



# Invitation For Bids

**IMPORTANT: SEE "NOTICE TO BIDDERS" CLAUSES HEREIN  
BIDS MAY BE SENT TO THE ABOVE ADDRESS ONLY**

**(E-Mail or Facsimile Bid Submissions Are NOT Acceptable)**

<b>BID OPENING:</b>	<b>TITLE: Group 05600 – GASOLINE &amp; E-85</b>
<b>DATE:</b> November 15, 2016 <b>TIME:</b> 11:00 AM ET	<b>Classification Codes: 15 Fuels &amp; Lubricants</b>
<b>INVITATION FOR BIDS NUMBER:</b> <b>23020</b>	<b>SPECIFICATION REFERENCE:</b> As Incorporated in the Invitation for Bids
<b>CONTRACT PERIOD: December 19, 2016 to December 18, 2018. With up to one (1) additional one (1) year period.</b>	

### DESIGNATED CONTACTS

<b>Primary Contact:</b> Jeffery Giocondo Contract Management Specialist (518) 474-9621 <a href="mailto:Jeffery.Giocondo@ogs.ny.gov">Jeffery.Giocondo@ogs.ny.gov</a>	<b>Secondary Contact:</b> James Jasiewicz Contract Management Specialist (518) 486-5238 <a href="mailto:james.jasiewicz@ogs.ny.gov">james.jasiewicz@ogs.ny.gov</a>
---	--

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

Procurement Lobbying: [http://ogs.ny.gov/aboutOgs/regulations/defaultSFL\\_139j-k.asp](http://ogs.ny.gov/aboutOgs/regulations/defaultSFL_139j-k.asp)

<b>Bidder's Federal Tax Identification Number:</b> <i>(Do Not Use Social Security Number)</i>	<b>NYS Vendor Identification Number:</b> <i>(See "New York State Vendor File Registration" clause)</i>			
Legal Business Name of Company Bidding:				
D/B/A - Doing Business As (if applicable):				
Street	City	State	County	Zip Code
If applicable, place an "x" in the appropriate box (check all that apply):		<input type="checkbox"/> Small Business #Employees	<input type="checkbox"/> Minority Owned Business	<input type="checkbox"/> Women Owned Business
If applicable, place an "x" in the appropriate box (check all that apply):		<input type="checkbox"/> Manufactured Within New York State	<input type="checkbox"/> Manufactured Outside New York State	
If you are not bidding, place an "x" in the box and return this page only.				
<input type="checkbox"/> WE ARE UNABLE TO BID AT THIS TIME BECAUSE:				
<b>Bidder's Signature:</b> Title:	Printed or Typed Name: Date:			
Phone:	Extension	Toll Free Phone:	Extension	
Fax:	Extension	Toll Free Fax:	Extension	
E-mail Address:		Company Website:		

**INDIVIDUAL, CORPORATION, PARTNERSHIP, OR LLC ACKNOWLEDGMENT**

STATE OF \_\_\_\_\_ }  
: \_\_\_\_\_ SS.:  
COUNTY OF \_\_\_\_\_ }

On the \_\_\_\_\_ day of \_\_\_\_\_ in the year 20\_\_\_\_, before me personally appeared \_\_\_\_\_, known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that **he** resides at \_\_\_\_\_,

Town of \_\_\_\_\_, County of \_\_\_\_\_,

State of \_\_\_\_\_; and further that:

**[Check One]**

- If an individual):** **he** executed the foregoing instrument in his/her name and on his/her own behalf.
- If a corporation):** **he** is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in said instrument; that, by authority of the Board of Directors of said corporation, **he** is authorized to execute the foregoing instrument on behalf of the corporation for purposes set forth therein; and that, pursuant to that authority, **he** executed the foregoing instrument in the name of and on behalf of said corporation as the act and deed of said corporation.
- If a partnership):** **he** is the \_\_\_\_\_ of \_\_\_\_\_, the partnership described in said instrument; that, by the terms of said partnership, **he** is authorized to execute the foregoing instrument on behalf of the partnership for purposes set forth therein; and that, pursuant to that authority, **he** executed the foregoing instrument in the name of and on behalf of said partnership as the act and deed of said partnership.
- If a limited liability company):** **he** is a duly authorized member of \_\_\_\_\_ LLC, the limited liability company described in said instrument; that **he** is authorized to execute the foregoing instrument on behalf of the limited liability company for purposes set forth therein; and that, pursuant to that authority, **he** executed the foregoing instrument in the name of and on behalf of said limited liability company as the act and deed of said limited liability company.

