secrecy, patent, copyright or trademark against commercial competition.

PURCHASE ORDER The Authorized User's fiscal form or format that is used when making a purchase (e.g., formal written Purchase Order, Procurement Card, electronic Purchase Order, or other authorized instrument).

RESPONSIBLE BIDDER A Bidder that is determined to have financial and organizational capacity, legal authority, satisfactory previous performance, skill, judgment and integrity, and that is found to be competent, reliable and experienced, as determined by the Commissioner under the law of the State of New York. For purposes of being deemed responsible, a Bidder must also be determined to be in compliance with Sections 139-j and 139-k of the State Finance Law relative to restrictions on contacts during the procurement process and disclosure of contacts and prior findings of non-responsibility under these statutes.

SERVICES Technical Support or Maintenance (defined below) that an Authorized User may order under this Contract. No consulting services are available under this Contract.

SITE The location (street address) where Licensed Software will be used or Services delivered.

SOURCE CODE The programming statements or instructions written and expressed in any language understandable by a human being skilled in the art which are translated by a language compiler to produce executable machine object code.

STATE State of New York.

SUBCONTRACTOR Any individual or other legal entity, (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) who has entered into a contract, express or implied, for the performance of a portion of a Contract with a Contractor.

SYSTEM A set of interacting or interdependent parts that form and operate as an integrated whole, one or more components of which are not delivered under this Contract.

TECHNICAL SUPPORT or MAINTENANCE Technical support, subscription and maintenance services for the Licensed Software that are offered by the Contractor under this Contract.

TERMS OF LICENSE The terms and conditions set forth in the Contract that are in effect and applicable to a Purchase Order at the time of order placement.

B. Section 14 (Confidential/Trade Secret Materials) is hereby replaced in its entirety with the following language:

a. As used in this Section, "Disclosing Party" means the State or an Authorized User when disclosing its Confidential Information (defined below) to the Contractor, or the Contractor when disclosing its Confidential Information to the State or an Authorized User, and "Receiving Party" means the State or an Authorized User when receiving disclosure of Confidential Information from the Contractor, or the Contractor when receiving disclosure of Confidential Information from the State or an Authorized User. "Confidential Information" means all confidential information disclosed by a party (the "Disclosing Party") to the other party (the "Receiving Party") after the effective

date of this Contract including, without limitation, information relating to the Disclosing Party's operations, processes, plans or intentions, know-how, design rights, trade secrets or business affairs. Confidential Information shall be clearly marked as "confidential," "proprietary," "restricted" or some similar designation. Except as provided in this Contract and specifically in clause 14(c) hereunder, the Receiving Party further agrees that any Confidential Information obtained by the Receiving Party from the Disclosing Party, its agents, subcontractors, officers, or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the Disclosing Party hereunder, will not be divulged to any third parties. The State and the Authorized User acknowledge that the Source Code to the Licensed Software and the Documentation are Confidential Information of Contractor. The State and Contractor agree that each is free to enter into similar agreements with others.

b. The Receiving Party:

- i. may not use any Confidential Information for any purpose other than in accordance with, and in the performance of, its obligations under this Contract;
- ii. may not disclose any Confidential Information to any person except with the prior written consent of the Disclosing Party or in accordance with Clause 14(c); and
- iii. shall make every reasonable effort to prevent the use or disclosure, other than as expressly permitted herein, of Confidential Information.

c. The Receiving Party may disclose information which would otherwise be Confidential Information if and to the extent that:

- i. it is required by law (such as the New York State Freedom of Information Law);
- ii. the information has come into the public domain, otherwise than through (a) a breach of this Clause by the Receiving Party, (b) a third party's breach of any duty of confidentiality owed to the Disclosing Party of which the Receiving Party was aware, or (c) a violation of law;
- iii. it was in the Receiving Party's lawful possession prior to the disclosure and had not been obtained by the Receiving Party either directly or indirectly from the Disclosing Party;
- iv. it is required by existing contractual obligations of which the Disclosing Party is aware;
- v. it is independently developed by the Receiving Party without reliance on the Confidential Information;
- vi. it is required by any securities exchange or regulatory or governmental body to which it is subject or by judicial process;
- vii. it is otherwise obtained under the Freedom of Information Law or other applicable New York State laws or regulations; or
- viii. the disclosure is to its professional advisers, auditors or banker; or to any of its directors, other officers, employees and sub-contractors (a "Recipient") to the extent that disclosure is reasonably necessary for the purposes of this Contract.

C. Section 24 (Pricing) is hereby replaced in its entirety with the following language:

24. PRICING

a. **Unit Pricing** If required by the Contract, the Contractor should insert the price per unit specified and the price extensions in decimals, not to exceed four places for each item unless otherwise specified, in the proposal presented to the Authorized User prior to a Purchase Order being issued. In the event of a discrepancy between the unit price and the extension, the unit price shall govern unless, in the sole judgment of the Commissioner, such unit pricing is obviously erroneous.

b. **Net Pricing** Prices shall be net, including transportation, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination(s) indicated in the proposal presented to the Authorized User and on the Purchase Order.

c. **"No Charge" Bid** When a quote is requested on a number of Products as a Group or Lot, a Contractor desiring to Bid "no charge" on a Product in the Group or Lot must clearly indicate such. Otherwise, such Bid may be considered incomplete and be rejected, in whole or in part, at the discretion of the Commissioner.

d. **Educational Pricing** All Products to be supplied for educational purposes that are subject to educational discounts shall be identified in the Bid and such discounts shall be made available to qualifying institutions.

e. **Third Party Financing** If Licensed Software acquisitions are financed through any third party financing, the Parties agree that this Contract does not require Contractor to agree to the terms and conditions of a “Consent & Acknowledgement Agreement.” An Authorized User cannot lease or rent any Licensed Software provided under this Contract. If an Authorized User grants a security interest in the Licensed Software, the secured party has no right to use or transfer the Licensed Software, and if the Authorized User decides to finance its acquisition of the Licensed Software, it must follow the Contractor’s policies regarding financing.

f. **Lower Prices or Better Terms** Contractor may offer lower prices or better terms (see Modification of Contract Terms) on any specific Purchase Order(s) from any Authorized User. Such offer shall have no effect on any other terms of this Contract.

g. **Best and Final Prices** As specified in the Bid Documents and Contract, a Contractor may be solicited at the time of issuance of a Purchase Order for best and final pricing for the Licensed Software or Service to be delivered to the Authorized User. Contractors are encouraged to reduce their pricing upon receipt of such request.

D. Section 34 (Performance and Responsibility Qualifications) is hereby replaced in its entirety with the following language:

34. PERFORMANCE AND RESPONSIBILITY QUALIFICATIONS

The Commissioner reserves the right to investigate or inspect at any time whether or not the Licensed Software, Services, qualifications or facilities offered by the Bidder/Contractor meet the requirements set forth in the Contract. Contractor shall at all times during the Contract term remain responsible and responsive. A Bidder/Contractor must be prepared, if requested by the Commissioner, to present evidence of legal authority to do business in New York State, integrity, experience, ability, prior performance, organizational and financial capacity as well as where applicable, a statement as to supply, plant, machinery and capacity of the manufacturer or source for the production, distribution and servicing of the Product offered/Bid. If the Commissioner determines that the conditions and terms of the Contract are not complied with, or that items, services or Product proposed to be furnished do not meet the specified requirements, or that the legal authority, integrity experience, ability, prior performance, organization and financial capacity or facilities are not satisfactory, the Commissioner may terminate the Contract.

E. Section 38 (Contract Creation/Execution) is hereby replaced in its entirety with the following language:

38. CONTRACT CREATION/EXECUTION This Contract shall be deemed executed and created upon the Commissioner’s mailing or electronic communication to the Contractor’s address on the Contract.

F. Paragraph d of section 39 (Participation in Centralized Contracts) is hereby replaced in its entirety with the following language:

d. Responsibility for Performance Participation in State Centralized Contracts by Authorized Users is permitted upon the following conditions: (i) the responsibility with regard to performance of any contractual obligation, covenant, condition or term thereunder by any Authorized User other than State Agencies shall be borne and is expressly assumed by such Authorized User and not by the State; (ii) a breach of the Contract by any particular Authorized User shall neither constitute nor be deemed a breach of the Contract as a whole which shall remain in full force and effect, and shall not affect the validity of the Contract nor the obligations of the Contractor thereunder respecting non-breaching Authorized Users, whether State or otherwise; (iii) for a breach by an Authorized User other than a State Agency, the State specifically and expressly disclaims any and all liability for such breach; and (iv) each non-state agency Authorized User guarantees to save the State, its officers, agents and employees harmless from any liability that may be or is imposed by their failure to perform in accordance with its obligations under the Contract.

G. Section 42 (Estimated/Specific Quantity Contracts) is hereby replaced in its entirety with the following language:

42. ESTIMATED/SPECIFIC QUANTITY CONTRACTS Purchases by Authorized Users from Contracts for services and technology are voluntary.

H. The first unnumbered paragraph of Section 44 (Purchase Orders) is hereby replaced in its entirety with the following language:

44. PURCHASE ORDERS

Unless otherwise authorized in writing by the Commissioner, no Product is to be delivered or furnished by Contractor until transmittal of an official Purchase Order from the Authorized User. Purchase Orders (unless terminated or cancelled pursuant to the Contract) shall be effective and binding upon the parties when placed in the mail or electronically transmitted prior to the termination of the contract period, addressed to the Contractor at the address for receipt of orders set forth in the Contract or in the Contract Award Notification. Prior to the issuance of a Purchase Order, Contractor may present a proposal to the Authorized User.

I. Section 45 (Product Delivery) is hereby replaced in its entirety with the following language:

45. LICENSED SOFTWARE DELIVERY

If so indicated on Appendix E, Contractor has made Licensed Software and related Documentation available to the Authorized User for electronic access and download via an electronic delivery website at <http://www-01.ibm.com/software/howtobuy/passportadvantage/>. The Authorized User should then select "sign in option" and enter its user id and password. Through the Internet URL, the Authorized User can access and electronically download the Licensed Software and related Documentation for each Program listed in Appendix E and so designated as available for electronic download. Provided that the Authorized User has continuously maintained Technical Support or Maintenance for the Licensed Software, the Authorized User may continue to download the software and related program Documentation for such Licensed Software. Please be advised that not all programs are available on all hardware/operating system combinations. For current program availability, please check the electronic delivery web site. The Authorized User acknowledges that Contractor's delivery obligation under this Contract is met by the provision of the electronic delivery website. If Authorized User loses or damages the media containing a Program licensed hereunder, upon the Authorized User's written notice, the Contractor will provide a replacement copy thereof, for a media and shipping charge. The following shipping terms shall apply: FCA Shipping Point, Prepaid, and Add. These terms shall also apply to any options exercised by the Authorized User. Unless otherwise agreed to by the Authorized User and the Contractor, the Authorized User shall be responsible for installation of the Licensed Software.

The Authorized User acknowledges that, unless otherwise provided for in this Contract, it accepts sole responsibility for (i) its system configuration, design and requirements, (ii) the selection of the Programs to achieve its intended results, and (iii) modifications, changes or alterations to the Programs.

J. Paragraph (b) of Section 47 (Shipping/Receipt of Product) is hereby replaced in its entirety with the following language:

b. Shipping Charges The Authorized User agrees to pay applicable media and shipping charges. The applicable shipping terms for the delivery of tangible media are: FCA Shipping Point, Prepaid, and Add.

K. Section 55 (Employees, Subcontractors & Agents) is hereby replaced in its entirety with the following language:

55. EMPLOYEES, SUBCONTRACTORS & AGENTS

At the Authorized User's request, Contractor shall provide the Authorized User with the resumes of all Contractor's employees, consultants, and subcontractors who shall perform Services at the Authorized User's site under this Contract. The Authorized User shall have the right to conduct interviews, unless otherwise agreed to by the parties, of all such employees, consultants, or subcontractors provided such interview occurs before the commencement of Services by the relevant employees, consultants or subcontractors. The Authorized User shall have the right to reject assignment of any Contractor employee, consultant, or subcontractor to a particular Service by providing the Contractor a reasonable and non-discriminatory basis for such rejection. This paragraph shall not apply to the provision of Technical Support or Maintenance.

L. Section 56 of the Contract (Assignment) is hereby replaced in its entirety with the following language:

The Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the contract or its right, title or interest therein, or its power to execute such contract to any other person, company, firm or corporation in

performance of the contract without the prior written consent of the Commissioner or Authorized User (as applicable), which consent may not be unreasonably withheld. Failure to obtain consent to assignment from the Authorized User shall revoke and annul such Contract. Notwithstanding the foregoing, the State shall not hinder, prevent or affect assignment of money by a Contractor for the benefit of its creditors. Prior to a consent to assignment of monies becoming effective, the Contractor shall file a written notice of such monies assignment(s) with the Comptroller. Prior to a consent to assignment of a Contract, or portion thereof, becoming effective, the Contractor shall submit the request to assignment to the Commissioner and seek written agreement from the Commissioner which will be filed with the Comptroller. The Commissioner reserves the right to reject any proposed assignee in his/her discretion. Notwithstanding the foregoing, Contractor's assignment of its accounts receivable to a wholly-owned subsidiary, does not require consent under this provision.

Upon notice to the Contractor, the Contract may be assigned without the consent of the Contractor to another State Agency or subdivision of the State pursuant to a governmental reorganization or assignment of functions under which the functions are transferred to a successor Agency or to another Agency that assumes OGS responsibilities for the Contract.

Notwithstanding the foregoing, the Commissioner or a state agency may, with the concurrence of the Comptroller if the original contract was subject to the Comptroller approval, waive prior written consent required under this paragraph in accordance with the provisions of State Finance Law §138.

M. Section 57 (Subcontractors and Suppliers) is hereby replaced in its entirety with the following language:

The Commissioner reserves the right to reject any Subcontractor or supplier proposed to work under this Contract for bona fide business reasons, which may include, but are not limited to: they are on the Department of Labor's list of companies with which New York State cannot do business; the Commissioner determines that the company is not qualified; the Commissioner determines that the company is not responsible; the company has previously provided unsatisfactory work or services; the company failed to solicit minority and women's business enterprises (M/WBE) Bidders as required by prior Contracts.

N. The following sentence is added as the first unnumbered paragraph to Section 60 (Termination):

With respect to the rights of termination set forth in this Contract, (a) only OGS may exercise these rights as to the Contract and/or any Purchase Order(s) it signs and (b) any other Authorized User may exercise any applicable rights of termination only with respect to its individual order(s).

O. The following sentence is added to the end of paragraph (a) of Section 60 (Termination):

Prior to the Contract being terminated pursuant to this subdivision based upon a determination that Contractor is nonresponsible, Contractor will be afforded due process under applicable case law.

P. The following sentence is added to the end of paragraphs (a), (c) and (d) of Section 60 (Termination):

If the Contract is terminated pursuant to this subdivision, the Authorized User shall remain liable for all accrued but unpaid fees and charges incurred through the date of the termination, subject to the provisions of Appendix A.

Q. All text of Section 61 (Savings/Force Majeure), commencing with "Notwithstanding" is hereby deleted and replaced with the following language:

If such event continues for more than 90 days, either party may cancel unperformed Services upon written notice. This section does not excuse either party's obligation to take reasonable steps to follow its normal disaster recovery procedures or the Authorized User's obligation to pay for License Software delivered or Services provided.

R. Section 62 (Contract Billings) is hereby replaced in its entirety with the following language:

62. CONTRACT BILLINGS

Contractor shall provide billing invoices to each Authorized User in order to receive payment. The State Comptroller shall render payment for purchases by State Agencies, and such payment shall be made in accordance with this

Contract. Payment of Contract purchases made by Authorized Users other than State Agencies shall be billed directly by Contractor on invoices/vouchers.

Submission of an invoice and payment thereof shall not preclude the Commissioner from reimbursement or demanding a price adjustment where the billing was inaccurate.

Contractor shall provide, upon request of the Commissioner, the information reasonably necessary to verify the accuracy of the billings. Such information shall be provided in the format reasonably requested by the Commissioner and in a media commercially available from the Contractor. The Commissioner may direct the Contractor to provide the information to the State Comptroller or to any Authorized User of the Contract.

S. Paragraph b of Section 63 (Default – Authorized User) is hereby replaced in its entirety with the following language:

b. Failure to Make Payment. In the event a participating Authorized User fails to make payment to the Contractor for Products delivered and accepted, and invoiced as set forth herein, within thirty (30) days of such delivery and acceptance, (unless otherwise provided by the appropriate governing law) the Contractor may, upon 10 days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional shipments of Licensed Software or provision of Services to such entity until such time as reasonable arrangements have been made and assurances given by such entity for current and future Contract payments. If the breach is for the failure to pay for Licensed Software and the breach continues unabated, upon written notice of termination, the Contractor may terminate the Authorized User's license for the unpaid-for Licensed Software.

T. Section 64 (Interest on Late Payment) is hereby replaced in its entirety with the following language:

64. PAYMENTS AND INTEREST ON LATE PAYMENTS

a. **State Agencies** Upon acceptance of Licensed Software or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be thirty (30) calendar days, excluding legal holidays, from the receipt of a proper invoice, as determined in accordance with State Finance Law §179-f(2) and 2 NYCRR Part 18. The payment of interest on certain payments due and owed by Agency may be made in accordance with State Finance Law §§179-d et. seq. and the implementing regulations (2 NYCRR §18.1 et seq.).

b. **By Non-State Agencies** Upon acceptance of Licensed Software or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be thirty (30) calendar days, excluding legal holidays, or as mandated by the appropriate governing law from the receipt of a proper invoice. The terms of State Finance Law Article 11-A apply only to procurements by and the consequent payment obligations of Agencies. Neither expressly nor by any implication is the statute applicable to Non-State Authorized Users. Neither OGS nor the State Comptroller is responsible for payments on any purchases made by a Non-State Agency Authorized User.

c. **By Contractor** Should the Contractor be liable for any payments to the State hereunder, interest, late payment charges and collection fee charges will be determined and assessed pursuant to Section 18 of the State Finance Law.

U. Section 65 (Remedies for Breach) is hereby replaced in its entirety with the following language:

65. REMEDIES FOR BREACH It is understood and agreed that all rights and remedies afforded below shall be in addition to all remedies or actions otherwise authorized or permitted by law, except where expressly limited in this Contract:

a. **Cover/Substitute Performance** In the event of Contractor's material, uncured breach, the Commissioner may, with or without formally Bidding: (i) Purchase from other sources; or (ii) if the Commissioner is unsuccessful after making reasonable attempts, under the circumstances then existing, to timely obtain acceptable service or acquire replacement Product of equal or comparable quality, the Commissioner may acquire acceptable replacement Product of lesser or greater quality. Such purchases may, in the discretion of the Commissioner, be deducted from the Contract quantity and payments due Contractor.

b. **Withhold Payment** In any case where a reasonable question of material non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Commissioner in accordance with Appendix A, section 9, Set-Off Rights.

c. **Bankruptcy** In the event that the Contractor files a petition under the U.S. Bankruptcy Code during the term of this Centralized Contract, Authorized Users may, at their discretion, make application to exercise its right to set-off against monies due the Debtor or, under the Doctrine of Recoupment, credit the Authorized User the amounts owed by the Contractor arising out of the same transactions.

d. **Reimbursement of Costs Incurred** The Contractor agrees to reimburse the Authorized User promptly for any and all reasonable additional costs incurred for acquiring acceptable services, and/or replacement Product. Should the cost of cover be less than the price charged under this Contract, the Contractor shall have no claim to the difference.

e. **Deduction/Credit** Sums due as a result of these remedies may be deducted or offset by the Authorized User from payments due, or to become due, the Contractor on the same or another transaction in accordance with Appendix A, section 9, Set-Off Rights . If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the Authorized User the amount of such claim or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, damages, etc., which arise from the administration of the Contract.

V. Section 66 (Assignment of Claim) is hereby replaced in its entirety with the following language:

66. ASSIGNMENT OF CLAIM Contractor may determine, in its discretion, to assign to the State its claims for overcharges associated with this Contract which may arise under the antitrust laws of the United States, 15 USC §1, et. seq. and the antitrust laws of the State of New York, General Business Law §340, et. seq.

W. Section 69 (Security) is hereby replaced in its entirety with the following language:

69. SECURITY In performing this Contract, Contractor warrants, covenants and represents that it will comply fully with the Authorized User(s)' rules, procedures and protocols ("Procedures"), including but not limited to physical, facility, documentary, information security and cyber security, provided that such Procedures do not violate any state, local or federal law. Authorized User shall indicate if there are any applicable Procedures to the Contractor; this may occur once the Contractor submits a proposal to the Authorized User requesting, among other things, information regarding such Authorized User's applicable "Security issues," if any. The Authorized User shall make available the relevant Procedures and Contractor shall be responsible for distributing to its representatives and assessing and ensuring compliance. If any part of the Procedures should violate Contractor's Code of Ethics and Business Conduct or Contractor is otherwise unable to comply, Contractor shall notify the Authorized User in writing and may reject the Purchase Order. The Authorized User shall be responsible for acquiring the necessary approvals for the waiver from the entity that issued the Procedure. The Contractor and the State agree that the Procedures do not modify or amend the other terms and conditions of the Contract.

X. Section 70 (Cooperation with Third Parties) is hereby replaced in its entirety with the following language:

70. COOPERATION WITH THIRD PARTIES The Contractor shall be responsible for fully cooperating with any third party, including but not limited to other Contractors or Subcontractors of the Authorized User, as necessary to ensure delivery of Licensed Software or coordination of performance of Services.

Y. Section 72 (Warranty) is hereby replaced in its entirety with the following language:

72. WARRANTIES AND REPRESENTATIONS

a. **Title and Ownership Warranty** Contractor warrants that it possesses (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver perpetual or term license rights to the Licensed Software. Contractor shall be solely liable for its costs of acquisition of such ownership rights and/or clear title. Notwithstanding any language to the contrary in this Contract, Section 75 of this Contract states the Authorized User's exclusive remedy and the Contractor's entire liability for any breach of this particular warranty.

b. **Licensed Software Warranty** Licensed Software offered shall be at a current production release, unless Authorized User specifies that it seeks to acquire incremental copies of a previously released version of the Licensed Software on the Purchase Order or in response to the proposal. Contractor agrees that no alpha or beta software is available under this Contract. Contractor warrants that the Licensed Software will perform in all material respects as described in the Documentation for one (1) year from the date of Authorized User's Acceptance of the original copy of the Licensed Software. The Authorized User must notify the Contractor of any Program warranty deficiency within that time period. This warranty only applies to unmodified portions of the Licensed Software.

c. **Virus Warranty** Contractor represents and warrants that prior to delivery Contractor shall use commercially reasonable methods to test and protect the Licensed Software against viruses and other harmful elements designed to disrupt the orderly operation of, or impair the integrity of data files resident on, any data processing system. Contractor represents and warrants that it will not deliver Licensed Software that contains any known virus. Contractor will also maintain a master copy of the appropriate versions of the Licensed Software, free of viruses. If the Authorized User believes a virus may be present in the delivered Licensed Software, then upon its request, Contractor will provide a master copy to the Authorized User for comparison with and correction of its copy of the Licensed Software.

d. **Date/Time Warranty** The Contractor represents that during the term of this Contract, including any extension or renewal hereof, the Licensed Software shall, when used in accordance with the Program Documentation, be able to accurately process (including, but not limited to, calculating, comparing, and sequencing) date/time data (including, but not limited to, calculating, comparing, and sequencing) transitions, including leap year and daylight savings time calculations.

e. **Services Warranty** Contractor warrants that the Services will be provided in a professional manner in accordance with industry standards. The Authorized User must notify Contractor of any Services warranty deficiencies within ninety (90) days from performance of the Services that gave rise to the warranty claim.

f. **Survival of Warranties** All warranties contained in this Contract, which have not expired by their terms, shall survive the termination of this Contract.

g. **NO IMPLIED WARRANTIES**
TO THE EXTENT PERMITTED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, INCLUDING WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

h. Contractor does not warrant or guarantee that the Licensed Software will be error free or operate without interruption or that Contractor will correct all Licensed Software errors. Contractor is not obliged to develop error corrections or updates for Authorized User's benefit but, in the event such corrections or updates are made generally commercially available by Contractor at no additional charge, Contractor shall provide them to Authorized User at no additional charge provided that the Authorized User is a current subscriber to Technical Support or Maintenance. Authorized User acknowledges that the Licensed Software has not been prepared to meet its individual requirements; it is Authorized User's responsibility to ensure that the facilities and functions described in its specification meet its requirements, and Authorized User is solely responsible for results obtained from its use of the Licensed Software.

Z. Section 73 (Legal Compliance) is hereby replaced in its entirety with the following language:

73. LEGAL COMPLIANCE

Contractor represents it will pay at its sole expense for all applicable permits, licenses, tariffs, tolls and fees and that it shall secure all notices and comply with all laws, ordinances, rules and regulations of any governmental entity applicable to the performance of obligations under the Contract or seek waiver therefrom. Prior to award and during the Contract term and any renewals thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Contract and any applicable laws, including but not limited to, permits, insurance coverage, licensing, and proof of coverage for workers' compensation, and shall provide such proof as required by the Commissioner. Failure to comply or failure to provide proof may constitute grounds for the Commissioner to cancel or suspend the Contract, in whole or in part or to take any other action deemed necessary by the Commissioner.

AA. Section 74 (Indemnification) is hereby replaced in its entirety with the following language:

The Contractor shall be fully liable for any act or omission of the Contractor, its employees, Subcontractors and agents, and shall fully indemnify and hold harmless the Authorized User and State from suits, actions, damages and costs of every name and description relating to personal injury and damage to real or tangible personal property caused by fault or negligence of Contractor, its employees, Subcontractors or agents arising from the Contractor's performance of this Contract, **without limitation**; provided, however, that the Contractor shall not be obligated to indemnify the Authorized User or State for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the Authorized User or State or the acts of third parties, other than those provided by the Contractor to perform under the Contract. In connection with the foregoing, the State shall give Contractor: (i) prompt written notice of any action, claim or threat of suit, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action at the expense of Contractor. This paragraph does not apply to any claims arising from damage to "intangible personal property," which includes documentation, software, data or data files that are in electronic format.

BB. Section 75 (Indemnification Relating to Third Party Rights) is hereby replaced in its entirety with the following language:

The Contractor will also indemnify and hold the Authorized Users harmless from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs that may be finally assessed against the Authorized User in any action for infringement of a United States Letter Patent, or of any copyright, trademark, trade secret or other third party proprietary right based upon Licensed Software or Documentation provided to the Authorized User by Contractor and except to the extent such claims arise from the Authorized User's negligence or willful misconduct, provided that the Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of infringement suit, or other suit, no later than 30 days after it receives notice of the claim (or sooner if required by law), (ii) sole control to settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action at the expense of Contractor. The State and the Authorized User reserve the right to join such action, at its sole expense, when it determines there is an issue involving a significant public interest.

If usage shall be enjoined for any reason or if Contractor believes that it may be enjoined, Contractor shall have the right, at its own expense and sole discretion: (i) to procure for the Authorized User the right to continue usage (ii) to modify the Licensed Software or Documentation so that usage becomes non-infringing, while preserving its utility or functionality, or if these alternatives are not commercially reasonable, the Contractor may terminate the license for, and require return of, the Licensed Software or Documentation and refund any fees the State may have paid for it.

The Contractor will not indemnify the Authorized User if it alters the Licensed Software or Documentation or uses it outside the scope of use identified in this Contract or the Contractor's user Documentation or if the Authorized User uses a version of the Licensed Software or Documentation which has been superseded, to the extent the infringement claim could have been avoided by using an unaltered current version of the Licensed Software or Documentation which was provided to the Authorized User and the Authorized User either has actual knowledge or is notified by the Contractor to use such version due to a potential or existing infringement claim; any such notice will be in writing or, for any software licensed under this Contract, may be posted at the Contractor's customer support website or included with a software update. The Contractor will not indemnify the Authorized User to the extent that an infringement claim is based upon any information, design, specification, instruction, software, data, or material not furnished by the Contractor. The Contractor will not indemnify the Authorized User to the extent that an infringement claim is based upon the combination of any Licensed Software or Documentation with any products or services not provided by Contractor except where such combinations are expressly specified by the Contractor in the Documentation. Contractor will not indemnify the Authorized User for infringement caused by its actions against any third party if the Contractor program(s) as delivered to the Authorized User and used in accordance with the terms of this Contract would not otherwise infringe any third party intellectual property rights.

In the event that an action at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the Licensed Software or Documentation under the Contract infringes any patent, copyright or proprietary right, and Contractor is of the opinion that the allegations in such action in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall promptly notify the Authorized User and the Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract. Contractor shall in such event attempt to secure a continuance to permit the State and the Authorized User to

appear and defend its interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. This constitutes the State's and the Authorized User's sole and exclusive remedy for any infringement claims or damages.

CC. Section 76 (Limitation of Liability) is hereby replaced in its entirety with the following language:

76. LIMITATION OF LIABILITY Except as otherwise set forth in the Indemnification Paragraphs above, the limit of liability shall be as follows:

a. Contractor's liability for any damages arising out of, or related to this Contract, whether in contract, tort or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the Purchase Order for the Licensed Software and Services, or parts thereof forming the basis of the Authorized User's claim, (said amount not to exceed a total of twelve (12) months charges payable under the applicable Purchase Order) or (ii) one million dollars (\$1,000,000), whichever is greater.

b. Notwithstanding the above, neither the Contractor nor the Authorized User shall be liable for any consequential, indirect, incidental, punitive or special damages of any kind, including, without limitation, damages resulting from loss of use or loss of profit by the Authorized User, the Contractor, or by others.

DD. Section 78 (Software License Grant) is hereby replaced in its entirety with the following language:

a. **License Scope** Following delivery of the Licensed Software, the Authorized User is granted a non-exclusive non-assignable, royalty free, perpetual (unless otherwise specified in the proposal and Purchase Order), limited right to use the Licensed Software ordered for its governmental and business operations subject to the terms of this Contract, including the Documentation. For Licensed Software that is specifically designed to allow a third party to interact with the Authorized User in furtherance of the Authorized User's governmental or business operations, such use is allowed under this Contract. The Authorized User may make a sufficient number of copies of the Licensed Software for its licensed use and one copy of each software media up to the maximum quantities stated in the Proof of Entitlement.

b. **License Term** The Purchase Order shall specify if the term of the license right is perpetual or for a specific term. The license term shall commence upon the License Effective Date. If the license right is for a specific term, where an acceptance period applies to the Licensed Software, the license term shall be extended by the time period for acceptance. Technical Support or Maintenance is included with each fixed term license and is in effect until the fixed term expires.

c. **Licensed Documentation** Documentation is delivered with the Licensed Software, or the Authorized User may access the Documentation online at <http://www-03.ibm.com/software/sla/sladb.nsf>. Contractor hereby grants to Authorized User a perpetual license right to make, reproduce and distribute, either electronically or otherwise, copies of Documentation in accordance with the terms of the license and the Documentation fully describes the proper procedure for using the Licensed Software.

d. **Permitted License Transfers** Upon prior written notice to the Contractor, the following license transfers are permitted under this Contract, at no cost to the Authorized User, unless the license type specifically prohibits such a transfer:

1. An Authorized User may transfer Licensed Software internally within its own entity;
2. If an Authorized User is subject to a governmental reorganization or otherwise mandated by its governing body to convey any of its specific functions to another governmental entity, the Licensed Software used to support the conveyed functions may be transferred to the entity acquiring the transferred functions. The transferor must discontinue its use of the transferred Licensed Software.
3. If an Authorized User merges with another governmental entity, the Licensed Software acquired may be used by the merged entity.

