# HOURLY-BASED INFORMATION TECHNOLOGY SERVICES CONTRACT

**BETWEEN**

## THE NEW YORK STATE OFFICE OF GENERAL SERVICES

**AND**

## TEMPOSITIONS, INC. D/B/A COMPUFORCE

## CONTRACT #: PR65787

THIS AGREEMENT (hereinafter "Agreement" or "Contract") for the acquisition of hourly-based information technology services is made by and between the People of the State of New York, acting by and through the Commissioner of the New York State Office of General Services (hereinafter "OGS" or "State") with its principle place of business at the Corning Tower, Empire State Plaza, Albany, New York, 12242, acting pursuant to the authority granted under State Finance Law §163 and TEMPOSITIONS, INC. D/B/A COMPUFORCE (or "Contractor") with offices at 420 LEXINGTON AVENUE, NEW YORK, NY 10170 are collectively referred to herein as "the Parties."

**WITNESSETH:**

WHEREAS, since taking office in January, Governor Andrew Cuomo has committed his administration to implementing enterprise-wide changes that will utilize modern business practices in running New York State government.

WHEREAS, New Yorkers need a government in which they can take pride, and this comprehensive overhaul of operations will help accomplish that goal.

WHEREAS, as part of Governor Cuomo's Procurement Transformation, the Division of the Budget and OGS issued a procurement for Hourly-Based Information Technology Services (hereinafter "HBITS") to create centralized contracts primarily for, but not limited to, New York State agencies that focuses on implementing best practices and identifying opportunities for savings and is consistent with the administration's policy goals of encouraging small businesses and certified minority and women-owned business enterprises.

WHEREAS, OGS issued a competitive solicitation, referenced as Request for Proposals (hereinafter "RFP") #22439, which was advertised in the December 5, 2011 and December 6, 2011 editions of the New York State Contract Reporter as required by the New York State Economic Development Law.

WHEREAS, OGS conducted a competitive process to identify bidders that will provide the best value for the provision of services set forth in the RFP, as evidenced by achieving the highest total score of responsive and responsible bidders using the evaluation criteria (60% financial and 40% technical) listed in the RFP.

WHEREAS, a decision was made to divide New York State into three regions for the purposes of establishing pricing, and the RFP further provided that the contracts will be awarded in a tiered approach with up to twenty (20) active contracts and up to five (5) waitlist contracts (hereinafter the "HBITS Contracts").

WHEREAS, through the issuance of the HBITS Contracts, New York State adopted a new model for procuring HBITS for Authorized Users. By means of a "best value" RFP, OGS awarded potential statewide HBITS opportunities to the top 25 bidders that bid a proposal for consideration.

WHEREAS, the bidders with the twenty highest best value score shall be placed on the Active list and the five (5) bidders with the next highest best value scores will be placed on the Waitlist, and that on an annual basis the performance of the Active list contractors shall be reviewed and the five (5) contractors with the lowest performance scores shall be placed on the Waitlist for the next year of the Contract and the current five (5) contractors on the Waitlist shall be placed on the Active list.

WHEREAS, the State has determined the Contractor submitted a responsive proposal, received one of the twenty-five highest scores, successfully concluded contract negotiations and has been placed either on the Active list or Waitlist for the first year of the Contract. The Contractor is willing to provide the services set forth herein.

NOW THEREFORE, in consideration of the terms hereinafter mentioned and also the mutual covenants and obligations moving to each Party hereto from the other, the Parties hereby agree as follows:

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# SECTION 1. INTRODUCTION

## 1.1 INTRODUCTION

### 1.1.1 Scope

This Contract sets forth the terms and conditions for the provision of HBITS, collectively referred to as "Services".

The rates for such Services are Hourly Wage Rates and Markups that the Contractor will charge the Authorized Users for Services rendered. The rates included in this Contract exclude previously utilized "Not-to-Exceed" rates. Appendix D, Pricing Schedules, sets forth the contractual rates for Services rendered under this Contract.

The Parties agree that this Contract sets forth two distinct processes for the acquisition of Contractual Services: one for the Authorized Users who are Executive Agencies; and a second, separate comparable process for the Authorized Users that are not Executive Agencies. The former is referred to as "MSP Users" or "Executive Agency Authorized User" and the latter is referred to as "Non-MSP Users" or "Non-Executive Agency Authorized User." When a requirement applies to every Contract user, the term "Authorized User" is employed.

## 1.2 CATEGORY HISTORY

New York State Executive Agencies spent approximately $140 million on HBITS during the 2010-2011 State Fiscal Year. Historically, the amount spent has been distributed across several contracting vehicles and across multiple Executive Agencies with little consistency and continuity. The result was a very inefficient HBITS program and process.

Following a detailed analysis of prior Statewide spending in this IT category, several areas were identified for savings within the procurement area of HBITS. The sourcing analysis showed that Executive Agencies paid vastly different hourly rates for similar job titles; sometimes differing by more than 40%. In addition, the prior procurement process proved to be costly and time consuming for both the Authorized Users and vendors. As a result, several agencies developed their own information technology services contracts and created a unique process for obtaining hourly-based consultants. This caused confusion within and across the Executive Agencies and within the vendor community. It is clear through the analysis that the Executive Agencies in many cases did not have visibility into the hourly bill rates being paid to vendors across agencies, nor did the State understand the layers of sub-contracting occurring within placements.

This HBITS Contract seeks to resolve the identified issues. The State will compel most, if not all, spending on HBITS for Executive Agencies via this HBITS Contract.

## 1.3 DEFINITIONS

The Contractor is directed to review Appendix B for a listing of terms and the corresponding definitions within standard New York State contracts. In addition, OGS has provided the following definitions that fall within the scope of this Contract:

**"Best Value"** shall mean the basis for awarding a contract for services to the bidder which best optimizes quality, cost and efficiency among Responsive and Responsible bidders. See State Finance Law § 163(1)(j).

**"Business Day"** shall mean Monday through Friday, excluding NYS Holidays, between the hours of 7:30 AM and 5:00 PM EST.

**"Candidate"** shall refer to a person proposed by a Contractor in response to a request from an Authorized User, prior to selection by an Authorized User.

**"Consultant"** shall refer to a Candidate that has been selected by an Authorized User to perform work.

**"CS"** shall mean the New York State Department of Civil Service.

**"DOB"** shall mean New York State Division of the Budget.

**"EEO"** shall mean Equal Employment Opportunity.

**"Engagement"** shall mean the period of time that a Consultant works for an Authorized User that begins on the first working day after a successful placement. A Task Order Request Form results in an engagement.

**"EST"** shall mean Prevailing Eastern Standard Time.

**"Executive Agency"** or "Executive Agencies" shall mean all state departments, offices or institutions but, for the purposes of this Contract, such definition excludes the State University of New York (SUNY) and the City University of New York (CUNY). Furthermore, such term shall not include the legislature and the judiciary organizations. For the sake of clarity, the term "Executive Agency" does not include any public benefit corporation, public authority, or local government entity.

**"Government or Governmental Entity"** shall mean an entity at the federal, state, county, city or provincial level.

**"HBITS"** shall mean Hourly-Based Information Technology Services.

**"Hourly Bill Rate"** refers to the hourly fee that the Contractor will receive for the Services provided under each engagement. The Hourly Bill Rate is calculated by multiplying the Markup times the Hourly Wage Rate. The Contractor's Hourly Bill Rate is set forth in Appendix D.

**"Hourly Wage Rate"** refers to the hourly rate that the Consultant will receive for services provided under each engagement, regardless of potential sub-contracting layers. The Contractor's Hourly Wage Rate is set forth in Appendix D.

**"Joint Venture"** shall mean a contractual agreement joining together two or more business enterprises, for the purpose of performing on a State Contract.

**"Knowledge Transfer"** generally describes method(s) to provide the knowledge, skills, training and expertise to the Authorized User to enable him/her to do the work independently if the Consultant was no longer available.

**"Markup"** shall mean all costs a Contractor will incur beyond the hourly wage rate paid to a Consultant. This may include, but is not limited, to statutory requirements (e.g., FICA, FUTA, SUTA, Worker's Compensation, etc.), overhead, recruiting costs, training, visa sponsorship, and profit. The Contractor's Markup is set forth in Appendix D.

**"May"** denotes the permissive in a contract clause or specification. Also see "Will."

**"M/WBE"** shall mean a business certified with Empire State Development (ESD) as a Minority and/or Woman-Owned Business (M/WBE).

"**MSP"** shall mean Managed Services Provider. OGS reserves the right to use a different name to describe the unit that fulfills the Contractual duties without undertaking a formal contract amendment. It will do so through the issuance of a purchasing memorandum. Such duties include, but are not limited to, making Contractors aware of Candidate placement opportunities, preliminary review of certain Candidate Response Forms, management of the centralized billing and payment function for Executive Agencies, monitoring M/WBE goal performance and conducting the annual evaluation of the Contractors.

**"Must"** denotes the imperative in a contract clause or specification. Also see "Shall."

"**n/a"** is a common abbreviation for *not applicable* or *not available*, used to indicate when information in a certain field on a table is not provided, either because it does not apply to a particular case in question or because it is not available.

**"New York State Small Business"** is defined as a company that is a resident to New York State, independently owned and operated, with 100 or fewer employees, and not dominant in its field.

**"Non-Executive Agency"** or "Non-Executive Agencies" shall mean all Authorized Users that are not included within the definition of Executive Agency; e.g., municipalities within the State of New York.

**"NYS Holidays"** refers to the legal holidays for State Employees in the Classified Service of the Executive Branch, as more particularly specified on the website of the NYS Department of Civil Service. This includes the following: New Year's Day; Martin Luther King Day; Washington's Birthday (observed); Memorial Day; Independence Day; Labor Day; Columbus Day; Veteran's Day; Thanksgiving Day; and Christmas Day. See http://www.cs.ny.gov/attendance_leave

**"OITS"** shall mean the Office of Information Technology Services. This entity was formerly known as the Office for Technology (OFT)

**"OSC"** shall mean the Office of the State Comptroller.

"**Procurement Services Group (PSG)"** shall mean a division of the New York State Office of General Services which is authorized by law to issue centralized, statewide contracts for use by New York agencies, political subdivisions, schools, libraries and others authorized by law to participate in such contracts.

**"Region 1"** shall mean those counties within New York State that are not included in Regions 2 or Region 3.

**"Region 2"** shall mean the Mid-Hudson Region which contains Dutchess, Orange and Putnam Counties.

**"Region 3"** shall mean the New York City Metro Region which contains Nassau, Rockland, Suffolk, Westchester, Bronx, Kings, New York, Queens, and Richmond Counties.

**"SBE"** shall mean a Small Business Enterprise. A "New York State Small Business" is defined as a company that is a resident to New York State, independently owned and operated, with 100 or fewer employees, and not dominant in its field. See State Finance Law §160(8).

**"S/M/WBE"** shall mean Small, Minority and Women-Owned Business Enterprises (S/M/WBE).

**"Shall"** denotes the imperative in a contract clause or specification. Also see "Must."

**"Slight Deviation"** shall mean a deviation of no greater than 5% below the Hourly Wage Rate and any percentage above the Hourly Wage Rate, provided that the Hourly Bill Rate remains unchanged. This term shall only apply to the Hourly Wage Rate.

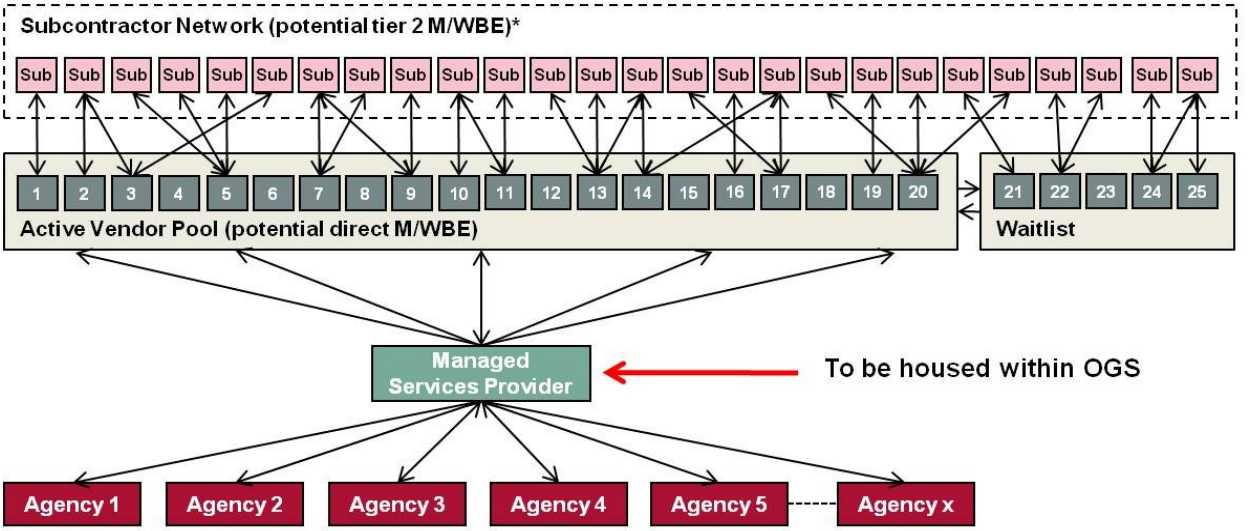
**"Will"** denotes the permissive in a contract clause or specification. Also see "May."

## SECTION 2. STATEMENT OF WORK

### 2.1 OVERVIEW

Requests for placements, posting of Task Order Request Forms for Consultants under the HBITS Contract shall only be distributed to the "Active" Contractors, group of 20. All Contractors awarded under the HBITS Contract are expected to (but not required to) maintain a subcontractor network that may include New York State certified M/WBEs and SBEs.

All Executive Agency placements under the HBITS Contract shall go through the MSP, an HBITS focused group, housed within OGS, which will handle all administrative aspects of placing Consultants, including centralized billing and payment for all Executive Agency purchases; as well as several other key activities within the enhanced HBITS process detailed in Appendix F. This organization will serve as the central point of contact for the Contractor pool. The following sets forth a pictorial representation of how the Executive Agencies, the MSP and the Contractor will exchange information regarding opportunities.




*Model is illustrative; some vendors have sufficient in-house resources while others will sub-contract business to other vendors

All non-Executive Agency Authorized User placements under the HBITS Contract shall be predominately conducted by such Authorized User. Such entities are referred to as "Non-MSP Users."

**2.2 HBITS ACQUISITION PROCESS**

OGS reserves the right to change the processes set forth in this Section and Appendix F in non-material and substantive ways without seeking a contract amendment. The remainder of this Section details the HBITS acquisition process. Section 2.2.2 outlines the Non-MSP/Non-Executive Agency acquisition process. Additional details are set forth in Appendix F.