Nothing in this section shall be deemed to relieve the Authorized User or the transferee entity of the obligation to use the Licensed Software in accordance with the terms and conditions of this Contract and all applicable Purchase Orders placed hereunder, including, without limitation, limiting usage of the Licensed Software to the quantity and license type for which such software is licensed. Once a permitted license transfer occurs in accordance with 2 or 3 above, the Authorized User may no longer use the Licensed Software.

e. Restricted Use By Outsourcers/Facilities Management, Service Bureaus/or Other Third Parties

1) Outsourcers, facilities management or service bureaus (“Outsourcers”) retained by Licensee shall have the right to use the Product to maintain Licensee’s business operations, including data processing, for the time period that they are engaged in such activities, provided that: 1) Licensee gives notice to Contractor of the Outsourcer, site of intended use of the Product, and means of access; and 2) the Outsourcer has executed, or agrees to execute, the Product manufacturer’s standard nondisclosure or restricted use agreement which executed agreement shall be accepted by the Contractor (“Non-Disclosure Agreement”); and 3) if such Outsourcer is engaged in the business of facility management, outsourcing, service bureau or other services, such Outsourcer will maintain a logical or physical partition within its computer system so as to restrict use and access to the program to that portion solely dedicated to beneficial use for Licensee. Authorized User is responsible for the compliance of its Outsourcers with the terms and conditions of this Contract and their use of the Licensed Software.

2) Upon written notice to Contractor, consultants and agents (collectively, “Agents”) retained by the Authorized User shall have the limited right to use the License Software to maintain Authorized User’s internal business operations subject to the terms of this Contract, including data processing, for the time period that they are engaged in such activities, provided that Authorized User is responsible for the compliance of its Agents with the terms and conditions of this Contract and their use of the Licensed Software.

f. Archival Back-Up and Disaster Recovery An Authorized User shall be entitled to use and copy the Licensed Software and related Documentation for archival backup and disaster recovery and shall have the rights under “Cold”, “Warm” or “Hot” Backup, as defined below:

“Cold backup” is a copy of the Licensed Software Program that may be stored for backup purposes or within the authorized use on a machine as long as the Licensed Software Program has not been started. In the event of failure of a machine, the Authorized User may initiate processing by the “cold backup” version of the Licensed Software. There is no charge for this copy and no additional use authorization is required.

“Warm backup” is a copy of the Licensed Software Program that may reside for backup purposes or within the authorized use on a machine and the Licensed Software Program is started, but is “idling,” and the Licensed Software is not “doing work” of any kind (except as set forth in the last paragraph of this Section). In the event of failure of a machine, the Authorized User may initiate processing by the “warm backup” version of the Licensed Software. There is no charge for this copy and no additional use authorization is required.

“Hot backup” is a copy of the Licensed Software Program that may reside for backup purposes or within the authorized use on a machine, the Licensed Software Program is started and is “doing work.” However, this Licensed Software Program requires a use authorization. If there is no use authorization, one must be acquired and there is a charge for this copy.

“Doing Work” includes, for example, production, development, program maintenance, and testing by or with the Licensed Software Program. It also could include other activities such as mirroring of transactions, updating of files, synchronization of programs, data or other resources (e.g. active linking with another machine, program, data base or other resource, etc.) or any activity that provides an active hot-switch or other synchronized switch-over between programs, data bases, or other resources to occur. For Licensed Software Programs in warm backup and in hot backup and residing on a machine, program or system configuration that supports or is designed to support a high availability environment by using various techniques (e.g., duplexing, mirroring of files or transactions, maintaining a “heartbeat,” active linking with another machine, program, data base or other resource, etc.), the Licensed Software Program is considered to be “doing work” and a use authorization and charge is required.

g. Confidentiality Restrictions The Licensed Software and Documentation is a trade secret, copyrighted and proprietary product of the Contractor. Licensee and its employees will keep the Product strictly confidential, and Licensee will not disclose or otherwise distribute or reproduce any Product to anyone other than as authorized under the terms of Contract. Licensee will not remove or destroy any proprietary markings or notice of Contractor’s or its licensors’ proprietary rights. The Contractor or its licensors retain all ownership and intellectual property rights to the Licensed Software and Documentation. If a license is terminated for the failure of the Authorized User to comply with the terms of this section 78, the Authorized User shall destroy all copies of the Licensed Software subject to the termination.

h. Restricted Use by the Authorized User Except as expressly authorized by the terms of Contract, the Authorized User shall not:

- (i) Copy or modify the Licensed Software;
- (ii) Cause or permit reverse engineering (unless required by law for interoperability), disassembly or decompilation of the Licensed Software (the foregoing prohibition includes but is not limited to review of data structures or similar items produced by the Licensed Software);
- (iii) Make the Licensed Software or Documentation available in any manner (including sublicensing or distribution) to any third party for use in the third party's business operations (unless such use or access is expressly permitted for the specific software license);
- (iv) Export the Licensed Software in violation of any U.S. Department of Commerce export administration regulations; or
- (v) If the Authorized User acquired copies of the Licensed Software as an upgrade, after the upgrade is installed, the Authorized User may not use the software from which it upgraded or transfer it to another party.

i. Open Source Software Open source software is developed independently of Contractor or may include Contractor contributions, and may be governed by a separate license ("open source software"). If the open source software is governed by a separate license, Contractor shall provide a copy of that license in the applicable Documentation and the Authorized User's license rights and obligations with respect to that open source software shall be defined by those separate license terms and subject to the conditions, if any, therein. Nothing in this Contract shall restrict, limit, or otherwise affect any rights or obligations the Authorized User may have, or conditions to which the Authorized User may be subject, under such separate open source license terms.

j. Third Party Software Contractor states that the only third party software that shall be offered for acquisition under this Contract is third party software that is a component of the Licensed Software. Third party software is developed independently of Contractor and may be governed by a separate license ("third party software"). If the third party software is governed by a separate license, Contractor shall provide a copy of that license in the applicable Documentation and the Authorized User's license rights and obligations with respect to that third party software shall be defined by those separate license terms and subject to the conditions, if any, therein. In the event the Authorized User desires additional information regarding the third party software, the Authorized User may so request such additional information from Contractor, and, if requested by the Authorized User, Contractor will assist Authorized User in obtaining the applicable Documentation prior to the Authorized User's completing its order so that the Authorized User can make its own determination as to whether the additional license rights and obligations in the Documentation are acceptable to the Authorized User. Contractor states that the Documentation is available to all Authorized Users prior to the acquisition of any Licensed Software at <http://www.ibm.com/software/sla/>. Nothing in this Contract shall restrict, limit, or otherwise affect any rights or obligations the Authorized User may have, or conditions to which the Authorized User may be subject, under such separate third party license terms.

EE. Section 79 (Product Acceptance) is hereby replaced in its entirety with the following language:

79. LICENSED SOFTWARE ACCEPTANCE

A. Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User(s) shall have sixty (60) days from the date of delivery to accept all Licensed Software. Where the Contractor is responsible for installation, acceptance shall be from completion of installation. Failure to provide notice of acceptance or rejection to the Contractor by the end of the period provided for under this clause constitutes acceptance by the Authorized User(s) as of the expiration of that period. Authorized User may, in writing, waive the Acceptance Period, or any part thereof, at any time.

If the Authorized User rejects the Licensed Software, it shall (a) cease using the applicable Licensed Software, and (b) certify to Contractor that it has destroyed or has returned to Contractor the Licensed Software, Program Documentation and all copies. This requirement applies to copies in all forms, partial and complete, in all types of media and computer memory, and whether or not modified or merged into other materials.

Contractor may offer Authorized User a free trial of the Licensed Software pursuant to (B) of section 79. If Authorized User accepts such free trial license for the Licensed Software, the length of the trial shall count toward the sixty (60) day acceptance period and such trial license will grant to Authorized User the right to examine the Licensed Software for at least sixty (60) days (unless the parties thereto agree otherwise). Upon the expiration of

such period, Authorized User must either issue a Purchase Order to Contractor for purchase of the Licensed Software or portions thereof in accordance with this Contract, or forthwith discontinue all use and return the Licensed Software to Contractor. Authorized User shall be deemed to have tested the Licensed Software to its satisfaction and accepted the Licensed Software upon its issuance of the Purchase Order.

If any agreed trial license period is less than sixty (60) days, then in addition to the trial license period, the Authorized User shall have the number of days to accept the Licensed Software that is the difference between sixty (60) days and the length of the agreed trial license, provided the Authorized User notifies Contractor in writing of its intention to use such acceptance period at the time the Authorized User issues its Purchase Order. Notwithstanding the foregoing, this provision does not apply to purchases which merely increase the number of licenses for software previously acquired by an Authorized User ("incremental licenses"). Such incremental license purchases are accepted upon Contractor's acceptance of the Purchase Order.

B. Trial Licensed Software. An Authorized User may order trial Licensed Software, or the Contractor may include additional trial Licensed Software with the order which the Authorized User may use for trial, nonproduction purposes only. The Authorized User may not use the trial Licensed Software to provide or attend third party training on the content and/or functionality of the Programs. The Authorized User has sixty (60) days from delivery to evaluate such trial Licensed Software, or such other time period as indicated on the evaluation license set forth hereto as Appendix F. If it decides to use any of this trial Licensed Software after the sixty (60) day trial period, the Authorized User must obtain a license for such trial Licensed Software from the Contractor. If it decides not to obtain a license for the trial Licensed Software after the sixty (60) day trial period, the Authorized User will cease using and will delete any such trial Licensed Software from its computer systems. Software licensed for trial purposes is provided "as is" and the Contractor does not provide Technical Support or Maintenance or offer any warranties for these programs.

FF. Section 80 (Audit of Licensed Product Usage) is hereby replaced in its entirety with the following language:

80. AUDIT OF LICENSED SOFTWARE USAGE

Contractor shall have the right to periodically audit, no more than annually, at Contractor's expense, use of Licensed Software at any Site where a copy of the Licensed Software resides provided that: (i) Contractor gives Licensee(s) at least thirty (30) days advance written notice, (ii) such audit is conducted during such party's normal business hours, (iii) the audit is conducted by an independent auditor, which will be either KPMG LLP or Deloitte & Touche LLP, and Contractor shall have a written confidentiality agreement in place with such auditor; (iv) Contractor and Licensee are each entitled to designate a representative who shall be entitled to participate in the review and receive information obtained by the audit; and (v) if the audit shows that such party is not in compliance, Licensee shall be required to purchase additional licenses or capacities necessary to bring it into compliance and shall pay for the unlicensed capacity, which may also include usage fees.

For purposes of establishing the fees that may be assessed in accordance with this Section, the following terms shall apply: During the performance of the audit Licensee shall ensure that Contractor and its independent auditors have unrestricted and immediate access to such Licensee for the purposes of conducting such; provided, however, if a particular Authorized User is unable by virtue of the laws or regulations applicable to its business to provide "unrestricted and immediate access" to all of its assets and databases, such Authorized User shall so inform Contractor and its independent auditors and the parties shall determine what access is reasonable under the circumstances. Further, Licensee agrees that any such audit shall be completed within four (4) months from the date that Contractor notifies the Licensee of the commencement of such audit, provided that to the extent any delay in such four (4)-month period is caused solely by Contractor or its independent auditor, the four (4) month period shall be extended for the same time period attributed to Contractor's or its independent auditor's sole delay.

For purposes of this section, the term "completed" shall mean: (i) the parties have agreed to the amount to be paid for any applicable additional licenses, capacities and usage fees; and (ii) the parties have entered into a mutually agreeable release agreement, which anticipates such payment. If Licensee provides (i) immediate and unrestricted access to Contractor and its auditors (or the parties have agreed to other reasonable access as set forth above) and (ii) any such audit is completed within four (4) months, Licensee shall be liable for a usage fee in addition to the license charges for the over-deployed Licensed Software. The usage fee will be calculated based on the period of time the Licensee over-deployed the Licensed Software on a pro-rata monthly basis, not to exceed the annual Technical Support or Maintenance fee per license. In the event the Licensee fails to fulfill both (i) and (ii) above,

then Contractor shall be entitled to up to two (2) years usage fees in addition to the license charges for the over-deployed Licensed Software.

Once the Licensee and Contractor enter into a mutually agreeable release agreement and such amount is paid, Licensee shall be deemed to have been in compliance retroactively, and Licensee shall have no further liability of any kind for the unauthorized use of the Licensed Software. The rights and obligations set forth in this paragraph remain in effect during the term of this Contract and for two years thereafter.

GG. Section 81 (Ownership/Title to Services Deliverables) is hereby replaced in its entirety with the following language:

81. OWNERSHIP/TITLE TO MATERIALS

The Parties agree that there shall be no Materials created, provided or delivered under this Contract.

HH. Section 82 (Proof of License) is hereby replaced in its entirety with the following language:

82. PROOF OF LICENSE The Contractor must provide to each Licensee who places a Purchase Order either: (i) the Product developer's certified License Confirmation Certificates in the name of such Licensee; or (ii) a written confirmation from the Proprietary owner accepting Product invoice as proof of license. Contractor shall submit a sample certificate which evidences an Authorized User's authorization to use the Licensed Software at the agreed-upon, specified level, or alternatively such written confirmation from the proprietary developer. Such certificates must be in a form acceptable to the Licensee. Proof of License may also be referred to as "Proof of Entitlement."

II. Section 84 (Changes to Product or Service Offerings) is hereby replaced in its entirety with the following language:

Successor Products. If the Contractor makes successor products available for the Contractor's product lines ("New Software") that includes substantially similar functionality and features as a Program for which an Authorized User has purchased a Program License ("Old Software"), the Contractor will provide the Authorized User with a migration path from the Old Software to the New Software and the right to use the New Software under this Contract at no additional charge, provided that (i) the Authorized User is current on Technical Support for the Old Software; (ii) this right shall only apply to New Software that is available in production release status on the operating system identified by the Authorized User at the time of the request; and (iii) the Contractor is currently making available, such migration path from the Old Software to the New Software to all of its other similarly-situated, supported customers without additional charge.

If the Contractor does not provide to all of its similarly-situated, supported customers a migration path from the Old Software to the New Software free of additional charge, then provided the Authorized User is current on Technical Support for the Old Software as of the date Contractor announces the New Software, the Contractor will continue to maintain the Old Software upon the Contract terms previously offered for not less than twelve (12) months from the date of such announcement. During such time Contractor and Authorized User shall mutually agree to the terms associated with any future migration or extended support plan.

Re-Named Programs. If any Program licensed under this Contract ("Original Program") is re-named or divided into two or more separate Programs ("Re-Named Program") and the functionality of the Re-Named Program is and remains the same as the functionality of the Original Program, and the Contractor makes such Re-Named Program generally available at no additional license fees to all of its similarly-situated customers who have maintained Technical Support or Maintenance for the Original Program, then the Contractor shall provide the Re-Named Program to the Authorized User for no additional license fees, provided that the Re-Named Program is available in production release and that the Authorized User is current on Technical Support or Maintenance for the Original Program pursuant to the Contractor's Technical Support or Maintenance Policies (or reinstated Technical Support or Maintenance for such Program pursuant to the Contractor's then current Technical Support or Maintenance Policies).

In the event that the Contractor offers successor or renamed programs, as referenced above, the Contractor will notify Authorized Users of the affected Licensed Software to the same extent and in the same manner that it provides notification to its other similarly-situated supported customers of the affected Licensed Software.

JJ. Section 86 (Source Code Escrow) is hereby replaced in its entirety with the following language:

As of the effective date of this Contract, it is not Contractor's standard business practice to place into escrow copies of source code associated with the Licensed Software. In the event Contractor's standard business practices change such that during the term of this Contract Contractor begins placing into escrow copies of source code associated with the Licensed Software, and Contractor begins to generally offer its commercial customers the benefit of such escrowed source code, Contractor will so notify OGS in writing. Contractor agrees to offer such escrowed materials to OGS on terms substantially similar to those Contractor may make generally available to its commercial customers. In the event the foregoing occurs, Contractor agrees to provide OGS a copy of the applicable escrow agreement. If OGS so elects, Contractor will name OGS as a beneficiary under such escrow agreement and authorize OGS to release the escrowed materials to the Authorized Users who require such escrowed materials in order to maintain the then- current version and functions of the Licensed Software. All other terms and conditions of the escrow agreement that are applicable to Contractor's commercial customers will similarly apply to OGS.

In addition, in the event Contractor: (i) ceases doing business; (ii) is placed in receivership or dissolved; (iii) files for bankruptcy; or (iv) is placed in involuntary bankruptcy that is not dismissed within ninety (90) days, Contractor shall provide a copy of the source code necessary to support the Licensed Software to OGS pursuant to a separate mutually agreed confidentiality agreement, and OGS shall be authorized to release the escrowed materials to the Authorized Users who require such escrowed materials in order to maintain the then- current version and functions of the Licensed Software. The right to use such source code shall be limited to such Authorized User's internal use only.

KK. A new section 87 (Technical Support or Maintenance) is added to read as follows:

87. LICENSED SOFTWARE TECHNICAL SUPPORT OR MAINTENANCE

Licensee shall have the option of electing the Technical Support or Maintenance set forth in Appendix E of the Contract by giving written notice to Contractor any time during the Centralized Contract term. Maintenance term(s) and any renewal(s) thereof are independent of the expiration of the Centralized Contract term and will not automatically renew.

Technical Support or Maintenance shall include, at a minimum, (i) the provision of error corrections, updates, revisions, fixes, upgrade and new releases to Licensee, and (ii) Help Desk assistance with locally accessible "800" or toll free, local telephone service, or alternatively on-line Help Desk accessibility. Contractor shall maintain the Licensed Software so as to provide Licensee with the ability to utilize the Products in accordance with the Documentation without significant disruption to its ongoing business operations during the Technical Support or Maintenance term.

Authorized User shall not be required to purchase Technical Support or Maintenance for use of the Licensed Software, and may discontinue maintenance at the end of any current maintenance term upon notice to Contractor. In the event that Authorized User does not initially acquire or discontinues maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product by acquiring the appropriate maintenance reinstatement part number for the Licensed Software.

LL. A new section 88 (Business Contact Information) is added to read as follows:

88. BUSINESS CONTACT INFORMATION. An Authorized User agrees to allow Contractor to store and use its contact information, including names, phone numbers, and email addresses, anywhere where Contractor does business. Such information will be processed and used in connection with Contractor's business relationship and may be provided to permitted assignees of Contractor for uses consistent with Contractor and permitted assignees' collective business activities, including communicating with an Authorized User and for purposes of fulfilling Contractor's obligations under this Contract.

MM. A new section 89 is added to read as follows:

89. Each party may communicate with the other by electronic means and such communications is acceptable as a signed writing to the extent permissible under applicable law, provided however that any communications made under this section does not satisfy the notice requirements set forth in section 12 of the Contract. The parties agree

that for all electronic communications, an identification code (called a “user ID”) contained in an electronic document is sufficient to verify the sender’s identity and the document’s authenticity. The parties agree that the scope of the section is limited to electronic communications regarding the ordering and maintenance processes.

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Appendix 1

New York State
Council of Contracting Agencies
Standard Vendor Responsibility Questionnaire
(Use the Uniform Contracting Questionnaire CCA-1, for all construction contracts)

Appendix 2

New York State Department of Taxation and Finance
Contractor Certification Form (ST-220)

APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

PLEASE RETAIN THIS DOCUMENT
FOR FUTURE REFERENCE.

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STANDARD CLAUSES FOR NYS CONTRACTS

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licenser, licensee, lessor, lessee or any other party):

1. EXECUTORY CLAUSE. In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

2. NON-ASSIGNMENT CLAUSE. In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent, in writing, of the State and any attempts to assign the contract without the State's written consent are null and void. The Contractor may, however, assign its right to receive payment without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

3. COMPTROLLER'S APPROVAL. In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed \$85,000 (State Finance Law Section 163.6.a).

4. WORKERS' COMPENSATION BENEFITS. In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

5. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, sexual orientation, age, disability, genetic predisposition or carrier status, or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State

citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. WAGE AND HOURS PROVISIONS. If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law.

7. NON-COLLUSIVE BIDDING CERTIFICATION. In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

8. INTERNATIONAL BOYCOTT PROHIBITION. In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2NYCRR 105.4).

9. SET-OFF RIGHTS. The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

10. RECORDS. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any

other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION. (a) FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER. All invoices or New York State standard vouchers submitted for payment for the sale of goods or services or the lease of real or personal property to a New York State agency must include the payee's identification number, i.e., the seller's or lessor's identification number. The number is either the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. Failure to include this number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or New York State standard voucher, must give the reason or reasons why the payee does not have such number or numbers.

(b) PRIVACY NOTIFICATION. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law.

(2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in New York State's Central Accounting System by the Director of Accounting Operations, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN. In accordance with Section 312 of the Executive Law, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State; or (iii) banking services, insurance policies or the sale of securities. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Governor's Office of Minority and Women's Business Development pertaining hereto.

13. CONFLICTING TERMS. In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

14. GOVERNING LAW. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

15. LATE PAYMENT. Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

16. NO ARBITRATION. Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

17. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of

the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of State Finance Law §165. (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES. In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

20. OMNIBUS PROCUREMENT ACT OF 1992. It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development
Division for Small Business
30 South Pearl St -- 7th Floor
Albany, New York 12245
Telephone: 518-292-5220
Fax: 518-292-5884
<http://www.empire.state.ny.us>

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development
Division of Minority and Women's Business Development
30 South Pearl St -- 2nd Floor
Albany, New York 12245
Telephone: 518-292-5250
Fax: 518-292-5803
<http://www.empire.state.ny.us>

The Omnibus Procurement Act of 1992 requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

21. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

22. PURCHASES OF APPAREL. In accordance with State Finance Law 162 (4-a), the State shall not purchase any apparel from any vendor unable or unwilling to certify that: (i) such apparel was manufactured in compliance with all applicable labor and occupational safety laws, including, but not limited to, child labor laws, wage and hours laws and workplace safety laws, and (ii) vendor will supply, with its bid (or, if not a bid situation, prior to or at the time of signing a contract with the State), if known, the names and addresses of each subcontractor and a list of all manufacturing plants to be utilized by the bidder.

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APPENDIX B
GENERAL SPECIFICATIONS

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GENERAL

1. **APPLICABILITY** The terms and conditions set forth in this Appendix B are expressly incorporated in and applicable to the resulting procurement contracts let by the Office of General Services Procurement Services Group, or let by any other Authorized User where incorporated by reference in its Bid Documents. Captions are intended as descriptive and are not intended to limit or otherwise restrict the terms and conditions set forth herein.

2. **GOVERNING LAW** This procurement, the resulting contract and any purchase orders issued hereunder shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise, and actions or proceedings arising from the contract shall be heard in a court of competent jurisdiction in the State of New York.

3. **ETHICS COMPLIANCE** All Bidders/Contractors and their employees must comply with the requirements of Sections 73 and 74 of the Public Officers Law, other State codes, rules, regulations and executive orders establishing ethical standards for the conduct of business with New York State. In signing the Bid, Bidder certifies full compliance with those provisions for any present or future dealings, transactions, sales, contracts, services, offers, relationships, etc., involving New York State and/or its employees. Failure to comply with those provisions may result in disqualification from the Bidding process, termination of contract, and/or other civil or criminal proceedings as required by law.

4. **CONFLICT OF TERMS** Unless otherwise set forth in the procurement or contract documents, conflicts among documents shall be resolved in the following order of precedence:

- a. **Appendix A** (Standard Clauses for NYS Contracts)
- b. **Mini-Bid Project Definition** if applicable and in accordance with the terms and conditions of the Back-Drop Contract.
- c. **Contract and other writing(s)** setting forth the final agreements, clarifications and terms between the Bid Documents and Contractor's Bid. In the latter circumstance, clarifications must specifically note in writing what was offered by the Contractor and what was accepted by the State. If not, such clarifications shall be considered last in the order of precedence under this paragraph.
- d. **Bid Documents** (Other than Appendix A).
 - i. Bid Specifications prepared by the Authorized User.
 - ii. Appendix B (General Specifications).
 - iii. Incorporated Contract Appendices, if any, following the order of precedence as stated for Contract above.
- e. **Contractor's Bid or Mini-Bid Proposal**.
- f. **Unincorporated Appendices** (if any).

5. **DEFINITIONS** Terms used in this Appendix B shall have the following meanings:

AFFILIATE Any individual or other legal entity, (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) that effectively controls another company in which (a) the Bidder owns more than 50% of the ownership; or (b) any individual or other legal entity which owns more than 50% of the ownership of the Bidder. In addition, if a Bidder owns less than 50% of the ownership of another legal entity, but directs or has the right to direct such entity's daily operations, that entity will be an Affiliate.

AGENCY OR AGENCIES The State of New York, acting by or through one or more departments, boards, commissions, offices or institutions of the State of New York.

ATTORNEY GENERAL Attorney General of the State of New York.

AUTHORIZED USER(S) Agencies, or any other entity authorized by the laws of the State of New York to participate in NYS centralized contracts (including but not limited to political subdivisions, public authorities, public benefit corporations and certain other entities set forth in law), or the State of New York acting on behalf of one or more such Agencies or other entities, provided that each such Agency or other entity shall be held solely responsible for liabilities or payments due as a result of its participation.

BID OR BID PROPOSAL An offer or proposal submitted by a Bidder to furnish a described product or a solution, perform services or means of achieving a practical end, at a stated price for the stated Contract term. As required by the Bid Documents, the Bid or proposal may be subject to modification through the solicitation by the Agency of best and final offers during the evaluation process prior to recommendation for award of the Contract.

BIDDER/OFFERER Any individual or other legal entity (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) which submits a Bid in response to a Bid Solicitation. The term Bidder shall also include the term "offeror." In the case of negotiated Contracts, "Bidder" shall refer to the "Contractor."

BID DOCUMENTS Writings by the State setting forth the scope, terms, conditions and technical specifications for a procurement of Product. Such writings typically include, but are not limited to: Invitation for Bids (IFB), Request for Quotation (RFQ), Request for Proposals (RFP), addenda or amendments thereto, and terms and conditions which are incorporated by reference, including but not limited to, Appendix A (Standard Clauses for NYS Contracts), Appendix B, (General Specifications). Where these General Specifications are incorporated in negotiated Contracts that have not been competitively Bid, the term "Bid Documents" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

BID SPECIFICATION A written description drafted by the Authorized User setting forth the specific terms of the intended procurement, which may include: physical or functional characteristics, the nature of a commodity or construction item, any description of the work to be performed, Products to be provided, the necessary qualifications of the Bidder, the capacity and capability of the Bidder to successfully carry out the proposed Contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform work. Where these General Specifications are incorporated in negotiated Contracts that have not been competitively Bid, the term "Bid Specifications" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

COMMISSIONER Commissioner of OGS, or in the case of Bid Specifications issued by an Authorized User, the head of such Authorized User or their authorized representative.

COMPTROLLER Comptroller of the State of New York.

CONTRACT The writing(s) which contain the agreement of the Commissioner and the Bidder/Contractor setting forth the total legal obligation between the parties as determined by applicable rules of law, and which most typically include the following classifications of public procurements:

a. Agency Specific Contracts Contracts where the specifications for a Product or a particular scope of work are described and defined to meet the needs of one or more Authorized User(s).

b. Centralized Contracts Single or multiple award Contracts where the specifications for a Product or general scope of work are described and defined by the Office of General Services to meet the needs of Authorized Users. Centralized Contracts may be awarded through multiple awards or through adoption of another jurisdiction's contract or on a sole source, single source, emergency or competitive basis. Once established, procurements may be made from the selected Contractor(s) without further competition or Mini-Bid unless otherwise required by the Bid Specifications or Contract Award Notification.

c. Back-Drop Contracts Multiple award Centralized Contracts where the Office of General Services defines the specifications for a Product or general scope of work to meet the needs of Authorized Users. Bids may be submitted either at a date and time certain or may be accepted on a continuous or periodic recruitment basis, as set forth in the Bid Specifications. Selection of a Contractor(s) from among Back-Drop contract holders for an actual Product, project or particular scope of work may subsequently be made on a single or sole source basis, or on the basis of a Mini-Bid among qualified Back-Drop contract holders, or such other method as set forth in the Bid Document.

d. Piggyback Contract A Contract let by any department, agency or instrumentality of the United States government, or any department, agency, office, political subdivision or instrumentality of any state or state(s) which is adopted and extended for use by the OGS Commissioner in accordance with the requirements of the State Finance Law.

e. Contract Letter A letter to the successful Bidder(s) indicating acceptance of its Bid in response to a solicitation. Unless otherwise specified, the issuance of a Letter of Acceptance forms a Contract but is not an order for Product, and Contractor should not take any action with respect to actual Contract deliveries except on the basis of Purchase Orders sent from Authorized User(s).

CONTRACT AWARD NOTIFICATION An announcement to Authorized Users that a Contract has been established.

CONTRACTOR Any successful Bidder(s) to whom a Contract has been awarded by the Commissioner.

DOCUMENTATION The complete set of manuals (e.g., user, installation, instruction or diagnostic manuals) in either hard or electronic copy, which are necessary to enable an Authorized User to properly test, install, operate and enjoy full use of the Product.

EMERGENCY An urgent and unexpected requirement where health and public safety or the conservation of public resources is at risk.

ENTERPRISE The total business operations in the United States of Authorized User (s) without regard to geographic location where such

operations are performed or the entity actually performing such operations on behalf of Authorized User.

ENTERPRISE LICENSE A license grant of unlimited rights to deploy, access, use and execute Product anywhere within the Enterprise up to the maximum capacity stated on the Purchase Order or in the Contract.

ERROR CORRECTIONS Machine executable software code furnished by Contractor which corrects the Product so as to conform to the applicable warranties, performance standards and/or obligations of the Contractor.

GROUP A classification of Product, services or technology which is designated by OGS.

INVITATION FOR BIDS (IFB) A type of Bid Document which is most typically used where requirements can be stated and award will be made based on lowest price to the responsive and responsible Bidder(s).

LICENSED SOFTWARE Software transferred upon the terms and conditions set forth in the Contract. "Licensed Software" includes error corrections, upgrades, enhancements or new releases, and any deliverables due under a maintenance or service contract (e.g., patches, fixes, PTFs, programs, code or data conversion, or custom programming).

LICENSEE One or more Authorized Users who acquire Product from Contractor by issuing a Purchase Order in accordance with the terms and conditions of the Contract; provided that, for purposes of compliance with an individual license, the term "Licensee" shall be deemed to refer separately to the individual Authorized User(s) who took receipt of and who is executing the Product, and who shall be solely responsible for performance and liabilities incurred. In the case of acquisitions by State Agencies, the Licensee shall be the State of New York.

LICENSE EFFECTIVE DATE The date Product is delivered to an Authorized User. Where a License involves Licensee's right to copy a previously licensed and delivered Master Copy of a Program, the license effective date for additional copies shall be deemed to be the date on which the Purchase Order is executed.

LICENSOR A Contractor who transfers rights in proprietary Product to Authorized Users in accordance with the rights and obligations specified in the Contract.

MINI-BID PROJECT DEFINITION A Bid Document containing project specific Bid Specifications developed by or for an Authorized User which solicits Bids from Contractors previously qualified under a Back-Drop Contract.

MULTIPLE AWARD A determination and award of a Contract in the discretion of the Commissioner to more than one responsive and responsible Bidder who meets the requirements of a specification, where the multiple award is made on the grounds set forth in the Bid Document in order to satisfy multiple factors and needs of Authorized Users (e.g., complexity of items, various manufacturers, differences in performance required to accomplish or produce required end results, production and distribution facilities, price, compliance with delivery requirements, geographic location or other pertinent factors).

NEW PRODUCT RELEASES (Product Revisions) Any commercially released revisions to the licensed version of a Product as may be generally offered and available to Authorized Users. New releases involve a substantial revision of functionality from a previously released version of the Product.

OGS The New York State Office of General Services.

PROCUREMENT RECORD Documentation by the Authorized User of the decisions made and approach taken during the procurement process and during the contract term.

PRODUCT A deliverable under any Bid or Contract which may include commodities, services and/or technology. The term "Product" includes Licensed Software.

PROPRIETARY Protected by secrecy, patent, copyright or trademark against commercial competition.

PURCHASE ORDER The Authorized User's fiscal form or format that is used when making a purchase (e.g., formal written Purchase Order, Procurement Card, electronic Purchase Order, or other authorized instrument).

REQUEST FOR PROPOSALS (RFP) A type of Bid Document that is used for procurements where factors in addition to cost are considered and weighted in awarding the contract and where the method of award is "best value," as defined by the State Finance Law.

REQUEST FOR QUOTATION (RFQ) A type of Bid Document that can be used when a formal Bid opening is not required (e.g., discretionary, sole source, single source or emergency purchases).

RESPONSIBLE BIDDER A Bidder that is determined to have financial and organizational capacity, legal authority, satisfactory previous performance, skill, judgment and integrity, and that is found to be competent, reliable and experienced, as determined by the Commissioner. For purposes of being deemed responsible, a Bidder must also be determined to be in compliance with Sections 139-j and 139-k of the State Finance Law relative to restrictions on contacts during the procurement process and disclosure of contacts and prior findings of non-responsibility under these statutes.

RESPONSIVE BIDDER A Bidder meeting the specifications or requirements prescribed in the Bid Document or solicitation, as determined by the OGS Commissioner.

SINGLE SOURCE A procurement where two or more Bidders can supply the required Product, and the Commissioner may award the contract to one Bidder over the other.

SITE The location (street address) where Product will be executed or services delivered.

SOLE SOURCE A procurement where only one Bidder is capable of supplying the required Product.

SOURCE CODE The programming statements or instructions written and expressed in any language understandable by a human being skilled in the art which are translated by a language compiler to produce executable machine Object Code.

STATE State of New York.

SUBCONTRACTOR Any individual or other legal entity, (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) who has entered into a contract, express or implied, for the performance of a portion of a Contract with a Contractor.

TERMS OF LICENSE The terms and conditions set forth in the Contract that are in effect and applicable to a Purchase Order at the time of order placement.

VIRUS Any computer code, whether or not written or conceived by Contractor, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Product manufacturer.

BID SUBMISSION

6. INTERNATIONAL BIDDING All offers (tenders), and all information and Product required by the solicitation or provided as explanation thereof, shall be submitted in English. All prices shall be expressed, and all payments shall be made, in United States Dollars (\$US). Any offers (tenders) submitted which do not meet the above criteria will be rejected.

7. BID OPENING Bids may, as applicable, be opened publicly. The Commissioner reserves the right at any time to postpone or cancel a scheduled Bid opening.

8. BID SUBMISSION All Bids are to be packaged, sealed and submitted to the location stated in the Bid Specifications. Bidders are solely responsible for timely delivery of their Bids to the location set forth in the Bid Specifications prior to the stated Bid opening date/time.

A Bid return envelope, if provided with the Bid Specifications, should be used with the Bid sealed inside. If the Bid response does not fit into the envelope, the Bid envelope should be attached to the outside of the sealed box or package with the Bid inside. If using a commercial delivery company that requires use of their shipping package or envelope, Bidder's sealed Bid, labeled as detailed below, should be placed within the shipper's sealed envelope to ensure that the Bid is not prematurely opened.

All Bids must have a label on the outside of the package or shipping container outlining the following information:

"BID ENCLOSED (bold print, all capitals)

- Group Number
- IFB or RFP Number
- Bid Submission date and time"

In the event that a Bidder fails to provide such information on the return Bid envelope or shipping material, the receiving entity reserves the right to open the shipping package or envelope to determine the proper Bid number or Product group, and the date and time of Bid opening. Bidder shall have no claim against the receiving entity arising from such opening and such opening shall not affect the validity of the Bid or the procurement.

Notwithstanding the receiving agency's right to open a Bid to ascertain the foregoing information, Bidder assumes all risk of late delivery associated with the Bid not being identified, packaged or labeled in accordance with the foregoing requirements.

All Bids must be signed by a person authorized to commit the Bidder to the terms of the Bid Documents and the content of the Bid (offer).

9. FACSIMILE SUBMISSIONS Unless specifically prohibited by the terms of the Bid Specifications, facsimile Bids may be SUBMITTED AT THE SOLE OPTION AND RISK OF THE BIDDER. Only the FAX number(s) indicated in the Bid Specifications may be used. Access to the facsimile machine(s) is on a "first come, first serve" basis, and the Commissioner bears no liability or responsibility and makes no guarantee whatsoever with respect to the Bidder's access to such equipment at any specific time. Bidders are solely responsible for submission and receipt of the entire facsimile Bid by the Authorized User prior to Bid opening and must include on the first page of the transmission the total number of pages transmitted in the facsimile, including the cover page. Incomplete, ambiguous or unreadable transmissions in whole or in part may be rejected at the sole discretion of the Commissioner. Facsimile Bids are fully governed by all conditions outlined in the Bid Documents and must be submitted on forms or in the format required in the Bid Specifications, including the executed signature page and acknowledgment.

10. AUTHENTICATION OF FACSIMILE BIDS The act of submitting a Bid by facsimile transmission, including an executed signature page or as otherwise specified in the Bid Documents, shall be deemed a confirming act by Bidder which authenticates the signing of the Bid.

11. LATE BIDS For purposes of Bid openings held and conducted by OGS, a Bid must be received in such place as may be designated in the Bid Documents or if no place is specified in the OGS Mailroom located in the Empire State Plaza, Albany, New York 12242, at or before the date and time established in the Bid Specifications for the Bid opening. For purposes of Bid openings held and conducted by Authorized Users other than OGS, the term late Bid is defined as a Bid not received in the location established in the Bid Specifications at or before the date and time specified for the Bid opening.

Any Bid received at the specified location after the time specified will be considered a late Bid. A late Bid shall not be considered for award unless: (i) no timely Bids meeting the requirements of the Bid Documents are received or, (ii) in the case of a multiple award, an insufficient number of timely Bids were received to satisfy the multiple award; and acceptance of the late Bid is in the best interests of the Authorized Users. Bids submitted for continuous or periodic recruitment contract awards must meet the submission requirements associated with their specifications. Delays in United States mail deliveries or any other means of transmittal, including couriers or agents of the Authorized User shall not excuse late Bid submissions. Similar types of delays, including but not limited to, bad weather, or security procedures for parking and building admittance shall not excuse late Bid submissions. Determinations relative to Bid timeliness shall be at the sole discretion of the Commissioner.

12. BID CONTENTS Bids must be complete and legible. All Bids must be signed. All information required by the Bid Specifications must be supplied by the Bidder on the forms or in the format specified. No alteration, erasure or addition is to be made to the Bid Documents. Changes may be ignored by the Commissioner or may be grounds for rejection of the Bid. Changes, corrections and/or use of white-out in

the Bid or Bidder's response portion of the Bid Document must be initialed by an authorized representative of the Bidder. Bidders are cautioned to verify their Bids before submission, as amendments to Bids or requests for withdrawal of Bids received by the Commissioner after the time specified for the Bid opening, may not be considered.

13. EXTRANEOUS TERMS Bids must conform to the terms set forth in the Bid Documents, as extraneous terms or material deviations (including additional, inconsistent, conflicting or alternative terms) may render the Bid non-responsive and may result in rejection of the Bid.

Extraneous term(s) submitted on standard, pre-printed forms (including but not limited to: product literature, order forms, license agreements, contracts or other documents) that are attached or referenced with submissions shall not be considered part of the Bid or resulting Contract, but shall be deemed included for informational or promotional purposes only.

Only those extraneous terms that meet all the following requirements may be considered as having been submitted as part of the Bid:

- a. Each proposed extraneous term (addition, deletion, counter-offer, deviation, or modification) must be specifically enumerated in a writing which is not part of a pre-printed form; and
- b. The writing must identify the particular specification requirement (if any) that Bidder rejects or proposes to modify by inclusion of the extraneous term; and
- c. The Bidder shall enumerate the proposed addition, counter offer, modification or deviation from the Bid Document, and the reasons therefore.

No extraneous term(s), whether or not deemed "material," shall be incorporated into a Contract or Purchase Order unless submitted in accordance with the above and the Commissioner or Authorized User expressly accepts each such term(s) in writing. Acceptance and/or processing of the Bid shall not constitute such written acceptance of Extraneous Term(s).

14. CONFIDENTIAL/TRADE SECRET MATERIALS

a. Contractor Confidential, trade secret or proprietary materials as defined by the laws of the State of New York must be clearly marked and identified as such upon submission by the Bidder. Marking the Bid as "confidential" or "proprietary" on its face or in the document header or footer shall not be considered by the Commissioner or Authorized User to be sufficient without specific justification as to why disclosure of particular information in the Bid would cause substantial injury to the competitive position of the Bidder. Bidders/Contractors intending to seek an exemption from disclosure of these materials under the Freedom of Information Law must request the exemption in writing, setting forth the reasons for the claimed exemption. Acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures. Properly identified information that has been designated confidential, trade secret, or proprietary by the Bidder will not be disclosed except as may be required by the Freedom of Information Law or other applicable State and federal laws.

b. Commissioner or Authorized User Contractor further warrants, covenants and represents that any confidential information obtained by Contractor, its agents, Subcontractors, officers, distributors, resellers

or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the State or any Authorized User hereunder or received from another third party, will not be divulged to any third parties. Contractor shall not be required to keep confidential any such material that is publicly available through no fault of Contractor, independently developed by Contractor without reliance on confidential information of the Authorized User, or otherwise obtained under the Freedom of Information Act or other applicable New York State laws and regulations. This warranty shall survive termination of this Contract. Contractor further agrees to take appropriate steps as to its agents, Subcontractors, officers, distributors, resellers or employees regarding the obligations arising under this clause to insure such confidentiality.

15. RELEASE OF BID EVALUATION MATERIALS Requests concerning the evaluation of Bids may be submitted under the Freedom of Information Law. Information, other than statistical or factual tabulations or data such as the Bid Tabulation, shall only be released as required by law after Contract award. Bid Tabulations are not maintained for all procurements. Names of Bidders may be disclosed after Bid opening upon request. Written requests should be directed to the Commissioner.

16. FREEDOM OF INFORMATION LAW During the evaluation process, the content of each Bid will be held in confidence and details of any Bid will not be revealed (except as may be required under the Freedom of Information Law or other State law). The Freedom of Information Law provides for an exemption from disclosure for trade secrets or information the disclosure of which would cause injury to the competitive position of commercial enterprises. This exception would be effective both during and after the evaluation process. If the Bid contains any such trade secret or other confidential or proprietary information, it must be accompanied in the Bid with a written request to the Commissioner to not disclose such information. Such request must state with particularity the reasons why the information should not be available for disclosure and must be provided at the time of submission of the Bid. Notations in the header, footer or watermark of the Bid Document will not be considered sufficient to constitute a request for non-disclosure of trade secret or other confidential or proprietary information. Where a Freedom of Information request is made for trademark or other confidential or proprietary information, the Commissioner reserves the right to determine upon written notice to the Bidder whether such information qualifies for the exemption for disclosure under the law. Notwithstanding the above, where a Bid tabulation is prepared and Bids publicly opened, such Bid tabulation shall be available upon request.

17. PREVAILING WAGE RATES - PUBLIC WORKS AND BUILDING SERVICES CONTRACTS If any portion of work being Bid is subject to the prevailing wage rate provisions of the Labor Law, the following shall apply:

a. “Public Works” and “Building Services” - Definitions

i. Public Works Labor Law Article 8 applies to contracts for public improvement in which laborers, workers or mechanics are employed on a “public works” project (distinguished from public “procurement” or “service” contracts). The State, a public benefit corporation, a municipal corporation (including a school district), or a commission appointed by law must be a party to the Contract. The wage and hours provision applies to any work performed by Contractor or Subcontractors.

ii. Building Services Labor Law Article 9 applies to Contracts for building service work over \$1,500 with a public agency, that: (i) involve the care or maintenance of an existing building, or (ii) involve the transportation of office furniture or equipment to or from such building, or (iii) involve the transportation and delivery of fossil fuel to such building, and (iv) the principal purpose of which is to furnish services through use of building service employees.

b. Prevailing Wage Rate Applicable to Bid Submissions A copy of the applicable prevailing wage rates to be paid or provided are annexed to the Bid Documents. Bidders must submit Bids which are based upon the prevailing hourly wages, and supplements in cash or equivalent benefits (i.e., fringe benefits and any cash or non-cash compensation which are not wages, as defined by law) that equal or exceed the applicable prevailing wage rate(s) for the location where the work is to be performed. Bidders may not submit Bids based upon hourly wage rates and supplements below the applicable prevailing wage rates as established by the New York State Department of Labor. Bids that fail to comply with this requirement will be disqualified.

c. Wage Rate Payments / Changes During Contract Term The wages to be paid under any resulting Contract shall not be less than the prevailing rate of wages and supplements as set forth by law. It is required that the Contractor keep informed of all changes in the Prevailing Wage Rates during the Contract term that apply to the classes of individuals supplied by the Contractor on any projects resulting from this Contract, subject to the provisions of the Labor Law. Contractor is solely liable for and must pay such required prevailing wage adjustments during the Contract term as required by law.

d. Public Posting & Certified Payroll Records In compliance with Article 8, Section 220 of the New York State Labor Law:

i. Posting The Contractor must publicly post on the work site, in a prominent and accessible place, a legible schedule of the prevailing wage rates and supplements.

ii. Payroll Records Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. For public works contracts over \$25,000 where the Contractor maintains no regular place of business in New York State, such records must be kept at the work site. For building services contracts, such records must be kept at the work site while work is being performed.

iii. Submission of Certified Payroll Transcripts for Public Works Contracts Only Contractors and Subcontractors on public works projects must submit monthly payroll transcripts to the Authorized User that has prepared or directs the preparation of the plans and specifications for a public works project, as set forth in the Bid Specifications. For Mini-Bid solicitations, the payroll records must be submitted to the entity preparing the agency Mini-Bid project specification. For “agency specific” Bids, the payroll records should be submitted to the entity issuing the purchase order. For all other OGS Centralized Contracts, such records should be submitted to the individual agency issuing the purchase order(s) for the work. Upon mutual agreement of the Contractor and the Authorized User, the form of submission may be submitted in a specified disk format acceptable to the Department of Labor provided: 1) the Contractor/Subcontractor retains the original records; and, (2) an original signed letter by a duly authorized individual of the Contractor or Subcontractor attesting to the truth and accuracy of the records accompanies the disk. This

provision does not apply to Article 9 of the Labor Law building services contracts.

iv. Records Retention Contractors and Subcontractors must preserve such certified transcripts for a period of three years from the date of completion of work on the awarded contract.

Day's Labor Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law.

No laborers, workmen or mechanics in the employ of the Contractor, Subcontractor or other person doing or contracting to do all or part of the work contemplated by the Contract shall be permitted or required to work more than eight hours in any one calendar day or more than five calendar days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. "Extraordinary emergency" shall be deemed to include situations in which sufficient laborers, workers and mechanics cannot be employed to carry on public work expeditiously as a result of such restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the NYS Commissioner of Labor for the preservation of the Contract site or for the protection of the life and limb of the persons using the Contract site.

18. TAXES

a. Unless otherwise specified in the Bid Specifications or Contract, the quoted Bid price includes all taxes applicable to the transaction.

b. Purchases made by the State of New York and certain non-State Authorized Users are exempt from New York State and local sales taxes and, with certain exceptions, federal excise taxes. To satisfy the requirements of the New York State Sales tax exemption, either the Purchase Order issued by a State Agency or the invoice forwarded to authorize payment for such purchases will be sufficient evidence that the sale by the Contractor was made to the State, an exempt organization under Section 1116 (a) (1) of the Tax Law. Non-State Authorized Users must offer their own proof of exemption upon request. No person, firm or corporation is, however, exempt from paying the State Truck Mileage and Unemployment Insurance or Federal Social Security taxes, which remain the sole responsibility of the Bidder/Contractor.

c. Pursuant to Revised Tax Law 5-a, Contractor will be required to furnish sales tax certification on its behalf and for its affiliates, and subcontractors for Contracts with a value greater than \$100,000 in accordance with provisions of the law.

d. Purchases by Authorized Users other than the State of New York may be subject to certain taxes which were not included in the Bid price, and in those instances the tax should be computed based on the Contract price and added to the invoice submitted to such entity for payment.

19. EXPENSES PRIOR TO CONTRACT EXECUTION The Commissioner and any Authorized User(s) are not liable for any costs incurred by a Vendor, Bidder or Contractor in the preparation and production of a Bid, Mini-Bid or best and final offers or for any work performed prior to Contract execution.

20. ADVERTISING RESULTS The prior written approval of the Commissioner is required in order for results of the Bid to be used by

the Contractor as part of any commercial advertising. The Contractor shall also obtain the prior written approval of the Commissioner relative to the Bid or Contract for press or other media releases.

21. PRODUCT REFERENCES

a. "**Or Equal**" In all Bid Specifications the words "or equal" are understood to apply where a copyrighted, brand name, trade name, catalog reference, or patented Product is referenced. References to such specific Product are intended as descriptive, not restrictive, unless otherwise stated. Comparable Product will be considered if proof of compatibility is provided, including appropriate catalog excerpts, descriptive literature, specifications and test data, etc. The Commissioner's decision as to acceptance of the Product as equal shall be final.

b. **Discrepancies in References** In the event of a discrepancy between the model number referenced in the Bid Specifications and the written description of the Products which cannot be reconciled, with respect to such discrepancy, then the written description shall prevail.

22. REMANUFACTURED, RECYCLED, RECYCLABLE OR RECOVERED MATERIALS

Upon the conditions specified in the Bid Specifications and in accordance with the laws of the State of New York, Contractors are encouraged to use recycled, recyclable or recovered materials in the manufacture of Products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the Product or packaging unless such use is precluded due to health, welfare, safety requirements or in the Bid Specifications. Contractors are further encouraged to offer remanufactured Products to the maximum extent practicable without jeopardizing the performance or intended end use of the Product and unless such use is precluded due to health, welfare, safety requirements or by the Bid Specifications. Where such use is not practical, suitable, or permitted by the Bid Specifications, Contractor shall deliver new materials in accordance with the "Warranties" set forth below.

Items with recycled, recyclable, recovered, refurbished or remanufactured content must be identified in the Bid or Bidder will be deemed to be offering new Product.

23. PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS

Bids offering Products that are manufactured or produced in public institutions will be rejected.

24. PRICING

a. **Unit Pricing** If required by the Bid Specifications, the Bidder should insert the price per unit specified and the price extensions in decimals, not to exceed four places for each item unless otherwise specified, in the Bid. In the event of a discrepancy between the unit price and the extension, the unit price shall govern unless, in the sole judgment of the Commissioner, such unit pricing is obviously erroneous.

b. **Net Pricing** Unless otherwise required by the Bid Specifications, prices shall be net, including transportation, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination(s) indicated in the Bid Specifications, subject to the cash discount.

c. **"No Charge" Bid** When Bids are requested on a number of Products as a Group or Lot, a Bidder desiring to Bid "no charge" on a Product in the Group or Lot must clearly indicate such. Otherwise,

such Bid may be considered incomplete and be rejected, in whole or in part, at the discretion of the Commissioner.

d. Educational Pricing All Products to be supplied for educational purposes that are subject to educational discounts shall be identified in the Bid and such discounts shall be made available to qualifying institutions.

e. Third Party Financing If Product acquisitions are financed through any third party financing, Contractor may be required as a condition of Contract Award to agree to the terms and conditions of a "Consent & Acknowledgment Agreement" in a form acceptable to the Commissioner.

f. Best Pricing Offer During the Contract term, if substantially the same or a smaller quantity of a Product is sold by the Contractor outside of this Contract upon the same or similar terms and conditions as that of this Contract at a lower price to a federal, state or local governmental entity, the price under this Contract, at the discretion of the Commissioner, shall be immediately reduced to the lower price.

Price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after:

(i) GSA Changes: Where NYS Net Prices are based on an approved GSA Schedule, the date the approved GSA Schedule pricing decreases during the Contract term; or

(ii) Commercial Price List Reductions: Where NYS Net Prices are based on a discount from Contractor's list prices, the date Contractor lowers its pricing to its customers generally or to similarly situated government customers during the Contract term; or

(iii) Special Offers/Promotions Generally: Where Contractor generally offers more advantageous special price promotions or special discount pricing to other customers during the Contract term for a similar quantity, and the maximum price or discount associated with such offer or promotion is better than the discount or Net Price otherwise available under this Contract, such better price or discount shall apply for similar quantity transactions under this Contract for the life of such general offer or promotion; and

(iv) Special Offers/Promotions to Authorized Users: Contractor may offer Authorized Users, under either this Contract or any other Contracting vehicle, competitive pricing which is lower than the NYS Net Price set forth herein at any time during the Contract term and such lower pricing shall not be applied as a global price reduction under the Contract pursuant to the foregoing paragraph (iii).

Unless otherwise specified in the Bid Specifications, Contractor may offer lower prices or better terms (see Modification of Contract Terms) on any specific Purchase Order(s) from any Authorized User without being in conflict with, or obligation to comply on a global basis, with the terms of this clause.

g. Best and Final Prices As specified in the Bid Documents and Contract, a Contractor may be solicited at the time of issuance of a Purchase Order or Mini-Bid award for best and final pricing for the Product or service to be delivered to the Authorized User. Contractors are encouraged to reduce their pricing upon receipt of such request.

25. DRAWINGS

a. Drawings Submitted With Bid When the Bid Specifications require the Bidder to furnish drawings and/or plans, such drawings and/or plans shall conform to the mandates of the Bid Documents and shall, when approved by the Commissioner, be considered a part of the Bid and of any resulting Contract. All symbols and other

representations appearing on the drawings shall be considered a part of the drawing.

b. Drawings Submitted During the Contract Term Where required to develop, maintain and deliver diagrams or other technical schematics regarding the scope of work, Contractor shall do so on an ongoing basis at no additional charge, and must, as a condition of payment, update drawings and plans during the Contract term to reflect additions, alterations, and deletions. Such drawings and diagrams shall be delivered to the Authorized User's representative.

c. Accuracy of Drawings Submitted All drawings shall be neat and professional in manner and shall be clearly labeled as to locations and type of product, connections and components. Drawings and diagrams are to be in compliance with accepted drafting standards. Acceptance or approval of such plans shall not relieve the Contractor from responsibility for design or other errors of any sort in the drawings or plans, or from its responsibility for performing as required, furnishing product, services or installation, or carrying out any other requirements of the intended scope of work.

26. SITE INSPECTION Where a site inspection is required by the Bid Specifications or Project Definition, Bidder shall be required to inspect the site, including environmental or other conditions for pre-existing deficiencies that may affect the installed Product, equipment, or environment or services to be provided and, which may affect Bidder's ability to properly deliver, install or otherwise provide the required Product. All inquiries regarding such conditions shall be made in writing. Bidder shall be deemed to have knowledge of any deficiencies or conditions which such inspection or inquiry might have disclosed. Bidder must provide a detailed explanation with its Bid if additional work is required under this clause in order to properly complete the delivery and installation of the required Product or provide the requested service.

27. PROCUREMENT CARD The State has entered into an agreement for purchasing card services. The Purchasing Card enables Authorized Users to make authorized purchases directly from a Contractor without processing a Purchase Orders or Purchase Authorizations. Purchasing Cards are issued to selected employees authorized to purchase for the Authorized User and having direct contact with Contractors. Cardholders can make purchases directly from any Contractor that accepts the Purchasing Card.

The Contractor shall not process a transaction for payment through the credit card clearinghouse until the purchased products have been shipped or services performed. Unless the cardholder requests correction or replacement of a defective or faulty Product in accordance with other Contract requirements, the Contractor shall immediately credit a cardholder's account for products returned as defective or faulty.

28. SAMPLES

a. Standard Samples Bid Specifications may indicate that the Product to be purchased must be equal to a standard sample on display in a place designated by the Commissioner and such sample will be made available to the Bidder for examination prior to the opening date. Failure by the Bidder to examine such sample shall not entitle the Bidder to any relief from the conditions imposed by the Bid Specifications.

b. Bidder Supplied Samples The Commissioner reserves the right to request from the Bidder/Contractor a representative sample(s) of the

Product offered at any time prior to or after award of a contract. Unless otherwise instructed, samples shall be furnished within the time specified in the request. Untimely submission of a sample may constitute grounds for rejection of Bid or cancellation of the Contract. Samples must be submitted free of charge and be accompanied by the Bidder's name and address, any descriptive literature relating to the Product and a statement indicating how and where the sample is to be returned. Where applicable, samples must be properly labeled with the appropriate Bid or Contract reference.

A sample may be held by the Commissioner during the entire term of the Contract and for a reasonable period thereafter for comparison with deliveries. At the conclusion of the holding period the sample, where feasible, will be returned as instructed by the Bidder, at the Bidder's expense and risk. Where the Bidder has failed to fully instruct the Commissioner as to the return of the sample (i.e., mode and place of return, etc.) or refuses to bear the cost of its return, the sample shall become the sole property of the receiving entity at the conclusion of the holding period.

c. Enhanced Samples When an approved sample exceeds the minimum specifications, all Product delivered must be of the same enhanced quality and identity as the sample. Thereafter, in the event of a Contractor's default, the Commissioner may procure a Product substantially equal to the enhanced sample from other sources, charging the Contractor for any additional costs incurred.

d. Conformance with Sample(s) Submission of a sample (whether or not such sample is tested by, or for, the Commissioner) and approval thereof shall not relieve the Contractor from full compliance with all terms and conditions, performance related and otherwise, specified in the Bid Specifications. If in the judgment of the Commissioner the sample or product submitted is not in accordance with the specifications or testing requirements prescribed in the Bid Specifications, the Commissioner may reject the Bid. If an award has been made, the Commissioner may cancel the Contract at the expense of the Contractor.

e. Testing All samples are subject to tests in the manner and place designated by the Commissioner, either prior to or after Contract award. Unless otherwise stated in the Bid Specifications, Bidder samples consumed or rendered useless by testing will not be returned to the Bidder. Testing costs for samples that fails to meet Contract requirements may be at the expense of the Contractor.

f. Requests For Samples By Authorized Users Requests for samples by Authorized Users require the consent of the Contractor. Where Contractor refuses to furnish a sample, Authorized User may, in its sole discretion, make a determination on the performance capability of the Product or on the issue in question.

BID EVALUATION

29. BID EVALUATION The Commissioner reserves the right to accept or reject any and all Bids, or separable portions of offers, and waive technicalities, irregularities, and omissions if the Commissioner determines the best interests of the State will be served. The Commissioner, in his/her sole discretion, may accept or reject illegible, incomplete or vague Bids and his/her decision shall be final. A conditional or revocable Bid which clearly communicates the terms or limitations of acceptance may be considered, and Contract award may be made in compliance with the Bidder's conditional or revocable terms in the offer.

30. CONDITIONAL BID Unless the Bid Specifications provides otherwise, a Bid is not rendered non-responsive if the Bidder specifies that the award will be accepted only on all or a specified group of items or Product included in the specification. It is understood that nothing herein shall be deemed to change or alter the method of award contained in the Bid Documents.

31. CLARIFICATIONS / REVISIONS Prior to award, the Commissioner reserves the right to seek clarifications, request Bid revisions, or to request any information deemed necessary for proper evaluation of Bids from all Bidders deemed to be eligible for Contract award. Failure to provide requested information may result in rejection of the Bid.

32. PROMPT PAYMENT DISCOUNTS While prompt payment discounts will not be considered in determining the low Bid, the Commissioner may consider any prompt payment discount in resolving Bids which are otherwise tied. However, any notation indicating that the price is net, (e.g., net 30 days), shall be understood to mean only that no prompt payment discount is offered by the Bidder. The imposition of service, interest, or other charges, except pursuant to the provisions of Article 11-A of the State Finance Law, which are applicable in any case, may render the Bid non-responsive and may be cause for its rejection.

33. EQUIVALENT OR IDENTICAL BIDS In the event two offers are found to be substantially equivalent, price shall be the basis for determining the award recipient. If two or more Bidders submit substantially equivalent Bids as to pricing or other factors, the decision of the Commissioner to award a Contract to one or more of such Bidders shall be final.

34. PERFORMANCE AND RESPONSIBILITY QUALIFICATIONS The Commissioner reserves the right to investigate or inspect at any time whether or not the Product, services, qualifications or facilities offered by the Bidder/Contractor meet the requirements set forth in the Bid Specifications/Contract or as set forth during Contract negotiations. Contractor shall at all times during the Contract term remain responsible and responsive. A Bidder/Contractor must be prepared, if requested by the Commissioner, to present evidence of legal authority to do business in New York State, integrity, experience, ability, prior performance, organizational and financial capacity as well as where applicable, a statement as to supply, plant, machinery and capacity of the manufacturer or source for the production, distribution and servicing of the Product offered/Bid. If the Commissioner determines that the conditions and terms of the Bid Documents, Bid Specifications or Contract are not complied with, or that items, services or Product proposed to be furnished do not meet the specified requirements, or that the legal authority, integrity experience, ability, prior performance, organization and financial capacity or facilities are not satisfactory, the Commissioner may reject such Bid or terminate the Contract.

35. DISQUALIFICATION FOR PAST PERFORMANCE AND FINDINGS OF NON-RESPONSIBILITY Bidder may be disqualified from receiving awards if Bidder, or anyone in Bidder's employment, has previously failed to perform satisfactorily in connection with public Bidding or contracts or is deemed non-responsive.

36. QUANTITY CHANGES PRIOR TO AWARD The Commissioner reserves the right, at any time prior to the award of a specific quantity Contract, to alter in good faith the quantities listed in

the Bid Specifications. In the event such right is exercised, the lowest responsible Bidder meeting Bid Specifications will be advised of the revised quantities and afforded an opportunity to extend or reduce its Bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its Bid price may result in the rejection of its Bid and the award of such Contract to the lowest responsible Bidder who accepts the revised qualifications.