A high-level breakdown of responsibilities between the Executive Agency, the MSP (NYS OGS) and the Contractor(s) is located in the table below. Detailed Contractor requirements and process can also be found in Section 6 and Appendix F of this Contract.

| ***Executive Agency Authorized User*** | ***MSP (New York State/OGS)*** | ***Contractor(s)*** |
|---|---|---|
| Internal agency approvals | Initial screen of Candidate Response Forms from Contractor pool | Recruiting and maintaining adequate M/WBE network |
| All necessary pre-approvals (for example; OFT, DOB) | Forward qualified Candidate Response Forms to Executive Agencies | Candidate identification, initial screening, pre-interviews |
| Set position requirements and specifications in the initial Task Order Request Form | • Solicit, receive and track Contractor Performance<br>• Receive feedback from MSP Users<br>• Communicate feedback to Contractor pool.<br>• Facilitate potential Contractor meetings | Background checks, H-1B Visa validation, Candidate training, foreign education vetting as meeting additional security requirements, as necessary. |
| Candidate interviews | Monitor M/WBE metrics and provide to Executive Agencies | |
| Final hiring authority | Ensure consistency in documentation | |
| Certification of Consultant Time Sheets and verification of invoices. | Centralized Billing and Payment for MSP users | |

### 2.2.1 HBITS Process For Executive Agencies

When a need is identified, an Executive Agency Authorized User is required to obtain all internal/control agency approvals necessary **prior** to initiating the HBITS process. Upon internal/control agency approvals, the Executive Agency Authorized User will inform the MSP of its need by submitting a completed Task Order Request Form (see Appendix F). The Task Order Request Form will identify the selected Job Titles needed, as well as requested qualifications.

The MSP will distribute an e-mail to all Active Contractors and post to the Contractor bulletin board the completed Task Order Request Forms. The MSP will accept responses to the Task Order Request Form from Active Contractors through 5:00PM EST on the tenth Business Day (exclusive of the day of transmission to the Contractors), unless it is titled as an "expedited" request through 5:00 PM on the fifth Business Day. Any requests for clarification on a Task Order Request Form must be submitted in writing to the MSP.

The Executive Agency Authorized User may request a minimum of one (1) and a maximum of (2) Candidate Response Forms per position from each Active Contractor. Once Candidate Response Forms have been collected, the MSP will review Hourly Bill Rates and ensure proposed qualifications are in accordance with the contract. Once reviewed the MSP will send the Candidate Response Forms to agencies for consideration. Hourly Bill Rates must satisfy the requirements of State Finance Law §163(10) (c). In addition, the MSP will review Candidate Response Forms to ensure that the proposed Candidates meet the mandatory qualifications specified in the Task Order Request Form. Executive Agency Authorized Users are not allowed to add additional "mandatory" qualifications to the Task Order Request Form other than those found in Appendix D for the requested job title and skill level. Candidate Response Forms that do not meet mandatory position requirements shall be rejected. The MSP may elect to perform additional screening of Candidate Response Forms. Upon completion of this screening, suitable Candidate Response Forms (up to 40) shall be passed on to the Executive Agency Authorized User by 5:00PM EST no later than on the second business day after the close of the submission period from Contractors (exclusive of receipt date).

The MSP shall use the following methodology to determine the total number of qualified Candidate Response Forms to be passed on to the Executive Agency Authorized User for each position sought:

a. If 10 – 40 qualified Candidates: 50% of the Candidate Response Forms with the lowest Hourly Bill Rates are forwarded to the Executive Agency Authorized User. If the 11$^{th}$ lowest Hourly Bill Rate is within 1% of the 10$^{th}$ lowest Hourly Bill Rate, that Candidate Response Form would also be forwarded to the Executive Agency Authorized User.

b. If 6 – 10 qualified Candidates: Candidate Response Forms with 5 lowest Hourly Bill Rates are forwarded to the Executive Agency Authorized User. If the 6$^{th}$ lowest Hourly Bill Rate is within 1% of the 5$^{th}$ lowest Hourly Bill Rate, that Candidate Response Form would also be forwarded to the Executive Agency Authorized User.

c. If 5 or fewer qualified Candidates: MSP will investigate and determine whether to restart process or forward all Candidate Response Forms.

The Executive Agency Authorized User must make every attempt to evaluate the Candidate Response Forms within five (5) business days of receipt and notify the Contractors via the MSP of Candidates selected for interview. The Executive Agency Authorized User shall interview at least the minimum number of Candidates for the number of positions sought in accordance with the below table. An Executive Agency Authorized User is required to interview the three (3) Candidates with the highest score resulting from the preliminary technical evaluation before it may select a lower ranked Candidate for the position.

| ***Number of Positions Sought through a Single Task Order*** | ***Minimum Number of Candidate Interviews*** |
|---|---|
| 1 | 3 |
| 2 | 5 |
| 3 | 6 |
| 4 | 8 |
| 5 | 10 |

Upon submission for a specified Task Order Request Form, a Contractor cannot submit the same Candidate for another position until such Candidate is released from consideration by the Authorized User. By the end of the five (5) business days after the MSP forwards the applicable Candidate Response Forms, the Executive Agency Authorized User will notify the MSP of the preliminary technical evaluation results, and the MSP will then inform the Contractors of their Candidates' status (interview requested or released). The MSP will not schedule interviews on behalf of the Executive Agency Authorized User. If the Executive Agency Authorized User does not notify the MSP of the preliminary technical evaluation results within five (5) business days, the Candidates shall be deemed released. If a Candidate is released, the Contractor may resume submitting name for other requests. Candidates selected for interview will not be considered released until the final selection is made by the Authorized User.

The Executive Agency Authorized User reserves the right to reject all Candidate Response Forms provided by the Active Contractors. In this case, the MSP may re-post the Task Order Request Form to the Active Contractor pool for Candidate Response Forms.

Circumstances may arise in which an Executive Agency Authorized User has an urgent HBITS need. In this case the Executive Agency Authorized User will indicate on the Task Order Request Form that a five (5) business day turnaround time is required for Contractors to return Candidate Response Forms. This will occur in limited circumstances and is subject to written pre-approval by the MSP. The failure of an Executive Agency Authorized User to plan for expected gaps in HBITS services shall not be considered as an adequate justification to receive approval for the five (5) business day turnaround time.

In the event that two Active Contractors submit the same Candidate for the same request, only the Contractor with the lower Hourly Bill Rate shall be considered. In the event a Candidate is submitted for different requests with overlapping schedules, only the submission to the earliest announced request shall be considered. In neither case will the Contractor that submitted the rejected Candidate Response Form be permitted to resubmit a new Candidate.

**2.2.2 HBITS Process for Non-MSP (Non-Executive Agency) Users**

When a need is identified, a Non-Executive Agency Authorized User is required to obtain all internal/control agency approvals necessary **prior** to initiating the HBITS process; see Appendix F for process. Upon internal/control agency approvals, the Non-Executive Agency Authorized User will complete a Task Order Request Form and send it to the MSP for dissemination. The Task Order Request Form will identify the selected Job Titles needed, as well as additional requested qualifications as dictated on the Task Order Request Form. The Non-Executive Agency Authorized User does **not** send the Task Order Request Form directly to the Active Contractors.

The MSP will distribute an e-mail to all Active Contractors and post to the Contractor bulletin board the completed Task Order Request Forms. However, the Non-Executive Agency Authorized User will accept Candidate Response Forms, instead of the MSP, directly from the Active Contractors through 5:00PM EST on the tenth Business Day (exclusive of the day of transmission to the Contractors). **Non-Executive Agency Authorized Users shall not be allowed to request a five (5) business day turnaround time for Contractors to propose Candidates.** Any requests for clarification on a Task Order Request Form must be submitted in writing to the agency contact name identified in the Task Order Request Form.

The Non-Executive Agency Authorized User may request a minimum of one (1) and a maximum of (2) Candidate Response Forms per position from each Active Contractor. Once Candidate Response Forms have been collected, the Non-Executive Agency Authorized User will review to determine if the proposed Candidates meet the mandatory qualifications specified in the Task Order Request Form. Non-Executive Agency Authorized Users are prohibited from requiring additional "mandatory" qualifications to the Task Order Request Form other than those set forth in Appendix F for the requested job title and skill level. The Non-Executive Agency Authorized User may perform additional screening of Candidate Response Forms if it chooses to do so. Upon completion of this screening, the Non-Executive Agency Authorized User shall begin evaluation of the suitable Candidates no later than the second business day after the close of the submission period from Contractors (exclusive of receipt date).

The Non-Executive Agency Authorized User shall use the following methodology to determine the total number of suitable resumes to be technically evaluated for each position sought:

1. If 10 – 40 qualified Candidates: 50% of the Candidate Response Forms with the lowest Hourly Bill Rates are to be technically evaluated. If the 11th lowest Hourly Bill Rate is within 1% of the 10th lowest Hourly Bill, that Candidate Response Form would also be evaluated.
2. If 6 – 10 qualified Candidates: Candidate Response Forms with the five lowest Hourly Bill Rates are to be technically evaluated. If the sixth lowest Hourly Bill Rate is within 1% of the fifth lowest Hourly Bill Rate, that Candidate Response Form would also be evaluated.
3. If five or fewer qualified Candidates: Non-Executive Agency Authorized User will investigate and determine whether to restart process or forward all Candidate Response Forms for technical evaluation.

The Non-Executive Agency Authorized User shall interview the minimum number of Candidates for the number of positions sought in accordance with the below table. A Non- Executive Agency Authorized User is required to interview the three (3) Candidates with the highest score resulting from the Preliminary Technical Evaluation before it may select a lower ranked Candidate for the position.

| ***Number of Positions Sought through a Single Task Order*** | ***Minimum Number of Candidate Interviews*** |
|---|---|
| 1 | 3 |
| 2 | 5 |
| 3 | 6 |
| 4 | 8 |
| 5 | 10 |

Upon submission, a Contractor cannot submit the same Candidate for another position until such Candidate is released from consideration. By the end of the five (5) business days, the Non-Executive Agency Authorized User will notify the Active Contractors of the results from the preliminary technical evaluation and inform the Contractors of their Candidates' status (interview requested or released). If the Non-Executive Agency Authorized User does not notify the Active Contractors of the evaluation results within five (5) business days after the close of the submission period, the Candidates shall be deemed released. If a Candidate is released, the Contractor may resume submitting such candidate's name for other requests. Candidates selected for interview will not be considered released until the selection is made. The MSP will not schedule interviews on behalf of the Non-Executive Authorized User.

The Non-Executive Agency Authorized User reserves the right to reject all Candidate Response Forms provided by the Active Contractors. In this case, the Non-Executive Agency Authorized User may re-engage the Active Contractor pool for Candidate Response Forms.

**2.3 HOURLY RATES**

Hourly Bill Rates shall be as set forth in Appendix D. Hourly Bill Rates are not negotiated at the time of placement. A Contractor may only modify its Hourly Bill Rates via a formal amendment to this Contract. Hourly Bill Rates established in the Contract is a factor considered by the MSP and Non-Executive Agency Authorized Users when selecting Candidate Response Forms for Executive Agency Authorized User consideration.

**2.3.1 Hourly Wage Rate Deviation**

To allow the selected Contractors to better manage both their cost and the quality of Candidates, , the Contract permits the payment of a Slight Deviation to the Hourly Wage Rates as set forth in Appendix D when proposing Candidates to Authorized Users, **provided that the Contracted Hourly Bill Rate remains unchanged** (see Section 1.3 for definitions). The Hourly Wage Rate refers to the actual hourly rate paid to the employee (direct or sub-contractor). Authorized Slight Deviations are set forth in Appendix D.

**2.4 ENGAGEMENT DURATION**

**Engagements under the HBITS Contract shall be a minimum of 2 months and a maximum of 24 months in length.** There will be no optional extensions for individual Engagements.

**2.5 ACTIVE AND WAITLIST CONTRACTORS; CONTRACTOR PERFORMANCE EVALUATION PROCESS**

OGS will maintain twenty (20) Active Contractors and up to five (5) Waitlisted Contractors at any given point during the HBITS Contract. Contractors will be evaluated on their performance as stated in Section 6.4 and Appendix F of this Contract on an annual basis. The Contractor Performance Evaluation Form and process can be found in Appendix F.

As a result of this evaluation, the five (5) Active Contractors with the lowest performance scores will be moved to the Waitlist at the end of each Contract year and the five (5) Waitlisted Contractors will be moved to Active status. This performance cycle will repeat at the end of each 12 month period; a Contractor will not be on the Waitlist for more than one (1) year at a time.

In the event of a tie amongst the five (5) Active Contractors with the lowest performance scores, the MSP will compare each Contractor's rates in Appendix D by calculating a weighted average Hourly Bill Rate based on that evaluation period. The Contractor with the lower weighted average Hourly Bill Rate will retain its position on the Active list. The weighted average Hourly Bill Rate is determined as follows:

| ***Engagement Number*** | ***Job Title/Skill Level/Skill Demand*** | ***Contractor's Hourly Bill Rate for specific engagement as denoted at the end of Evaluation Period*** | ***Final Cost = 1 Times Hourly Bill Rate*** |
|---|---|---|---|
| 1 | Job Title/Skill Level/Skill Demand | $XX.XX | $XX.XX |
| 2 | Job Title/Skill Level/Skill Demand | $XX.XX | $XX.XX |
| 3 | Job Title/Skill Level/Skill Demand | $XX.XX | $XX.XX |
| 4 | Job Title/Skill Level/Skill Demand | $XX.XX | $XX.XX |
| ….. | Job Title/Skill Level/Skill Demand | $XX.XX | $XX.XX |
| Nth Value | Job Title/Skill Level/Skill Demand | $XX.XX | $XX.XX |
| | **Total Cost (weighted average Hourly Bill Rate) Equals:** | | **Sum of Final Cost for All Engagements** |

The following table contains the start and end dates for each evaluation period:

| ***Start of Contractor Evaluation Period*** | ***End of Contractor Evaluation Period*** | ***MSP Evaluation and Determination of Active/Waitlisted Contractors*** |
|---|---|---|
| Contract Month 1 | Contract Month 11 | No later than end of Contract Month 12 |
| 13 | 23 | 24 |
| 25 | 35 | 36 |
| 37 | 47 | 48 |
| 49 | 59 | 60 |

The figure below illustrates a possible scenario, showing how the Waitlisted Contractors will shift based on the performance scores of the Active Contractors between Contract Years 1 and 2.

| Contract Year 1 Begin |
|---|
| **Active Contractors** |
| Contractor 1 |
| Contractor 2 |
| Contractor 3 |
| Contractor 4 |
| Contractor 5 |
| Contractor 6 |
| Contractor 7 |
| Contractor 8 |
| Contractor 9 |
| Contractor 10 |
| Contractor 11 |
| Contractor 12 |
| Contractor 13 |
| Contractor 14 |
| Contractor 15 |
| Contractor 16 |
| Contractor 17 |
| Contractor 18 |
| Contractor 19 |
| Contractor 20 |
| **Waitlist Contractors** |
| Contractor 21 |
| Contractor 22 |
| Contractor 23 |
| Contractor 24 |
| Contractor 25 |

| End of Contract Year 1 Performance Evaluation | |
|---|---|
| **Active Contractors** | **Performance Score** |
| Contractor 1 | 100 |
| Contractor 2 | 90 |
| Contractor 3 | 92 |
| Contractor 4 | 78 |
| Contractor 5 | 98 |
| Contractor 6 | 98 |
| Contractor 7 | 94 |
| Contractor 8 | 82 |
| Contractor 9 | 100 |
| Contractor 10 | 95 |
| Contractor 11 | 97 |
| Contractor 12 | 65 |
| Contractor 13 | 75 |
| Contractor 14 | 100 |
| Contractor 15 | 98 |
| Contractor 16 | 100 |
| Contractor 17 | 98 |
| Contractor 18 | 72 |
| Contractor 19 | 85 |
| Contractor 20 | 90 |
| **Waitlist Contractors** | |
| Contractor 21 | |
| Contractor 22 | |
| Contractor 23 | |
| Contractor 24 | |
| Contractor 25 | |

| Contract Year 2 Begin |
|---|
| **Active Contractors** |
| Contractor 1 |
| Contractor 2 |
| Contractor 3 |
| Contractor 5 |
| Contractor 6 |
| Contractor 7 |
| Contractor 9 |
| Contractor 10 |
| Contractor 11 |
| Contractor 14 |
| Contractor 15 |
| Contractor 16 |
| Contractor 17 |
| Contractor 19 |
| Contractor 20 |
| Contractor 21 |
| Contractor 22 |
| Contractor 23 |
| Contractor 24 |
| Contractor 25 |
| **Waitlist Contractors** |
| Contractor 4 |
| Contractor 8 |
| Contractor 12 |
| Contractor 13 |
| Contractor 18 |

The second figure below illustrates a possible scenario, showing how the Waitlisted Contractors will shift based on the performance scores of the Active Contractors between Contract Years 2 and 3.

**Contract Year 2 Begin**

| Active Contractors |
|---|
| Contractor 1 |
| Contractor 2 |
| Contractor 3 |
| Contractor 5 |
| Contractor 6 |
| Contractor 7 |
| Contractor 9 |
| Contractor 10 |
| Contractor 11 |
| Contractor 14 |
| Contractor 15 |
| Contractor 16 |
| Contractor 17 |
| Contractor 19 |
| Contractor 20 |
| Contractor 21 |
| Contractor 22 |
| Contractor 23 |
| Contractor 24 |
| Contractor 25 |
| **Waitlist Contractors** |
| Contractor 4 |
| Contractor 8 |
| Contractor 12 |
| Contractor 13 |
| Contractor 18 |

**End of Contract Year 2 Performance Evaluation**

| Active Contractors | Performance Score |
|---|---|
| Contractor 1 | 98 |
| Contractor 2 | 84 |
| Contractor 3 | 90 |
| Contractor 5 | 92 |
| Contractor 6 | 88 |
| Contractor 7 | 76 |
| Contractor 9 | 100 |
| **Contractor 10** | **68** |
| Contractor 11 | 100 |
| **Contractor 14** | **71** |
| Contractor 15 | 92 |
| **Contractor 16** | **65** |
| Contractor 17 | 84 |
| Contractor 19 | 82 |
| **Contractor 20** | **58** |
| Contractor 21 | 90 |
| **Contractor 22** | **70** |
| Contractor 23 | 89 |
| Contractor 24 | 95 |
| Contractor 25 | 99 |
| **Waitlist Contractors** | |
| Contractor 4 | |
| Contractor 8 | |
| Contractor 12 | |
| Contractor 13 | |
| Contractor 18 | |

**Contract Year 3 Begin**

| Active Contractors |
|---|
| Contractor 1 |
| Contractor 2 |
| Contractor 3 |
| Contractor 5 |
| Contractor 6 |
| Contractor 7 |
| Contractor 9 |
| Contractor 11 |
| Contractor 15 |
| Contractor 17 |
| Contractor 19 |
| Contractor 21 |
| Contractor 23 |
| Contractor 24 |
| Contractor 25 |
| Contractor 4 |
| Contractor 8 |
| Contractor 12 |
| Contractor 13 |
| Contractor 18 |
| **Waitlist Contractors** |
| **Contractor 10** |
| **Contractor 14** |
| **Contractor 16** |
| **Contractor 20** |
| **Contractor 22** |

A Contractor is not guaranteed business within the State; even if selected for Active Contractor status. Further, a Contractor must meet compliance standards and perform adequately in order to retain the Active designation for the entire 12 month period.

Contractor and Authorized Users agree that only Active Contractors shall receive solicitations from Authorized Users of this Contract. A Contractor that is designated as a Waitlisted Contractor agrees it shall not accept or respond to solicitations issued under this Contract during such designation. No Authorized Users (Executive Agencies or Non-Executive Agencies) shall be permitted to solicit Contractors on the Waitlist for new services under this Contract. Responses to a solicitation from an Active Contractor that is moved to the Waitlist are eligible for award provided the solicitation was commenced prior to the date the Active Contractor was moved to the Waitlist. However, any existing engagements with an Active Contractor that is moved to the Waitlist will survive the Waitlist period, unless otherwise terminated by the Authorized User.

OGS intends to maintain pools of 20 Active Contractors and five (5) Waitlisted Contractors. The State reserves the right to decrease the size of each pool. Such reduction may occur as a result of Contract termination, merger and acquisitions, etc.

Contractor agrees that an Active or Waitlisted Contractor is prohibited from subcontracting through any other HBITS Contractor.

## SECTION 3. SERVICE GROUPS AND JOB TITLES

All Job Titles, Levels, and Skill Demands are defined in Appendix D, Pricing Schedules.

### 3.1 SERVICE GROUP 1, STANDARD TITLES

For Service Group 1, the Contractor has provided OGS, via Appendix D, the following information for each job title:

1. Hourly Wage Rates for all listed Job Titles at four distinct experience levels labeled **Junior, Mid-Level, Senior and Expert**; and for two demand levels, **Normal Demand and High Demand** hourly rate.

    a. **Normal demand** is defined as technologies and skills of a low to normal technical level, and/or there is a high supply and low demand for resources with the technology or skill

    b. **High Demand** is defined as technologies or skills of a high technical level, and/or the technology is new, and/or there is a low supply and a high demand for resources with the technology or skill

    c. Skill Demands, located in Appendix D, sets forth the listing of technologies and/or skills that the State considers Normal or High Demand.

2. Hourly Wage Rates and Standard Title Markup percentage for each of the three (3) Regions are identified in Appendix D.

### 3.2 SERVICE GROUP 2, SOFTWARE/HARDWARE SPECIFIC TITLES

For Service Group 2, the Contractor has provided OGS, via Appendix D, the following information for each job title:

1. Hourly Wage Rates for all listed Job Titles

2. Hourly Wage Rates and Software/Hardware Specific Markup percentage for each of the three (3) Regions identified in Appendix D

Service Group 2 does <u>not</u> contain the four distinct experience levels (Junior, Mid-Level, Senior and Expert), as referenced in Service Group 1.

### 3.3 HOURLY WAGE RATES AND TRAVEL

The Hourly Wage Rates shall be deemed **EXCLUSIVE** of travel, meals and lodging (see Section 5.19.2 for detailed terms on travel, meals and lodging). The Contractor agrees that Consultants shall not be separately reimbursed for expenses incurred for travel to and from a designated work location (commuting expenses). The Contractor agrees that it shall submit for travel, meals and lodging reimbursement only when it has received the prior written approval from the Authorized User for such travel in accordance with this Contract.

## SECTION 4. DISPUTES

### 4.1 DISPUTE RESOLUTION POLICY

For the period after the Office of the State Comptroller's approval of the HBITS Contract and the end of this HBITS Contract, a Contractor is directed to the following site: http://www.ogs.ny.gov/BU/PC/Docs/VendorDisputePolicy.pdf for the OGS dispute resolution policy.

## SECTION 5. TERMS AND CONDITIONS

### 5.1 CONTRACT PERIOD

This Contract shall commence five (5) days after approval by OSC, effective upon mailing by OGS and shall be in effect for five (5) years with the State's sole option to extend for a period not to exceed one (1) year. Notwithstanding the

termination of this Contract pursuant to the above stated term, the terms and conditions hereof shall be effective and binding for all Authorized User engagements entered into before the termination hereof.

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

### 5.2 GENERAL REQUIREMENTS

1. Contractor will maintain an adequate organizational structure and resources sufficient to discharge its contractual responsibilities including time sheets, invoicing, billing and personnel issues as evidenced by compliance with the requirements and procedures set forth in this Contract and according to standard operating procedures established by the Authorized Users;
2. Contractor will continue to be able to conduct business in NYS, pay taxes and be financially sound to fulfill obligations of this Contract as evidenced by information in its recertified standard vendor responsibility questionnaire in accordance with Section 5.12 and independently acquired information;
3. Contractor will notify the State in writing of any relevant changes in a Consultant's status using the Task Order Modification Request form set forth in Appendix F. Change include but are not limited to Consultant schedule change, change in visa status, etc.;
4. Contractor will enforce all terms and conditions of this Contract with all independent contractors and subcontractors. The Contractor will retain full responsibility for the performance of subcontracted employees or independent contractors under this Contract, such as a failure to fulfill the terms and conditions.
5. The State shall not be liable for any expense incurred by the Contractor or Consultant as a consequence of any traffic infraction or parking violations attributable to employees or agents of the Contractor.

### 5.3 APPENDICES

#### 5.3.1 APPENDIX A
Appendix A, Standard Clauses For New York State Contracts, dated December 2011, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein.

#### 5.3.2 APPENDIX B
Appendix B, Office of General Services General Specifications, dated July 2006, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein and shall govern any situations not covered by this Bid Document or Appendix A.

#### 5.3.2.1 APPENDIX B AMENDMENTS
Appendix B is amended as follows:

1. **Section 4, Conflict of Terms, of Appendix B is deleted and replaced with the following:**

   The following shall be incorporated into the resulting Contract. Other documents may be identified for inclusion during the course of the solicitation process. Conflicts among the documents shall be resolved in the following order of precedence:

   1. Appendix A, Standard Clauses for New York State Contracts;
   2. The resulting Contract;
   3. Appendix B, General Specifications; and
   4. Other Appendices as deemed necessary.

2. **Section 38 (Contract Creation/Execution) is deleted and replaced with the following:**

   *Reserved.*

3. **Section 60 (Termination) is hereby amended through the addition of a new (e):**

(e) Cancellation by Authorized User for Convenience

An Authorized User retains the right to cancel a Purchase Order for convenience upon at least thirty (30) calendar days written notice to Contractor without penalty or other early termination charge. This provision should not be understood as waiving the State's right to terminate the contract for cause or stop work immediately for unsatisfactory work, but is supplementary to that provision. If the Purchase Order is cancelled pursuant to this section, the Authorized User shall remain liable for all accrued but unpaid charges incurred through the date of cancellation.

**4. Section 62 (Contract Billings) is deleted and replaced with the following language:**

62. CONTRACT BILLINGS AND PAYMENTS FOR AUTHORIZED USERS THAT UTILIZE MANAGED SERVICES PROVIDER:

a) Billings. Contractor shall provide complete and accurate billing invoices to the Office of General Services in order to receive payment. Billing invoices submitted to OGS must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer. Submission of an invoice and payment thereof shall not preclude the OGS Commissioner from requesting 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.

b) The OGS and Contractor agree that payments for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payments shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller website at www.osc.state.ny.us, by e-mail at epunit@osc.state.ny.us, or by telephone at 518-486-1255. Contractor acknowledges that it will not receive payment on any invoices submitted under this Contract that are payable by the State Comptroller if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

c) CONTRACT BILLINGS AND PAYMENTS FOR AUTHORIZED USERS THAT DO NOT UTILIZE MANAGED SERVICES PROVIDER:

(i) Billings. Contractor shall provide complete and accurate billing invoices to each non-Executive Agency Authorized User in order to receive payment. Billing invoices submitted to a Non-Executive Agency Authorized User must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer. Submission of an invoice and payment thereof shall not preclude the Commissioner from requesting 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 Non-Executive Agency Authorized User, any and all information necessary to verify the accuracy of the billings. Such information shall be provided in the format requested by the Non-Executive Agency Authorized User and in a media commercially available from the Contractor. The Non-Executive Agency Authorized User may direct the Contractor to provide the information to the State Comptroller or to any Authorized User of the Contract.

(ii) Payment of Contract purchases made by a Non-Executive Agency Authorized User when the State Comptroller is responsible for issuing such payment: The Non-Executive Agency Authorized User and Contractor agree that payments for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized

by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payments shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller website at www.osc.state.ny.us, by e-mail at epunit@osc.state.ny.us, or by telephone at 518-486-1255. Contractor acknowledges that it will not receive payment on any invoices submitted under this Contract that are payable by the State Comptroller if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above. This does not apply for Payment of Contract purchases made by a Non-Executive Agency Authorized User when the State Comptroller is not responsible for issuing such payment.

(iii) Payment of Contract purchases made by a Non-Executive Agency Authorized User when the State Comptroller is not responsible for issuing such payment: The Non-Executive Agency Authorized User and Contractor agree that payments for such Contract purchases shall be billed directly by Contractor on invoices/vouchers, together with complete and accurate supporting documentation as required by the Non-Executive Agency Authorized User. Such payments shall be as mandated by the appropriate governing law from the receipt of a proper invoice. Such Non-Executive Agency Authorized User and Contractor are strongly encouraged to establish electronic payments.

**5.3.3 APPENDIX C**

Appendix C, Contractor's Executive Law, Article 15-A (M/WBE) Requirements, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein.

**5.3.4 APPENDIX D**

Appendix D, Pricing Schedules, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein.

**5.3.5 APPENDIX E**

Appendix E, Report of Contract Purchases, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein. OGS reserves the right to make unilateral changes to this report of Contract Purchases document without seeking the prior written approval of the Department of Law or OSC.

**5.3.6 APPENDIX F**

Appendix F, HBITS Processes and Forms, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein. The Parties agree that the processes and forms set forth in this appendix may be updated as necessary, such as to facilitate the development of a web portal or other automated systems. OGS reserves the right to make changes to these processes and forms without seeking the prior written approval of the Department of Law or OSC, however, OGS agrees that any such changes shall comply with the terms and conditions of this Contract and not be material or substantive in nature. The Parties agree that detailed instructions for the completion of these forms shall be set forth in the "How to Use" document presented on the OGS web site or as part of the web portal or other automated system. Form 8, Monthly Report, shall be submitted electronically in Microsoft Excel 2007 or higher format, which will be separately provided by OGS.

**5.3.7 APPENDIX G**

Appendix G, Contract Administrators, Toll-Free Number and Webcasting Technologies, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein. The Contractor agrees to keep this information current. The Parties reserve the right to update this appendix without seeking the prior written approval of the Department of Law or OSC.

**5.4 SHORT TERM EXTENSION**

In the event the replacement contract has not been issued, any contract let and awarded hereunder by the State may be extended unilaterally by the State for an additional period of up to one month upon notice to the Contractor with the same terms and conditions as the original contract including, but not limited to, quantities (prorated for such one month extension), prices, and delivery requirements. With the concurrence of the Contractor, the extension may be for a

period of up to three months in lieu of one month. However, this extension terminates should the replacement contract be issued in the interim.

## 5.5 CANCELLATION

### 5.5.1 Cancellation by Authorized Users for Cause

The Authorized User's rights to cancel a Purchase Order for cause are set forth in Appendix B, §60(a). The Authorized User's rights to seek remedies for Contract breach are set forth in Appendix B, §65.

### 5.5.2 Cancellation by Authorized Users for Convenience

Please see Appendix B, § 60.

## 5.6 PERFORMANCE AND BID BONDS

There are no BONDS for this Contract. In accordance with Appendix B, §58 "Performance/Bid Bond," the Commissioner of OGS has determined that no performance, payment or Bid bond, or negotiable irrevocable letter of credit or other form of security for the faithful performance of the Contract shall be required at any time during the Initial Term, or any renewal term, for this Contract.

## 5.7 LIQUIDATED DAMAGES

The only liquidated damages in this Contract are set forth in Section 6.5.4 and Appendix C.