37. TIMEFRAME FOR OFFERS The Commissioner reserves the right to make awards within sixty (60) days after the date of the Bid opening or such other period of time as set forth in the Bid Documents, during which period, Bids must remain firm and cannot be withdrawn. Pursuant to Section 163(9)(e) of the State Finance Law and Section 2-205 of the Uniform Commercial Code when applicable, where an award is not made within the sixty (60) day period or other time specified as set forth in the Bid Documents, the Bids shall remain firm until such later time as either a Contract is awarded or the Bidder delivers to the Commissioner written notice of the withdrawal of its Bid. Any Bid which expressly states therein that acceptance must be made within a shorter specified time, may at the sole discretion of the Commissioner, be accepted or rejected.

TERMS & CONDITIONS

38. CONTRACT CREATION / EXECUTION Except for contracts governed by Article 11-B of the State Finance Law, subject to and upon receipt of all required approvals as set forth in the Bid Specifications a Contract shall be deemed executed and created with the successful Bidder(s), upon the Commissioner's mailing or electronic communication to the address on the Bid/Contract of: (i) the final Contract Award Notice; (ii) a fully executed Contract; or (iii) a Purchase Order authorized by the Commissioner.

39. PARTICIPATION IN CENTRALIZED CONTRACTS The following shall not limit or inhibit the OGS Commissioner's authority under State Finance Law, Section 163 (10) (e) (Piggybacking):

a. Agencies All State Agencies may utilize and purchase under any state Centralized Contract let by the Commissioner, unless the Bid Documents limit purchases to specific State Agencies.

b. Non-State Agency Authorized Users Authorized Users other than State Agencies are permitted to make purchases through state Centralized Contracts where permitted by law, the Contract or the Commissioner.

c. Voluntary Extension Purchase Orders issued against a State Centralized Contract by any Authorized User not provided for in the Bid Specifications shall be honored by the Contractor at its discretion and only with the approval of the OGS Commissioner and any other approvals required by law. Contractors are encouraged to voluntarily extend service Contracts to those additional entities authorized to utilize commodity Contracts under Section 163 (3) (iv) of the State Finance Law.

d. Responsibility for Performance Participation in state Centralized Contracts by Authorized Users is permitted upon the following conditions: (i) the responsibility with regard to performance of any contractual obligation, covenant, condition or term thereunder by any Authorized User other than State Agencies shall be borne and is expressly assumed by such Authorized User and not by the State; (ii) a breach of the Contract by any particular Authorized User shall neither constitute nor be deemed a breach of the Contract as a whole which shall remain in full force and effect, and shall not affect the

validity of the Contract nor the obligations of the Contractor thereunder respecting non-breaching Authorized Users, whether State or otherwise; (iii) for a breach by an Authorized User other than a State Agency, the State specifically and expressly disclaims any and all liability for such breach; and (iv) each non-state agency Authorized User and Contractor guarantees to save the State, its officers, agents and employees harmless from any liability that may be or is imposed by their failure to perform in accordance with its obligations under the Contract.

e. Contract Migration Authorized Users holding individual Contracts with a Contractor at the time that Contractor is awarded a Centralized Contract for the same Products or services shall be permitted to migrate to that Centralized Contract effective with its commencement date. Such migration shall not operate to diminish, alter or eliminate any right that the Authorized User otherwise had under the terms and conditions of their individual Contract.

40. MODIFICATION OF CONTRACT TERMS The terms and conditions set forth in the Contract shall govern all transactions by Authorized User(s) under this Contract. The Contract may only be modified or amended upon mutual written agreement of the Commissioner and Contractor.

The Contractor may, however, offer Authorized User(s) more advantageous pricing, payment, or other terms and conditions than those set forth in the Contract. In such event, a copy of such terms shall be furnished to the Authorized User(s) and Commissioner by the Contractor at the time of such offer.

Other than where such terms are more advantageous for the Authorized User(s) than those set forth in the Contract, no alteration or modification of the terms of the Contract, including substitution of Product, shall be valid or binding against Authorized User(s) unless authorized by the Commissioner or specified in the Contract Award Notification. No such alteration or modification shall be made by unilaterally affixing such terms to Product upon delivery (including, but not limited to, attachment or inclusion of standard pre-printed order forms, product literature, "shrink wrap" terms accompanying software upon delivery, or other documents) or by incorporating such terms onto order forms, purchase orders or other documents forwarded by the Contractor for payment, notwithstanding Authorized User's subsequent acceptance of Product, or that Authorized User has subsequently processed such document for approval or payment.

41. SCOPE CHANGES The Commissioner reserves the right, unilaterally, to require, by written order, changes by altering, adding to or deducting from the Bid Specifications, such changes to be within the general scope of the Contract. The Commissioner may make an equitable adjustment in the Contract price or delivery date if the change affects the cost or time of performance. Such equitable adjustments require the consent of the Contractor, which consent shall not be unreasonably withheld.

42. ESTIMATED / SPECIFIC QUANTITY CONTRACTS Estimated quantity contracts are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Contract term. No guarantee of any quantity(s) is implied or given. Purchases by Authorized Users from Contracts for services and technology are voluntary.

With respect to any specific quantity stated in the contract, the Commissioner reserves the right after award to order up to 20% more or less (rounded to the next highest whole number) than the specific

quantities called for in the Contract. Notwithstanding the foregoing, the Commissioner may purchase greater or lesser percentages of Contract quantities should the Commissioner and Contractor so agree. Such agreement may include an equitable price adjustment.

43. EMERGENCY CONTRACTS In the event that a disaster emergency is declared by Executive Order under Section 28 of Article 2-B of the Executive Law, or the Commissioner determines pursuant to his/her authority under Section 163 (10) (b) of the State Finance Law that an emergency exists requiring the prompt and immediate delivery of Product, the Commissioner reserves the right to obtain such Product from any source, including but not limited to this Contract(s), as the Commissioner in his/her sole discretion determines will meet the needs of such emergency. Contractor shall not be entitled to any claim or lost profits for Product procured from other sources pursuant to this paragraph. The reasons underlying the finding that an emergency exists shall be included in the procurement record.

44. PURCHASE ORDERS Unless otherwise authorized in writing by the Commissioner, no Product is to be delivered or furnished by Contractor until transmittal of an official Purchase Order from the Authorized User. Unless terminated or cancelled pursuant to the authority vested in the Commissioner, Purchase Orders shall be effective and binding upon the Contractor when placed in the mail or electronically transmitted prior to the termination of the contract period, addressed to the Contractor at the address for receipt of orders set forth in the Contract or in the Contract Award Notification.

All Purchase Orders issued pursuant to Contracts let by the Commissioner must bear the appropriate Contract number and, if necessary, required State approvals. As deemed necessary, the Authorized User may confirm pricing and other Product information with the Contractor prior to placement of the Purchase Order. The State reserves the right to require any other information from the Contractor which the State deems necessary in order to complete any Purchase Order placed under the Contract. Unless otherwise specified, all Purchase Orders against Centralized Contracts will be placed by Authorized Users directly with the Contractor and any discrepancy between the terms stated on the vendor's order form, confirmation or acknowledgment, and the Contract terms shall be resolved in favor of the terms most favorable to the Authorized User. Should an Authorized User add written terms and conditions to the Purchase Order that conflict with the terms and conditions of the Contract, the Contractor has the option of rejecting the Purchase Order within five business days of its receipt but shall first attempt to negotiate the additional written terms and conditions in good faith with the Authorized User, or fulfill the Purchase Order. Notwithstanding the above, the Authorized User reserves the right to dispute any discrepancies arising from the presentation of additional terms and conditions with the Contractor.

If, with respect to an Agency Specific Contract let by the OGS Commissioner, a Purchase Order is not received by the Contractor within two weeks after the issuance of a Contract Award Notification, it is the responsibility of the Contractor to request in writing that the appropriate Authorized User forward a Purchase Order. If, thereafter, a Purchase Order is not received within a reasonable period of time, the Contractor shall promptly notify in writing the appropriate purchasing officer in OGS. Failure to timely notify such officer may, in the discretion of the OGS Commissioner and without cost to the State, result in the cancellation of such requirement by the OGS Commissioner with a corresponding reduction in the Contract quantity and price.

45. PRODUCT DELIVERY Delivery must be made as ordered to the address specified on the Purchase Order and in accordance with the terms of the Contract or Contract Award Notice. Unless otherwise specified in the Bid Documents, delivery shall be made within thirty calendar days after receipt of a Purchase Order by the Contractor. The decision of the Commissioner as to compliance with delivery terms shall be final. The burden of proof for delay in receipt of Purchase Order shall rest with the Contractor. In all instances of a potential or actual delay in delivery, the Contractor shall immediately notify the Commissioner and the Authorized User, and confirm in writing the explanation of the delay, and take appropriate action to avoid any subsequent late deliveries. Any extension of time for delivery must be requested in writing by the Contractor and approved in writing by the Authorized User. Failure to meet such delivery time schedule may be grounds for cancellation of the order or, in the Commissioner's discretion, the Contract.

46. WEEKEND AND HOLIDAY DELIVERIES Unless otherwise specified in the Bid Specifications or by an Authorized User, deliveries will be scheduled for ordinary business hours, Monday through Friday (excluding legal holidays observed by the State of New York). Deliveries may be scheduled by mutual agreement for Saturdays, Sundays or legal holidays observed by the State of New York where the Product is for daily consumption, an emergency exists, the delivery is a replacement, delivery is late, or other reasonable circumstance in which event the convenience of the Authorized User shall govern.

47. SHIPPING/RECEIPT OF PRODUCT

a. Packaging Tangible Product shall be securely and properly packed for shipment, storage and stocking in appropriate, clearly labeled shipping containers and according to accepted commercial practice, without any extra charges for packing materials, cases or other types of containers. The container shall become and remain the property of the Authorized User unless otherwise specified in the Contract documents.

b. Shipping Charges Unless otherwise stated in the Bid Specifications, all deliveries shall be deemed to be freight on board (F.O.B.) destination tailgate delivery at the dock of the Authorized User. Unless otherwise agreed, items purchased at a price F.O.B. Shipping point plus transportation charges shall not relieve the Contractor from responsibility for safe and proper delivery notwithstanding the Authorized User's payment of transportation charges. Contractor shall be responsible for ensuring that the Bill of Lading states "charges prepaid" for all shipments.

c. Receipt of Product The Contractor shall be solely responsible for assuring that deliveries are made to personnel authorized to accept delivery on behalf of the Authorized User. Any losses resulting from the Contractor's failure to deliver Product to authorized personnel shall be borne exclusively by the Contractor.

48. TITLE AND RISK OF LOSS Notwithstanding the form of shipment, title or other property interest, risk of loss shall not pass from the Contractor to the Authorized User until the Products have been received, inspected and accepted by the receiving entity. Acceptance shall occur within a reasonable time or in accordance with such other defined acceptance period as may be specified in the Bid Specifications or Purchase Order. Mere acknowledgment by Authorized User personnel of the delivery or receipt of goods (e.g., signed bill of lading) shall not be deemed or construed as acceptance of the Products received. Any delivery of Product that is substandard or does not comply with the Bid Specifications or Contract terms and

conditions, may be rejected or accepted on an adjusted price basis, as determined by the Commissioner.

49. RE-WEIGHING PRODUCT Deliveries are subject to re-weighing at the point of destination by the Authorized User. If shrinkage occurs which exceeds that normally allowable in the trade, the Authorized User shall have the option to require delivery of the difference in quantity or to reduce the payment accordingly. Such option shall be exercised in writing by the Authorized User.

50. PRODUCT SUBSTITUTION In the event a specified manufacturer's Product listed in the Contract becomes unavailable or cannot be supplied by the Contractor for any reason (except as provided for in the Savings/Force Majeure Clause) a Product deemed in writing by the Commissioner to be equal to or better than the specified Product must be substituted by the Contractor at no additional cost or expense to the Authorized User. Unless otherwise specified, any substitution of Product prior to the Commissioner's written approval may be cause for cancellation of Contract.

51. REJECTED PRODUCT When Product is rejected, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of rejection by the Authorized User. Upon notification of rejection, risk of loss of rejected or non-conforming Product shall remain with Contractor. Rejected items not removed by the Contractor within ten calendar days of notification shall be regarded as abandoned by the Contractor, and the Authorized User shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse the Authorized User for any and all costs and expenses incurred in storage or effecting removal or disposition after the ten-calendar day period.

52. INSTALLATION Where installation is required, Contractor shall be responsible for placing and installing the Product in the required locations. All materials used in the installation shall be of good quality and shall be free from any and all defects that would mar the appearance of the Product or render it structurally unsound. Installation includes the furnishing of any equipment, rigging and materials required to install or place the Product in the proper location. The Contractor shall protect the site from damage for all its work and shall repair damages or injury of any kind caused by the Contractor, its employees, officers or agents. If any alteration, dismantling or excavation, etc. is required to effect installation, the Contractor shall thereafter promptly restore the structure or site. Work shall be performed to cause the least inconvenience to the Authorized User(s) and with proper consideration for the rights of other Contractors or workers. The Contractor shall promptly perform its work and shall coordinate its activities with those of other Contractors. The Contractor shall clean up and remove all debris and rubbish from its work as required or directed. Upon completion of the work, the building and surrounding area of work shall be left clean and in a neat, unobstructed condition, and everything in satisfactory repair and order.

53. REPAIRED OR REPLACED PARTS / COMPONENTS

Where the Contractor is required to repair, replace or substitute Product or parts or components of the Product under the Contract, the repaired, replaced or substituted Products shall be subject to all terms and conditions for new parts and components set forth in the Contract including Warranties, as set forth in the Additional Warranties Clause herein. Replaced or repaired Product or parts and components of such Product shall be new and shall, if available, be replaced by the original manufacturer's component or part. Remanufactured parts or components meeting new Product standards may be permitted by the Commissioner or Authorized User. Before installation, all proposed substitutes for the

original manufacturer's installed parts or components must be approved by the Authorized User. The part or component shall be equal to or of better quality than the original part or component being replaced.

54. ON-SITE STORAGE With the written approval of the Authorized User, materials, equipment or supplies may be stored at the Authorized User's site at the Contractor's sole risk.

55. EMPLOYEES, SUBCONTRACTORS & AGENTS All employees, Subcontractors or agents performing work under the Contract must be trained staff or technicians who meet or exceed the professional, technical and training qualifications set forth in the Bid Specifications or the Bid Documents, whichever is more restrictive, and must comply with all security and administrative requirements of the Authorized User. The Commissioner reserves the right to conduct a security background check or otherwise approve any employee, Subcontractor or agent furnished by Contractor and to refuse access to or require replacement of any personnel for cause based on, including but not limited to, professional, technical or training qualifications, quality of work or change in security status or non-compliance with Authorized User's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract terms. The Commissioner reserves the right to reject and/or bar from the facility for cause any employee, Subcontractor, or agents of the Contractor.

56. ASSIGNMENT The Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the contract or its right, title or interest therein, or its power to execute such contract to any other person, company, firm or corporation in performance of the contract without the prior written consent of the Commissioner or Authorized User (as applicable). Failure to obtain consent to assignment from the Authorized User shall revoke and annul such Contract. Notwithstanding the foregoing, the State shall not hinder, prevent or affect assignment of money by a Contractor for the benefit of its creditors. Prior to a consent to assignment of monies becoming effective, the Contractor shall file a written notice of such monies assignment(s) with the Comptroller. Prior to a consent to assignment of a Contract, or portion thereof, becoming effective, the Contractor shall submit the request to assignment to the Commissioner and seek written agreement from the Commissioner which will be filed with the Comptroller. The Commissioner reserves the right to reject any proposed assignee in his/her discretion.

Upon notice to the Contractor, the Contract may be assigned without the consent of the Contractor to another State Agency or subdivision of the State pursuant to a governmental reorganization or assignment of functions under which the functions are transferred to a successor Agency or to another Agency that assumes OGS responsibilities for the Contract.

57. SUBCONTRACTORS AND SUPPLIERS The Commissioner reserves the right to reject any proposed Subcontractor or supplier for bona fide business reasons, which may include, but are not limited to: they are on the Department of Labor's list of companies with which New York State cannot do business; the Commissioner determines that the company is not qualified; the Commissioner determines that the company is not responsible; the company has previously provided unsatisfactory work or services; the company failed to solicit minority and women's business enterprises (M/WBE) Bidders as required by prior Contracts.

58. PERFORMANCE / BID BOND The Commissioner reserves the right to require a Bidder or Contractor to furnish without additional cost, a performance, payment or Bid bond or negotiable

irrevocable letter of credit or other form of security for the faithful performance of the Contract. Where required, such bond or other security shall be in the form prescribed by the Commissioner.

59. SUSPENSION OF WORK The Commissioner, in his/her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, in the best interests of the Authorized User. In the event of such suspension, the Contractor will be given a formal written notice outlining the particulars of such suspension. Examples of the reason for such suspension include, but are not limited to, a budget freeze or reduction on State spending, declaration of emergency, contract compliance issues or other such circumstances. Upon issuance of such notice, the Contractor is not to accept any Purchase Orders, and shall comply with the suspension order. Activity may resume at such time as the Commissioner issues a formal written notice authorizing a resumption of performance under the Contract.

An Authorized User may issue a formal written notice for the suspension of work for which it has engaged the Contractor for reasons specified in the above paragraph. The written notice shall set forth the reason for such suspension and a copy of the written notice shall be provided to the Commissioner.

60. TERMINATION

a. For Cause: For a material breach that remains uncured for more than thirty (30) days or other specified period after written notice to the Contractor, the Contract or Purchase Order may be terminated by the Commissioner or Authorized User at the Contractor's expense where Contractor becomes unable or incapable of performing, or meeting any requirements or qualifications set forth in the Contract, or for non-performance, or upon a determination that Contractor is non-responsible. Such termination shall be upon written notice to the Contractor. In such event, the Commissioner or Authorized User may complete the contractual requirements in any manner it may deem advisable and pursue available legal or equitable remedies for breach.

b. For Convenience: By written notice, this Contract may be terminated at any time by the State for convenience upon sixty (60) days written notice or other specified period without penalty or other early termination charges due. Such termination of the Contract shall not affect any project or Purchase Order that has been issued under the Contract prior to the date of such termination. If the Contract is terminated pursuant to this subdivision, the Authorized User shall remain liable for all accrued but unpaid charges incurred through the date of the termination. Contractor shall use due diligence and provide any outstanding deliverables.

c. For Violation of the Sections 139-j and 139-k of the State Finance Law: The Commissioner reserves the right to terminate the Contract in the event it is found that the certification filed by the Bidder in accordance with Section 139-k of the State Finance Law was intentionally false or intentionally incomplete. Upon such finding, the Commissioner may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms of the Contract.

d. For Violation of Revised Tax Law 5a: The Commissioner reserves the right to terminate the contract in the event it is found that the certification filed by the Contractor in accordance with §5-a of the Tax Law is not timely filed during the term of the Contract or the certification furnished was intentionally false or intentionally incomplete. Upon such finding, the Commissioner may exercise its termination right by providing written notification to the Contractor.

61. SAVINGS/FORCE MAJEURE A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, strikes, fires, explosions, actions of the elements, floods, or other similar causes beyond the control of the Contractor or the Commissioner in the performance of the Contract which non-performance, by exercise of reasonable diligence, cannot be prevented. Contractor shall provide the Commissioner with written notice of any force majeure occurrence as soon as the delay is known.

Neither the Contractor nor the Commissioner shall be liable to the other for any delay in or failure of performance under the Contract due to a force majeure occurrence. Any such delay in or failure of performance shall not constitute default or give rise to any liability for damages. The existence of such causes of such delay or failure shall extend the period for performance to such extent as determined by the Contractor and the Commissioner to be necessary to enable complete performance by the Contractor if reasonable diligence is exercised after the cause of delay or failure has been removed.

Notwithstanding the above, at the discretion of the Commissioner where the delay or failure will significantly impair the value of the Contract to the State or to Authorized Users, the Commissioner may:

- a. Accept allocated performance or deliveries from the Contractor. The Contractor, however, hereby agrees to grant preferential treatment to Authorized Users with respect to Product subjected to allocation; and/or
- b. Purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the Contract quantities without penalty or liability to the State; or
- c. Terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.

In addition, the Commissioner reserves the right, in his/her sole discretion, to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (i) the volatility is due to causes outside the control of Contractor; (ii) the volatility affects the marketplace or industry, not just the particular Contract source of supply; (iii) the effect on pricing or availability of supply is substantial; and (iv) the volatility so affects Contractor's performance that continued performance of the Contract would result in a substantial loss.

62. CONTRACT BILLINGS Contractor and the distributors/resellers designated by the Contractor, if any, shall provide complete and accurate billing invoices to each Authorized User in order to receive payment. Billings for Authorized Users must contain all information required by the Contract and the State Comptroller. The State Comptroller shall render payment for Authorized User purchases, and such payment shall be made in accordance with ordinary State procedures and practices. Payment of Contract purchases made by Authorized Users, other than Agencies, shall be billed directly by Contractor on invoices/vouchers, together with complete and accurate supporting documentation as required by the Authorized User.

Submission of an invoice and payment thereof shall not preclude the Commissioner from reimbursement or demanding a price adjustment in any case where the Product delivered is found to deviate from the terms and conditions of the Contract or where the billing was inaccurate.

Contractor shall provide, upon request of the Commissioner, any and all information necessary to verify the accuracy of the billings. Such information shall be provided in the format requested by the Commissioner and in a media commercially available from the Contractor. The Commissioner may direct the Contractor to provide the information to the State Comptroller or to any Authorized User of the Contract.

63. DEFAULT – AUTHORIZED USER

a. Breach of Authorized User Not Breach of Centralized Contract. An Authorized User's breach shall not be deemed a breach of the Centralized Contract, rather it shall be deemed a breach of the Authorized User's performance under the terms and conditions of the Centralized Contract.

b. Failure to Make Payment. In the event a participating Authorized User fails to make payment to the Contractor for Products delivered, accepted and properly invoiced, within 60 days of such delivery and acceptance, the Contractor may, upon 10 days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional shipments of Product or provision of services to such entity until such time as reasonable arrangements have been made and assurances given by such entity for current and future Contract payments.

c. Notice of Breach. Notwithstanding the foregoing, the Contractor shall, at least 10 days prior to declaring a breach of Contract by any Authorized User, by certified or registered mail, notify both the Commissioner and the purchasing official of the breaching Authorized User of the specific facts, circumstances and grounds upon which a breach will be declared.

d. It is understood, however, that if the Contractor's basis for declaring a breach is insufficient, the Contractor's declaration of breach and failure to service an Authorized User shall constitute a breach of its Contract and the Authorized User may thereafter seek any remedy available at law or equity.

64. INTEREST ON LATE PAYMENTS

a. State Agencies The payment of interest on certain payments due and owed by Agency may be made in accordance with Article 11-A of the State Finance Law (SFL §179-d et. Seq.) and Title 2 of the New York Code of Rules and Regulations, Part 18 (Implementation of Prompt Payment Legislation -2 NYCRR §18.1 et seq.).

b. By Non-State Agencies The terms of Article 11-A apply only to procurements by and the consequent payment obligations of Agencies. Neither expressly nor by any implication is the statute applicable to Non-State Authorized Users. Neither OGS nor the State Comptroller is responsible for payments on any purchases made by a Non-State Agency Authorized User.

c. By Contractor Should the Contractor be liable for any payments to the State hereunder, interest, late payment charges and collection fee charges will be determined and assessed pursuant to Section 18 of the State Finance Law.

65. REMEDIES FOR BREACH It is understood and agreed that all rights and remedies afforded below shall be in addition to all remedies or actions otherwise authorized or permitted by law:

a. Cover/Substitute Performance In the event of Contractor's material breach, the Commissioner may, with or without formally Bidding: (i) Purchase from other sources; or (ii) If the Commissioner is unsuccessful after making reasonable attempts, under the circumstances then existing, to timely obtain acceptable service or acquire replacement Product of equal or comparable quality, the Commissioner may acquire acceptable replacement Product of lesser or greater quality.

Such purchases may, in the discretion of the Commissioner, be deducted from the Contract quantity and payments due Contractor.

b. Withhold Payment In any case where a question of non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Commissioner. Should the amount withheld be finally paid, a cash discount originally offered may be taken as if no delay in payment had occurred.

c. Bankruptcy In the event that the Contractor files a petition under the U.S. Bankruptcy Code during the term of this Centralized Contract, Authorized Users may, at their discretion, make application to exercise its right to set-off against monies due the Debtor or, under the Doctrine of Recoupment, credit the Authorized User the amounts owed by the Contractor arising out of the same transactions.

d. Reimbursement of Costs Incurred The Contractor agrees to reimburse the Authorized User promptly for any and all additional costs and expenses incurred for acquiring acceptable services, and/or replacement Product. Should the cost of cover be less than the Contract price, the Contractor shall have no claim to the difference. The Contractor covenants and agrees that in the event suit is successfully prosecuted for any default on the part of the Contractor, all costs and expenses expended or incurred by the Authorized User in connection therewith, including reasonable attorney's fees, shall be paid by the Contractor.

Where the Contractor fails to timely deliver pursuant to the guaranteed delivery terms of the Contract, the ordering Authorized User may rent substitute equipment temporarily. Any sums expended for such rental shall, upon demand, be reimbursed to the Authorized User promptly by the Contractor or deducted by the Authorized User from payments due or to become due the Contractor on the same or another transaction.

e. Deduction/Credit Sums due as a result of these remedies may be deducted or offset by the Authorized User from payments due, or to become due, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the Authorized User the amount of such claim or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, liquidated damages, etc., which arise from the administration of the Contract.

66. ASSIGNMENT OF CLAIM Contractor hereby assigns to the State any and all its claims for overcharges associated with this Contract which may arise under the antitrust laws of the United States, 15 USC Section 1, et. seq. and the antitrust laws of the State of New York, General Business Law Section 340, et. seq.

67. TOXIC SUBSTANCES Each Contractor furnishing a toxic substance as defined by Section 875 of the Labor Law, shall provide such Authorized User with not less than two copies of a material safety data sheet, which sheet shall include for each such substance the information outlined in Section 876 of the Labor Law.

Before any chemical product is used or applied on or in any building, a copy of the product label and Material Safety Data Sheet must be provided to and approved by the Authorized User agency representative.

68. INDEPENDENT CONTRACTOR It is understood and agreed that the legal status of the Contractor, its agents, officers and employees under this Contract is that of an independent Contractor, and in no manner shall they be deemed employees of the Authorized User, and therefore are not entitled to any of the benefits associated with such employment. The Contractor agrees, during the term of this Contract, to maintain at Contractor's expense those benefits to which its employees would otherwise be entitled by law, including health benefits, and all necessary insurance for its employees, including worker's compensation, disability and unemployment insurance, and to provide the Authorized User with certification of such insurance upon request. The Contractor remains responsible for all applicable federal, state and local taxes, and all FICA contributions.

69. SECURITY Contractor warrants, covenants and represents that it will comply fully with all security procedures of the Authorized User(s) in performance of the Contract including but not limited to physical, facility, documentary and cyber security rules, procedures and protocols.

70. COOPERATION WITH THIRD PARTIES The Contractor shall be responsible for fully cooperating with any third party, including but not limited to other Contractors or Subcontractors of the Authorized User, as necessary to ensure delivery of Product or coordination of performance of services.

71. CONTRACT TERM - RENEWAL In addition to any stated renewal periods in the Contract, any Contract or unit portion thereof let by the Commissioner may be extended by the Commissioner for an additional period(s) of up to one year with the written concurrence of the Contractor and Comptroller. Such extension may be exercised on a month to month basis or in other stated periods of time during the one year extension.

72. ADDITIONAL WARRANTIES Where Contractor, product manufacturer or service provider generally offers additional or more advantageous warranties than set forth below, Contractor shall offer or pass through any such warranties to Authorized Users. Contractor hereby warrants and represents:

a. Product Performance Contractor warrants and represents that Products delivered pursuant to this Contract conform to the manufacturer's specifications, performance standards and documentation, and the documentation fully describes the proper procedure for using the Products.

b. Title and Ownership Warranty Contractor warrants, represents and conveys (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver perpetual license rights to any Products transferred to Authorized User under this Contract. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor fully indemnifies the Authorized User for any loss, damages or actions arising from a breach of said warranty without limitation.

c. Contractor Compliance Contractor represents and warrants to pay, at its sole expense, for all applicable permits, licenses, tariffs, tolls and fees to give all notices and comply with all laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any renewals thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Bid/Contract and any applicable laws, including but not limited to, permits, insurance coverage, licensing, proof of coverage for worker's compensation, and shall provide such proof as required by the Commissioner. Failure to do so may constitute grounds for the Commissioner to cancel or suspend this Contract, in whole or in part, or to take any other action deemed necessary by the Commissioner.

d. Product Warranty Unless recycled or recovered materials are available in accordance with the "Recycled or Recovered Materials" clause, Product offered shall be standard new equipment, current model or most recent release of regular stock product with all parts regularly used with the type of equipment offered; and no attachment or part has been substituted or applied contrary to the manufacturer's recommendations and standard practice.

Contractor further warrants and represents that components or deliverables specified and furnished by or through Contractor shall individually, and where specified and furnished as a system, be substantially uninterrupted or error-free in operation and guaranteed against faulty material and workmanship for the warranty period, or for a minimum of one (1) year from the date of acceptance, whichever is longer ("Project warranty period"). During the Project warranty period, defects in the materials or workmanship of components or deliverables specified and furnished by or through Contractor shall be repaired or replaced by Contractor at no cost or expense to the Authorized User. Contractor shall extend the Project warranty period for individual component(s), or for the System as a whole, as applicable, by the cumulative period(s) of time, after notification, during which an individual component or the System requires servicing or replacement (down time) or is in the possession of the Contractor, its agents, officers, Subcontractors, distributors, resellers or employees ("extended warranty").

Where Contractor, the Independent Software Vendor "ISV," or other third party manufacturer markets any Project Deliverable delivered by or through Contractor with a standard commercial warranty, such standard warranty shall be in addition to, and not relieve the Contractor from, Contractor's warranty obligations during the project warranty and extended warranty period(s). Where such standard commercial warranty covers all or some of the Project warranty or extended warranty period(s), Contractor shall be responsible for the coordination during the Project warranty or extended warranty period(s) with ISV or other third party manufacturer(s) for warranty repair or replacement of ISV or other third party manufacturer's Product.

Where Contractor, ISV or other third party manufacturer markets any Project Deliverable with a standard commercial warranty which goes beyond the Project warranty or extended warranty period(s), Contractor shall notify the Authorized User and pass through the manufacturer's standard commercial warranty to Authorized User at no additional charge; provided, however, that Contractor shall not be responsible for coordinating services under the third party extended warranty after expiration of the Project warranty and extended warranty period(s).

e. Replacement Parts Warranty If during the regular or extended warranty period's faults develop, the Contractor shall promptly repair or, upon demand, replace the defective unit or component part affected. All costs for labor and material and transportation incurred to repair or replace defective Product during the warranty period shall be borne solely by the Contractor, and the State or Authorized User shall in no event be liable or responsible therefor.