## 5.8 CONTRACT AMENDMENT PROCESS

During the term of the Contract, the Contract may be amended as changes occur within the industry. OGS reserves the right to consider amendments which are not specifically covered by the terms of the Contract but are judged to be in the best interest of the State. OGS, an Authorized User, or the Contractor may suggest amendments. All amendments are subject to approval by the Department of Law and OSC.

The Parties reserve the right to amend the Contract to update the listing of Normal and High Demand technologies at a later date to reflect technology changes. Contracts amendments shall be subject to the prior written approval of the Department of Law and OSC.

## 5.9 GENERAL DESCRIPTION CONTRACTS

This Contract is a "PR" Contract. This type of Contract is for the provision of consultant services, as defined in State Finance Law, which an Authorized User utilizes on an intermittent basis. Purchase orders under this type of Contract are issued:

a) To a given Contractor for a specific term;

b) For either a fixed amount (if known) or a not-to-exceed amount (if known).

Payments are then made each month against the purchase order for actual expenditures.

## 5.10 NON-STATE AGENCIES PARTICIPATION IN CENTRALIZED CONTRACTS AND EXTENSION OF USE

New York State political subdivisions and others authorized by New York State law may participate in centralized contracts established by OGS. These include, but are not limited to local governments, public authorities, public school and fire districts, public and nonprofit libraries, and certain other nonpublic/nonprofit organizations. See State Finance Law §163(1) (k) and Appendix B, §39 Participation in Centralized Contracts. For purchase orders issued by the Port Authority of New York and New Jersey (or any other authorized entity that may have delivery locations adjacent to New York State), services to be provided may include locations adjacent to New York State.

In order for services to be extended to additional States or governmental jurisdictions there must be mutual written agreement between New York State (the lead Contracting State) and the Contractor. Political subdivisions and other authorized entities within each participating State or governmental jurisdiction may also participate in any resultant Contract if such State normally allows participation by such entities. New York State reserves the right to negotiate additional discounts based on any increased volume generated by such extensions.

Upon request, all eligible non-State agencies must furnish the Contractor(s) with the proper tax exemption certificates and documentation certifying eligibility to use State Contracts. A list of categories of eligible entities is available on the OGS web site (http://www.ogs.state.ny.us/purchase/snt/othersuse.asp). Questions regarding an organization's eligibility to purchase from New York State Contracts may also be directed to OGS Procurement Services Group's Customer Services at 518-474-6717.

Contractors are encouraged to voluntarily extend service Contracts to those additional entities authorized to utilize commodity Contracts under State Finance Law §163(3) (iv), as per Appendix B, §39(c).

**5.11 USE OF CONTRACT BY STATE AGENCIES, POLITICAL SUBDIVISIONS AND OTHER AUTHORIZED USERS**
In order to use this Contract, an Authorized User must follow the procedures and methods described in Section 2.2 and Appendix F in order to obtain Services from the HBITS Contracts. Failure of an Authorized User to follow such procedures and methods can result in withdrawal of approval for use of centralized contracts.

**5.12 NEW YORK STATE VENDOR RESPONSIBILITY QUESTIONNAIRE FOR-PROFIT BUSINESS ENTITY (QUESTIONNAIRE)**
Contractor agrees that if it is found by the State that Contractor's responses to the Questionnaire were intentionally false or intentionally incomplete, on such finding, OGS may terminate the Contract. 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.

Contractor agrees it shall recertify its Questionnaire no later than the end of the eleven month of each Contract year. For example, if the Contract is approved by OSC on July 1st and takes effect on July 6th, then the Contractors shall recertify its Questionnaire no later than May 31st.

**5.13 METHOD OF PAYMENT**

**5.13.1 Method of Payment for MSP Users**
This section only applies to Executive Agency Authorized Users that must utilize the MSP. The Parties acknowledge that it is anticipated that the method of submitting documents for payment will change from a paper based system to an online system during the Contract term. The MSP reserves the right to request additional information from the Contractor or the Executive Agency Authorized User.

**Contractor shall invoice OGS, not the Executive Agency Authorized Users, monthly in arrears** for all Services actually rendered during such month for the benefit of all Executive Agency Authorized Users. The Contractor shall prepare a single invoice and a single Monthly Report for each payment period no later than the 15th of the following month.

The invoice for payment shall include the following minimum information: Contract identification number; the names of each Executive Agency Authorized User that acquired Services; Task Order numbers; time period billed; and aggregate amount billed for each Executive Agency Authorized User and aggregate amount billed for the time period. Invoices for payment shall be submitted to OGS on a New York State Standard Voucher or company invoice or other approved document for Services satisfactorily completed during that month. Bi-weekly or weekly billing for Services actually rendered is not allowed under this Contract.

Invoice questions can be referred to **Claimsunit@OGS.NY.GOV and** the invoice shall be submitted to:

**New York State Office of General Services**
**Division of Financial Administration**
**Re: HBITS Payment**
**PO Box 2117 - ESP Station**
**Albany, NY 12220-0117**

The Contractor shall also complete and submit a single Monthly Report using the format set forth in Appendix F. Such Monthly Report shall present the information broken down by each Executive Agency Authorized User, Task Order number and Consultant. The Monthly Report shall include, but not be limited to the following information: location where Service was performed; service group; job title; skill level; skill demand; total hours worked during billing period;

Hourly Wage Rate, Markup, Hourly Bill Rate, and total amount billed. The MSP reserves the right to request additional information. The Monthly Report should match the invoice submitted to OGS. The MSP shall provide the Monthly Report to the Executive Agency Authorized User for use in validate the amounts invoiced. The Executive Agency Authorized User shall be responsible for validating the time worked for each Consultant using its internal time and attendance records and the Monthly Report.

Monthly report questions can be referred to HBITS@ogs.ny.gov and the **Monthly Report** (Form 8) shall be submitted to:

**NYS Office of General Services**
**Attn: HBITS Contract Manager**
**Corning Tower, 38th Floor**
**Empire State Plaza**
**Albany, NY 12242-0064**

The MSP reserves the right to request that the Contractor submit time records with signatures or other approvals, which will include the daily hours worked by the respective Consultants. If requested, the Contractor agrees it shall provide such time records within five business days of the request.

The MSP reserves the right to request from the Contractor additional documentation of the Services rendered to an Authorized User on any related invoice or Monthly Report, as needed.

Timeliness of payment and any interest for late payment to be paid to the Contractor(s) is governed by Appendix B, Clause 62, Contract Billings (as amended) and Clause 64, Interest on Late Payments.

Payment of purchases made by Executive Agency Authorized Users under this Contract shall be the sole responsibility of OGS. The Contractor(s) shall bill OGS directly on vouchers authorized by OGS. After payment to the Contractor, OGS shall bill the Executive Agency Authorized Users for the Services obtained under this Contract. The Executive Agency Authorized User agrees it will undertake the necessary actions to facilitate timely payment to OGS for the Services received. The Executive Agency Authorized User shall review and validate the payment of invoices for Services received. If there are discrepancies between its internal records and the Monthly Report, it shall promptly notify the MSP and participate in the resolution of such discrepancy.

The Parties agree that if the resolution of a discrepancy occurs after OGS has made payment for an invoice, OGS shall adjust the Contractor's subsequent month's bill accordingly.

**5.13.2 Method of Payment for Non-MSP Users**

**Contractor shall invoice the Non-Executive Agency Authorized User, monthly in arrears**, for all Services actually rendered for the benefit of the Non-Executive Agency Authorized User, with appropriate invoices with full supporting detail(s) to the Non-Executive Agency Authorized User's reasonable satisfaction. Invoices for payment shall be submitted to the Non-Executive Agency Authorized User at the end of each month on a New York State Standard Voucher or company invoice, or other approved document for Services satisfactorily completed during that month. Bi-weekly or weekly billing for services actually rendered is not allowed.

At a minimum, said invoicing will include the Contract ID number, the name of the Non-Executive Agency Authorized User, the location where service was performed, the name of the Consultant, the Hourly Wage Rate, markup percentage, Hourly Bill Rate (hourly wage rate times Markup) and, either in its body or as an attachment shall itemize services performed during that month, name(s) of individuals(s) being billed along with total hours worked for the given billing period, for each individual, signed by the Contractor. The Non-Executive Agency Authorized User reserves the right to request that time sheets with signatures, which will include the daily hours worked by the respective Consultants, to be attached to invoices as backup. The Non-Executive Agency Authorized User will be obligated to review and validate all invoices submitted by the Contractor.

Timeliness of payment and any interest to be paid to the Contractor(s) is governed by Appendix B, §62, Contract Billings and 64, Interest on Late Payments.

Payment of purchases made by Non-Executive Agency Authorized Users under this Contract shall be the sole responsibility of the Non-Executive Agency Authorized User and the Contractor(s) shall bill the Non-Executive Agency Authorized User directly on vouchers authorized by such Non-Executive Agency Authorized User.

**5.13.3 Other Payment Information**
Upon request, all eligible Non-Executive Agencies must furnish Contractor(s) with the proper tax exemption certificates. Contractor(s) is encouraged to voluntarily extend service Contracts to those additional entities authorized to utilize commodity Contracts under Section 163(3) (iv) of the Procurement Act of 1995, as per Appendix B, §39(c).

**5.14 SERVICES WARRANTY**
The Authorized User shall have the right to interview a Candidate, either in-person, by telephone, and/or via webcasting, to determine his/her qualifications. The qualifications must reflect the position of the specific job title requested. The Authorized User reserves the right to reject the Candidate if the Authorized User determines that the Candidate is not qualified based on the referenced job title, skill level and the mandatory requirement from Appendix D.

To ensure all services conform to Contract specifications, the Contractor shall implement quality control procedures and a quality assurance plan. Upon request, the Contractor must provide this quality assurance plan to OGS within 20 business days of such request.

Contractor shall warrant that the services acquired under this Contract 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) calendar days from performance of the services that gave rise to the warranty claim.

**5.15 SUBCONTRACTORS**
Subcontractor is defined in Appendix B, §5. Contractor agrees that all Contracts between the Contractor and its Subcontractors shall be by bona fide written Contract. Contractor further agrees that such bona fide written Contract shall mandate compliance with the terms and conditions of this Contract. Contractor further agrees that it shall be fully liable for Subcontractor(s)' performance and compliance with all Contract terms and conditions. **Contractor is required to identify any and all subcontractors involved with the placement of a Consultant with an Authorized User. This includes subcontractors that are directly paying the Hourly Wage Rate to the hired Consultant.** A Contractor shall also identify if any subcontractor is a New York State certified M/WBE. A Contractor serving as a Prime Contractor under the HBITS Contract is prohibited from also serving as a subcontractor to another Prime Contractor under the HBITS Contract.

Contractor shall include in all subcontracts relating to this Contract, in such a manner that they will be binding upon each subcontractor with respect to work performed in connection with the Contract, provisions specifying:

- That the work performed by the subcontractor must be in accordance with the terms and conditions of this Contract including, but not limited to, APPENDIX A;
- That the subcontractor must pass through all terms and conditions of the Contract, including but not limited to APPENDIX A and Hourly Wage Rate requirements, to any lower tier subcontracts;
- That nothing contained in such subcontract shall impair the rights of the Authorized User or the State;
- That nothing contained herein shall create any contractual relationship between any subcontractor and Authorized User or the State;
- That subcontractors shall maintain and protect against any unauthorized disclosure all records with respect to work performed under the subcontract in the same manner as required of the Contractor;
- That the State and/or Authorized User shall have the same authority to audit the records of all subcontractors as it does those of the Contractor; and
- That subcontractor shall cooperate with any investigation, audit, or other inquiry related to the Contract or any litigation relating thereto.

Contractor shall be fully responsible to Authorized User for the acts and omissions of, and the performance of Services by, all subcontractors and/or persons either directly or indirectly employed by such subcontractors. Contractor shall not

in any way be relieved of any programmatic or financial responsibility under the Contract by the terms of its agreement with any subcontractor.

**5.16 EMPLOYEE INFORMATION REQUIRED TO BE REPORTED BY CERTAIN CONSULTANT CONTRACTORS AND SERVICE CONTRACTORS**

Chapter 10 of the Laws of 2006 amended the Civil Service Law and the State Finance Law, relative to maintaining certain information concerning Contract Employees working under State Agency service and consulting Contracts. State Agency consultant Contracts are defined as "Contracts entered into by a state Agency for *analysis, evaluation, research, training, data processing, computer programming, engineering, environmental health and mental health services, accounting, auditing, paralegal, legal, or similar services*" ("covered consultant Contract" or "covered consultant services"). The amendments also require that certain Contract Employee information be provided to the state Agency awarding such Contracts, OSC, DOB and CS. The effective date of these amendments is June 19, 2006. The requirements will apply to the covered Contracts awarded on and after such date.

To meet these requirements, the Contractor agrees to complete:

- **Form A - Contractor's Planned Employment Form**, if required. Note: State Agencies are required to furnish this information but may require a Contractor to submit the information.

- **Form B - Contractor's Annual Employment Report**. Throughout the term of the Contract by May 15th of each year the Contractor agrees to report the following information to the State Agency awarding the Contract, or if the Contractor has provided Contract Employees pursuant to an OGS centralized Contract, such report must be made to the State Agency purchasing from such Contract. For each covered consultant Contract in effect at any time between the preceding April 1st through March 31st fiscal year or for the period of time such Contract was in effect during such prior State fiscal year Contractor reports the:

    1. Total number of Employees employed to provide the consultant services, by employment category.
    2. Total number of hours worked by such Employees.
    3. Total compensation paid to all Employees that performed consultant services under such Contract.*

*NOTE: The information to be reported is applicable only to those Employees who are directly providing services or directly performing covered consultant services. However, such information shall also be provided relative to Employees of Subcontractors who perform any part of the service Contract or any part of the covered consultant Contract. This information does not have to be collected and reported in circumstances where there is ancillary involvement of an Employee in a clerical, support, organizational or other administrative capacity.

Contractor agrees to simultaneously report such information to CS and OSC as designated below:

**Department of Civil Service**
Alfred E. Smith State Office Building
Albany, NY 12239

**Office of the State Comptroller** - Bureau of Contracts
110 State St., 11th Floor
Albany, New York
Attn: Consultant Reporting

In addition, Contractor agrees to simultaneously report such information to OGS as designated below:

**NYS Office of General Services**
Corning Tower, 38th Floor
Empire State Plaza
Albany, NY 12242-0064
Attn: HBITS Contract Manager

Contractor is advised herein and understands that this information is available for public inspection and copying pursuant to §87 of the New York State Public Officers Law (Freedom of Information Law). In the event individual Employee names or social security numbers are set forth on a document, the State Agency making such disclosure is obligated to redact both the name and social security number prior to disclosure.

Further information is available in the Office of the State Comptroller's Bulletin G-226 regarding the Contractor Consultant Law requirements and report Forms A and B at http://www.osc.state.ny.us/agencies/gbull/g-226.htm

INSTRUCTIONS FOR COMPLETING FORM A AND B:
Form A and Form B should be completed for Contracts for consulting services in accordance with OSC's Bulletin G-226 http://www.osc.state.ny.us/agencies/gbull/g-226.htm and the following:

- **Form A** - **Contractor's Planned Employment Form (**available from and submitted to the using Agency, if necessary.)
- **Form B** - **Contractor's Annual Employment Report** (to be completed by May 15th of each year for each consultant Contract in effect at any time between the preceding April 1st through March 31st fiscal year and submitted to the CS, OSC and procuring Agency.)

**Scope of Contract**: choose a general classification of the single category that best fits the predominate nature of the services provided under the Contract.

**Employment Category**: enter the specific occupation(s), as listed in the O*NET occupational classification system, which best describes the Employees providing services under the Contract.
*(Note: Access the O*NET database, which is available through the US Department of Labor's Employment and Training Administration, on-line at online.onetcenter.org to find a list of occupations.)*

**Number of Employees**: enter the total number of Employees in the employment category employed to provide services under the Contract during the report period, including part time Employees and Employees of subcontractors.

**Number of Hours**: enter the total number of hours worked during the report period by the Employees in the employment category.

**Amount Payable under the Contract**: enter the total amount paid by the State to the State Contractor under the Contract, for work by the Employees in the employment category, for services provided during the report period.

**5.17 PREFERRED SOURCE PRODUCTS/SERVICES**
NYS State Finance Law §162 requires that governmental entities afford first priority to the products/services of preferred source suppliers such as Correctional Industries (Corcraft), Industries for the Blind of NYS, and NYS Industries for the Disabled, when such products/services meet the form, function and utility of the Authorized User.

**5.18 INFORMATION SECURITY BREACH AND NOTIFICATION ACT**
Section 208 of the State Technology Law (STL) and Section 899-aa of the General Business Law (GBL) require that State entities and persons or businesses conducting business in New York who own or license computerized data which includes private information including an individual's unencrypted personal information plus one or more of the following: social security number, driver's license number or non-driver ID, account number, credit or debit card number plus security code, access code or password which permits access to an individual's financial account, must disclose to a New York resident when their private information was, or is reasonably believed to have been, acquired by a person without valid authorization. Disclosure of breach of that private information to all individuals affected or potentially affected must occur in the most expedient time possible without unreasonable delay, after necessary measures to determine the scope of the breach and to restore integrity, but with delay if law enforcement determines it impedes a criminal investigation. When notification is necessary, the State entity or person or business conducting business in New York must also notify the following New York State agencies: the Attorney General, the Office of Cyber Security & Critical Infrastructure Coordination (CSCIC) and the Consumer Protection Board (CPB). Information relative to the law and the notification process is available at: http://www.cscic.state.ny.us/security/securitybreach/

**5.19 PLACEMENTS**
In the event of a successful placement of a Consultant by a Contractor, the State shall not renegotiate the terms and conditions of the Contract with the Contractor or the Consultant.

**5.19.1 Minimum Utilization**
The State, under this Contract, shall not be held liable for any minimum utilization of the Contractor's Consultants.

### 5.19.2 Terms and Conditions for Travel, Meals and Lodging

1. Consultants will not be separately reimbursed for expenses incurred for travel to and from a designated work location (commuting expenses).
2. During the course of an assignment, the Consultant may be required to perform services at a location other than the assignment's designated work location (e.g., the designated work location is the Authorized User's main offices in the Corning Tower on the Empire State Plaza, however, the Consultant is required to attend a meeting in New York City). In such cases, with the prior written approval of the Authorized User, the Contractor shall be reimbursed for mileage, lodging and meals to the extent authorized by the NYS Office of the State Comptroller as further set forth at: http://www.osc.state.ny.us/agencies/travel/reimbrate.htm.
3. Unless otherwise specified in writing by the Authorized User, a vehicle will not be provided by Authorized User or the State to the Consultant for travel. Therefore, the Contractor will be responsible for ensuring that the Consultant has access to an appropriate vehicle (e.g., personal vehicle or rental vehicle) or common carrier with which to carry out any necessary travel. For the Contractor to obtain reimbursement for the use of a rental vehicle, such use must be justified as the most cost-effective mode of transportation under the circumstances (including consideration of the most effective use of Consultant time). The Contractor shall provide evidence of three (3) written or telephone price quotes, and the paid invoice must detail the type of vehicle rented, miles traveled, license plate number, and time of pickup and return.
4. The Contractor is responsible for keeping adequate records to substantiate any claims for reimbursement, by personnel for travel in performance of the services.
5. The Authorized User shall have prior approval of any travel that occurs during a Consultant engagement.

### 5.19.3 Work in the United States

All work performed by Consultants under this Contract must be performed within the United States.

### 5.20 ADDITIONAL PAYMENT PROVISION

The State shall not be liable for the payment of any taxes under this Contract however designated, levied or imposed. No person, firm, or corporation is exempt from paying the State Truck Mileage and Unemployment Insurances Taxes and other Federal, State, and local taxes to which the Contractor is subject.

### 5.21 OWNERSHIP OF WORK PRODUCT

Contractor agrees that its Consultants are engaged to perform services and that the Authorized User shall have full and complete ownership of all deliverables prepared by such Consultant. At the end of the engagement, Contractor agrees that the Consultant shall provide all deliverables and materials to the Authorized User.

### 5.22 ADDITIONAL REQUIREMENTS FOR FEDERALLY FUNDED PLACEMENTS

As a condition of placements made with Authorized Users using Federal funds, Contractor agrees to all terms and conditions contained in this section. Authorized Users shall be obligated to identify its use of federal funds in the Task Order Request Form.

### 5.22.1 Copeland Anti-Kickback Act

Upon request by the Authorized User, the Contractor agrees to provide a written document stating compliance with Federal Executive Order 11246, the Copeland "Anti-Kickback Act" (18 USC 874), Section 508 of the Federal Clean Air Act, Section 306 of the Federal Clean Water Act. This document must also certify that neither the Contractor nor its principals are debarred or suspended from Federal financial assistance programs and activities and to complete and return in pursuit of such certification any appropriate form required by the Authorized User (see Federal Executive Order 12549 and 7 CFR Part 3017).

### 5.22.2 Drug-Free Workplace Act

The Contractor agrees to comply with the provisions of Section 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.). By accepting this engagement, the Contractor certifies that it will provide a Drug Free Workplace by implementing the provisions at 29 CFR 94, pertaining to the Drug Free

Workplace. In accordance with these provisions, a list of places where performance of work is done in connection with this specific engagement will take place must be maintained at your office and available for Federal inspection.

**5.22.3 Federal Lobbying**
Section 1352 of Title 31 of the U.S. Code requires that funds appropriated to a Federal agency be subject to a requirement that any Federal Contractor or grantee (such as the State) must be required to certify that no Federal funds will be used to lobby or influence a Federal officer or a Member of Congress. The State's certification in general provides that the language of this certification shall be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and Contracts under grants, loans and cooperative agreements) and that all sub-clients shall certify and disclose accordingly. The certification also requires the completion of Federal lobbying reports and the imposition of a civil penalty of $10,000 to $100,000 for failing to make a required report. The Contractor understands and agrees to the Federal requirements for certification and disclosure. Upon request by the Authorized User, the Contractor agrees to provide such certification.

**5.22.4 Confidentiality of Public and Medical Assistance Client Information**
The Contractor, its officers, agents and employees and subcontractors, shall treat all information, with particular emphasis on information relating to Public Assistance or Medical Assistance clients and providers of services or benefits, which is obtained by it through its performance under this Contract, as confidential information to the extent required by the laws of the State and of the United States and any regulations promulgated there under.

**5.22.5 Rights to Information**
The Contractor agrees that the Federal granting agency shall be granted a royalty-free, non-exclusive and irrevocable license to produce, publish or otherwise use such documents and software and to authorize others to do so for government purposes to the extent that the services which resulted in the production of such documents and software are Federally funded. The grant excludes the proprietary products, documentation, materials and information (and derivative works thereto) of Contractor, Contractor's subcontractors and third party product providers.

**5.22.6 Confidentiality**
Except for personal information relating to clients and providers which shall be kept confidential pursuant to requirements of State or Federal laws, and information relating to the business and finances of the State or the Contractor, confidential information disclosed by one party to the other continues to be subject to this Contract for six years following termination of this Contract. No obligation of confidentiality applies to:

1. Information the Contractor already possesses without an obligation of confidentiality.

2. Information the Contractor develops independently from publicly available data.

3. Information the Contractor receives without obligation of confidentiality from a third party.

4. Information that is, or becomes, publicly available without breach of this Agreement.

**5.22.7 Federal Government Authorization**
The Contractor agrees that the United States Government shall be deemed an entity authorized to conduct an examination in accordance with the provisions set forth in Appendix A, §10 Records.

**5.22.8 Federal Government Inspection, Review, Investigation or Audit of Services**
The responsible Federal governmental agency authorized by law, reserves the right to inspect, review, investigate or audit all parts of any services provided herein by the Contractor's or any subcontractors' or vendors' facilities engaged by the prime Contractor in performing services in this Contract. In such capacity, the Authorized User or its representative(s) must have access to facilities, records, reports, personnel and other appropriate aspects of services furnished by the Contractor, in accordance with the requirements of the State Public Officers Law except for proprietary information for which the disclosure of which would cause substantial injury to the competitive position of the Contractor's enterprise.

**5.22.9 Notification**
To the extent permitted by law, the Contractor shall promptly notify the Authorized User of any request by anyone for access to any records maintained pursuant to this Contract. Access by Federal or State bank regulatory agents, or

Contractor's regular outside auditors to Contractor's financial records, pursuant to regularly scheduled or routine audits or inspection of Contractor, shall not require notification to the Authorized User provided that rights of confidentiality or proprietary interests are preserved.

**5.22.10 Unavailable Federal Funds**
Should the State determine that Federal funds are unavailable; the Authorized User may terminate all or any part of the engagement immediately upon notice to the Contractor. Such notification will be in written format. The Authorized User shall be obligated to pay the Contractor only for the expenditures made and obligations incurred by the Contractor until such time as the Contractor receives notice of termination in writing from the Authorized User.

**5.22.11 Federal Government Reservation of Rights**
Nothing in this Contract shall be interpreted to limit such rights as the Authorized User and the Federal Government must reserve to conform to all applicable Federal regulations, including 45 CFR Part 74, 45 CFR 95.617, 7 CFR Part 277 and 7 CFR Part 3016, and such rights are hereby reserved.

**5.22.12 Equal Employment Opportunity**
The Contractor shall comply with E.O. 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

**5.22.13 HIPAA**
The Contractor and its Consultants shall comply with the Authorized User's policies regarding compliance with the Health Insurance and Portability Act of 1996 (HIPAA).

**5.23 DEPARTMENT OF LABOR SPECIFIC TERMS AND CONDITIONS**
If the funding for the engagements undertaken by the New York State Department of Labor pursuant to this Contract is provided by the United States Department of Labor, the following certifications are required:

A. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION-LOWER TIER COVERED TRANSACTIONS

1. The Contractor certifies, by submission of its Candidate Response Form (see Appendix F), that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

2. Where the Contractor is unable to certify to any of the statement in this certification, such prospective participant shall attach an explanation to this proposal.

3. The Contractor shall pass the requirements of A.1. and A.2., above, to each person or entity with whom the Contractor enters into a subcontract at the next lower tier.

B. NONDISCRIMINATION & EQUAL OPPORTUNITY ASSURANCE

As a condition to the award of financial assistance from the Department of Labor under Title I of WIA, the Contractor assures that it will comply fully with the nondiscrimination and equal opportunity provisions of the following laws:

(1) Section 188 of the Workforce Investment Act of 1998 (WIA) which prohibits discrimination against all individuals in the United States on the basis of race, color, religion, sex, national origin, age disability, political affiliation, or belief, and against beneficiaries on the basis of either citizenship/status as a lawfully admitted immigrant authorized to work in the United States or participation in any WIA Title I - financially assisted program or activity;

(2) Title VI of the Civil Rights Act of 1964, as amended which prohibits discrimination on the basis of race, color, and national origin;

(3) Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against qualified individuals with disabilities; and

(4) The Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age. The Contractor also assures that it will comply with 29 CFR Part 37 and all other regulations implementing the laws listed above. This assurance applies to the Contractor's operation of the WIA Title I - financially assisted program or activity, and to all agreements the Contractor makes to carry out the WIA Title I-financially assisted program or activity.

**5.24 IRAN DIVESTMENT ACT**

As a result of the Iran Divestment Act of 2012 (Act), Chapter 1 of the 2012 Laws of New York, a new provision has been added to the State Finance Law (SFL), § 165-a, effective April 12, 2012. Under the Act, the Commissioner of OGS will develop a list (prohibited entities list) of "persons" who are engaged in "investment activities in Iran" (both are defined terms in the law). Pursuant to SFL § 165-a(3)(b), the initial list is expected to be issued no later than 120 days after the Act's effective date, at which time it will be posted on the OGS website.

By entering into this Contract, Contractor (or any assignee) certifies that once the prohibited entities list is posted on the OGS website, it will not utilize on such Contract any subcontractor that is identified on the prohibited entities list.

Additionally, Contractor agrees that after the list is posted on the OGS website, should it seek to renew the Contract, it will be required to certify at the time the Contract is renewed or assigned that it or its assignee is not included on the prohibited entities list.

During the term of the Contract, should OGS receive information that a person is in violation of the above-referenced certification, OGS will offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment which is in violation of the Act within 90 days after the determination of such violation, then OGS shall take such action as may be appropriate including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

OGS reserves the right to reject any request for assignment for an entity that appears on the prohibited entities list prior to the award of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the prohibited entities list after contract award.

## SECTION 6. ADDITIONAL HBITS TERMS AND CONDITIONS

Except as otherwise noted, all terms in this Section apply to both the Executive Agency and Non-Executive Agency Authorized Users, the Contractor and OGS.

**6.1 CPI ADJUSTMENTS**

At the start of Contract Year 3 and Contract Year 5, the Contractor's Hourly Wage Rates in Appendix D will be subject to an increase equal to the percentage increase, not to exceed 3%, in the Consumer Price Index (CPI) for all urban consumers (CPI-U) as published 90 days prior to the anniversary date for the preceding 24 month period by the U.S. Department of Labor, Bureau of Labor Statistics, Washington D.C. 20212. In the event the CPI reflects a negative adjustment, the hourly rates for the preceding twenty-four month period will remain flat. The index is also available through the Internet at the Bureau of Labor Statistics web site at http://stats.bls.gov/. Go to "Inflation and Consumer Spending" then click "Consumer Price Index" and then click on "Tables created by BLS" then click on "Table Containing History of CPI-U U.S. All Items Indexes and Annual % Changes 1913 to Present."

**6.1.1 Calculation of CPI Adjustment**

Price adjustments using the CPI involve changing the base payment by the percent change in the level of the CPI between the reference period and a subsequent time period. This is calculated by first determining the index point change between the two periods and then the percent change. The price adjustment shall be calculated as follows. Take the CPI for the 3rd month prior to the month of the start date of the Contract and subtract this figure from the CPI value for the 3rd month prior to the anniversary date of the Contract. (e.g., if start date begins in December, use the September CPI). That sum is then divided by the CPI value for the original 3rd month prior to start date and this result is then multiplied by 100 to equal the percent change that is the price adjustment value. This percentage of increase or

decrease shall be applied to the Contract year, effective on the latter of the anniversary date or upon notification by OGS/PSG.

The following example illustrates **the computation of percent change**:

| | |
|---|---|
| CPI for current period | 136.0 |
| Less CPI for previous period | (-) 129.9 |
| Equals index point change | = 6.1 |
| Divided by previous period CPI | ÷ 129.9 |
| Equals | = 0.047 |
| Result multiplied by 100 | = 0.047 x 100 |
| Equals percent change | = 4.7% |

**6.1.2 Agreement of CPI Adjustment**
Prior to the start of Contract Year 3 and Contract Year 5, the MSP will calculate the CPI adjustment and transmit to the Contractor. The Contractor must submit the CPI-adjusted rates in the form and manner specified by OGS no later than 30 days prior to the start of Contract Year 3 and 5. OGS shall confirm acceptance of the adjusted hourly rates in writing as soon as time permits. OGS reserves the right to independently calculate the CPI adjustments using the formula described in Section 6.1.1. In the event of a discrepancy, the Contractor must provide its CPI calculations to OGS for review.