Any part of component replaced by the Contractor under the Contract warranty shall be replaced at no cost to the Authorized User and guaranteed for the greater of: a) the warranty period under paragraph (d) above; or b) if a separate warranty for that part or component is generally offered by the manufacturer, the standard commercial warranty period offered by the manufacturer for the individual part or component.

f. Virus Warranty The Contractor represents and warrants that Licensed Software contains no known viruses. Contractor is not responsible for viruses introduced at Licensee's site.

g. Date/Time Warranty Contractor warrants that Product(s) furnished pursuant to this Contract shall, when used in accordance with the Product documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) transitions, including leap year calculations. Where a Contractor proposes or an acquisition requires that specific Products must perform as a package or system, this warranty shall apply to the Products as a system.

Where Contractor is providing ongoing services, including but not limited to: i) consulting, integration, code or data conversion, ii) maintenance or support services, iii) data entry or processing, or iv) contract administration services (e.g., billing, invoicing, claim processing), Contractor warrants that services shall be provided in an accurate and timely manner without interruption, failure or error due to the inaccuracy of Contractor's business operations in processing date/time data (including, but not limited to, calculating, comparing, and sequencing) various date/time transitions, including leap year calculations. Contractor shall be responsible for damages resulting from any delays, errors or untimely performance resulting therefrom, including but not limited to the failure or untimely performance of such services.

This Date/Time Warranty shall survive beyond termination or expiration of this contract through: a) ninety (90) days or b) the Contractor's or Product manufacturer/developer's stated date/time warranty term, whichever is longer. Nothing in this warranty statement shall be construed to limit any rights or remedies otherwise available under this Contract for breach of warranty.

h. Workmanship Warranty Contract warrants that all components or deliverables specified and furnished by or through Contractor under the Project Definition/Work Order meet the completion criteria set forth in the Project Definition/Work Order and any subsequent statement(s) of work, and that services will be provided in a workmanlike manner in accordance with industry standards.

i. Survival of Warranties All warranties contained in this Contract shall survive the termination of this Contract.

73. LEGAL COMPLIANCE Contractor represents and warrants that it shall secure all notices and comply with all laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any renewals thereof, Contractor must

establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Bid and Contract and any applicable laws, including but not limited to, permits, licensing, and shall provide such proof as required by the Commissioner. Failure to comply or failure to provide proof may constitute grounds for the Commissioner to cancel or suspend the Contract, in whole or in part, or to take any other action deemed necessary by the Commissioner. Contractor also agrees to disclose information and provide affirmations and certifications to comply with Sections 139-j and 139-k of the State Finance Law.

74. INDEMNIFICATION Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully indemnify and save harmless the Authorized Users from suits, actions, damages and costs of every name and description relating to personal injury and damage to real or personal tangible property caused by any intentional act or negligence of Contractor, its agents, employees, partners or Subcontractors, without limitation; provided, however, that the Contractor shall not indemnify for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the Authorized Users.

75. INDEMNIFICATION RELATING TO THIRD PARTY RIGHTS The Contractor will also indemnify and hold the Authorized Users harmless from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs that may be finally assessed against the Authorized Users in any action for infringement of a United States Letter Patent, or of any copyright, trademark, trade secret or other third party proprietary right except to the extent such claims arise from the Authorized Users gross negligence or willful misconduct, provided that the State shall give Contractor: (i) prompt written notice of any action, claim or threat of infringement suit, or other suit, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action at the expense of Contractor.

If usage shall be enjoined for any reason or if Contractor believes that it may be enjoined, Contractor shall have the right, at its own expense and sole discretion to take action in the following order of precedence: (i) to procure for the Authorized User the right to continue Usage (ii) to modify the service or Product so that Usage becomes non-infringing, and is of at least equal quality and performance; or (iii) to replace said service or Product or part(s) thereof, as applicable, with non-infringing service or Product of at least equal quality and performance. If the above remedies are not available, the parties shall terminate the Contract, in whole or in part as necessary and applicable, provided the Authorized User is given a refund for any amounts paid for the period during which Usage was not feasible.

The foregoing provisions as to protection from third party rights shall not apply to any infringement occasioned by modification by the Authorized User of any Product without Contractor's approval.

In the event that an action at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the service or Product under the Contract infringes any patent, copyright or proprietary right, and Contractor is of the opinion that the allegations in such action in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract. Contractor shall in

such event protect the interests of the Authorized User and secure a continuance to permit the Authorized User to appear and defend its interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the Authorized User may have. This constitutes the Authorized User's sole and exclusive remedy for patent infringement, or for infringement of any other third party proprietary right.

76. LIMITATION OF LIABILITY Except as otherwise set forth in the Indemnification Paragraphs above, the limit of liability shall be as follows:

a. Contractor's liability for any claim, loss or liability arising out of, or connected with the Products and services provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the Purchase Order for the Products and services, or parts thereof forming the basis of the Authorized User's claim, (said amount not to exceed a total of twelve (12) months charges payable under the applicable Purchase Order) or (ii) one million dollars (\$1,000,000), whichever is greater.

b. The Authorized User may retain such monies from any amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted against the Authorized User unless Contractor at the time of the presentation of claim shall demonstrate to the Authorized User's satisfaction that sufficient monies are set aside by the Contractor in the form of a bond or through insurance coverage to cover associated damages and other costs.

c. Notwithstanding the above, neither the Contractor nor the Authorized User shall be liable for any consequential, indirect or special damages of any kind which may result directly or indirectly from such performance, including, without limitation, damages resulting from loss of use or loss of profit by the Authorized User, the Contractor, or by others.

77. INSURANCE Contractor shall secure and maintain insurance coverage as specified in the Bid Documents and shall promptly provide documentation of specified coverages to the Authorized User. If specified, the Contractor may be required to add the Authorized User as an additional insured.

**THE FOLLOWING CLAUSES PERTAIN TO
TECHNOLOGY & NEGOTIATED CONTRACTS**

78. SOFTWARE LICENSE GRANT Where Product is acquired on a licensed basis the following shall constitute the license grant:

a. License Scope Licensee is granted a non-exclusive, perpetual license to use, execute, reproduce, display, perform, or merge the Product within its business enterprise in the United States up to the maximum licensed capacity stated on the Purchase Order. Product may be accessed, used, executed, reproduced, displayed or performed up to the capacity measured by the applicable licensing unit stated on the Purchase Order (i.e., payroll size, number of employees, CPU, MIPS, MSU, concurrent user, workstation). Licensee shall have the right to use and distribute modifications or customizations of the Product to and for use by any Authorized Users otherwise licensed to use the Product, provided that any modifications, however extensive, shall not diminish Licensor's proprietary title or interest. No license, right or interest in any trademark, trade name, or service mark is granted hereunder.

b. License Term The license term shall commence upon the License Effective Date, provided, however, that where an acceptance or trial period applies to the Product, the License Term shall be extended by the time period for testing, acceptance or trial.

c. Licensed Documentation If commercially available, Licensee shall have the option to require the Contractor to deliver, at Contractor's expense: (i) one (1) hard copy and one (1) master electronic copy of the Documentation in a mutually agreeable format; (ii) based on hard copy instructions for access by downloading from the Internet (iii) hard copies of the Product Documentation by type of license in the following amounts, unless otherwise mutually agreed:

- Individual/Named User License - one (1) copy per License
- Concurrent Users - 10 copies per site
- Processing Capacity - 10 copies per site

Software media must be in a format specified by the Authorized User, without requiring any type of conversion.

Contractor hereby grants to Licensee a perpetual license right to make, reproduce (including downloading electronic copies of the Product) and distribute, either electronically or otherwise, copies of Product Documentation as necessary to enjoy full use of the Product in accordance with the terms of license.

d. Product Technical Support & Maintenance Licensee shall have the option of electing the Product technical support and maintenance ("maintenance") set forth in the Contract by giving written notice to Contractor any time during the Centralized Contract term. Maintenance term(s) and any renewal(s) thereof are independent of the expiration of the Centralized Contract term and will not automatically renew.

Maintenance shall include, at a minimum, (i) the provision of error corrections, updates, revisions, fixes, upgrade and new releases to Licensee, and (ii) Help Desk assistance with locally accessible "800" or toll free, local telephone service, or alternatively on-line Help Desk accessibility. Contractor shall maintain the Products so as to provide Licensee with the ability to utilize the Products in accordance with the Product documentation without significant functional downtime to its ongoing business operations during the maintenance term.

Authorized User shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon notice to Contractor. In the event that Authorized User does not initially acquire or discontinues maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product without any additional penalties or other charges, by paying Contractor the amount which would have been due under the Contract for the period of time that such maintenance had lapsed, at then current NYS net maintenance rates.

e. Permitted License Transfers As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated site not originally specified in the license, including transfers between Agencies ("permitted license transfers"). Licensee(s) do not have to obtain the approval of Contractor for permitted license transfers, but must give thirty (30) days prior written notice to Contractor of such move(s) and certify in writing that the Product is not in use at the prior site. There shall be no additional license or other transfer fees due Contractor, provided that: i) the

maximum capacity of the consolidated machine is equal to the combined individual license capacity of all licenses running at the consolidated or transferred site (e.g., named users, seats, or MIPS); or ii) if the maximum capacity of the consolidated machine is greater than the individual license capacity being transferred, a logical or physical partition or other means of restricting access will be maintained within the computer system so as to restrict use and access to the Product to that unit of licensed capacity solely dedicated to beneficial use for Licensee. In the event that the maximum capacity of the consolidated machine is greater than the combined individual license capacity of all licenses running at the consolidated or transferred site, and a logical or physical partition or other means of restricting use is not available, the fees due Contractor shall not exceed the fees otherwise payable for a single license for the upgrade capacity.

f. Restricted Use By Outsourcers / Facilities Management, Service Bureaus / or Other Third Parties Outsourcers, facilities management or service bureaus retained by Licensee shall have the right to use the Product to maintain Licensee's business operations, including data processing, for the time period that they are engaged in such activities, provided that: 1) Licensee gives notice to Contractor of such party, site of intended use of the Product, and means of access; and 2) such party has executed, or agrees to execute, the Product manufacturer's standard nondisclosure or restricted use agreement which executed agreement shall be accepted by the Contractor ("Non-Disclosure Agreement"); and 3) if such party is engaged in the business of facility management, outsourcing, service bureau or other services, such third party will maintain a logical or physical partition within its computer system so as to restrict use and access to the program to that portion solely dedicated to beneficial use for Licensee. In no event shall Licensee assume any liability for third party's compliance with the terms of the Non-Disclosure Agreement, nor shall the Non-Disclosure Agreement create or impose any liabilities on the State or Licensee.

Any third party with whom a Licensee has a relationship for a state function or business operation, shall have the temporary right to use Product (e.g., JAVA Applets), provided that such use shall be limited to the time period during which the third party is using the Product for the function or business activity.

g. Archival Back-Up and Disaster Recovery Licensee may use and copy the Product and related Documentation in connection with: i) reproducing a reasonable number of copies of the Product for archival backup and disaster recovery procedures in the event of destruction or corruption of the Product or disasters or emergencies which require Licensee to restore backup(s) or to initiate disaster recovery procedures for its platform or operating systems; ii) reproducing a reasonable number of copies of the Product and related Documentation for cold site storage. "Cold Site" storage shall be defined as a restorable back-up copy of the Product not to be installed until and after the declaration by the Licensee of a disaster; iii) reproducing a back-up copy of the Product to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed herein. "Disaster Recovery" shall be defined as the installation and storage of Product in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development.

h. Confidentiality Restrictions The Product is a trade secret, copyrighted and proprietary product. Licensee and its employees will keep the Product strictly confidential, and Licensee will not disclose or otherwise distribute or reproduce any Product to anyone other than as

authorized under the terms of Contract. Licensee will not remove or destroy any proprietary markings of Contractor.

i. Restricted Use by Licensee Except as expressly authorized by the terms of license, Licensee shall not:

- (i) Copy the Product;
- (ii) Cause or permit reverse compilation or reverse assembly of all or any portion of the Product;
- (iii) Export the Licensed Software in violation of any U.S. Department of Commerce export administration regulations.

79. PRODUCT ACCEPTANCE Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User(s) shall have thirty (30) days from the date of delivery to accept hardware products and sixty (60) days from the date of delivery to accept all other Product. Where the Contractor is responsible for installation, acceptance shall be from completion of installation. Failure to provide notice of acceptance or rejection or a deficiency statement to the Contractor by the end of the period provided for under this clause constitutes acceptance by the Authorized User(s) as of the expiration of that period. The License Term shall be extended by the time periods allowed for trial use, testing and acceptance unless the Commissioner or Authorized User agrees to accept the Product at completion of trial use.

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User shall have the option to run testing on the Product prior to acceptance, such tests and data sets to be specified by User. Where using its own data or tests, Authorized User must have the tests or representative set of data available upon delivery. This demonstration will take the form of a documented installation test, capable of observation by the Authorized User, and shall be made part of the Contractor's standard documentation. The test data shall remain accessible to the Authorized User after completion of the test.

In the event that the documented installation test cannot be completed successfully within the specified acceptance period, and the Contractor or Product is responsible for the delay, Authorized User shall have the option to cancel the order in whole or in part, or to extend the testing period for an additional thirty (30) day increment. Authorized User shall notify Contractor of acceptance upon successful completion of the documented installation test. Such cancellation shall not give rise to any cause of action against the Authorized User for damages, loss of profits, expenses, or other remuneration of any kind.

If the Authorized User elects to provide a deficiency statement specifying how the Product fails to meet the specifications within the testing period, Contractor shall have thirty (30) days to correct the deficiency, and the Authorized User shall have an additional sixty (60) days to evaluate the Product as provided herein. If the Product does not meet the specifications at the end of the extended testing period, Authorized User, upon prior written notice to Contractor, may then reject the Product and return all defective Product to Contractor, and Contractor shall refund any monies paid by the Authorized User to Contractor therefor. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to the amounts set forth in the Limitation of Liability Clause for any liability for costs incurred at the direction or recommendation of Contractor.

80. AUDIT OF LICENSED PRODUCT USAGE Contractor shall have the right to periodically audit, no more than annually, at Contractor's expense, use of licensed Product at any site where a copy of the Product resides provided that: (i) Contractor gives Licensee(s) at least thirty (30) days advance written notice, (ii) such audit is conducted during such party's normal business hours, (iii) the audit is conducted by an independent auditor chosen on mutual agreement of the parties. Contractor shall recommend a minimum of three (3) auditing/accounting firms from which the Licensee will select one (1). In no case shall the Business Software Alliance (BSA), Software Publishers Association (SPA), Software and Industry Information Association (SIIA) or Federation Against Software Theft (FAST) be used directly or indirectly to conduct audits, or be recommended by Contractor; (iv) Contractor and Licensee are each entitled to designate a representative who shall be entitled to participate, and who shall mutually agree on audit format, and simultaneously review all information obtained by the audit. Such representatives also shall be entitled to copies of all reports, data or information obtained from the audit; and (v) if the audit shows that such party is not in compliance, Licensee shall be required to purchase additional licenses or capacities necessary to bring it into compliance and shall pay for the unlicensed capacity at the NYS Net Price in effect at time of audit, or if none, then at the Contractor's U.S. Commercial list price. Once such additional licenses or capacities are purchased, Licensee shall be deemed to have been in compliance retroactively, and Licensee shall have no further liability of any kind for the unauthorized use of the software.

81. OWNERSHIP/TITLE TO PROJECT DELIVERABLES

a. Definitions

(i) For purposes of this paragraph, "Products." A deliverable furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), whether printed in hard copy or maintained on diskette, CD, DVD or other electronic media c) third party software, d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components, and e) any properties embodied therein, whether in tangible or intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, source code, object code).

(ii) For purposes of this paragraph, "Existing Products." Tangible Products and intangible licensed Products that exist prior to the commencement of work under the Contract. Contractor bears the burden of proving that a particular product was in existence prior to the commencement of the Project.

(iii) For purposes of this paragraph, "Custom Products." Products, preliminary, final or otherwise, which are created or developed by Contractor, its Subcontractors, partners, employees or agents for Authorized User under the Contract.

b. Title to Project Deliverables Contractor acknowledges that it is commissioned by the Authorized User to perform the services detailed in the Purchase Order. Unless otherwise specified in writing in the Bid or Purchase Order, the Authorized User shall have ownership and license rights as follows:

(i) Existing Products:

1. Hardware - Title and ownership of Existing Hardware Product shall pass to Authorized User upon Acceptance.

2. Software - Title and ownership to Existing Software Product(s) delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other independent software vendor proprietary owner ("Existing Licensed Product"), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with Contractor or the proprietary owner of other independent software vendor(s) (ISV). Effective upon acceptance, such Product shall be licensed to Authorized User in accordance with the Contractor or ISV owner's standard license agreement, provided, however, that such standard license, must, at a minimum: (a) grant Authorized User a non-exclusive, perpetual license to use, execute, reproduce, display, perform, adapt (unless Contractor advises Authorized User as part of Contractor's proposal that adaptation will violate existing agreements or statutes and Contractor demonstrates such to the Authorized User's satisfaction) and distribute Existing Licensed Product to the Authorized User up to the license capacity stated in the Purchase Order or work order with all license rights necessary to fully effect the general business purpose(s) stated in the Bid or Authorized User's Purchase Order or work order, including the financing assignment rights set forth in paragraph (c) below; and (b) recognize the State of New York as the licensee where the Authorized User is a state agency, department, board, commission, office or institution. Where these rights are not otherwise covered by the ISV's owner's standard license agreement, the Contractor shall be responsible for obtaining these rights at its sole cost and expense. The Authorized User shall reproduce all copyright notices and any other legend of ownership on any copies authorized under this paragraph.

(ii) **Custom Products:** Effective upon creation of Custom Products, Contractor hereby conveys, assigns and transfers to Authorized User the sole and exclusive rights, title and interest in Custom Product(s), whether preliminary, final or otherwise, including all trademark and copyrights. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction and marketing by or through Contractor, its agents, employees, or Subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under a Purchase Order, project definition or work order in the course of Contractor's business. Authorized User may, by providing written notice thereof to the Contractor, elect in the alternative to take a non-exclusive perpetual license to Custom Products in lieu of Authorized User taking exclusive ownership and title to such Products. In such case, Licensee on behalf of all Authorized Users shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purpose(s) as stated in paragraph (b)(i)(2), above.

c. Transfers or Assignments to a Third Party Financing Agent It is understood and agreed by the parties that a condition precedent to the consummation of the purchase (s) under the Contract may be the obtaining of acceptable third party financing by the Authorized User. The Authorized User shall make the sole determination of the acceptability of any financing proposal. The Authorized User will make all reasonable efforts to obtain such financing, but makes no representation that such financing has been obtained as of the date of Bid receipt. Where financing is used, Authorized User may assign or transfer its rights in Licensed Products (existing or custom) to a third party financing entity or trustee ("Trustee") as collateral where required by the terms of the financing agreement. Trustee's sole rights with respect to transferability or use of Licensed Products shall be to exclusively sublicense to Authorized User all of its Licensee's rights

under the terms and conditions of the License Agreement; provided, further, however, in the event of any termination or expiration of such sublicense by reason of payment in full, all of Trustee's rights in such Licensed Product shall terminate immediately and Authorized User's prior rights to such Existing Licensed Product shall be revived.

d. Sale or License of Custom Products Involving Tax-Exempt Financing (i.e., Certificates of Participation - COPS) The Authorized User's sale or other transfer of Custom Products which were acquired by the Authorized User using third party, tax-exempt financing may not occur until such Custom Products are, or become, useable. In the event that the Contractor wishes to obtain ownership rights to Custom Product(s), the sale or other transfer shall be at fair market value determined at the time of such sale or other transfer, and must be pursuant to a separate written agreement in a form acceptable to the Authorized User which complies with the terms of this paragraph.

e. Contractor's Obligation with Regard to ISV (Third Party) Product Where Contractor furnishes Existing Licensed Product(s) as a Project Deliverable, and sufficient rights necessary to effect the purposes of this section are not otherwise provided in the Contractor or ISV's standard license agreement, Contractor shall be responsible for obtaining from the ISV third party proprietary owner/developer the rights set forth herein to the benefit of the Authorized User at Contractor's sole cost and expense.

82. PROOF OF LICENSE The Contractor must provide to each Licensee who places a Purchase Order either: (i) the Product developer's certified License Confirmation Certificates in the name of such Licensee; or (ii) a written confirmation from the Proprietary owner accepting Product invoice as proof of license. Contractor shall submit a sample certificate, or alternatively such written confirmation from the proprietary developer. Such certificates must be in a form acceptable to the Licensee.

83. PRODUCT VERSION Purchase Orders shall be deemed to reference Manufacturer's most recently released model or version of the Product at time of order, unless an earlier model or version is specifically requested in writing by Authorized User and Contractor is willing to provide such version.

84. CHANGES TO PRODUCT OR SERVICE OFFERINGS

a. Product or Service Discontinuance Where Contractor is the Product Manufacturer/Developer, and Contractor publicly announces to all U.S. customers ("date of notice") that a Product is being withdrawn from the U.S. market or that maintenance service or technical support provided by Contractor ("withdrawn support") is no longer going to be offered, Contractor shall be required to: (i) notify the Commissioner, each Licensee and each Authorized User then under contract for maintenance or technical support in writing of the intended discontinuance; and (ii) continue to offer Product or withdrawn support upon the Contract terms previously offered for the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice; and (iii) at Authorized User's option, provided that the Authorized User is under contract for maintenance on the date of notice, either: provide the Authorized User with a Product replacement or migration path with at least equivalent functionality at no additional charge to enable Authorized User to continue use and maintenance of the Product.

In the event that the Contractor is not the Product Manufacturer, Contractor shall be required to: (i) provide the notice required under the paragraph above, to the entities described within five (5) business

days of Contractor receiving notice from the Product Manufacturer, and (ii) include in such notice the period of time from the date of notice that the Product Manufacturer will continue to provide Product or withdraw support.

The provisions of this subdivision (a) shall not apply or eliminate Contractor's obligations where withdrawn support is being provided by an independent Subcontractor. In the event that such Subcontractor ceases to provide service, Contractor shall be responsible for subcontracting such service, subject to state approval, to an alternate Subcontractor.

b. Product or Service Re-Bundling In the event that Contractor is the Product manufacturer and publicly announces to all U.S. customers ("date of notice") that a Product or maintenance or technical support offering is being re-bundled in a different manner from the structure or licensing model of the prior U.S. commercial offering, Contractor shall be required to: (i) notify the State and each Authorized User in writing of the intended change; (ii) continue to provide Product or withdrawn support upon the same terms and conditions as previously offered on the then-current NYS Contract for the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice; and (iii) shall submit the proposed rebundling change to the Commissioner for approval prior to its becoming effective for the remainder of the Contract term. The provisions of this section do not apply if the Contractor is not the Product manufacturer.

85. NO HARDSTOP/PASSIVE LICENSE MONITORING

Unless an Authorized User is otherwise specifically advised to the contrary in writing at the time of order and prior to purchase, Contractor hereby warrants and represents that the Product and all Upgrades do not and will not contain any computer code that would disable the Product or Upgrades or impair in any way its operation based on the elapsing of a period of time, exceeding an authorized number of copies, advancement to a particular date or other numeral, or other similar self-destruct mechanisms (sometimes referred to as "time bombs," "time locks," or "drop dead" devices) or that would permit Contractor to access the Product to cause such disablement or impairment (sometimes referred to as a "trap door" device). Contractor agrees that in the event of a breach or alleged breach of this provision that Authorized User shall not have an adequate remedy at law, including monetary damages, and that Authorized User shall consequently be entitled to seek a temporary restraining order, injunction, or other form of equitable relief against the continuance of such breach, in addition to any and all remedies to which Authorized User shall be entitled.

86. SOURCE CODE ESCROW FOR LICENSED PRODUCT

If Source Code or Source Code escrow is offered by either Contractor or Product manufacturer or developer to any other commercial customers, Contractor shall either: (i) provide Licensee with the Source Code for the Product; or (ii) place the Source Code in a third party escrow arrangement with a designated escrow agent who shall be named and identified to the State, and who shall be directed to release the deposited Source Code in accordance with a standard escrow agreement acceptable to the State; or (iii) will certify to the State that the Product manufacturer/developer has named the State, acting by and through the Authorized User, and the Licensee, as a named beneficiary of an established escrow arrangement with its designated escrow agent who shall be named and identified to the State and Licensee, and who shall be directed to release the deposited Source Code in accordance with the terms of escrow. Source Code, as well as any corrections or enhancements to such source code, shall be updated

for each new release of the Product in the same manner as provided above and such updating of escrow shall be certified to the State in writing. Contractor shall identify the escrow agent upon commencement of the Contract term and shall certify annually that the escrow remains in effect in compliance with the terms of this paragraph.

The State may release the Source Code to Licensees under this Contract who have licensed Product or obtained services, who may use such copy of the Source Code to maintain the Product.

FOR NEGOTIATED CONTRACTS THE FOLLOWING CLAUSES ARE RESERVED BECAUSE BIDDING DOES NOT APPLY:

Clauses: 7, 8, 9, 10, 11, 12, 13, 16, 15, 21, 25, 26, 28, 29, 30, 31, 32, 33, 36, 49, 50, 52, 54 and 37

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APPENDIX C

**Contractor's Executive Law, Article 15-A
(M/WBE) Requirements**

CONTRACTOR'S REQUIREMENT UNDER ARTICLE 15-A

In July of 1988, Article 15-A of the Executive Law was passed by the New York State Legislature. This legislation provides specific rules, regulations and procedures for minority and women-owned enterprise participation in certain State Contracts.

The Office of General Services (OGS) is required to implement the provisions of Article 15-A for all of its Contracts (1) in excess of \$25,000 for labor, services, supplies, equipment, materials, or any combination of the foregoing and (2) for Contracts in excess of \$100,000 for real property renovation and construction. For purposes of this Contract, OGS hereby establishes a goal of 0% for minority business enterprises (MBE) participation and 0% for women-owned business enterprises (WBE) participation.

In order to be awarded an OGS Contract, every bidder must comply with the requirements, rules and regulations outlined in Article 15-A.

POLICY AND PROVISIONS

It is the policy of the State of New York to promote equality of economic opportunity for minority and women-owned business enterprises (M/WBEs) in State Contracting. In order to comply with the State's objectives, the Contractors shall use "good faith efforts" to provide meaningful participation by M/WBE Subcontractors or suppliers in the performance of this Contract.

For the purpose of determining a Contractor's good faith effort to comply with the requirements of Article 15-A or to be entitled to a waiver therefrom, the Contracting agency shall consider:

- (a) Whether the Contractor has advertised in general circulation media, trade association publications, minority-focus and women-focus media. In such event,
 - (i) whether or not certified minority or women-owned businesses which have been solicited by the Contractor exhibited interest in submitting proposals for a particular project by attending a pre-bid conference; and
 - (ii) whether certified businesses which have been solicited by the Contractor have responded in a timely fashion to the Contractor's solicitations for timely competitive bid quotations prior to the Contracting agency's bid date; and
- (b) Whether there has been written notification to appropriate certified businesses that appear in the Directory of Certified M/WBE prepared pursuant to paragraph (f) of subdivision three of section three hundred eleven of this article; and
- (c) Whether the Contractor can reasonably structure the amount of work to be performed under subcontracts in order to increase the likelihood of participation by certified businesses.

- A. **GOALS** - The MBE and WBE participation goals as stated earlier are based on the availability of M/WBEs currently certified by New York State and geographically located to be able to perform the work in the region where the project is located. The total dollar value of the Contract, scope of work, the supplies and equipment necessary to perform the project, are also considerations used to determine the percentage goals.
- B. **UTILIZATION** - The Contractor may count as M/WBE participation: subcontracting part of the Contract to certified firms or purchasing supplies and equipment used to perform the terms and conditions of the Contract from certified firms.

Upon a showing by the Contractor of every good faith effort to achieve the goal for M/WBE participation in the work, the State will waive a Contractor's failure to achieve the goal M/WBE participation.

- C. **MINORITY AND WOMEN-OWNED BUSINESS OFFICER** - The Contractor shall designate an Affirmative Action officer and assign the officer the responsibility and authority to monitor the M/WBE program for this Contract. The OGS' Office of Minority and Women-owned Business Enterprises' staff is available to help in identifying certified M/WBEs.
- D. **REQUIRED REPORTS** - The Contractor is required to submit a Utilization Plan (BDC-328) to the NYS Office of General Services within five (5) days after the opening of bids for construction Contracts exceeding \$100,000 and 14 days after notification of award for commodity and service Contracts exceeding \$25,000. The Contractor must also submit the MBE/WBE Letter of Intent to Participate (BDC-49). The Letter MBE/WBE of Intent to Participate is a commitment by the Contractor and the subcontractor/supplier that the terms and conditions for M/WBE participation on this Contract are agreed to. Any modifications or changes to the agreed participation by certified M/WBEs, over the term of the Contract, must be reported on a revised Utilization Plan.
- E. **NONDISCRIMINATION** - The Contractor agrees not to discriminate on the basis of race, creed, color, national origin, gender, age, disability, or marital status, in any respect, against any potential subcontractor, supplier, other company, firm, or enterprise in any manner relating to the performance of this Contract.

POST AWARD

The Contractor must submit to the Office of Minority and Women-owned Business Enterprises after notification of award, the following forms, by the 10th day of each month:

1. (BDC-58) Cumulative Monthly Payment Statements
2. (BDC-25) Monthly Affirmation of Income Payments

All questions regarding compliance to Article 15-A requirements or copies of the forms should be addressed to:

New York State Office of General Services
Office of Minority and Women-owned Business Enterprises
35th Floor, Room 3580
Corning Tower Building
Empire State Plaza
Albany, NY 12242

The telephone numbers and addresses for New York State Department of Economic Development are as follows:

New York State Department of Economic Development
633 Third Avenue
New York, NY 10017

Telephone: (212) 803-2414

New York State Department of Economic Development
Division of Minority and Women's Business Development
30 South Pearl Street
Albany, New York 12245
Telephone: (518) 292-5250

APPENDIX D

CONTRACT UPDATE FORM



STATE OF NEW YORK
 EXECUTIVE DEPARTMENT - OFFICE OF GENERAL SERVICES
 PROCUREMENT SERVICES GROUP
 Corning Tower – 37th Floor
 Empire State Plaza
 Albany, New York 12242

CONTRACT UPDATE FORM	
OGS CONTRACT NO.: _____	DATE OF SUBMISSION: _____
CONTRACT PERIOD: From: _____ To: _____	VENDOR CONTACT: NAME: _____ PHONE NO: _____ FAX NO.: _____ E-MAIL: _____
GROUP NO. & DESCRIPTION: _____ _____	
NOTE: Submission of this FORM does not constitute acceptance by the State of New York until approved by the appropriate New York State representative(s).	

INSTRUCTIONS:

1. This form is to be used for all contract updates. The form is to be completed **in triplicate** and submitted to the OGS Procurement Services Group for final approval. Vendors shall complete, sign, and notarize where indicated, and attach this form to a cover letter written on standard company letterhead. Any submission that is not complete or signed **in triplicate** will be rejected.
2. *Contractor may be required to submit the Product and price information for the update in an Excel spreadsheet format in hard copy and on a floppy disk and/or electronically via e-mail to the OGS Purchasing Officer.*
3. *To expedite the processing of updates that qualify as Auto Adds, do not combine Auto Adds with Regular or Special Adds. **If more than one type of update is being submitted, they should be submitted as totally separate requests.***
4. *The list must be dated and the format should be consistent with the format of the price list(s) included in the Pricing Appendix of the Contract.*
5. *The contract update must be accompanied by either the GSA Price List and revised NYS Net Price List incorporating all changes or the US Commercial Price List and revised NYS Net Price List incorporating all changes, whichever is applicable.*

COMPLETE STATEMENTS 1 THROUGH 8 BELOW:

1. This request is an: <input type="checkbox"/> Auto Add <input type="checkbox"/> Regular Add <input type="checkbox"/> Special Add See contract for an explanation of these terms.	2. The intent of this submittal is to: <input type="checkbox"/> Add new products <input type="checkbox"/> Delete products <input type="checkbox"/> Increase pricing <input type="checkbox"/> Reduce pricing <input type="checkbox"/> Amend VAR list
--	--

<p>3. All terms and conditions of the contract shall apply to this request. <input type="checkbox"/> Agree <input type="checkbox"/> Disagree</p>	<p>4. All discounts as agreed to in the contract shall apply. <input type="checkbox"/> Agree <input type="checkbox"/> Disagree</p>
<p>5. All discounts are: <input type="checkbox"/> GSA <input type="checkbox"/> Most Favored Nation* *Prices offered are the lowest offered to any similarly situated entity.</p>	<p>6. Attached documentation includes: <input type="checkbox"/> Current approved GSA (labeled "For information only") <input type="checkbox"/> Current commercial price list (labeled "For information only") <input type="checkbox"/> Revised NYS Net Price List</p>
<p>7. If other than an auto-ad, describe the Nature and Purpose of the update: _____</p>	
<p>8. For a regular add, please explain how pricing has been restructured to customers, and/or identify and describe new Products or services, which fall into a new group or category that did not exist at the time of approval of the Contract by the New York State Comptroller. If not applicable, state NA: _____</p>	

The following CORPORATE ACKNOWLEDGEMENT statement is to be included in each of the three original forms. The request must be signed by an individual given the authority to perform this action by the corporation's board of directors and the signature must be notarized.

Signature of Authorized Vendor Representative:

<u>CORPORATE ACKNOWLEDGMENT</u>	
STATE OF	}
	:
	ss.:
COUNTY OF	}
<p>On the ____ day of _____ in the year 20__, before me personally came: _____, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in _____; that he/she/they is (are) _____ (the President or other officer or director or attorney in fact duly appointed) of _____, the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by authority of the board of directors of said corporation.</p>	
<p>_____ Notary Public</p>	

FOR STATE USE ONLY

OGS APPROVAL:

Approved _____ *Approved as amended* _____
Disapproved _____

Name: _____

Title: _____

Date _____

OSC APPROVAL:

Approved _____ *Disapproved* _____

Name: _____

Title: _____

Date _____

APPENDIX E

CONTRACTOR'S REQUIRED SUBMISSIONS

SUBMISSION #1
MANDATORY CONTRACTOR QUESTIONNAIRE
 [CONTRACTOR MUST ANSWER ALL QUESTIONS]
 Page 1 of 3

1. Are you a New York State resident business?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
2. Total number of people employed by your firm:	355,766	
3. Total number of people employed by your firm in New York State:	NOT AVAILABLE	
4. Is your company independently owned and operated?	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
5. Place of manufacture or development of Product(s) offered (Please indicate "Yes" or "No" for A, B or C):		
A. All NYS manufacture/development?	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
OR		
B. All manufactured/developed outside NYS?	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
OR		
C. Manufactured/developed in NYS and outside NYS?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
6. Is your firm at least 51% owned and controlled by women, or 51% owned and controlled by minority group members, i.e., Black Hispanic, Asian, Pacific Islander, American Indian, Alaskan Native? If yes, <input type="checkbox"/> Minority Owned <input type="checkbox"/> Women Owned If yes, have you been certified or registered? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, List certification or registration authority: _____ _____	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
7. Do any of the Products offered herein incorporate recycled materials?	Yes <input type="checkbox"/>	No <input type="checkbox"/> N/A <input checked="" type="checkbox"/>
8. Do any of the Products offered herein contain remanufactured components?	Yes <input type="checkbox"/>	No <input type="checkbox"/> N/A <input checked="" type="checkbox"/>
9. Are any of the Products offered herein Energy Star Compliant? If yes, which Products? _____ _____	Yes <input type="checkbox"/>	No <input type="checkbox"/> N/A <input checked="" type="checkbox"/>
10. BIDDER/OFFERER DISCLOSURE OF PRIOR NON-RESPONSIBILITY DETERMINATIONS Pursuant to Procurement Lobbying Law (SFL §139-j)		
A. Has any Governmental Entity made a finding of non-responsibility regarding the individual or entity seeking to enter into the Procurement Contract in the previous four years?		No
If yes, please answer the following:		
B. Was the basis for the finding of non-responsibility due to a violation of State Finance Law §139-j?		
C. If yes, was the basis for the finding of non-responsibility due to the intentional provision of false or incomplete information to a governmental entity?		

If yes, please provide details regarding the finding of non-responsibility:	
Governmental Entity:	_____
Date of Finding of Non-responsibility:	_____
Basis of Finding of Non-Responsibility: (add additional pages if necessary)	_____
D. Has any governmental agency terminated or withheld a procurement contract with the above-named individual or entity due to the intentional provision of false or incomplete information?	Yes _____ No x _____
If yes, please provide details:	
Governmental Entity:	_____
Date of Termination or Withholding of Contract:	_____
Basis of Termination or Withholding: (add additional pages if necessary)	_____
Signature:	_____
Printed Name:	_____
Date:	_____
<p>11. "NONDISCRIMINATION IN EMPLOYMENT IN NORTHERN IRELAND: MacBRIDE FAIR EMPLOYMENT PRINCIPLES"</p> <p>In accordance with Section 165 of the State Finance Law, the Developer, by submission of this contract, certifies that it or any individual or legal entity in which the Developer holds a 10% or greater ownership interest, or any individual or legal entity that holds a 10% or greater ownership interest in the Developer, either:</p> <p>(answer Yes or No to one or both of the following, as applicable),</p> <p>A. have business operations in Northern Ireland:</p> <p>If yes,</p> <p>B. shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles relating to non-discrimination in employment and freedom of workplace opportunity regarding such operations in Northern Ireland, and shall permit independent monitoring of compliance with such Principles.</p>	<p>a. Yes x _____ No _____</p> <p>b. Yes x _____ No _____</p>

<p>12. Are prices quoted the same as or lower than those quoted other corporations, institutions and government agencies (including GSA/VA contracts) on similar products, quantities, terms and conditions? See "Best Pricing Offer" in Appendix B, OGS General Specifications. If "NO", please explain on a separate sheet.</p>	<p>Yes <input checked="" type="checkbox"/> _____</p>	<p>No _____</p>
<p>A. Do you have a contract with the General Services Administration (GSA) or Veterans Affairs (VA) for products offered? (Check all that apply.)</p>	<p>Yes <input checked="" type="checkbox"/> _____ GSA <input checked="" type="checkbox"/> _____ VA _____</p>	<p>No _____</p>
<p>B. If yes, will you offer New York State your GSA or VA pricing or better?</p>	<p>Yes <input checked="" type="checkbox"/> _____ GSA <input checked="" type="checkbox"/> _____ VA _____</p>	<p>No _____</p>
<p>C. If yes, a copy of the GSA or VA schedule is required. Have you included a copy? LINK</p>	<p>Yes <input checked="" type="checkbox"/> _____ GSA <input checked="" type="checkbox"/> _____ VA _____</p>	<p>No _____</p>
<p>13. If awarded a contract, will bidder accept the New York State Procurement Card?</p>	<p>Yes _____</p>	<p>No <input checked="" type="checkbox"/> _____</p>
<p>A. If yes, state any dollar limit on orders for which you will accept the NYS Procurement Card.</p>	<p>Up to \$ _____</p>	
<p>B. Additional discount for purchases made with the NYS Procurement Card:</p>	<p>Yes _____ _____ %</p>	<p>No _____</p>
<p>14. Will you offer a Cash Discount for payment within 15 days of delivery and/or receipt of voucher?</p>	<p>Yes _____ _____ %</p>	<p>No _____</p>
<p>15. Will you offer a Cash Discount for payment within 30 days of delivery and/or receipt of voucher?</p>	<p>Yes _____ _____ %</p>	<p>No _____</p>

***** ALL VENDORS PLEASE TAKE NOTICE OF NUMBER 16 BELOW *****

16. NON-COLLUSION CERTIFICATION

By submission of this contract, each contractor and each person signing on behalf of any contractor certifies, and in the case of a joint contract each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief:

- (1) The prices in this contract have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other contractor or with any competitor;
- (2) Unless otherwise required by law, the prices which have been quoted in this contract have not been knowingly disclosed by the contractor and will not knowingly be disclosed by the contractor prior to contract award, directly or indirectly, to any other contractor or to any competitor; and
- (3) No attempt has been made or will be made by the contractor to induce any other person, partnership or corporation to submit or not to submit a contract for the purpose of restricting competition.

(Contractor's Signature)

(Name of Business)

Submission # 2 Contractor & Reseller/Distributor Information

Contractor Information (for Ordering and Contract Administration Purposes)

1. CONTRACTOR/COMPANY INFORMATION	
Company Name:	International Business Machines Corporation
Address: (From first page of Contract)	80 State Street Albany, NY 12207
FEDERAL ID #:	13-0871985
Source Code Escrow Agent Name:	
Address:	
Phone Number:	

2. CENTRALIZED CONTRACT	
Contract Administrator Name:	International Business Machines Corporation
Title:	Contract Administrator
Mailing Address:	80 State Street Albany, NY 12207
Telephone Number:	(518)487-6259
E-mail:	criccio@us.ibm.com
FAX:	845-264-6605

3. SALES/BILLING	
Contact Name:	UPSTATE: Joe Bruno DOWNSTATE: Rob McGarry
Title:	Software Sales
Address:	80 State Street Albany, NY 12207
Telephone Number:	J. Bruno (518)487-6293, R McGarry (212)745-6067
E-mail:	jbruno@us.ibm.com Robert.mcgarry@us.ibm.com
FAX:	845-264-6605

4. MAINTENANCE/ SERVICE	
Contact Name:	Linda Launey
Title:	Client Representative
Address:	Smyrna, GA
E-mail:	launey@us.ibm.com
WWW Address:	www.ibm.com
Telephone Number:	770-863-2147
Contract "Toll" Free Support Phone Number:	1-800-426-1751
FAX:	845-264-6605
Hours of Availability:	

Reseller/Distributor Information	
Contractor's General Commercial Qualifying Criteria for Resellers/Distributors:	1. Attach a description of all reseller criteria following this page; or 2. If Contractor does not market or distribute product through resellers/distributors in the normal course of business, Contractor must attach a statement to that effect following this page. 3. Attach additional sheets, if necessary.
Reseller/Distributor	
(#1) Company Name:	
Address:	
FEDERAL ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller is Authorized to:	<input type="checkbox"/> Take Orders <input type="checkbox"/> Ship Direct <input type="checkbox"/> Receive Payment
Qualifying Criteria Applicable to this Reseller:	

Reseller/Distributor	
(#2) Company Name:	
Address:	
FEDERAL ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller is Authorized to:	<input type="checkbox"/> Take Orders <input type="checkbox"/> Ship Direct <input type="checkbox"/> Receive Payment
Qualifying Criteria Applicable to this Reseller:	

Reseller/Distributor	
(#3) Company Name:	
Address:	
FEDERAL ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller is Authorized to:	<input type="checkbox"/> Take Orders <input type="checkbox"/> Ship Direct <input type="checkbox"/> Receive Payment
Qualifying Criteria Applicable to this Reseller:	

Submission # 3

NYS Contract Net Price List

(NYS Net Prices For: Software, Maintenance,
Consulting & Training Services)

(to be attached by Contractor)

Pricing is Based On:

- US Commercial List, Dated _____
- GSA Supply Schedule Number _____
Dated _____
- Other: NYS 18-Dec-08

Submission # 4

Maintenance & Support

(Description of Services,
including response times, severity level,
support phone numbers, hours of availability, etc.)

(to be attached by Contractor)

Appendix E #4(a) – Maintenance (Description of Services); Passport Advantage



Contractor provides the Technical Support or Maintenance to Authorized Users for selected Licensed Software at volume pricing under these terms.

Licensed Software eligible for Technical Support or Maintenance under these terms (“Eligible Products”) are so identified on Appendix E and include commercially available IBM Programs, authorizations to increase your use of a Program, IBM Trade-ups, Competitive Trade-ups, IBM Annual Software Subscription and Support Renewals and IBM Software Subscription and Support Reinstatement.

If Contractor withdraws an Eligible Product from sales and marketing, Authorized User will no longer be able to obtain it under these terms. If Contractor withdraws a Program or a version of a Program from sales and marketing, Authorized User may not increase its level of use, beyond the authorizations already acquired, on or after the effective date of withdrawal without Contractor’s prior written consent, which Contractor will not unreasonably withhold. In accordance with Section 84 of this Contract, Contractor may add or withdraw Eligible Products at any time.

The “Anniversary” is the first day of the month that follows the anniversary of the date Contractor accepts an Authorized User’s initial order for Eligible Products (the “Effective Date”), unless the Effective Date is the first day of a month, in which event the anniversary of the Effective Date is the Anniversary.

A “Term” is the period that begins either on the date Contractor provides the Authorized User with the Proof of Entitlement (in the case of the initial Term) or on the Anniversary (in the case of subsequent Terms), and ends on the day immediately prior to the next Anniversary.

1. Eligible Products

Eligible Products are for use within your Enterprise only and may not be resold, rented, leased, or transferred to third parties except as otherwise expressly provided in the Contract. Any attempt to do so in violation of these provisions is void. In addition, such Eligible Products may not be used to provide commercial hosting or other commercial information technology services to third parties except as otherwise expressly provided in the Contract.

1.1 IBM Programs

1.1.1 Versions and Platforms:

Authorized User is authorized to use the Program(s) obtained under this Contract on any platform or operating system for which Contractor currently makes Program code available under these terms unless the Program is designated as platform or operating system specific at the time the Authorized User obtains it.

1.1.2 IBM Trade-ups:

Licenses for certain Programs that replace qualifying IBM Programs may be obtained for a reduced charge. In accordance with Section 84 of this Contract, Authorized User agrees to terminate its use of the replaced IBM Programs when Authorized User installs the replacement Programs.

1.1.3 Competitive Trade-ups:

Licenses for certain Programs that replace qualifying Non-IBM Programs may be obtained for a reduced charge. The Authorized User agrees to terminate its use of the replaced Non-IBM Programs within a reasonable period of time from the Authorized User’s installation of the replacement Programs.

1.2 Software Subscription and Support

1.2.1 Software Subscription and Support

Contractor provides software subscription and support (“IBM Software Subscription and Support”) with each IBM Program licensed under the terms of the Contract. Software Subscription and Support is a single

offering not available as separate components. For purposes of this Appendix, "software subscription and support" means IBM Software Subscription and Support.

IBM Software Subscription and Support begins on the date of Contractor provides Authorized User with the Proof of Entitlement and ends on the last day of the corresponding month in the following year, unless the date of acquisition is the first day of the month, in which case coverage ends on the last day of the month, 12 months from the date Contractor provides Authorized User with the Proof of Entitlement.

While IBM Software Subscription and Support is in effect for an IBM Program license:

- a. Contractor will make available to the Authorized User and authorize the Authorized User to use the most current commercially available version, release, or update, should any be made available.
- b. Contractor provides Authorized User assistance for your 1) routine, short duration installation and usage (how-to) questions; and 2) code-related questions ("Support"). Such Support for a particular version or release of a Program is available only until Contractor withdraws Support for that Program's version or release. When Support is withdrawn, the Authorized User must upgrade to a supported version or release of the Program in order to continue to receive Support. The IBM "Software Support Lifecycle" policy is available at <http://www-306.ibm.com/software/info/supportlifecycle/>.
- c. Contractor provides assistance via telephone and, if available, electronic access, only to the Authorized User's information systems (IS) technical support personnel during the normal business hours (published prime shift hours) of your Contractor support center. (This assistance is not available to the Authorized User's end users.) Contractor provides Severity 1 assistance 24 hours a day, every day of the year. Consult the IBM Software Support Handbook for details at ibm.com/software/support.
- d. Contractor may request that Authorized User allow it to remotely access the Authorized User's system to assist the Authorized User in isolating the software problem cause. Authorized User remains responsible for adequately protecting its system and all data contained in it whenever Contractor remotely accesses it with the Authorized User's permission.

IBM Software Subscription and Support does not include assistance for 1) the design and development of applications, 2) Authorized User's use of IBM Programs in other than their specified operating environment or 3) failures caused by products for which Contractor is not responsible under this Contract.

1.2.2 Automatic Annual Renewal of Software Subscription and Support

Authorized User may renew expiring software subscription and support by written authorization to renew (i.e., Purchase Order accompanied by an Order Form), prior to the expiration date, in accordance with the terms of this Contract.

IF CONTRACTOR DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE, EXPIRING SOFTWARE SUBSCRIPTION AND SUPPORT WILL NOT BE AUTOMATICALLY RENEWED TO THE NEXT ANNIVERSARY.

Software subscription and support obtained or renewed on the Anniversary is renewable for an additional coverage period of 12 full months.

Software subscription and support obtained on a date other than the Anniversary is renewable at the next Anniversary for an additional coverage period of less than 12 full months for a pro-rated charge, thereby extending the coverage to the following Anniversary.

If Authorized User chooses not to renew software subscription and support coverage for certain or all of your Program licenses and, at a later date, wishes to again obtain coverage for any of those Program licenses, Authorized User must obtain IBM Software Subscription and Support Reinstatement.

1.2.3 Withdrawal of software subscription and support for a particular Program

If Contractor withdraws software subscription and support for a particular Program, Authorized User understands that

- a. Contractor will not make software subscription and support renewal available for that Program; and

- b. in accordance with Section 84 of this Contract, if Authorized User renewed IBM Software Subscription and Support for that IBM Program license prior to the notice of withdrawal, Contractor, at its sole discretion, will either continue to provide IBM Software Subscription and Support to the Authorized User for that Program license until the end of the then current coverage period or you may obtain a prorated refund.

1.3 Fixed Term Licensing

As an option, Contractor licenses certain Programs for a "Fixed Term." "Fixed Term" means that the duration of the license is the limited term so designated by Contractor in the Program's PoE, beginning on the date that the Authorized User's order is accepted by IBM; on the calendar day following the expiration of a prior Fixed Term; or on the calendar day following the Anniversary date, as applicable.

1.3.1 Automatic Renewal of Fixed Term Licenses

Authorized User may renew its expiring Fixed Term License by written authorization to renew (i.e., Purchase Order accompanied by an Order Form), prior to the expiration date, in accordance with the terms of this Contract.

IF CONTRACTOR DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE, EXPIRING FIXED TERM LICENSES WILL NOT BE AUTOMATICALLY RENEWED FOR THE SAME DURATION AS THE EXPIRING TERM.

If the Authorized User chooses not to renew the Fixed Term License, Authorized User agrees to discontinue use of the Program on the expiration date.

If, after the expiration date, the Authorized User chooses to resume use of the Program, Authorized User must pay charges associated with an initial Fixed Term License rather than a Fixed Term License renewal.

1.3.2 Anniversary Coordination

For Fixed Terms of six months or more only, initial or subsequent Fixed Terms entered into on a date other than the Anniversary may be renewed at the next Anniversary for an additional period, at a pro-rated renewal charge, in order to extend the Fixed Term to the following Anniversary.

1.3.3 Withdrawal of Fixed Term License for a particular Program

If Contractor withdraws Fixed Term licensing for a particular Program, Authorized User understands that:

- a. Authorized User may not renew the Fixed Term License for that Program; and
- b. if Authorized User renewed the Fixed Term License for a Program prior to the notice of withdrawal, Authorized User will, at IBM's sole discretion, either (a) continue to use the Program under the Fixed Term licensing terms until the end of the then current Fixed Term or (b) obtain a prorated refund.

2. Obtaining Eligible Products

To obtain additional authorizations to use Programs under Passport Advantage Authorized User must have already obtained the Program code.

Under Passport Advantage, each Eligible Product, including CEO Product Categories, is assigned Suggested Volume Price ("SVP") points.

"CEO Product Categories" (groupings of Eligible Products) are obtained on a per-user basis. You must obtain your first CEO Product Category ("Primary Product Category") for all Users within an Authorized User and for not less than the number of Users specified in the CEO Product Categories Table at ibm.com/software/passportadvantage. A "User" is an individual to whom a machine capable of copying, using, or extending the use of Programs has been assigned.

Authorized User may obtain additional CEO Product Categories if it meets the minimum number of Users requirement specified in the CEO Product Category in the CEO Product Categories Table at ibm.com/software/passportadvantage. However, Authorized User need not obtain additional CEO Product Categories for all its Users.

A User may use any or all of the Programs included in a chosen CEO Product Category. However, all IBM Programs that are used for client access must be obtained from the same CEO Product Category as the server Program they access.

CEO Product Categories: Additions and Deletions

Contractor may add Eligible Products to or delete Eligible Products from any CEO Product Category. If Contractor deletes an Eligible Product from a CEO Product Category, Authorized User may continue to use the deleted Eligible Product but it may not exceed the number of Users enrolled prior to the deletion.

Increasing the number of Users

In the event Authorized User increases the number of Users, it must obtain an authorization to use the CEO Product Category for each new User.

Decreasing the number of Users

Authorized User will notify Contractor in writing prior to your next Anniversary in the event Authorized User's total number of Users decreases. Decreases may result from a reorganization, restructuring, or sale of one or more of Authorized User's Sites. A reduction in the number of Users of a temporary or seasonal nature does not qualify as a decrease. Following a decrease in the number of Users, a lower SVP Level may result. If the level of authorized use of a CEO Product Category drops below the minimum number of Users applicable to that CEO Category, Authorized User may not renew IBM Software Subscription and Support on a CEO Product Category basis.

3. Relationship SVP Level

If the Authorized User is an agency or affiliated entity of a state or local government, then such Authorized User receives special pricing due to its status as government and therefore other pricing and discounting mechanisms and procedures, such as the Passport Advantage RSVP terms, do not apply.

If the Authorized User is an Accredited Education Institution (defined below), then Eligible Products must be used for academic or administrative purposes of the educational institution, and may not be used in the performance of commercial services for any third party. Additionally, such Authorized User receives special pricing due to its status as an Accredited Education Institution and therefore other pricing and discounting mechanisms and procedures, such as the Passport Advantage RSVP terms, do not apply.

For purposes of this Appendix, an "Accredited Education Institution" is defined as a public or privately funded body, non-profit making, and not owned by a commercial organization. The institution may take the form of:

1. a university or college offering education leading to nationally recognized qualifications or levels of academic achievement, accredited by a regional or national accrediting council or commission or appropriate government agency or board of education of the state or country in which the educational institution is located,
2. a teaching hospital associated with an accredited institution,
3. a research institution, or consortia comprised of accredited institutions, or
4. a primary, elementary or secondary level school, either publicly or privately funded, where education is the principal objective leading to nationally recognized qualifications or levels of academic achievement, accredited to deliver education by national or regional councils or agencies.

IBM Appendix E #4(b) – Maintenance (Description of Services); Acquisition of SWM

These terms govern an Authorized User's acquisition of Technical Support or Maintenance on certain Licensed Software identified on Appendix E. As used in this Appendix, such Technical Support or Maintenance shall be referred to as ("SWM"), which may also be referred to as Subscription and Support ("S&S"). SWM may be provided through a telecommunications link.

Section 1 of the Appendix contains terms that are specific to a particular platform. The terms in the remaining sections are in addition to those in section 1, and apply to all platforms.

1. Software Maintenance

(1) For Programs running on zSeries (S/390) or equivalent platforms:

- (a) **Eligible Programs:** Licensed Programs for which S&S is available are listed at www-1.ibm.com/servers/eserver/zseries/library/swpriceinfo/ . Click on Exhibits: Subscription and Support.
- (b) **Support Period:** One year. When an Authorized User orders S&S with a Program, the initial Support Period begins on the date that IBM makes the Program available to you through the provision of the Proof of Entitlement. If an Authorized User terminates S&S, Contractor does not issue credit for the unused portion of a Support Period.
- (c) **Renewal: UNLESS AN AUTHORIZED USER REQUESTS RENEWAL OF S&S IN WRITING PRIOR TO THE END OF A SUPPORT PERIOD, CONTRACTOR WILL NOT AUTOMATICALLY RENEW EXPIRING S&S.** Subsequent Support Periods begin on the day following the end of the preceding Support Period.
- (d) **Anniversary Adjustment:** When an Authorized User acquires S&S initially or resume it, or prior to the end of the then current Support Period for renewals, an Authorized User may request that the Support Period duration be adjusted to end at a month of its choice. If the Authorized User does not choose a date, Contractor will inform the Authorized User of the end date. The Support Charge will be pro-rated accordingly.
- (e) **Subscription and Support:** For the unmodified portion of a Program, and to the extent problems can be recreated in the Specified Operating Environment, includes:
 - (i) Code Corrections: code to correct reported, substantial deviations from the Program's then applicable Specifications;
 - (ii) Fixes: existing Code Corrections, restrictions or known bypasses for reported problems;
 - (iii) Program Updates: periodic releases of collections of Code Corrections, Fixes, functional enhancements (including modifications to accommodate applicable statutory or regulatory changes) and new versions and releases to the Program and documentation.
 - (iv) Technical Assistance: a reasonable amount of remote assistance via telephone, mail, facsimile (fax) or e-mail to address suspected Program defects. Technical assistance is available from the Contractor support center in your country. Details, including hours of operation, are outlined in the Software Support Handbook at techsupport.services.ibm.com/guides/handbook.html
- (f) **Resumption Fee:** Equal to the total of all Support Charges that the Authorized User would have paid during the lapsed interval (i) had the Authorized User not declined S&S at the time it acquired the license for a Program and the Authorized User now wishes to acquire S&S or (ii) if the Authorized User wishes to resume S&S that the Authorized User had previously terminated. A Support Period in such an instance begins on the date that Contractor accepts the Authorized User's order.
- (g) **Support Upgrade:** If an Authorized User upgrades S&S due to an increase in the level of use of a license, any increase to the Support Charge will be pro-rated to the next anniversary.

(2) For Programs running on distributed platforms (iSeries, pSeries, xSeries, RSS, other):

- (a) **Eligible Programs:** Licensed Programs for which Software Maintenance is available are listed at www-1.ibm.com/services/si/swm/ for Retail Store Solutions (RSS) and for all other Programs at www-1.ibm.com/servers/eserver/series/sftsol/subscript2.htm or may be obtained from the Contractor marketing representative.
- (b) **Initial Support Period:** Authorized User must choose either one year, the charge for which may be included with the Program, or, for an additional charge, three years of Software Maintenance at the time you order a Program. The Initial Support Period begins on the date that IBM makes the Program available to you through the provision of the Proof of Entitlement. If the Program is part of an iSeries grouped offering, then the Initial Support Period duration will be adjusted so that the expiration coincides with that of the other Programs in the group. In such event, the Initial Support Period may be less than one year.
- (c) **Subsequent Support Periods (under this Agreement):** One or three years, at the Authorized User's option. For iSeries and pSeries, if Authorized User terminates SWM, Contractor does not issue credit for the unused portion of a Support Period.
- (d) **Renewal (under this Appendix):** It is the Authorized User's responsibility to renew SWM at the end of each Support Period. Contractor will renew expiring SWM under the Contract terms and charges in effect on that date, if Contractor receives the Authorized User's order to renew (i.e., Purchase Order accompanied by an Order Form or other writing) not later than the expiration date. Subsequent Support Periods begin on the day following the end of the preceding Support Period.
- (e) **Software Maintenance:**
- (i) Contractor makes available to an Authorizes User the most current commercially available version, release, or update to all of the Programs for which an Authorized User acquires SWM under this Contract, should any be made available. For pSeries Programs under this Contract, an Authorized User may obtain upgrades to any current commercially available version, release or update.
 - (ii) Contractor provides you assistance for an Authorized User's 1) routine, short duration installation and usage (how-to) questions; and 2) code-related questions.
 - (iii) Contractor provides assistance via telephone and, if available, electronic access, only to the Authorized User's information systems (IS) technical support personnel during the normal business hours (Contractor's published prime shift hours) of your Contractor support center. This assistance is not available to the Authorized User's end users. Contractor provides Severity 1 assistance 24 hours a day, every day of the year. Consult the IBM Software Support Guide, which may be found at techsupport.services.ibm.com/guides/handbook.html for details.
 - (iv) In some instances, Contractor may request that an Authorized User allow it to remotely access its system to assist the Authorized User in isolating the software problem cause.
 - (v) SWM does not include assistance for 1) the design and development of applications, 2) the Authorized User's use of Programs in other than their specified operating environment or 3) failures caused by products for which Contractor is not responsible under this Contract.
- (f) **Software Maintenance After License Fee:** The charge to resume SWM if an Authorized User
- (i) did not renew it prior to the end of the then current Support Period or
 - (ii) terminated it.
- A Support Period for a resumption of SWM begins on the date that Contractor accepts an Authorized User's order.
- (g) **Transfer of IBM Software Maintenance on iSeries and pSeries Machines:** In addition to the provisions of Section 3. Software Maintenance Transferability below, SWM for Programs running on iSeries or pSeries machines
- (i) applies to a designated machine (type, model and serial number); and
 - (ii) may be transferred only to another machine that is licensed for the same operating system at the same or a more recent release level.

2. Charges and Payment

If an Authorized User returns a Program for refund as allowed under its license terms, Contractor will terminate, and refund any charges paid for, SWM ordered with the Program.

Software Maintenance acquired directly from Contractor

- (1) Charges for SWM during each Support Period, called the Support Charge, are invoiced in advance.
- (2) The Support Charge may vary, depending on, for example, the machine (type/model), the Program or group of Programs.

3. Software Maintenance Transferability

An Authorized User may transfer SWM only to a location that is within the United States in accordance with the express provisions set forth in the Contract.

4. Authorized User's Responsibilities

An Authorized User agrees that when it acquires SWM for a Program:

- (1) Authorized User will acquire SWM at the same authorized level of use as the Program for which the Authorized User is acquiring it, as well as all copies of the Program at the same location. This includes Programs you have already acquired and those you may acquire subsequently;
- (2) Authorized User remains responsible for adequately protecting its system and all data contained in it whenever Contractor remotely accesses it with Authorized User's permission to assist Authorized User in isolating the software problem cause;
- (3) to provide sufficient, free, and safe access to your facilities for Contractor to fulfill its obligations;
and
- (4) to have specified equipment or programs installed at your location if SWM is provided through a telecommunications link.

Submission # 5

Sub-Capacity Licensing

(to be attached by Contractor)



Appendix E #5(a) – Passport Advantage Sub-Capacity Licensing Terms

The terms of this Appendix E #5(a) for Sub-Capacity Terms (“Sub-Capacity Appendix”) are in addition to those of any terms set forth in Section 87 (Technical Support & Maintenance) of the Contract and govern the transaction when you obtain “Eligible Sub-Capacity Products” from Contractor for use on an “Eligible Virtualization Environment.”