**6.1.3 CPI Adjustments for Consultant Placements Already In Effect**
Under no circumstance shall a CPI adjustment be granted to an existing placement. CPI adjustments can only apply to Hourly Wage Rates prior to the start date of a new engagement.

**6.1.4 CPI Adjustment to Markup**
Under no circumstance will a CPI adjustment be applied to the Markup percentages.

**6.1.5 Government Mandated Program Price Adjustments**
The State may, at its sole discretion, address the issue of Government Mandated Program Price adjustments on a case by case basis if and when such a government mandate comes to pass.

**6.2 CONTRACTOR INTERACTION WITH AUTHORIZED USERS**
As part of the MSP layer that is described in Section 2, Contractor will have frequent interaction with MSP staff who will administer this Contract.

**6.2.1 Contract Administrator**
Contractor shall provide a dedicated Contract administrator to support the updating and management of the Contract on a timely basis. This individual will act as the primary point of contact for Authorized Users and the MSP. This individual shall fully understand the terms and conditions of this Contract.

The Contract administrator shall be a person at the Contractor's management level. The position cannot be staffed by the Contractor's clerical personnel. The Contract administrator is set forth in Appendix G.

**6.2.1.1 Secondary Contact**
The Contractor must also provide a secondary point of contact for Authorized Users and the MSP in the event the Contract administrator is unavailable. This position may be staffed by whomever the Contractor determines can provide the best service to the State, however, the individual assigned may not act as the Contract Administrator. This individual shall fully understand the terms and conditions of this Contract. This information is set forth in Appendix G.

**6.2.2 Toll-Free Number**
The Contractor shall provide a toll-free telephone number for Authorized User usage which must be staffed at a minimum from 9:00 AM to 5:00 PM EST Monday through Friday. This information is set forth in Appendix G.

### 6.2.3 Webcasting

The Contractor must have access to webcasting technology throughout the Contract. This service must be provided to the State and Authorized Users free of charge. Authorized Users may have security restrictions which preclude them from installing certain kinds of applications, software, and/or hardware. Contractor shall be responsible for providing webcasting technology that is compliant with Authorized User(s) security restrictions.

OGS expects this technology to be utilized for Contractor meetings with OGS and Authorized Users. In addition, prospective Candidates offered by the Contractor may be expected to interview with the Authorized User via this technology. An Authorized User reserves the right to conduct Candidate interviews via the Contractor's webcasting technology. An Authorized User also reserves the right to conduct in-person interviews for any Candidate placement.

This information is set forth in Appendix G.

### 6.2.4 Administrative Fee

Four times a year, Contractor is required to pay an Administrative Fee to the State in the amount of 0.75% for all Services acquired under this HBITS Contract. This includes Services acquired by all Authorized Users. Costs associated with travel that are billed to the State are excluded from the Administrative Fee remittance payment. These payments must be remitted in accordance with the following schedule:

| Payment No. | Billing Period | Administrative Fee Due Date to OGS |
|---|---|---|
| 1 | January 1st to March 31st | May 15th |
| 2 | April 1st to June 30th | August 15th |
| 3 | July 1st to September 30th | November 15th |
| 4 | October 1st to December 31st | February 15th(of following calendar year) |

Payments, in the form of check or money order, can be made to the following contact name and address:

**New York State Office of General Services**
**Division of Financial Administration**
**Re: HBITS Administrative Fee Payment**
**PO Box 2117 - ESP Station**
**Albany, NY 12220-0117**

Include with your payment, your NYS vendor identification number, the HBITS Contract number and reference what payment number the remittance addresses (e.g., 1, 2, 3 or 4). Also include pertinent contact name and information for questions and verification. The State shall have the right to verify fee payments and to take any action(s) necessary to enforce its rights under the Contract including, but not limited to, the right to stop payments until such fees are received, review Contractor's financial records pertaining to sales under their Contract or suspend further sales under the Contract.

Failure to remit payment in accordance with the above listed schedule shall affect the Contractor's yearly performance evaluation. Repeated failure to timely remit the Administrative Fee may result in OGS terminating the Contract for cause. A Contractor's status as Active or Waitlisted does not affect its contractual obligation to remit payments for the administrative fee. If moved from Active to the Waitlist, Contractor is still obligated to remit the administrative fee for any billings made under the Contract during the billing period.

If Contractor had no billings during the applicable billing period and is not required to pay the Administrative Fee, it shall submit a written notice that no administrative fee is due in accordance with above listed schedule.

Such written notice shall be submitted to OGS as designated below:

**NYS Office of General Services**
**Re: HBITS Administrative Fee Non-Payment**
**Corning Tower, 38th Floor**
**Empire State Plaza**
**Albany, NY 12242-0064**

**Attn: HBITS Contract Manager**

**6.2.5 Quarterly Meetings with Managed Services Provider**
The MSP reserves the right to hold mandatory quarterly meetings in Albany, NY with Contractor. At a minimum, the Contractor's designated Contract Administrator must be in attendance. The State reserves the right to meet individually with Contractor's staff. These meetings may be used as a venue to communicate interim Contractor performance findings. See Section 6.4 and Appendix F for Contractor Performance Criteria. The format of such meetings will be determined by OGS and communicated to Contractors prior to the meeting.

If the Contract Administrator is unable meet with the MSP, the MSP reserves the right to meet with whom it deems appropriate. It is expected these meetings will be held during the calendar months of January, April, July and October during the term of this Contract.

The Contractor shall also be available for meetings upon the State's request.

Contractor attendance at all meetings is at Contractor's expense and shall not be billed to the State.

A Contractor's status as Active or Waitlisted does not affect its contractual obligation to attend quarterly meetings. If moved from Active to the Waitlist, Contractor is still obligated to meet with the MSP in accordance with this section.

**6.2.6 Report of Contract Purchases**
The Contractor shall furnish quarterly reports, using the format specified in Appendix E containing total sales for both Executive Agency and Non-Executive Agency Authorized User Contract purchases no later than the dates set forth below. The report is to be submitted electronically in Microsoft Excel 2007 or higher format to the attention of the individual shown on the front page of the Contract Award Notification. Additional related Contract purchase information may be required and must be supplied upon request.

| Report No. | Reporting Period | Report Due Date to OGS |
|---|---|---|
| 1 | January 1st to March 31st | May 15th |
| 2 | April 1st to June 30th | August 15th |
| 3 | July 1st to September 30th | November 15th |
| 4 | October 1st to December 31st | February 15th(of following calendar year) |

For any sales involving a subcontractor, Contractor shall identify if each subcontractor is a M/WBE and Contractor shall verify such status through the Empire State Development Minority- and Women-Owned Businesses Database web site at: http://www.esd.ny.gov/MWBE/directorySearch.html.

The State reserves the right to modify the individual(s) and/or State governmental entity designated to receive these quarterly reports.

A Contractor's status as Active or Waitlisted does not affect its contractual obligation to submit Report of Contract Purchases. If moved from Active to the Waitlist, Contractor is still obligated to submit its Report of Contract Purchases.

**6.2.7 M/WBE Compliance**
In addition to the identification of subcontractors status in the Report of Contract Purchases, the Contractor shall also file with the MSP the "Contractor's Monthly Compliance and Payment Report" on the MWBE Form 102 on a monthly basis. See Appendix C for a link to this form and instructions for submission.

A Contractor's status as Active or Waitlisted does not affect its obligation to submit its monthly M/WBE Form 102. If moved from Active to the Waitlist, Contractor is still obligated to remit such form for any sales made under the Contract during the reporting period.

**6.2.8 Format of Placement Response**
Contractor must comply with the State's format for requesting information about potential Candidates for Authorized Users. A copy of the form is set forth in Appendix F, entitled Candidate Response Form.

**6.2.9 Authorized User Feedback**
An Authorized User will submit all feedback to the MSP in the form and manner specified by OGS. This information will include, but is not limited to the following: Authorized User Preliminary Technical Evaluation Form – Candidate Specific and Summary; Authorized User Interview Evaluation Form – Candidate Specific and Summary; HBITS Task Order Satisfaction Form, etc. Authorized Users shall provide this information to the MSP, upon request, in a timely fashion. See Section 6.4 and Appendix F of this Contract for more detail on Contractor Performance Criteria.

**6.2.10 Contractor Status**
The State reserves the right to amend the Contractor's status as Active or Waitlisted in accordance with the provisions of this Contract without acquiring the prior written approval of the Department of Law or OSC.

**6.2.11 Contractor Responsiveness**
Contractor will be responsive to Authorized User concerns including the return of telephone calls and e-mails no later than two (2) business days from receipt

**6.3 CANDIDATE PLACEMENT REQUIREMENTS**
Prior to Candidate placement with an Authorized User, the Contractor must comply with a series of requirements for each proposed Candidate. The Contractor will ensure that the provisions of this Contract are incorporated within all sub-contracts, and acknowledge the responsibility for ensuring that these provisions are fully complied with by all subcontractors. The Contractor's agreement to comply with the provisions of this section is a material representation of fact upon which reliance was placed when the Authorized User determined to enter into an engagement with the Contractor. The Contractor shall provide this information in form and manner requested by OGS.

**6.3.1 Eligibility to Work**
The Contractor must ascertain and validate that the proposed Candidate is either a U.S. Citizen or non-U.S. citizen.

1. Where the Candidate is a U.S. citizen, the Contractor must identify the proposed Candidate with, at a minimum, the first and last name of the Candidate as it appears on his/her Driver's License, Non-Drivers Identification Card, or other accepted forms of government identification.
2. Where the Candidate proposed is not a U.S. citizen, the Contractor shall identify such to the Authorized User.
3. Where the Candidate proposed is not a U.S. citizen, the Contractor must identify the proposed Candidate with, at a minimum, the first and last name of the Candidate as it appears on his/her Visa and/or Passport. No other names or derivations may be used.
4. The Contractor must retain all necessary paperwork throughout the length of each Consultant's engagement with an Authorized User.
5. The Contractor is responsible for ensuring each Consultant retains the authorization to legally work in the United States throughout the term of each engagement based on the length of term identified in the Task Order Request Form.

**6.3.2 Background Check**
The Contractor shall complete an industry standard criminal history background check and all sound screening practices prior to a Candidate's official start date at the Contractor's expense. The Authorized User reserves the right to view the contents of a background check prior to approving the Candidate.

1. If the Contractor is unable to determine a Candidate's fitness due to the results of a criminal history/ security background check, as discussed herein, the Contractor shall forward a description of the results to the MSP and/or Authorized User, for review and determination. Such review and determination by the MSP and/or Authorized User shall be conducted in accordance with Correction Law Article 23-A. In conducting a

criminal history/security background check, the Contractor is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings. If it is later determined that the Contractor knowingly, rendered a false positive determination of a Candidate's fitness, failed to conduct a criminal history/security background check, or failed to reasonably interpret the results in confirming a Candidate's fitness to perform duties under the terms of this Contract, in addition to any other remedies available to the MSP and the Authorized User, the Authorized User may terminate the Candidate placement for cause.

2. The Contractor shall provide immediate written notice to the Authorized User if at any time the Contractor learns that its determination of a Candidate's fitness to perform duties under the terms of this Contract was erroneous or has changed by reason of changed circumstances.

**6.3.3 Education Credential Validation**

An Authorized User may require an associate's degree, bachelor's degree, or a higher level of degree as a requirement of the placement. For those Candidates who obtain an educational credential from a foreign institution, defined as institutions residing outside the United States, the credential must be verified by a company approved by the NYS CS. As of May 2012, such listing can be found at http://www.cs.ny.gov/jobseeker/degrees.cfm.

1. The Contractor shall retain this proof of degree equivalency at all times.

2. The Contractor shall provide proof of degree equivalency to the State when responding to a Candidate Placement Request if a degree is a placement requirement.

**6.3.4 Pre-Interviews**

The Contractor must interview each proposed Candidate and verify his/her qualifications prior to presenting a Candidate.

1. The Contractor shall be responsible for standing behind the accuracy of each proposed Candidate placement's work history, resume, technical skills, certifications, educational credentials, references and all other information presented to the MSP or Non-Executive Agency Authorized User for review.

**6.3.5 Employment Status**

When responding to a request, the Contractor must identify if the proposed placement will be a direct employee of the Contractor, an employee of a subcontractor or an independent contractor.

1. If the Candidate is a subcontractor or provided through a subcontractor, the Contractor must provide the name, address and telephone number of all subcontractors involved in the placement. If more than one subcontractor is involved in any Candidate placement, each subcontractor must be listed.

2. If the Contractor fails to properly identify a Candidate's employment status, the Authorized User may immediately terminate the placement.

**6.3.6 S/M/WBE Status**

The Contractor must identify if the proposed Candidate will be provided by a New York State certified M/WBE and/or a business that meets the definition of a New York State Small Business.

**6.3.7 H1-B or Other Visa Status**

The Contractor must identify if the proposed Candidate will be working under a H1-B or other visa during the time of the placement.

**6.3.8 Anticipated Absences**

The Contractor shall identify any dates in which the proposed Candidate will be unavailable during the duration of the proposed engagement.

1. This includes absences related to work visas.

**6.3.9 Availability for Interview**

The Authorized User will provide timeframes to the Contractor for Candidate interviews.

1. The Contractor shall make all reasonable efforts to accommodate the interview schedule of the Authorized User.
2. As denoted in Section 6.2.3, an Authorized User may request to conduct an interview via the Contractor's webcasting technology. The Contractor shall ensure the proposed Candidate is able to conduct an interview via webcasting.
3. The State reserves the right to conduct in-person or telephone interviews at no cost to the State.

**6.3.10 Additional Requirements from Authorized Users**

An Authorized User may have distinct requirements that must be met by all individuals employed by or working at the Authorized User. The Contractor's Consultants will be expected to comply with these requirements as a condition of the placement.

1. An Authorized User may at its discretion request additional background checks to be conducted by the Contractor, at the expense of the Authorized User, including, but not limited to, finger-printing and the signing of a confidentiality statement and/or a non-disclosure agreement. The Authorized User retains the responsibility to conduct any fingerprint-based background check within its legal authority.
2. An Authorized User may also conduct its own background checks at the expense of the Authorized User.
3. An Authorized User may require Candidates to provide photo identification such as a NYS Driver's License, Non-Drivers Identification Card, Passport, etc. in order to receive a State or other applicable identification card used for entrance into the Authorized User's building and/or facilities.
4. An Authorized User may require its Consultants to attend training, both for professional development and as required by State law or in accordance with the policy of the Authorized User. If required by an Authorized User, attendance at training sessions, during the course of a placement, will be mandatory. For trainings in which attendance will incur a cost on the attendee, the Authorized User shall pay for the Consultant's attendance. Authorized User shall also be billed by the Contractor for the time the Consultant spends at such training.

   a. Authorized User-mandated training is intended to augment a Consultant's skills in order to better perform on a current engagement. It is not intended to provide Consultants with the skills originally specified by the Authorized User in the Task Order Request Form.
5. Authorized Users may specify the manner and method by which the Consultant shall participate in Knowledge Transfer at the time of placement or at any time during the Consultant Engagement.