1. Definitions

Quarterly Report Period – The period that begins on the first day in a calendar quarter and ends on the last day in the calendar quarter. Alternatively, if the Authorized User’s fiscal year is different from the calendar year, Authorized User may choose to begin the period on the first day in its fiscal quarter and end on the last day in its fiscal quarter. This period may also be monthly or weekly depending on the Authorized User’s requirements.

Quarterly Reports – A set of reports available in the IBM License Metric Tool (“ILMT”), or by another method acceptable to Contractor as specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. These reports provide the Processor Value Unit (“PVU”) license requirements based on the Virtualization Capacity available to the Eligible Sub-Capacity Product.

Eligible Sub-Capacity Product – A Product for which Sub-Capacity Licensing is available. See listing at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Eligible Virtualization Environment – A server or a group of servers cooperating as a single computing entity that contain an Eligible Processor Technology, an Eligible Operating System Technology, and an Eligible Virtualization Technology;

- **Eligible Operating System Technology** – An operating system for which Sub-Capacity Licensing is available. See listing at: <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> .
- **Eligible Processor Technology** – A processor technology for which Sub-Capacity Licensing is available. See listing at: <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> .
- **Eligible Virtualization Technology** – A virtualization technology for which Sub-Capacity Licensing is available. An Eligible Virtualization Technology is capable of restricting processor capacity to a subset of the total physical capacity, sometimes referred to as partition, LPAR, or virtual machine. See listing at: <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>

Full Capacity – The total number of physical processor cores activated and available for use by the Eligible Sub-Capacity Product(s) on a server.

Processor Chip – Electronic circuitry containing one or more Processor Cores that plugs into a Processor Socket.

Processor Core(s) – A physical functional unit within a computing device that interprets and executes program instructions and consists of at least one instruction control unit and one or more arithmetic and logic units. A multi-core technology allows two or more Processor Cores to be active on a single Processor Chip. A System z Integrated Facility for Linux (IFL) engine is considered a single Processor Core.

Processor Socket – Electronic circuitry that accepts a Processor Chip.

Processor Value Unit(s) – A metric used by Contractor to assign a value to a Processor Core. The Processor Value Unit licensing model is described at: http://www.ibm.com/software/lotus/passportadvantage/pvu_licensing_for_customers.html.

Service Provider – an entity that provides IT Services for end user customers, either directly or through a reseller.

Sub-Capacity Licensing – Licensing of Eligible Sub-Capacity Products based on Virtualization Capacity.

Virtualization Capacity – the highest peak processor capacity available to an Eligible Sub-Capacity Product when deployed on an Eligible Virtualization Environment. Rules for calculating the Virtualization Capacity for each Eligible Virtualization Environment can be found at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

2. Authorizations

- a. A Proof of Entitlement (PoE) must be acquired for the total number of PVUs associated with the Virtualization Capacity available to an Eligible Sub-Capacity Product.
- b. Prior to an increase in an Eligible Sub-Capacity Product's Virtualization Capacity, Authorized User must first acquire additional authorizations, including Software Subscription and Support, if applicable.
- c. Unless otherwise agreed to in writing, Contractor does not give credits or refunds for charges already due or paid if an Eligible Product's use falls below the authorized level of use.

3. Contractor's Responsibilities

Contractor will make available and authorize Authorized User to use:

- a. the ILMT at no charge, when ordered by Authorized User. Contractor provides the ILMT to Authorized User for its compliance with these Sub-Capacity Licensing terms; and
- b. the Information Center included with the ILMT to aid Authorized User's compliance with these Sub-Capacity Licensing terms.

Authorized User may make copies of the ILMT and Information Center for its compliance with these Sub-Capacity Licensing terms.

4. Authorized User's Responsibilities under Sub-Capacity Licensing Terms

Authorized User agrees to:

- a. install and configure the most current version of ILMT in accordance with the ILMT Information Center, within 90 days of its first Eligible Sub-Capacity Product deployment on an Eligible Virtualization Environment, to enable Authorized User to collect Virtualization Capacity data by Eligible Sub-Capacity Product and generate Quarterly Reports in accordance with these Sub-Capacity Licensing terms. Exceptions to this requirement are:
 - (1) when ILMT does not yet provide support for the Eligible Virtualization Environment;
 - (2) if the Authorized User has fewer than 1,000 employees and contractors, Authorized User is not a Service Provider, and Authorized User has not contracted with a Service Provider to manage its Eligible Virtualization Environment;
 - (3) if the total physical capacity of the Authorized User's servers with an Eligible Virtualization Environment, measured on a Full Capacity basis, but licensed using sub-capacity terms is less than 1,000 PVUs; or
 - (4) when the Authorized User's servers with Eligible Sub-Capacity Products are licensed to the Full Capacity of the servers.

For these exceptions, use of ILMT, while recommended, is not required for Sub-Capacity Licensing. In lieu of ILMT, Authorized User is required to manually manage and track its Eligible Virtualization Environment, and manually prepare Quarterly Reports documenting the Virtualization Capacity by Eligible Sub-Capacity Product for its Eligible Virtualization Environment during each calendar or fiscal quarter. These Quarterly Reports must contain the information listed in the example Quarterly Report (although at the following URL the report may be referred to as an "Audit Report") available at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. These Quarterly Reports must be prepared as frequently as is required to maintain a history of increases to Virtualization Capacity, but not less often than once per quarter, and must be maintained for at least two years;

- b. promptly install new versions, releases, modifications, or code corrections (“fixes”) of the ILMT that Contractor makes available. Authorized User will need to subscribe to Tivoli Support notifications via <http://www.ibm.com/support/mynotifications> in order to be notified when these become available;
- c. initiate generation of, using ILMT or manually, Quarterly Reports at least each calendar or fiscal quarter and retain for a period of not less than two years the Quarterly Reports and make these reports available to Contractor upon Contractor’s written request or as specified in Section 80 (Audit of Licensed Product Usage) of the Contract. Failure to generate Quarterly Reports or make Quarterly Reports available to Contractor will result in charging for Eligible Sub-Capacity Products under Full Capacity terms;
- d. assign a person in its organization with authority to manage and promptly resolve any questions on Quarterly Reports or inconsistencies between Quarterly Report contents, license entitlement, or ILMT configuration;
- e. promptly place an order with Contractor if Quarterly Reports reflect Eligible Sub-Capacity Product use in excess of Authorized User’s authorized level. Software Subscription and Support coverage will be determined to begin at the time Authorized User exceeded its authorized level.

5. Additional Terms

Product deployments that are not able to meet these Sub-Capacity Licensing requirements must be licensed using Full Capacity terms.

Processor Value Unit [PVU] licensing for Distributed SW

Updated September 17, 2008

A Processor Value Unit (PVU) is a unit of measure used to differentiate licensing of middleware on distributed processors and, over time, will evolve to differentiate processor families based on their relative performance among other factors. The Processor Value Unit structure consists of 5 broad tiers or levels, and all supported processor families have been assigned to one of those tiers. For each product, customers will need to acquire the appropriate number of Processor Value Units for the level or tier of all processor cores activated and ready for use on which the software is deployed.

Table of Processor Value Units [PVUs] per core

The table below lists current generally available processors only, as of the published date. PVU requirements for future processor technologies may differ. For PVU requirements for any processor technologies not listed below, please consult the [Guide to Identifying Your Processor Family](#). If still don't find what you are looking for, please [contact IBM](#). IBM Software defines "Processor" as a Core.

Table of Processor Value Units (PVUs) per Core

Processor Families		Processor Type						PVUs <i>per</i> Processor Core
Vendor	Brand	One-Core (1)	Dual-Core (2)	Quad-Core (4)	Hexa-Core (6)	Octi-Core (8)	IFL Engine	
IBM	POWER6 (see note 1)		■					120
IBM	System z10						■ ²	
IBM	POWER5		■					100
IBM	System z9, z990, S/390 ³						■ ²	
Fujitsu	SPARC64 VI, VII		■	■				
HP	PA-RISC		■					
Intel®	Itanium®		■					
Sun	UltraSPARC IV		■					
Any	Any single core	■						
IBM	POWER6 (see note 1)		■					80
IBM	PowerPC 970		■					50
IBM	POWER5 QCM			■				
AMD	Opteron		■	■				
Intel®	Xeon®		■	■	■			
Sun	UltraSPARC T2			■	■	■		
IBM	PowerXCell™ 8i	■ ⁴						30
IBM	Cell/B.E.™	■ ⁴						
Sun	UltraSPARC T1			■	■	■		

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Notes:

- ¹ IBM Power Systems (formerly System i and p) 520 and JS12 models, and IBM BladeCenter JS12 and JS22 models require 80 PVUs per core. All other POWER6 processor-based server models require 120 PVUs per core.
- ² Each IFL or CP engine is equivalent to 1 processor core.
- ³ Refers to System z9, eServer zSeries, or System/390 servers.
- ⁴ Entitlements required for PPE cores only.

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With Processor Value Units, IBM continues the practice of licensing to the processor core. This practice provides the licensing granularity customers require, while offering them the flexibility to configure their systems to best support their business objectives.

Key benefits

Processor Value Units enable sub-capacity licensing at the processor core and provide:

- a licensing structure that avoids fractional licensing or processor factors for multi-core chips
- flexibility and granularity enabling customers to run a product on as few or as many processor cores as they require
- the capability to deliver software price performance improvements as new processor families are introduced
- a sustainable licensing foundation for the future

And, licenses are transferable across distributed systems.

IBM Appendix #5(c) - System z Programs Sub-Capacity Pricing

Subject to the terms below (the "System z Sub-Capacity Appendix"), Contractor enables Authorized User to obtain Sub-Capacity Pricing for certain System z IPLA Programs ("Eligible Programs"). Eligible Programs are specified at <http://www.ibm.com/zseries/library/swpriceinfo/>. (Click on "Sub-Capacity zSeries IPLA Programs.") .

This System z Sub-Capacity Appendix supersedes any subcapacity terms offered for Eligible Programs in their License Information or other agreements.

6. Incorporated Terms

- (1) Eligible Programs Running in a Workload License Charges ("WLC") Environment
The following sections of the Attachment for IBM System z Workload License Charges, Z125-6516 ("WLC Attachment") to the IBM Customer Agreement apply to the Eligible Programs, as if they were Variable Workload License Charge ("VWLC") Programs with Sub-Capacity Pricing, and are incorporated by reference into this System z Sub-Capacity Appendix.
- (2) Eligible Programs Running in an Entry Workload License Charges ("EWLC") Environment
The following sections of the Attachment for EWLC, TWLC, zELC and z/OS.e License Charges, Z125-6587 ("EWLC Attachment") to the IBM Customer Agreement apply to the Eligible Programs, as if they were Entry Workload License Charge ("EWLC") Programs with Sub-Capacity Pricing, and are incorporated by reference into this System z Sub-Capacity Appendix.

7. Additional Definitions

- (1) Environment: Standalone machine or Parallel Sysplex
- (2) Execution-Based Terms:

Execution-Based licensing terms apply to Eligible Programs whose value is based on the capacity of the execution (run-time) Environment. The capacity of an Eligible Program with Execution-Based terms must equal the capacity of the LPAR(s) where it executes.

- (3) Reference-Based Terms:
 - (a) Reference-Based licensing terms apply to Eligible Programs that add value to particular monthly license charge (MLC) Programs. For clarity, MLC Programs are expressly excluded from the scope of this Contract, and must be acquired by the Authorized User under a separate agreement. The capacity of an Eligible Program with Reference-Based terms must equal the capacity of the applicable MLC Program. This MLC Program is called the "Parent Program."
 - (b) Eligible Programs with Reference-Based terms add value to the Parent Program across the Environment, regardless of where in the Environment the Programs executes.
 - (c) When an Eligible Program with Reference-Based terms is used in a qualified Parallel Sysplex (described in the WLC Attachment), the capacity of the Eligible Program must be equal to the capacity of the Parent Programs across the Parallel Sysplex.
 - (d) Where there are multiple versions of the Parent Program licensed in the Environment, the IPLA charges will be based on the total billable MSUs of the Parent Programs, but capped at the Parent Programs' z/OS MSU capacity.

- (4) z/OS-Based Terms:

z/OS-Based licensing terms apply to Eligible Programs that provide value to the particular machine where the Program is used. The capacity of an Eligible Program with z/OS-Based Terms must equal the capacity of z/OS on that machine.

8. Qualifications

- (1) Authorized User must have agreed to the terms of the WLC Attachment or the EWLC Attachment, as applicable.
- (2) Authorized User must agree to keep Contractor informed of the type, model, and serial number of each machine on which each Eligible Program is executing. The scope of Authorized User's tracking extends to all machines in its enterprise, whether the Eligible Programs have Sub-Capacity or Full Capacity charges. If Authorized User is unwilling or unable to fulfill your tracking responsibilities, Contractor may not extend the terms set forth in this System z Sub-Capacity Appendix. In such event Full Capacity terms would apply.

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- (3) If Authorized User has Eligible Programs with Execution-Based or z/OS-Based terms, Authorized User must have selected Sub-Capacity Pricing for VWLC or EWLC, as appropriate, on the machine where the Eligible Program is being used, otherwise Full Capacity MSUs will apply.
- (4) If Authorized User has Eligible Programs with Reference-Based terms, Authorized User must have selected Sub-Capacity Pricing for VWLC or EWLC, as appropriate, for the Parent Program(s). Full Capacity MSUs will apply for any machine(s) where the Parent Program is not in Sub-Capacity mode.
- (5) z/OS or z/OS.e must run in z/Architecture (64-bit) mode.
- (6) OS/390 and MVS may not be licensed to a machine with Sub-Capacity Pricing.
- (7) For specific machine qualifications, see <http://ibm.com/zseries/library/swpriceinfo/>. See machines with "WLC" in the WLC column or "EWLC" in the Group column.
- (8) Monthly Sub-Capacity reports, generated by the Sub-Capacity Reporting Tool ("SCRT"), must be submitted to remain eligible for Sub-Capacity pricing. SCRT terms are described in the WLC and EWLC Attachments. (NOTE: In the event Authorized User is unable to submit your SCRT Report by the ninth calendar day of the month, Authorized User must email scrt@us.ibm.com by the ninth calendar day to request an extension.
- (9) In the event of an unusual situation, Authorized User has the opportunity to override the MSU values on the SCRT Report(s) prior to submission. Authorized User must provide an explanation for each override.
- (10) Sub-Capacity terms may not be transferred to third parties.

9. Charges

- (1) One-time charges are based on the number of MSUs reported in the SCRT Report during a Reporting Period. This value corresponds to the Product LPAR Utilization Capacity of the Eligible Programs with Execution-Based or z/OS-Based terms or the Parent Program, as applicable. If Sub-Capacity Pricing is not in effect, one-time charges are based on Full Capacity MSUs or Full Logical Model Capacity, as appropriate.

NOTE: Information on Contractor's billing process, including how to determine the applicable Reporting Period for a particular month's charges, can be found on the Sub-Capacity Corner website at <http://www.ibm.com/zseries/swprice/subcap/>.

- (2) For native z/OS LPARs, the number of MSUs associated with an LPAR is equivalent to the highest observed rolling 4-hour average utilization in a Reporting Period. Authorized User may manage native z/OS LPAR utilization by explicitly specifying the defined capacity of the LPAR(s) on the Hardware Management Console ("HMC"). This, however, is not required to obtain Sub-Capacity Pricing benefits.
- (3) If Authorized User chooses to specify the capacity of the LPAR(s), the SCRT will use the lower of the specified capacity or the 4-hour rolling average utilization in order to determine the Product LPAR Utilization Capacity for each Program.
- (4) For non-native z/OS LPARs (i.e., z/OS guests of VM), the number of MSUs associated with an LPAR is equivalent to the maximum potential MSU capacity of that LPAR.
- (5) The capping function in the Eligible Operating System is used to ensure the workload does not exceed the LPAR defined capacity Authorized User has specified on a rolling four hour average. To achieve this, the capping function may automatically reduce and limit computer resources to workloads running in that LPAR. By defining the LPAR capacity, Authorized User authorizes the capping function to cap the computer's resources as defined.
- (6) If Sub-Capacity Pricing is not in effect, aggregated charges are based on Full Capacity MSUs or Full Logical Model Capacity, as appropriate.

When any of the above conditions are not met, then the Eligible Program no longer qualifies. Authorized User agrees that such a change will be considered as an order placed by such Authorized User without further action on its part, and Authorized User authorizes Contractor to make any resulting billing increase, including S&S, if applicable. Contractor does not give credits or refunds for charges already due or paid if the applicable Product LPAR Utilization Capacity falls below the then current authorized entitlement.

10. Contractor's Responsibilities

- (1) Contractor will provide the following on the SCRT website (<http://ibm.com/zseries/swprice/scrt/>):
 - (a) The SCRT, which is at no charge. (**NOTE:** Written notification of updates will be sent by email)
 - (b) the process for transmitting SCRT Reports and Notification of Changes to Contractor

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- (2) Contractor will calculate the applicable MSUs for Eligible Programs with Reference-Based or z/OS-Based terms, by using the MSUs of the Parent Program(s) or z/OS, as applicable, from the SCRT Report(s).

11. Verification

In the event Contractor audits the Licensed Software in accordance with the terms of Section 80 of the Contract, and such audit covers any System z Programs covered by this System z Sub-Capacity Appendix, then for purposes of such System z Programs, the following additional provisions shall also apply: Authorized User agrees to: 1) create, retain, and provide to Contractor and its auditors written and other records, system tools outputs, and other electronic or hard copy system information, including information regarding the system configurations on which the System z Programs covered by this System z Sub-Capacity Appendix operate; and 2) permit Contractor and its auditors to be present and observe while Authorized User accesses machines to provide such records, outputs and other system information.



Appendix #5(d) – Attachment for IBM System z Workload License Charges

The terms of this Appendix apply to certain IBM System z Workload License Charges. Any Programs licensed in accordance with the terms of this Appendix that require z/Architecture (64-bit) hardware in order to execute properly may be licensed only to a Designated Machine that properly implements z/Architecture.

1. Definitions

Eligible Machine	A Machine to which an Eligible Operating System is licensed. Any copies of Eligible Operating Systems that run on an Eligible Machine must run in z/Architecture (64-bit) mode. Eligible Machines are specified on the IBM System z Workload License Charges Exhibit, Z125-6324-11 or later, (“Exhibit”).
Eligible Operating System	An Operating System specified in the Exhibit.
Full Capacity MSUs	The total capacity of an Eligible Machine as specified in the Exhibit.
Guest (LPAR)	z/TPF or z/OS when running under z/VM.
MSUs	Millions of Service Units per hour. Units of Workload capacity of an Eligible Machine.
Native (LPAR)	z/TPF or z/OS when not running under z/VM.
Operating System Family	An Contractor operating system and the Contractor middleware that runs under it. The applicable Contractor operating systems are z/OS, z/TPF, and z/VSE V4 or higher.
Product LPAR Utilization Capacity	The highest number of MSUs utilized by the combined logical partitions (“LPARs”) in which a Variable Workload License Charges (“VWLC”) Contractor Program runs concurrently during a Reporting Period. The number of MSUs is based on a 4-hour rolling average utilization.
PSLC	Parallel Sysplex License Charges available for selected Contractor Programs which are used on an Eligible Machine and are running under an Eligible Operating System. See Exhibit – Parallel Sysplex License Charges (Z125-5206-57 or later).
Reporting Period	The period which begins on the second day of a month and ends on the first day of the following month.
Sub-Capacity Pricing	WLC for VWLC Contractor Programs based on less than Full Capacity MSUs.
Sub-Capacity Report	A report generated by the Contractor-provided Sub-Capacity Reporting Tool. The tool analyzes System Management Facilities (“SMF”) data and SCRT89 data and calculates the Product LPAR Utilization Capacity for most VWLC Contractor Programs. The Sub-Capacity Report includes these calculations. Authorized User is required to submit the report to Contractor only if Sub-Capacity Pricing is in effect.
WLC	Workload License Charges available for selected Contractor Programs which are used on an Eligible Machine and are running under an Eligible Operating System. WLC charges allow for Sub-Capacity Pricing.

2. Charges

(1) Authorized User has a choice of selecting either, if available, but not both, WLC or PSLC for all Contractor Programs within an Operating System Family on an Eligible Machine that has an Eligible Operating System licensed to it. However:

- (a) once Authorized User selects WLC, Authorized User may not switch back to PSLC without prior Contractor approval, which Contractor may grant in its sole discretion;
- (b) WLC Programs and PSLC Programs may not be aggregated together for pricing purposes; and
- (c) Contractor Programs with charge types shown below, however, may be licensed to the same Eligible Machine as Contractor Programs with WLC charges:
 - (i) New Application License Charges (“NALC”) which is described in the Attachment for IBM System z New Application License Charges (Z125-5884-10 or later).

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- (ii) System z New Application License Charges (“zNALC”) which is described in the Attachment for zNALC License Charges on IBM System z (Z125-7454-00 or later).
 - (iii) Select Application License Charges (“SALC”) which is described in the Select Application License Charges Amendment to Attachment for IBM System z Usage Pricing Charges (Z125-7284-01 or later).
 - (iv) Midrange Workload License Charges (“MWLC”) which is described in the Attachment for IBM System z Midrange Workload License Charges (Z125-7452-00 or later).
- (2) When Flat Workload License Charges (“FWLC”) apply to Contractor Programs, charges are a fixed monthly charge. z/OS must be licensed to the Eligible Machine. FWLC charges are not available on an Eligible Machine if any Program in the z/OS Operating System Family has PSLC Charges,
- (3) When VWLC charges apply to Contractor Programs:

- (a) monthly charges are based on the number of MSUs reported in the Contractor Program’s Sub-Capacity Report for the specified Eligible Machine during a Reporting Period. This value corresponds to the Product LPAR Utilization Capacity or, on a non-partitioned Eligible Machine, must equal the Full Capacity MSUs. If Sub-Capacity Pricing is not in effect, monthly charges are based on Full Capacity MSUs;

NOTE: Information on Contractor’s billing process, including how to determine the applicable Reporting Period for a particular month’s charges, can be found on the Sub-Capacity Corner website at <http://www.ibm.com/zseries/swprice/subcap/> ;

- (b) Eligible Operating System licenses are charged at Full Capacity MSUs until Contractor has processed the initial Sub-Capacity Report for that Eligible Operating System on that Eligible Machine, enabling Sub-Capacity Pricing for that Operating System Family;
- (c) the initial monthly charge for a non-operating system license is based upon the applicable operating system MSUs;
- (d) once Sub-Capacity Pricing has commenced for an Eligible Operating System on an Eligible Machine, if a VWLC Contractor Program does not appear in a Sub-Capacity Report subsequent to its initial monthly charge, it will be charged at the minimum VWLC MSUs;

NOTE: Contractor specifies minimum VWLC MSUs in its programming announcements;

- (e) If Authorized User elects to have Sub-Capacity Pricing for a VWLC Contractor Program on an Eligible Machine, then Authorized User must have Sub-Capacity Pricing for all VWLC Contractor Programs in that Operating System Family on that Eligible Machine;
- (f) VWLC features have the same MSUs as the Program;
- (g) when z/TPF is licensed to an Eligible Machine, the Sub-Capacity Reporting Tool calculates the number of MSUs for z/TPF Contractor Programs running on it. See the Amendment for Calculation of z/TPF MSUs (Z125-7283) for further details;
- (h) when z/OS is licensed to an Eligible Machine, the Sub-Capacity Reporting Tool calculates the number of MSUs used across all of the z/OS LPARs in which each z/OS VWLC Contractor Program ran during the Reporting Period as follows:

If z/OS is running in Native LPAR(s) ...	and z/OS is running in Guest LPAR(s), at least one of which is at V1.6 or lower ...	and z/OS is running in Guest LPAR(s), at least one of which is at V1.7 or higher ...	then, MSUs are calculated in LPAR(s) in which the VWLC Contractor Program ran, as follows:
Yes	Yes	Yes	The highest combined: 1. 4-hour rolling average utilization across all z/OS Native LPARs, and 2. the maximum capacity of all z/OS Guest LPARs
Yes	Yes	No	
Yes	No	Yes	The highest combined 4-hour rolling average utilization across all z/OS Native LPARs and z/OS Guest systems
Yes	No	No	
No	No	Yes	
No	Yes	Yes	The highest combined maximum capacity of all z/OS Guest LPARs
No	Yes	No	

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Authorized User may manage Native z/OS LPAR utilization by specifying an LPAR defined capacity on the Hardware Management Console ("HMC"). However, this is not required to obtain Sub-Capacity Pricing. If Authorized User chooses to specify the defined capacity for a particular Native z/OS LPAR, the Sub-Capacity Reporting Tool will use the lower of the specified capacity or the 4-hour rolling average in order to determine the number of MSUs associated with a VWLC Contractor Program;

- (i) If an OS/390 or MVS operating system is licensed to the same Eligible Machine, then charges for the z/OS Operating System Family are based on Full Capacity MSUs;
 - (j) the capping function in z/OS is used to ensure the workload does not exceed the LPAR defined capacity Authorized User has specified on a 4-hour rolling average. To achieve this, the capping function may automatically reduce and limit computer resources to workloads running in that LPAR. By defining the LPAR capacity, Authorized User authorizes the capping function to cap the computer's resources as defined; and
 - (k) increases in any Contractor System z Program VWLC charges, due to changes Authorized User makes in the MSU capacity for any Eligible Machine it is licensed to, will be in effect for a minimum period of one month.
- (4) When aggregated VWLC charges apply to Contractor Programs, aggregated charges:
- (a) are available only for Contractor Programs used on an Eligible Machine in a Parallel Sysplex.
 - (b) are based on the sum of the MSUs on the Sub-Capacity Reports that Authorized User submits to Contractor for each copy of a Contractor Program installed on qualifying Eligible Machines in a Parallel Sysplex. If Sub-Capacity Pricing is not in effect, aggregated charges are based on Full Capacity MSUs.
 - (c) require two or more Eligible Machines actively coupled using the applicable coupling links and Coupling Facility specified in the Exhibit.
 - (d) To be actively coupled, the following criteria must be met:
 - (i) All Eligible Machines in the Parallel Sysplex must be physically attached via coupling links to a common Coupling Facility. In addition, time synchronization must be provided using either timer links to a common Sysplex Timer or coupling links transporting Server Time Protocol ("STP") timing information in an STP Coordinated Timing Network("CTN").
If a Coupling Facility is divided into LPARs, all Eligible Machines must be attached to the same Coupling Facility LPAR.
 - (ii) All Eligible Operating System images that comprise the Parallel Sysplex environment must have at least one common Systems Enablement Function, specified in the Exhibit, activated to use the Coupling Facility across all images in the Parallel Sysplex.
 - (iii) The configuration and operating modes described in this Attachment must be the normal mode of operations for this environment.
 - (iv) An Eligible Machine can only be in one Parallel Sysplex for pricing purposes. The Eligible Operating System images participating in the Systems Enablement Function(s) must account for at least 50 percent of the total Eligible Operating System workload on each Eligible Machine.
In the event there are two LPARs, each 50 percent of the total Eligible Operating System workload, connected to two Parallel Sysplexes, Authorized User may select which Parallel Sysplex the Eligible Machine will be included in for billing.
 - (v) On an annual basis, upon Contractor's request, Authorized User will provide Contractor with a completed Contractor Sysplex Verification Package for any year during which Authorized User receives aggregated WLC pricing.
NOTE: Information can be found at <http://ibm.com/zseries/swprice/sysplex/>
 - (e) Additional information regarding the technical aspects of Parallel Sysplex aggregation and detailed information on tools, processes and procedures may be found at the Sysplex Aggregation website at the following URL: <http://ibm.com/zseries/swprice/sysplex/>

3. Contractor's Responsibilities

Contractor will:

1. specify in the Exhibit a) the Eligible Machines and their Full Capacity MSUs, b) the applicable Coupling Facilities, c) Eligible Operating Systems, d) Systems Enablement Functions, and e) the date and the process for transmitting Sub-Capacity Reports to Contractor;

2. provide the Sub-Capacity Reporting Tool;
3. adjust VWLC in response to the changes Authorized User indicates on the Sub-Capacity Reports Authorized User submits; and
4. register Eligible Machines when Authorized User submits the initial Sub-Capacity Reports.

4. Authorized User's Responsibilities under Sub-Capacity Pricing

Authorized User agrees to:

1. promptly install any enabling code for Contractor Programs or Contractor System z Licensed Internal Code ("LIC") required for Sub-Capacity Pricing;
2. collect, and retain for a period of not less than six months, the SMF and SCRT89 data records for all LPARs, by Eligible Machine, required by the Sub-Capacity Reporting Tool for each Reporting Period;
3. run the most current version of the Sub-Capacity Reporting Tool against the collected SMF and SCRT89 data to produce a Sub-Capacity Report. In addition, Authorized User agrees to specify the LPAR name(s) in the Sub-Capacity Report where any Contractor Programs run for which SMF or SCRT89 data is not created. If there have been special circumstances during the Reporting Period, Authorized User may provide alternate values, as defined in the *SCRT Users Guide* (SG24-6522), for each Contractor Program with an explanation for the variance.
4. send to Contractor within the time specified in the Exhibit,
 - (a) the initial Sub-Capacity Report that is based on the data for the entire initial Reporting Period for each Eligible Machine that Authorized User wishes Contractor to register for Sub-Capacity Pricing; and
 - (b) subsequent Sub-Capacity Reports that are based on the data for each entire Reporting Period thereafter, for each registered Eligible Machine.

Sub-Capacity Reports may not be used to order or discontinue licenses, move licenses between Eligible Machines, report Eligible Machine model upgrades, or enable or disable Contractor Program features.

Both Contractor and Authorized User agree that Sub-Capacity Reports that reflect a changed Product LPAR Utilization Capacity will be considered to be orders placed by Authorized User without further action on Authorized User's part, and Authorized User authorizes Contractor to make any resulting billing increase.. Sub-Capacity Reports not submitted by the "not later than" date specified in the Exhibit will result in Contractor Programs being charged on a Full Capacity MSU basis for the Reporting Period;

5. configure Authorized User's Eligible Machine to send Transmit System Availability Data ("TSAD") weekly to Contractor via the Remote Support Facility ("RSF"). This enables Contractor to verify that the Product LPAR Utilization Capacity MSUs in the Sub-Capacity Reports Authorized User submits to Contractor are consistent with Authorized User's actual Eligible Machine configuration. An alternate means for Authorized User to collect and transmit this data is provided in the "z/OS Planning for Sub-Capacity Pricing" publication. Failure to submit TSAD may result in Contractor Programs being charged on a Full Capacity MSU basis;
6. assign a person in Authorized User's organization with authority to discuss and promptly resolve any questions on Sub-Capacity Reports or inconsistencies between Sub-Capacity Report contents or current license entitlement, and configuration data reported via the RSF; and
7. notify Contractor if Authorized User elects to convert from Sub-Capacity Pricing to WLC at Full Capacity MSUs.

5. Verification

For purposes of this section, "ICA Program Terms" means terms applicable to ICA Programs in the IBM Authorized User Agreement and applicable Transaction Documents and Attachments (including this one). In the event Contractor audits the Licensed Software in accordance with the terms of Section 80 of the Contract, and such audit covers any System z Programs covered by this Appendix, then for purposes of such System z Programs, the following additional provisions shall also apply: Contractor may verify Authorized User's compliance with ICA Program Terms at all site(s) and for all environments in which Authorized User uses or installs ICA Programs (whether for testing or productive use or otherwise). As reasonably necessary to verify Authorized User's use and installation of ICA Programs and Authorized User's compliance with the ICA Program Terms, Authorized User agrees to: 1) create, retain, and provide to Contractor and its auditors written and other records,

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system tools outputs, and other electronic or hard copy system information, including information regarding the system configurations on which the ICA Programs operate; and 2) permit Contractor and its auditors to be present and observe while Authorized User accesses machines to provide such records, outputs and other system information.

IBM Appendix #5(e)

Attachment for EWLC, TWLC, zELC and z/OS.e License Charges

This Appendix provides additional terms for Programs running on an Eligible Machine, including terms for z/OS.e and Programs with zSeries Entry License Charges (“zELC”), Entry Workload License Charges (“EWLC”) or Tiered Workload License Charges (“TWLC”). When running on an Eligible Machine, z/TPF, z/OS or z/OS.e must be running in z/Architecture (64-bit) mode.

NOTE: If z/OS.e is not running and the only charges for operating systems on an Eligible Machine are zELC, TWLC, or Full-Capacity EWLC charges, then this Appendix need not be signed. Contractor System z Machines Exhibit (Z125-3901-54 or later - Part 4) applies.

1. Definitions

Eligible Machine	A Machine to which an Eligible Operating System is licensed. Any copies of Eligible Operating Systems that run on an Eligible Machine must run in zArchitecture (64-bit) mode. Eligible Machines are specified in the Exhibit for EWLC, TWLC, zELC and z/OS.e License Charges, Z125-6588-09 or later (“Exhibit”).
Eligible Operating Systems	An Operating System specified in the Exhibit.
Full Capacity	EWLC pricing of Programs based on the total MSUs of the Eligible Machine.
Full Logical Model Capacity	The total MSU capacity of the Logical Model.
Guest (LPAR)	An Eligible Operating System when running on z/VM.
MSUs	Millions of Service Units per hour. Units of Workload capacity of an Eligible Machine.
Native (LPAR)	An Eligible Operating System when not running on z/VM.
Operating System Family	A Contractor operating system and the Contractor middleware that runs under it. The applicable Contractor operating systems are z/OS, z/TPF, and z/VSE V4 or higher.
Product LPAR Utilization Capacity	The highest number of MSUs utilized by the combined logical partitions (“LPARs”) in which an EWLC Contractor Program runs concurrently during a Reporting Period. The number of MSUs is based on a 4-hour rolling average utilization.
Reporting Period	The period which begins on the second day of a month and ends on the first day of the following month.
Sub-Capacity	EWLC pricing of Programs based on less than the total MSUs of the Eligible Machine.
Sub-Capacity Report	A report generated by the Contractor-provided Sub-Capacity Reporting Tool. The tool analyzes System Management Facilities (“SMF”) data and SCRT89 data and calculates the Product LPAR Utilization Capacity for most EWLC Contractor Programs. The Sub-Capacity Report includes these calculations. Authorized User is required to submit the report to Contractor only if Sub-Capacity pricing is in effect.
System z9 and zSeries Software Contracts Website	http://www.ibm.com/zseries/library/swpriceinfo/

2. LPAR Limitations

Authorized User may not use more than 15 LPARs on a zSeries 890 Capacity Setting 110

3. Charges for Programs running on an Eligible Machine

(1) Logical Models:

For determining the basis for certain software license charges, an Eligible Machine may be divided into two Logical Models, one running z/OS.e and the other running some other operating system(s). If the Eligible Machine is running only z/OS.e, or is not running z/OS.e, then there is only one Logical Model and it is equal to the physical Eligible Machine model. (**Note:** Integrated Facility for Linux (“IFL”) engines are not part of Logical Models or the physical Eligible Machine model.) Logical Models may be calculated as follows

- (a) If the only charges for Programs on an Eligible Machine are zELC, a table illustrating the various Logical Model combinations may be found in the Exhibit.
- (b) If an Eligible Machine is running a combination of z/OS.e with EWLC charges and some other operating system, the following steps are used to calculate the Logical Model:
 - i. Authorized User advises Contractor of planned MSUs:
Within 30 days of the billing period start date for EWLC charges, will advise Contractor of the planned MSU usage for both the z/OS.e and the non-z/OS.e Logical Models. The total planned MSUs must equal the total MSU capacity of the Eligible Machine. To determine the total MSU capacity of each model of an Eligible Machine, see the System z9 and zSeries Software Contracts Website.
 - ii. Contractor to calculate Logical Model sizes:
 - (1) Contractor will calculate the Logical Model sizes for zELC Programs by selecting the Logical Model with an MSU rating that equals Authorized User's planned z/OS.e MSU usage, or the next higher Logical Model if Authorized User's planned z/OS.e MSU usage exceeds the MSU rating for a Logical Model. Contractor will similarly calculate the non-z/OS.e Logical Model using non-z/OS.e MSUs.
 - (2) Contractor will calculate the appropriate tier for TWLC programs based upon Authorized User's planned z/OS.e MSU usage. Contractor will similarly calculate the non-z/OS.e tier using the non-z/OS.e MSUs.
 - iii. Changing Logical Models sizes:
If an Eligible Machine is upgraded or downgraded, or if Authorized User changes the MSUs used for z/OS.e, Authorized User will advise Contractor of the new planned MSUs for both z/OS.e and non-z/OS.e. Contractor will adjust the Logical Model sizes accordingly.
 - iv. If MSU usage is greater than the total MSU capacity of the Eligible Machine:
In the event actual MSUs reported on a Sub-Capacity Report for both the z/OS.e and non-z/OS.e Logical Models exceed the total MSU capacity of the Eligible Machine, Contractor will reduce the z/OS.e MSUs so that the total MSUs do not exceed the total MSU capacity of the Eligible Machine. However, the z/OS.e MSUs may not be reduced below 3 MSUs. If necessary, the non-z/OS.e MSUs will also be reduced so the total MSU capacity of the Eligible Machine is not exceeded.
This calculation will not impact zELC charges, only EWLC charges.
 - v. Actual MSU use exceeds planned MSUs provided to Contractor:
If the Sub-Capacity Report shows that actual non-z/OS.e MSU usage exceeded the planned MSU usage that Authorized User provided to Contractor, Contractor may adjust the size of the Logical Models accordingly. Both Authorized User and Contractor agree that this will be considered to be an order placed by Authorized User without further action on Authorized User's part. Authorized User authorizes Contractor to make any resulting billing increase and agree to pay such revised charges.
- (c) If the charges on an Eligible Machine are either aggregated Variable Workload License Charge ("VWLC") or aggregated Parallel Sysplex License Charges ("PSLC"), and a Program is running on only one of the Logical Models, the Full Logical Model Capacity for each Logical Model is defined as follows:
 - (i) For a Program running in the Logical Model with z/OS.e:
 - (1) divide the total number of MSUs in the Eligible Machine by the number of engines in that Eligible Machine;
 - (2) multiply that result by the number of engines in the Logical Model;
 - (3) if the result is not a whole number, any fraction equal to or greater than one-half is rounded up to the next whole number. Otherwise, fractions are dropped.
 - (ii) For a Program running in the Logical Model without z/OS.e, subtract the MSUs calculated above from the total MSUs in the Eligible Machine.

(2) z/OS.e Charges:

z/OS.e charges are based on the number of engines in the Logical Model in which z/OS.e runs or on EWLC charges.

(3) Aggregated Charges:

- (a) Aggregated PSLC may apply if the Eligible Machine is coupled in a Parallel Sysplex that has aggregated PSLC charges. Usage Pricing Charges may apply.
- (b) Aggregated Workload License Charges (“WLC”) may apply if the Eligible Machine is coupled in a Parallel Sysplex that has aggregated WLC charges.
- (c) Prerequisite Attachments, Supplements and Exhibits for Aggregated Charges (as applicable)
 - (i) For PSLC:
 - (1) Attachment for Parallel Sysplex License Charges (Z125-5205); and
 - (2) Exhibit - Parallel Sysplex License Charges (Z125-5206).
 - (ii) For WLC:
 - (1) Appendix for Contractor System z Workload License Charges (Z125-6516); and
 - (2) Contractor System z Workload License Charges Exhibit (Z125-6324).

(4) zELC Charges:

- (a) zELC charges are based on the category of the Logical Model.
- (b) zELC charges are available for selected Programs used on Eligible Machines that are identified in the “Group” column by “zELC,” followed by the zELC category, on the System z9 and zSeries Software Contracts Website.
- (c) When zELC charges are not available for certain Programs, a default charge applies. It is specified on the System z9 and zSeries Software Contracts Website for each applicable Eligible Machine in the column called “Other.”
- (d) If Authorized User selects zELC charges for any Program on an Eligible Machine, then all Programs for which zELC charges are available must have zELC charges, unless EWLC charges are available for selected Programs. In this case those Programs may have EWLC charges.
- (e) Increases in any zELC or default charges for Programs, due to changes in the category or model placement for any Eligible Machine to which the Programs are licensed, will be in effect for a minimum period of one month.

(5) TWLC Charges

- (a) TWLC charges are a tiered price structure and based on Full Logical Model Capacity. Sub-Capacity pricing is not available.
- (b) TWLC charges are available for selected Programs used on non-aggregated Eligible Machines identified in the “Group” column by “TWLC” followed by the TWLC tier on the System z9 and zSeries Software Contracts Website.
- (c) When TWLC charges are not available for certain programs, a default charge applies. It is specified on the System z9 and zSeries Software Contracts Website for each applicable Eligible Machine in the column called “Other.”
- (d) If Authorized User selects TWLC charges for any Program on an Eligible Machine, then all Programs for which TWLC charges are available must have TWLC charges, unless EWLC charges are available for selected Programs. In this case those Programs must have EWLC charges. However, if Authorized User elects Midrange Workload License Charges (“MWLC”) on z/VSE V4 then all Programs with MWLC available must have MWLC charges.
- (e) Increases in any TWLC or default charges for Programs, due to changes in the tier placement for any Eligible Machine to which the Programs are licensed, will be in effect for a minimum period of one month.

(6) EWLC Charges:

- (a) EWLC charges are based on Full Capacity or Sub-Capacity pricing.
- (b) EWLC charges are available only for selected Programs used on non-aggregated Eligible Machines that are identified in the “Group” column by “EWLC” on the System z9 and zSeries Software Contracts Website.
- (c) If Authorized User selects EWLC charges for a Program on an Eligible Machine, then all Programs for which EWLC charges are available must have EWLC charges. All other Programs on that Eligible Machine must have zELC charges, if zELC charges are available, or TWLC charges, if TWLC charges are available. However, if Authorized User elects Midrange Workload License Charges (“MWLC”) on z/VSE V4 then all Programs with MWLC available must have MWLC charges.

Contractor Programs with Select Application License Charges (“SALC”) may be licensed to the same Eligible Machine as Contractor Programs with EWLC Charges. SALC is described in the Select Application License Charges Amendment to Attachment for Contractor System z Usage Pricing Charges (Z125-7284-00 or later),

(d) Full Capacity Pricing Terms:

Increases in EWLC charges for Programs, due to changes in the model placement for any Eligible Machine to which the Programs are licensed, will be in effect for a minimum period of one month.

(e) Sub-Capacity Pricing Terms:

(i) Sub-Capacity Charges:

- (1) Monthly charges are based on the number of MSUs reported in the Program's Sub-Capacity Report for the specified Eligible Machine during a Reporting Period. This value corresponds to the Product LPAR Utilization Capacity or must equal Full Capacity. If Sub-Capacity pricing is not in effect, monthly charges are based on Full Capacity.

NOTE: Information on Contractor's billing process, including how to determine the applicable Reporting Period for a particular month's charges, can be found on the Sub-Capacity Corner website at

<http://www.ibm.com/zseries/swprice/subcap/>.

- (2) Eligible Operating System licenses are charged at Full Capacity MSUs until Contractor has processed the initial Sub-Capacity Report for that Eligible Operating System on that Eligible Machine, enabling Sub-Capacity Pricing for that Operating System Family.
- (3) The initial monthly charge for a non-operating system license is based upon the applicable operating system MSUs.
- (4) Once Sub-Capacity Pricing has commenced for an Eligible Operating System on an Eligible Machine, if an EWLC Program does not appear in a Sub-Capacity Report subsequent to its initial monthly charge, the Program will be charged at the minimum EWLC MSUs.
NOTE: Contractor specifies minimum EWLC MSUs in its programming announcements.
- (5) If Authorized User elects to have Sub-Capacity Pricing for an EWLC Contractor Program on an Eligible Machine, then Authorized User must have Sub-Capacity Pricing for all EWLC Contractor Programs in that Operating System Family on that Eligible Machine.
- (6) EWLC features have the same MSUs as the Program.
- (7) When z/TPF is licensed to an Eligible Machine, the Sub-Capacity Reporting Tool calculates the number of MSUs for z/TPF Programs running on it. See the Amendment for Calculation of z/TPF MSUs (Z125-7283) for further details.
- (8) When z/OS or z/OS.e is licensed to an Eligible Machine, the Sub-Capacity Reporting Tool calculates the number of MSUs used across all the z/OS and z/OS.e LPARs in which each EWLC Program ran during the Reporting Period as follows:

If z/OS or z/OS.e is running in Native LPAR(s) ...	and z/OS or z/OS.e is running in Guest LPAR(s), at least one of which is at V1.6 or lower ...	and z/OS or z/OS.e is running in Guest LPAR(s), at least one of which is at V1.7 or higher ...	then, MSUs are calculated in LPAR(s) in which the EWLC Contractor Program ran, as follows:
Yes	Yes	Yes	The highest combined 3. 4-hour rolling average utilization across all z/OS and z/OS.e Native LPARs, and 4. The maximum capacity of all z/OS and z/OS.e Guest LPARs
Yes	Yes	No	
Yes	No	Yes	The highest combined 4-hour rolling average utilization across all z/OS and z/OS.e Native LPARs and z/OS and z/OS.e Guest systems
Yes	No	No	
No	No	Yes	The highest combined maximum capacity of all z/OS and z/OS.e Guest LPARs
No	Yes	Yes	
No	Yes	No	

Authorized User may manage Native z/OS or z/OS.e LPAR utilization by specifying the LPAR defined capacity on the Hardware Management Console ("HMC"). However, this is not

required to obtain Sub-Capacity pricing. If Authorized User chooses to specify the defined capacity for a particular Native z/OS or z/OS.e LPAR, the Sub-Capacity Reporting Tool will use the lower of the specified capacity or the 4-hour rolling average in order to determine the number of MSUs associated with each EWLC Program

- (9) If an OS/390 or MVS operating system is licensed to the same Eligible Machine, then charges for the z/OS Operating System Family are based on Full Capacity.
 - (10) The capping function in z/OS or z/OS.e is used to ensure the workload does not exceed the LPAR defined capacity Authorized User has specified on a 4-hour rolling average. To achieve this, the capping function may automatically reduce and limit computer resources to workloads running in that LPAR. By defining the LPAR capacity, Authorized User authorizes the capping function to cap the computer's resources as defined.
- (ii) Contractor's Responsibilities:
Contractor will:
- (1) specify in the Exhibit a) the Eligible Machines, and b) the date and the process for transmitting Sub-Capacity Reports to Contractor;
 - (2) provide the Sub-Capacity Reporting Tool;
 - (3) adjust EWLC in response to the changes Authorized User indicates on the Sub-Capacity Reports that Authorized User submits; and
 - (4) register Eligible Machines when Authorized User submits the initial Sub-Capacity Reports.

(iii) Authorized User's Responsibilities under Sub-Capacity Pricing:

Authorized User agrees to:

- (1) promptly install any enabling code for Programs or Contractor System z Licensed Internal Code ("LIC") required for Sub-Capacity pricing;
- (2) collect, and retain for a period of not less than six months, the SMF and SCRT89 data records for all LPARs, by Eligible Machine, required by the Sub-Capacity Reporting Tool for each Reporting Period;
- (3) run the most current version of the Sub-Capacity Reporting Tool against the collected SMF and SCRT89 data to produce a Sub-Capacity Report. In addition, Authorized User agrees to specify the LPAR name(s) in the Sub-Capacity Report where any Contractor Programs run for which SMF or SCRT89 data is not created. If there have been special circumstances during the Reporting Period, Authorized User may also provide alternate values, as defined in the *SCRT Users Guide* (SG24-6522), for each Program, with an explanation for the variance;
- (4) send to Contractor within the time specified in the Exhibit:
 - (i) the initial Sub-Capacity Report that is based on the data for the entire initial Reporting Period for each Eligible Machine that Authorized User wishes Contractor to register for Sub-Capacity pricing; and
 - (ii) subsequent Sub-Capacity Reports that are based on the data for each entire Reporting Period thereafter, for each registered Eligible Machine.

Sub-Capacity Reports may not be used to order or discontinue licenses, move licenses between Eligible Machines, report Eligible Machine model upgrades, or enable or disable Program features.

Both Contractor and Authorized User agree that Sub-Capacity Reports that reflect a changed Product LPAR Utilization Capacity will be considered to be orders placed by Authorized User without further action on Authorized User's part. Authorized User authorizes Contractor to make any resulting billing increase, and agrees to pay such revised charges. Sub-Capacity Reports not submitted by the "not later than" date specified in the Exhibit will result in Programs being charged on a Full Capacity basis for the Reporting Period;

- (5) configure Authorized User's Eligible Machine to send Transmit System Availability Data ("TSAD") weekly to Contractor via the Remote Support Facility ("RSF"). This enables Contractor to verify that the Product LPAR Utilization Capacity MSUs in the Sub-Capacity Reports Authorized User submits to Contractor are consistent with Authorized User's actual Eligible Machine configuration. An alternate means for Authorized User to collect and transmit this data is provided in the "z/OS Planning for Sub-Capacity Pricing" publication. Failure to submit TSAD may result in Programs being charged on a Full Capacity basis;

- (6) assign a person in Authorized User's organization with authority to discuss and promptly resolve any questions on Sub-Capacity Reports or inconsistencies between Sub-Capacity Report contents or current license entitlement, and configuration data reported via the RSF; and
- (7) notify Contractor if Authorized User elects to convert from Sub-Capacity pricing to EWLC at Full Capacity.

(7) GOTC Charges (Graduated One-Time Charges)

- (a) Programs for which Authorized User has paid GOTC may be moved to an Eligible Machine.
- (b) Upgrade charges will apply if the Eligible Machine "Default Model Group" specified in the Exhibit or the System z9 and zSeries Software Contracts Website is higher than the current GOTC entitlement. Refunds do not apply if the Eligible Machine Default Model Group is lower.
- (c) Contact Contractor for special pricing if the GOTC license is being moved to an Eligible Machine whose applicable default charge is based on MSUs rather than a specific Default Model Group.

4. Additional License Terms for z/OS.e

- (1) Authorized User may run z/OS.e only on Eligible Machines.
- (2) Authorized User must run z/OS.e in a Logical Partition ("LPAR") that has "ZOSE" as the first four characters of the LPAR name.
- (3) Authorized User must execute z/OS.e in z/Architecture (64-bit) mode.
- (4) Authorized User must order and license z/OS.e for the number of engines in the Logical Model in which Authorized User will run z/OS.e, or alternatively, z/OS.e may be ordered with EWLC charges.
- (5) Authorized User may use only the levels of Language Environment (LE), JES2 and JES3 that are delivered with z/OS.e.
- (6) Authorized User may not run any of the following z/OS.e base elements, optional features, or functions:
 - (a) BookManager READ
 - (b) BookManager BUILD feature
 - (c) GDDM
 - (d) GDDM-PGF feature
 - (e) GDDM-REXX feature
 - (f) DCE Application Support
 - (g) LANRES
 - (h) Bulk Data Transfer (BDT) File-to-File feature
 - (i) Language Environment's use of Run-time Library Services (RTLS)
 - (j) Language Environment Routine Retention (LRR)
 - (k) Language Environment Compatibility Preinitialization for C and PL/I
 - (l) Encina Toolkit Executive
 - (m) MICR/OCR
 - (n) Communications Server Network Print Facility (NPF) feature
- (7) Authorized User may not run any of the following under z/OS.e:
 - (a) CICS, IMS, FORTRAN, or COBOL applications. However, Authorized User may run precompiled COBOL DB2 stored procedures and other precompiled COBOL applications using the Language Environment preinitialization interface (CEEPIPI). Authorized User may also use DB2, CICS and IMS Connectors to access existing z/OS or OS/390 systems or an application server on Linux for zSeries. Hipersockets may be used as long as they access LPARs or IFLs on the same Eligible Machine.
 - (b) COBOL, FORTRAN, PL/I, or VisualAge PL/I compilers. However, Authorized User may execute precompiled PL/I and VisualAge PL/I applications.
 - (c) DB2 QMF Host feature, DB2 QMF HPO feature.
 - (d) Authorized User may not have more than eight concurrent TSO users under z/OS.e.
 - (e) Authorized User may not run any operating system other than z/OS.e, z/VM V4, z/VM V5 and LINUX in the z/OS.e Logical Model. Such operating systems include, for example, z/OS, OS/390, MVS, VM (prior to z/VM V4), VSE, z/VSE, TPF, z/TPF, etc.

- (f) Authorized User agrees to configure Authorized User's Eligible Machine to send Transmit System Availability Data ("TSAD") to Contractor weekly via the Remote Support Facility ("RSF"). This enables Contractor to verify that Authorized User's z/OS.e license matches Authorized User's actual Eligible Machine configuration. An alternate means for Authorized User to collect and transmit this data is provided in the "Hardware Management Console Operations Guide" publication.

5. Programs that run on an IFL

- (1) Programs that run on an IFL engine may be licensed under the terms of the agreement provided with them.
- (2) Charges for Programs that Contractor has announced as eligible to run on IFL engines are based on the total number of IFL engines installed on the Eligible Machine.
- (3) If a Program runs on the IFL engine(s) and on the engine(s) of one or both of the Logical Models, the charges are based on the total of the IFL engines and the engines in the Logical Models where the Program runs.

6. Verification

In the event Contractor audits the Licensed Software in accordance with the terms of Section 80 of the Contract, and such audit covers any System z Programs covered by this Appendix, then for purposes of such System z Programs, the following additional provisions shall also apply: Authorized User agrees to: 1) create, retain, and provide to Contractor and its auditors written and other records, system tools outputs, and other electronic or hard copy system information, including information regarding the system configurations on which the ICA Programs operate; and 2) permit Contractor and its auditors to be present and observe while Authorized User accesses machines to provide such records, outputs and other system information.

Contractor will notify Authorized User in writing if any such verification indicates that Authorized User is not in compliance with the ICA Program Terms. Authorized User agrees to promptly pay any additional charges and other liabilities Authorized User becomes obligated to pay based on its use and deployment of ICA Programs or its failure to comply with the ICA Program Terms at any time during the period such ICA Programs are licensed to Authorized User.

APPENDIX F

License Agreements for Evaluation Programs



Appendix F #1 – License Agreement for Evaluation of Programs

Part 1 - General Terms

BY DOWNLOADING, INSTALLING, COPYING, ACCESSING, OR USING THE PROGRAM YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ACCEPTING THESE TERMS ON BEHALF OF ANOTHER PERSON OR A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT AND WARRANT THAT YOU HAVE FULL AUTHORITY TO BIND THAT PERSON, COMPANY, OR LEGAL ENTITY TO THESE TERMS. IF YOU DO NOT AGREE TO THESE TERMS,

- DO NOT DOWNLOAD, INSTALL, COPY, ACCESS, OR USE THE PROGRAM; AND
- PROMPTLY RETURN THE PROGRAM TO THE PARTY FROM WHOM YOU ACQUIRED IT. IF YOU DOWNLOADED THE PROGRAM, CONTACT THE PARTY FROM WHOM YOU ACQUIRED IT.

"IBM" is International Business Machines Corporation or one of its subsidiaries.

"License Information" ("LI") is a document that provides information specific to a Program. The Program's LI is available in a file in the Program's directory, by the use of a system command, or as a booklet which accompanies the Program. The LI may also be found at <http://www.ibm.com/software/sla/>.

"Program" is the following, including the original and all whole or partial copies: 1) machine-readable instructions and data, 2) components, 3) audio-visual content (such as images, text, recordings, or pictures), 4) related licensed materials, and 5) license use documents or keys, and documentation.

"You" and "Your" refer either to an individual person or to a single legal entity.

This Agreement includes the Contract, Part 1 – General Terms, License Information, and Addendum to International License Agreement for Evaluation of Programs (Addendum) and is the complete agreement between You and IBM regarding the use of the Program. It replaces any prior oral or written communications between You and IBM concerning Your use of the Program. The terms of License Information may replace or modify those of Part 1.

1. Entitlement

License

The Program is owned by IBM or an IBM supplier, and is copyrighted and licensed, not sold.

IBM grants You a nonexclusive license to use the Program when you lawfully acquire it.

You may 1) use the Program only for internal evaluation, testing, or demonstration purposes, on a trial or "try-and-buy" basis; and 2) make and install a reasonable number of copies, including a backup copy, of the Program to support such use. The terms of this license apply to each copy You make. You will reproduce all copyright notices and all other legends of ownership on each copy, or partial copy, of the Program.

THE PROGRAM MAY CONTAIN A DISABLING DEVICE THAT WILL PREVENT IT FROM BEING USED AFTER THE EVALUATION PERIOD ENDS. YOU WILL NOT TAMPER WITH THIS DISABLING DEVICE OR THE PROGRAM. YOU SHOULD TAKE PRECAUTIONS TO AVOID ANY LOSS OF DATA THAT MIGHT RESULT WHEN THE PROGRAM CAN NO LONGER BE USED. The presence of a disabling device shall be noted on the Addendum.

You will 1) maintain a record of all copies of the Program and 2) ensure that anyone who uses the Program (accessed either locally or remotely) does so only for Your authorized use and complies with the terms of this Agreement.

You may not 1) use, copy, modify or distribute the Program except as provided in this Agreement; 2) reverse assemble, reverse compile, or otherwise translate the Program except as specifically permitted by law without the possibility of contractual waiver; or 3) sublicense, rent, or lease the Program.

The evaluation period begins when You agree to the terms of this Agreement and ends 1) as of the duration or date specified in the License Information or 2) when the Program automatically disables itself. There is no charge for the use of the Program for the duration of the evaluation period. Unless IBM specifies in the License Information that You may retain the Program, You will destroy the Program and all copies made of it within ten days of the end of the evaluation period. If IBM specifies that you may retain the Program, and you elect to do so, the Program will be then subject to a different license agreement, that will be provided to you at that time. In addition, a charge may apply.

IBM may terminate Your license if You fail to comply with the terms of this Agreement. If IBM does so, You must destroy all copies of the Program.

2. No Warranty

SUBJECT TO ANY STATUTORY WARRANTIES WHICH CANNOT BE EXCLUDED, IBM MAKES NO WARRANTIES OR CONDITIONS EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, REGARDING THE PROGRAM OR TECHNICAL SUPPORT, IF ANY.

The exclusion also applies to any of IBM's Program developers and suppliers.

Manufacturers, suppliers, or publishers of non-IBM Programs may provide their own warranties.

IBM does not provide technical support, unless IBM specifies otherwise.

3. Limitation of Liability

Circumstances may arise where, because of a default on IBM's part or other liability, You are entitled to recover damages from IBM. In each such instance, regardless of the basis on which You may be entitled to claim damages from IBM,

APPENDIX F - SUBMISSION #1

Contractor Name: IBM Corp.

(including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM is liable for no more than 1) damages for bodily injury (including death) and damage to real property and tangible personal property and 2) the amount of any other actual direct damages up to the charges for the Program that is the subject of the claim.

This limitation of liability also applies to IBM's Program developers and suppliers. It is the maximum for which they and IBM are collectively responsible.

UNDER NO CIRCUMSTANCES IS IBM, ITS PROGRAM DEVELOPERS OR SUPPLIERS LIABLE FOR ANY OF THE FOLLOWING, EVEN IF INFORMED OF THEIR POSSIBILITY:

- 1) **LOSS OF, OR DAMAGE TO, DATA;**
- 2) **SPECIAL, INCIDENTAL, OR INDIRECT DAMAGES, OR FOR ANY ECONOMIC CONSEQUENTIAL DAMAGES; OR**
- 3) **LOST PROFITS, BUSINESS, REVENUE, GOODWILL, OR ANTICIPATED SAVINGS.**

SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU.

4. General

- 1) Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.
- 2) In the event that any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.
- 3) You may not export the Program.
- 4) You agree to allow IBM to store and use Your contact information, including names, phone numbers, and e-mail addresses, anywhere they do business. Such information will be processed and used in connection with our business relationship, and may be provided to contractors, Business Partners, and assignees of IBM for uses consistent with their collective business activities, including communicating with You (for example, for processing orders, for promotions, and for market research).
- 5) Reserved.
- 6) Neither You nor IBM is responsible for failure to fulfill any obligations due to causes beyond its control.
- 7) This Agreement will not create any right or cause of action for any third party, nor will IBM be responsible for any third party claims against You except, as permitted by the Limitation of Liability section above, for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable.
- 8) U.S. Government Users Restricted Rights - Use, duplication or disclosure restricted by the GSA ADP Schedule Contract with the IBM Corporation.

5. Governing Law, Jurisdiction, and Arbitration

Governing Law

Both You and IBM consent to the application of the laws of the State of New York to govern, interpret, and enforce all of Your and IBM's rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles.

The United Nations Convention on Contracts for the International Sale of Goods does not apply.

Jurisdiction

All of our rights, duties, and obligations are subject to the courts of the country in which You acquired the Program license.

International Business Machines
By: _____

[insert Licensee name]
By: _____

Name: _____
Title: _____

Name: _____
Title: _____

Address: _____

Address: _____

Date: _____

Date: _____



Appendix F #2 – Addendum to International License Agreement for Evaluation of Programs

Evaluation Period

Check the appropriate boxes:

Start Date:

End Date:

Original Addendum

Revised Addendum

Program Contains Hardstop or

Passive Monitoring Device

LIST OF PROGRAMS TO BE EVALUATED

Program Number	Plant Order Number	Quantity	Estimated Delivery Date	Description
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Licensee: _____

Attn: _____

Telephone Number: _____

These terms are in addition to those of the IBM International License Agreement for Evaluation of Programs (the "Agreement"). By signing this Addendum, 1) you accept its terms, 2) Programs listed on it become subject to it and the Agreement, and 3) you waive any money-back guarantee and, if applicable, the evaluation period counts towards the acceptance period set forth in the Contract associated with such Programs.

Both of us agree that the complete agreement between us about this transaction consists of 1) the Contract; 2) this Addendum and 3) the International License Agreement for Evaluation of Programs.

Agreed to (Customer Name):

Agreed to:

International Business Machines Corporation

By

By

Authorized signature

Authorized signature

Name (type or print):

Name (type or print):

Date:

Date:

Customer number:

Addendum number:

Customer address:

IBM Office number:

IBM address:

Installation address:

IBM Addendum to International License Agreement for Evaluation of Programs (Continued)

Program Number	Plant Order Number	Quantity	Estimated Delivery Date	Description
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