**6.3.11 Consultant Availability and Timeliness**

Contractor agrees that its Candidates must be available to and actually report to an Engagement in no more than 10 Business Days from notification of placement.

Contractor agrees it will be evaluated on the time and attendance of Candidate placements as reported by the Authorized Users. Lateness is defined as late arrival to the agreed upon working hours with the Authorized User. Repeated lateness by a single employee is grounds for termination of a placement based on the discretion of the Authorized User. In addition, repeated lateness by multiple placements from a single Contractor will be considered by the MSP as part of the Contractor's performance criteria.

**6.3.12 Multiple Placement Requests**

A Contractor agrees it is prohibited from submitting the same Candidate for multiple placement requests until such Candidate is released from consideration for an engagement under this Contract. If a Candidate is released, the Contractor may resume submitting such individual's resume for other requests. Candidates selected for interview will not be considered released until the selection is made by the Authorized User.

Once a Consultant has begun an Engagement, such Consultant will not thereafter be taken off of the Engagement by the Contractor, or proposed by Contractor to fulfill a separate New York State engagement through an HBITS Contract unless the new engagement has a start date after the end date of the current engagement.

### 6.4 CONTRACTOR PERFORMANCE CRITERIA

Contractor will be annually evaluated on its performance of contractual duties. By doing so, the State seeks continued performance and quality Candidates from its Contractors throughout the life of this Contract. The Performance Criteria below are not listed nor weighted in any particular order. All Contractors will be evaluated in a similar manner. Criteria 1 - 14 will be evaluated based on transactions with MSP users; criteria 14 will be evaluated based on transactions with non-MSP users.

The Contractor will be evaluated on all Performance Criteria as outlined in this Section.

1. Contractor will submit the required Form B reports as stated in Section 5.16. These reports must be submitted to the Authorized User, CS and OSC, and OGS for all placements made against this Contract by May 15th of each calendar year.
2. Contractor will submit all monthly M/WBE compliance reports to the MSP or Authorized User, as appropriate, for all placements made against this Contract. Contractor shall comply with the Authorized User's reporting format for M/WBE compliance.
3. Contractors must continue to engage in good faith efforts to meet the Minority-owned Business Enterprises (MBE) participation goal of 11% and the Women-owned Business Enterprises (WBE) participation goal of 9%. See Appendix C for Contractor's requirements. Evidence of good faith efforts include, but are not limited to, the use of M/WBE subcontractors,
4. Contractor will remit the Administrative Fee or report set forth in Section 6.2.4 in accordance with the outlined schedule.
5. Contractor will maintain all adequate insurance as identified in Section 6.6. The State reserves the right verify a Contractor's insurance levels at any point during this Contract.
6. Contractor will pay the Hourly Wage Rate, within the Slight Deviation as defined in Section 1.3, to each of its Consultants as specified in Appendices D and F. The MSP will account for instances in which it finds that Consultants are not being compensated at the Hourly Wage Rate within the Slight Deviation. This will be verified by the MSP through randomly selected validation with Consultants and subcontractors. The MSP reserves the right to undertaken additional steps as it deems necessary to enforce this provision.
7. Contractor must commit to paying Consultants no later than 15 business days after receiving payment from the Authorized User. This will be verified by the MSP through randomly selected validation with Consultants and subcontractors. The MSP reserves the right to undertaken additional steps as it deems necessary to enforce this provision.
8. Contractor will be evaluated on the time and attendance of Candidate placements as reported by the Authorized Users. Authorized User shall report time and attendance problems by using the Authorized User Issue Form set forth in Appendix F. In addition, Authorized User shall have the option to note the time and attendance issue on the Task Order Satisfaction Form set forth in Appendix F.
9. The MSP will evaluate all Authorized User feedback from the Authorized Users Preliminary Technical Evaluation Forms and the Authorized User Interview Evaluation Forms. A Contractor who receives both repeated positive and negative feedback will be scored accordingly.
10. Contractor will ensure prospective Candidates are available for interview with Authorized User on the mutually agreed upon times. A Contractor who repeatedly reschedules interviews or fail to provide Candidates for the interview will be scored accordingly, as recorded in the Authorized User's Interview Evaluations Form.
11. Contractor will provide potential Candidates to at least 60% of the posted Task Order Request Forms during each Contract year within the specified time period (five (5) or ten (10) business days). However, if a Contractor responds to 75% or more of posted Task Order Request Forms, it will be favorably accounted for in the evaluation process.
12. For the purposes of this Contract, a response to a Task Order Request Form is defined as providing a completed Candidate Response Form for review within the time period specified.

13. Contractor will be evaluated on quality of each of its Consultant's performance, on factors including, but not limited to: Authorized User feedback on Consultant performance and quality of work product; compliance with Authorized User work place rules; the need to replace Consultants within one month of engagement commencement (see Section 6.5.4 on Consultant Replacement); and other points as outlined in Appendix F.
14. Contractor will be also evaluated based on the Task Order Satisfaction Forms submitted by MSP and non-MSP Authorized Users.

## 6.5 AUTHORIZED USER REQUIREMENTS

### 6.5.1 Requirements Prior to Using the Contracts

Prior to engaging the MSP, an Authorized User must obtain all required approvals. For example, an Executive Agency must obtain internal agency approvals, approvals from the Office of Information Technology Services through the PTP process (if applicable), the Division of Budget (B-1184, if required), and federal approvals (if required).

### 6.5.2 Requirements at Time of Contract Use

The Authorized User reserves the right to select the level of personnel for the tasks to be performed, as well as to stipulate the length of time that such personnel will be retained, provided that the Authorized User provides such information to the Contractor prior to the commencement of work.

#### 6.5.2.1 Candidate Qualification Review

An Authorized User (both MSP and non-MSP users) must provide the following information, where available, when requesting a Candidate placement on the Task Order Request Form (see Appendix F):

1. Job title and Level
2. Skill Demand
3. Home Base - Region
4. Office Location and anticipated work hours
5. Engagement Length (2-24 Months)
6. Projected Start Date
7. Job Specifications, including but not limited to:
    a) Environment
    b) Hardware and software used by the Authorized User
    c) Day to day tasks of the position
    d) Desirable Experience Requested in addition to mandatory requirements
    e) Role context – Is it part of large-scale project, day-to-day maintenance of mission critical systems, etc.
    f) Travel requirements associated with the placement
8. Additional Security Requirements, such as fingerprinting or additional screenings required and if a confidentiality/non-disclosure agreement must be executed
9. Identify if budgetary approval to fill position has been received
10. Identify if it is a new or incumbent position
11. Identify, where applicable, if attendance at trainings will be anticipated during the engagement
12. Identify, where applicable, the type or manner of knowledge transfer requested during the engagement.
13. Identify federal funding source (if applicable) and whether federal-specific terms of this Contract apply.

#### 6.5.2.2 Candidate Response Form Review

The process for requesting a Contractor to submit candidates for a specific position is set forth in Sections 2.2.1 and 2.2.2. The Authorized User shall record the results of its review process using the forms set forth in Appendix F.

The Authorized User shall provide the MSP with the appropriate and timely feedback on each of the Candidates presented for initial review and interview.

**6.5.2.3 Candidate Interview**
The Authorized User shall have the right to interview Candidates to determine his/her qualifications. The qualifications must reflect the position of the specific job title requested. The Authorized User reserves the right to reject the Candidate if the Authorized User determines that the Candidate is not qualified based on the referenced job qualifications. The Authorized User reserves the right to conduct in-person interviews for any Candidate placement. An Authorized User shall undertake its best efforts to schedule interviews with identified Candidates within five (5) business days of advising the MSP, if applicable, of the Candidates the Authorized User intends to interview.

**6.5.2.4 Candidate Selection**
The Authorized User (not the MSP) shall have final hiring authority of all Candidate placement requests.

**6.5.3 Requirements During the Engagement**

1. The Authorized User shall inform the Contractor of the Consultant's direct supervisor and/or the person responsible for signing the Consultant's time card.
2. The Authorized User is responsible for the provision of reasonable office space, utilities, janitorial services, security, work-related telephone service and furniture (desks, chairs, work tables) necessary for the Contractor's performance of services under this Contract. The Authorized User will also provide forms, equipment, including necessary computer hardware and software, and supplies necessary for the Consultant to complete the tasks associated with the engagement.
3. The Authorized User shall provide all workplace rules to the Consultant. This includes, but is not limited to, the following: Time and attendance policy, time card submission, building access procedures, request for leave, computer/phone usage guidelines, and other Authorized User policies (such as Drug-free Workplace Policy Statement, Workplace Violence Policy, and smoking policy).
4. Any Consultant that an Authorized User deems unfit to perform a position at the time after Placement start date shall be recorded by writing the Contractor and the Managed Service Provider and may result in that Consultant's termination under this engagement.
5. The Authorized User shall have prior approval of any and all Consultant absences, such as vacation days not previously identified during the Task Order Request Form process.
6. The Authorized User shall indicate the manner in which it requests Knowledge Transfer to occur from the Consultant to the Authorized User's staff.
7. The Authorized User shall indicate any training that the Consultant must attend.
8. The Authorized User shall indicate a change in working hours where appropriate, not previously specified during the Request process.
9. The Authorized User shall advise the Contractor and Consultant of the means by which time worked must be recorded and the Authorized User retain copies of such records in accordance with its record keeping policies.
10. The Authorized User shall be responsible for validating the time worked for each Consultant using its internal records.

**6.5.4 Consultant Replacements**
OGS recognizes that circumstances may arise that necessitate a Consultant to be substituted during the engagement. Replacement of a Consultant will not be grounds for an increase in the Hourly Wage Rate or Markup, or an extension of the time for completion of the engagement. When providing a replacement Candidate, Contractor must respond in the format of the original Request. Any replacement Candidate must meet or exceed all requirements as set forth by the Authorized User in the original Task Order Request Form. Replacement Candidates are subject to all Candidate

Placement Requirements in Section 6.3. For an Executive Agency, the Contractor will complete the Task Order Modification Request Form and submit to the MSP for approval and maintaining accurate records. If the Authorized User is not an Executive Agency, then the Contractor will complete the Task Order Modification Request Form and file it with the MSP, but is subject to the approval of the Non-Executive Agency Authorized User. See Appendix F.

The Contractor expressly acknowledges that if the Contractor or the chosen Consultant does not fulfill the obligations of the Contract, costs to the Authorized User to replace the Consultant's services will result, and establishing the precise value of such costs would be difficult and time consuming. Accordingly, Contractor agrees with the following damages set forth in Sections 6.5.4.1 and 6.5.4.2.

Contractors are reminded that Appendix B, §60 (e) states than an Authorized User retains the right to cancel a Purchase Order for convenience upon at least thirty (30) calendar days written notice to Contractor without penalty or other early termination charge. This provision should not be understood as waiving the State's right to terminate the Contract for cause or stop work immediately for unsatisfactory work, but is supplementary to that provision. If the Purchase Order is cancelled pursuant to this section, the Authorized User shall remain liable for all accrued but unpaid charges incurred through the date of cancellation.

**6.5.4.1 Rapid Replacement (under 1 month)**
In the event it becomes necessary to replace a Consultant prior to the completion of one month (160 hours) of work on a particular engagement, the Contractor shall provide the Authorized User with five (5) business days prior written notification describing the circumstances of the need for replacement. The Contractor shall identify a comparable replacement for the Authorized User within ten (10) business days. The Authorized User reserves the right to do one of the following:

1. Allow the originally selected Contractor to provide a replacement Consultant if the replacement is necessitated by Consultant termination, sickness, or other similar material change in the employment circumstance of the Consultant. Contractor acknowledges that the failure to provide a Consultant for the duration of the engagement constitutes a breach of contract and that as a liquidated damage; the Authorized User has the right to receive up to two working weeks (80 hours) of work from the replacement Consultant, at no cost to the Authorized User, during a transition/ramp-up period. This liquidated damage may be waived in whole or in part if it is determined that the need to replace the Consultant was beyond the control of the Contractor.
2. Award the engagement to the next Candidate based on the initial Task Order Request Form.
3. Terminate the engagement with the Contractor.

**6.5.4.2 Steady State Replacement (1 month and over)**
In the event it becomes necessary to replace a Consultant during the term of the engagement after one month (160 hours) of work, due to Consultant termination, sickness, or other similar material change in the employment circumstance of the Consultant, the Contractor shall provide the Authorized User with 20 business days prior written notification describing the circumstances of the need for replacement. The Contractor will utilize the Task Order Modification Form as provided in Appendix F.

The Contractor shall also identify a comparable replacement for the Authorized User within ten (10) business days. The Authorized User has the right to receive up to two working weeks (80 hours) of work from the replacement Consultant, at no cost to the Authorized User, during a transition/ramp-up period. This right may be waived in whole or in part if it is determined that the need to replace the Consultant was beyond the control of the Contractor.

The Authorized User reserves the right to terminate the engagement with the Contractor if a replacement is required.

**6.5.5 Authorized User Provision of Information to MSP**

An Authorized User agrees it shall provide information to the MSP in accordance with the provisions of this Contract and as requested by the MSP. Such information shall include, but not be limited to, task orders, preliminary technical evaluation forms, post interview forms, validation of invoices, completion of task order satisfaction forms and submission of information for the Contractor Performance Evaluation process.

## 6.6 INSURANCE

### 6.6.1 General Conditions

Contractor must provide proof of current insurance throughout the Contract term if requested by an Authorized User or OGS. The Contractor shall procure at its sole cost and expense, and shall maintain in force at all times during the term of this Contract, policies of insurance as herein below set forth, written by companies authorized by the New York State Insurance Department to issue insurance in the State of New York ("admitted" carriers) with an A.M. Best Company rating of "A-" Class "VII". If, during the term of the policy, a carrier's rating falls below "A-" Class "VII", the insurance must be replaced no later than the renewal date of the policy with an insurer acceptable to the New York State Office of General Services ("OGS") and rated at least "A-" Class "VII" in the most recently published Best's Insurance Report. OGS may, at its sole discretion, accept policies of insurance written by a non-authorized carrier or carriers when Certificates and/or other policy documentation is accompanied by a completed Excess Lines Association of New York (ELANY) Affidavit; provided that nothing herein shall be construed to require OGS to accept insurance placed with a non-authorized carrier under any circumstances.

The Contractor shall deliver to OGS evidence of such policies in a form acceptable to OGS. These policies must be written in accordance with the requirements of the paragraphs below, as applicable.

#### 6.6.1.1 Conditions Applicable to Insurance

All policies of insurance required by this Contract must meet the following requirements:

1. **Coverage Types and Policy Limits**. The types of coverage and policy limits required from the Contractor are specified in Paragraph B *Insurance Requirements* below.

2. **Policy Forms**. Except as may be otherwise specifically provided herein or agreed in writing by OGS, policies must be written on an occurrence basis.

3. **Certificates of Insurance/**Notices. Contractor shall provide a Certificate or Certificates of Insurance, in a form satisfactory to OGS, before commencing any work under this Contract. Certificates shall reference the Contract Number. Certificates shall be mailed to the Office of General Services, Procurement Services Group, Corning Tower- 38th Floor, Empire State Plaza, Albany, NY 12242.

Unless otherwise agreed, policies shall be written so as to include a provision that the policy will not be canceled, materially changed, or not renewed without at least thirty (30) days prior written notice except for non-payment as required by law to OGS. The Contractor shall not take any action, or omit to take any action that would suspend or invalidate any of the required coverages during the period of time such coverages are required to be in effect. Not less than thirty (30) days prior to the expiration date or renewal date, the Contractor shall supply OGS updated replacement Certificates of Insurance, and amendatory endorsements.

Certificates of Insurance shall:

a) Be in the form approved by OGS.

b) Disclose any deductible, self-insured retention, aggregate limit or any exclusion to the policy that materially changes the coverage required by the Contract.

c) Specify the Additional Insured and Named Insured as required herein.

d) Refer to this Contract by number and any other attachments on the face of the certificate.

e) When coverage is provided by a non-admitted carrier, be accompanied by a completed ELANY Affidavit,

And;

f) Be signed by an authorized representative of the insurance carrier or producer.

Only original documents (Certificates of Insurance and other attachments) will be accepted.

4. **Primary Coverage.** All insurance policies shall provide that the required coverage shall apply on a primary and not on an excess or contributing basis as to any other insurance that may be available to OGS or any Authorized User for any claim arising from the Contractor's work under this Contract, or as a result of the Contractor's activities. Any other insurance maintained by OGS or any Authorized User shall be excess of and shall not contribute with the Contractor's insurance regardless of the "other insurance" clause contained in OGS or the Authorized User's own policy of insurance.

5. **Policy Renewal/Expiration**. At least thirty (30) days prior to the expiration of any policy required by this Contract, evidence of renewal or replacement policies of insurance with terms no less favorable to OGS than the expiring policies shall be delivered to OGS in the manner required for service of notice in Paragraph A.3. *Certificates of Insurance/Notices* above. If, at any time during the term of this Contract, the coverage provisions and limits of the policies required herein do not meet the provisions and limits set forth in the Contract or proof thereof is not provided to OGS, the Contractor shall immediately cease work. The Contractor shall not resume work until authorized to do so by OGS. Any delay, time lost, or additional cost incurred as a result of the Contractor not having insurance required by the Contract or not providing proof of same in a form acceptable to OGS, shall not give rise to a delay claim or any other claim against OGS. Should the Contractor fail to provide or maintain any insurance required by this Contract, or proof thereof is not provided, OGS or Authorized Users may withhold further Contract payments, treat such failure as a breach or default of the Contract.

6. **Self-Insured Retention/Deductibles**. Certificates of Insurance must indicate the applicable deductible/self-insured retention on each policy. Deductibles or self-insured retentions above $100,000 are subject to approval from OGS. The Contractor shall be solely responsible for all claim expenses and loss payments within the deductible or self-insured retention.

7. **Subcontractors.** Should the Contractor engage a Subcontractor, the Contractor shall require all Subcontractors, prior to commencement of an agreement between Contractor and the Subcontractor, to secure and keep in force during the term of this Contract the endeavor to impose the insurance requirements of this document on the Subcontractor, as applicable. Required insurance limits should be determined commensurate with the work of the Subcontractor. Proof thereof shall be supplied to OGS.

Acceptance and/or approval by OGS does not and shall not be construed to relieve Contractor of any obligations, responsibilities or liabilities under the Contract.

All insurance required by the Contract shall name The People of the State of New York, its officers, agents, and employees as additional insured to the extent of the liabilities assumed by Contractor as set forth in the Indemnification Section of this Agreement. The additional insured requirement does not apply to Workers Compensation, Disability or Professional Liability coverage.

**6.6.2 Insurance Requirements**

Contractor, throughout the term of this Contract, or as otherwise required by this Contract, shall obtain and maintain in full force and effect, the following insurance with limits not less than those described below and as required by the terms of this Contract, or as required by law, whichever is greater (limits may be provided through a combination of primary and umbrella/excess policies):

1. Commercial General Liability Insurance with a limit of not less than $2,000,000 each occurrence. Such liability shall be written on the ISO occurrence form CG 00 01, or a substitute form providing equivalent coverages and shall cover liability arising from premises operations, independent contractors, products-completed operations, broad form property damage, personal & advertising injury, cross liability coverage, liability assumed in a Contract (including the tort liability of another assumed in a Contract) and explosion, collapse & underground coverage.

   If such insurance contains an aggregate limit, it shall apply separately on a per job basis.

   Policy shall include bodily injury, property damage and broad form contractual liability coverage.

   a) General Aggregate $2,000,000

   b) Products – Completed Operations Aggregate $1,000,000

c) Personal and Advertising Injury $1,000,000

d) Each Occurrence $1,000,000

2. Workers Compensation, Employers Liability, and Disability Benefits as required by New York State. If employees will be working on, near or over navigable waters, US Longshore and Harbor Workers Compensation Act endorsement must be included. The Alternate Employer Endorsement WC 00 03 01A must be included on the policy naming The People of the State of New York as the alternate employer for this Contract. See Section 6.6.3 below.

3. Comprehensive Business Automobile Liability Insurance with a limit of not less than $2,000,000 each accident. Such insurance shall cover liability arising out of any automobile including owned, leased, hired and non-owned automobiles.

4. Professional Liability: The Contractor shall maintain errors and omissions liability insurance with a limit of not less than $2,000,000 per loss.

   a. Such insurance shall apply to professional errors, acts, or omissions arising out of the scope of services covered by this Contract and, if the project involves abatement, removal, repair, replacement, enclosure, encapsulation and/or disposal of any petroleum, petroleum product hazardous material or substance, it may not exclude bodily injury, property damage, pollution or asbestos related claims, testing, monitoring, measuring, or laboratory analyses.

   b. If coverage is written on a claims-made policy, the Contractor warrants that any applicable retroactive date precedes the start of work; and that continuous coverage will be maintained, or an extended discovery period exercised, throughout the performance of the services and for a period of not less than three years from the time work under this Contract is completed. Written proof of this extended reporting period must be provided to OGS prior to the policy's expiration or cancellation.

5. Crime Insurance.

   a. The policy shall be issued with limits of $50,000.

   b. The policy shall include coverage for all directors, officers, agents and employees of the Contractor.

   c. The policy shall include coverage for third party fidelity and name the State of New York as loss payee.

   d. The policy shall include coverage for extended theft and mysterious disappearance.

   e. The policy shall not contain a condition requiring an arrest and conviction.

   f. Policies shall be endorsed to provide coverage for computer crime/fraud.

6. Waiver of Subrogation. Contractor shall cause to be included in each of its policies insuring against loss, damage or destruction by fire or other insured casualty a waiver of the insurer's right of subrogation against OGS, or, if such waiver is unobtainable (i) an express agreement that such policy shall not be invalidated if Contractor waives or has waived before the casualty, the right of recovery against OGS or (ii) any other form of permission for the release of OGS.

**6.6.3 Workers' Compensation Insurance and Disability Benefits Requirements**

Workers' Compensation Law (WCL) §57 & §220 requires the heads of all municipal and state entities to ensure that businesses applying for permits, licenses or contracts document it has appropriate workers' compensation and disability benefits insurance coverage. These requirements apply to both original Contracts and renewals, whether the governmental agency is having the work done or is simply issuing the permit, license or Contract. Failure to provide proof of such coverage or a legal exemption will result in a rejection of renewal.

## SECTION 7 MISCELLANEOUS

### 7.1. 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 both parties 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.

### 7.2. 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 above, and (ii) if to Contractor, addressed to Contract Administrator at the address set forth below. 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 set forth in the Contract Award Notification. The Contractor's Contract Administrator is initially set forth in Appendix G and will be updated though the P-memo process.

All notices sent shall be effective upon actual receipt by the receiving party. The Contractor will be required to forward a copy of the official notice to an Authorized User that is associated with the subject of the notice.

Written notice of any alleged breach by one party to the other shall provide specific facts, circumstances and grounds upon which the breach is being declared.

### 7.3. 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.

### 7.4. 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.

**IN WITNESS WHEREOF**, the Parties have executed this Contract as of the date last written below.

The Parties further hereby certify that original copies of this executed and approved signature page will be affixed, upon final approval by the NYS Comptroller, to exact copies of this Contract being executed simultaneously herewith. The acknowledgment 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 agreement, 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, Contractor 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).

**CONTRACTOR NAME**

By:_____
Name:
Title:

Date: _____

Corporate Federal ID #:_____

Vendor Identification #: _____

**THE PEOPLE OF THE STATE OF NEW YORK**

By:_____
Name:
Title:

Date: _____

**CORPORATE ACKNOWLEDGMENT**

**STATE OF** }
: **ss.:**
**COUNTY OF** }

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.

_____
**Signature and Office of Person Taking Acknowledgment**

_____

_____

**APPROVED AS TO FORM**
**NEW YORK STATE ATTORNEY GENERAL**
**COMPTROLLER**

**APPROVED**
**NEW YORK STATE**

# APPENDIX A

# STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

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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 State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments 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. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

**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 and 5 NYCRR 143, 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 the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(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, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts 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. 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 Department of Economic Development's Division 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 Section 165 of the State Finance Law, (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. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

**23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.** If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

**24. PROCUREMENT LOBBYING.** To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

**25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.**
To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

# APPENDIX B

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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-responsible.

**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. <u>SAVINGS/FORCE MAJEURE</u>** 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. <u>CONTRACT BILLINGS</u>** 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. <u>Replacement Parts Warranty</u>** 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. <u>Virus Warranty</u>** The Contractor represents and warrants that Licensed Software contains no known viruses. Contractor is not responsible for viruses introduced at Licensee's site.

**g. <u>Date/Time Warranty</u>** 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. <u>Workmanship Warranty</u>** 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. <u>Survival of Warranties</u>** 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. <u>AUDIT OF LICENSED PRODUCT USAGE</u>** 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. <u>OWNERSHIP/TITLE TO PROJECT DELIVERABLES</u>**

**a. <u>Definitions</u>**

**(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. <u>Title to Project Deliverables</u>** 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 REQUIREMENTS AND PROCEDURES FOR EQUAL EMPLOYMENT AND BUSINESS PARTICIPATION OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND NEW YORK STATE CERTIFIED MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES

**Policy Statement**

New York State Office of General Services, as part of its responsibility, recognizes the need to promote the employment of minority group members and women and to ensure that certified minority and women-owned business enterprises have opportunities for maximum feasible participation in the performance of OGS contracts.

In 2006, the State of New York commissioned a disparity study to evaluate whether minority and women-owned business enterprises had a full and fair opportunity to participate in state contracting. The findings of the study were published on April 29, 2010, under the title "The State of Minority and Women-Owned Business Enterprises: Evidence from New York" ("the Disparity Study"). The report found evidence of statistically significant disparities between the level of participation of minority and women-owned business enterprises in state procurement contracting versus the number of minority and women-owned business enterprises that were ready, willing and able to participate in state procurements. As a result of these findings, the Disparity Study made recommendations concerning the implementation and operation of the statewide certified minority and women-owned business enterprises program.

**Equal Employment Opportunity Requirements**

By submission of a bid or proposal in response to this solicitation, the Offerer agrees with all of the terms and conditions of Appendix A including Clause 12 - Equal Employment Opportunities for Minorities and Women. The contractor is required to ensure that it and any subcontractors awarded a subcontract over $25,000 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, shall undertake or continue programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, equal opportunity shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, termination, and rates of pay or other forms of compensation. This requirement does not apply to: (i) work, goods, or services unrelated to this contract; or (ii) employment outside New York State.

Contractor further agrees to submit with the bid a staffing plan (Form EEO 100) identifying the anticipated work force to be utilized on the Contract and if awarded a contract, will, upon request, submit to OGS a workforce utilization report (Form EEO 101) identifying the work force actually utilized on the Contract if known.

**Business Participation Opportunities for New York State Certified Minority- and Women-Owned Business Enterprises (MWBE)**

For purposes of this procurement, OGS hereby establishes a goal of 11% for Minority-owned Business Enterprises (MBE) participation and 9% for Women-owned Business Enterprises (WBE) participation (collectively referred to as MWBE), for a total contract MWBE goal of 20%. A Contractor must document good faith efforts to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of this Contract and Contractor agrees that OGS may withhold payment pending receipt of the required MWBE documentation. The directory of New York State Certified MWBEs can be viewed at: http://www.esd.ny.gov/MWBE.html. For guidance on how OGS will determine a Contractor's "good faith efforts," refer to 5 NYCRR §142.8.

In accordance with 5 NYCRR §142.13, Offeror/Contractor acknowledges that if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such finding constitutes a breach of Contract and OGS may withhold payment from the Contractor as liquidated damages. Such liquidated damages shall be calculated as an amount equaling the difference between: (1) all sums identified for payment to

MWBEs had the Contractor achieved the contractual MWBE goals; and (2) all sums actually paid to MWBEs for work performed or materials supplied under the Contract.

By submitting a bid or proposal, Offeror/Contractor agrees to submit the following documents and information as evidence of compliance with the foregoing:

A. Offeror is required to submit a Utilization Plan on Form MWBE 100 with their bid or proposal. The Utilization Plan shall list the MWBEs the Contractor intends to use to perform the State contract and a description of the Contract scope of work that the Contractor intends to structure to meet the goals on the State contract, and the estimated or, if known, actual dollar amounts to be paid to and performance dates of each component of a State contract that the Contractor intends to be performed by a NYS Certified minority- or woman-owned business. Any modifications or changes to the agreed participation by NYS Certified M/WBEs after the Contract Award and during the term of the Contract must be reported on a revised M/WBE Utilization Plan and submitted to OGS.

B. OGS will review the submitted MWBE Utilization Plan and advise the Offeror of OGS acceptance or issue a notice of deficiency within 20 days of receipt.

C. If a notice of deficiency is issued, Offeror agrees that it shall respond to the notice of deficiency within seven (7) business days of receipt by submitting to the OGS Office of Minority and Women-Owned Enterprises, [35th Floor, Corning Tower, Empire State Plaza, Albany, New York 12242 Phone: (518) 473-7083 Fax: (518) 486-2679], a written remedy in response to the notice of deficiency. If the written remedy that is submitted is not timely or is found by OGS to be inadequate, OGS shall notify the Offeror and direct the Offeror to submit, within five (5) business days, a request for a partial or total waiver of MWBE participation goals on Form MWBE101/BDC 333. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid or proposal.

D. OGS may disqualify an Offeror as being non-responsive under the following circumstances:
a) If an Offeror fails to submit a MWBE Utilization Plan;
b) If an Offeror fails to submit a written remedy to a notice of deficiency;
c) If an Offeror fails to submit a request for waiver; or
d) If OGS determines that the Offeror has failed to document good faith efforts.

An Offeror who documents good faith efforts to meet the goal requirements may submit a request for a partial or total waiver on form MWBE 101/BDC 333, at the same time it submits its MWBE Utilization Plan. If a request for waiver is submitted with the MWBE Utilization Plan and is not accepted by OGS at that time, the provisions of clauses B-D above, will apply.

A Contractor shall attempt to utilize, in good faith, any MBE or WBE identified within its MWBE Utilization Plan, during the performance of the Contract. Requests for a partial or total waiver of established goal requirements made subsequent to Contract Award may be made at any time during the term of the Contract to OGS, but must be made no later than prior to the submission of a request for final payment on the Contract.

A Contractor is required to submit a Contractor's Monthly Compliance & Payment Report on Form MWBE 102 to the OGS Office of Minority and Women-Owned Enterprises, [35th Floor, Corning Tower, Empire State Plaza, Albany, New York 12242 Phone: (518) 473-7083 Fax: (518) 486-2679], by the 10th day of each month during the term of the Contract documenting the progress made toward achievement of the MWBE goals of the Contract.

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

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