\_\_\_\_\_  
**Notary Public**  
**Registration No.**

---

## Table of Contents

SECTION 1. INTRODUCTION .....	6
1.1 Overview and Scope .....	6
1.2 Estimated Quantities .....	6
1.3 Definitions and Acronyms .....	7
1.4 Order of Precedence .....	9
1.4.1 Conflict of Terms/Order of Precedence .....	9
SECTION 2. PROCUREMENT SCHEDULE .....	10
2.1 Inquiries and Issuing Office .....	10
2.2 Key Events and Dates .....	10
2.3 Summary Of Policy and Prohibitions On Procurement Lobbying .....	10
2.4 Pre-Bid Conference .....	11
2.5 New York State Contract Reporter .....	11
SECTION 3. QUALIFICATIONS AND REQUIREMENTS .....	11
3.1 Qualifications of Prospective Bidders .....	11
3.2 Price Page Details .....	12
3.2.1 Price Sheet Instructions .....	12
3.2.2 Price Sheet Rounding Details .....	13
3.2.3 OPIS Posting Location Pricing .....	13
3.2.4 Volume Discount .....	13
3.3 Product Requirements .....	13
3.4 M/WBE Interest in Partnership .....	13
3.5 Bid Deviations .....	14
3.6 Financial Stability .....	14
SECTION 4. PROCUREMENT/ADMINISTRATIVE BACKGROUND .....	14
4.1 NYS Reserved Rights .....	14
SECTION 5. FORMAT AND CONTENT OF BID SUBMITTAL .....	15
5.1 Responsiveness .....	15
5.2 Incorporation .....	15
5.3 General Bid Content .....	15
5.4 Bid Delivery .....	17
5.4.1 Bid Envelopes and Packages .....	17
5.4.2 Hand Deliveries .....	17
5.5 Bid Liability .....	17
5.6 Important Building Access Procedures .....	18
SECTION 6. METHOD OF AWARD .....	18
6.1 Method of Award .....	18
6.2 Evaluation Process .....	18
6.3 Notification of Award .....	18

---

6.4	Vendor Responsibility on Accuracy.....	19
6.5	Minor Deviations/Minor Technicality .....	<b>Error! Bookmark not defined.</b>
6.6	No Award on Individual Item .....	19
6.7	Electronic Bid Opening Results.....	19
	SECTION 7. TERMS AND CONDITIONS.....	19
7.1	Appendix A.....	19
7.2	Appendix B.....	19
7.3	Appendix C .....	19
7.4	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 ...	19
7.4.1	Policy Statement .....	20
7.4.2	General Provisions .....	20
7.4.3	Equal Employment Opportunity (EEO) .....	20
7.4.4	Contract Goals .....	21
	ALL FORMS ARE AVAILABLE AT: <a href="http://www.ogs.ny.gov/MWBE/Forms.asp">http://www.ogs.ny.gov/MWBE/Forms.asp</a> .....	22
7.5	Contract Term and Renewal, and Short Term Extension .....	22
7.5.1	Contract Term .....	22
7.5.2	Contract Renewal.....	22
7.4.3	Short Term Extension.....	22
7.5	Conflict of Terms / Order of Precedence .....	22
7.6	Extension of Use .....	23
7.7	Contract Amendment Process .....	23
7.8	Non-State Agencies Participation in Centralized Contracts.....	23
7.9	New York State Vendor File Registration .....	23
7.10	New York State Vendor Responsibility .....	24
7.11	New Accounts .....	25
7.12	Websites and Online Ordering .....	25
7.13	New York State Statewide Financial System.....	25
7.14	Price Page Details.....	25
7.14.1	Price Page Instructions .....	25
7.14.2	Price Sheet Rounding Details .....	26
7.15	Volume Discount .....	26
7.16	Minimum Order Size.....	26
7.17	Unanticipated Excessive Purchase.....	26
7.18	Shipping Charges.....	27
7.19	Delivery .....	27
7.20	Delivery Schedules.....	27
7.21	Price .....	28
7.22	Price Revisions.....	29
7.23	Method of Payment / Invoices.....	31

---

7.24	New York State Procurement Card.....	31
7.25	Billing/Ordering Systems.....	31
7.25	Samples .....	31
7.26	Discrepancies.....	32
7.27	Emergency Purchasing .....	32
7.28	Administrative and Reporting Requirements .....	32
7.29	Guarantee .....	32
7.30	Engineering Service .....	33
7.31	Tax Law §5-A .....	33
7.32	Use of Recycled or Remanufactured Materials .....	33
7.33	Mercury-Added Consumer Products.....	34
7.34	Environmental Attributes and NYS Executive Order 4.....	34
7.35	NYS Required Certifications .....	34
7.36	Encouraging Use of New York State Businesses in Contract Performance.....	34
SECTION 8. FUEL SPECIFICATIONS .....		34
8.1	Fill and Vent Requirements/Vapor Recovery Systems.....	34
8.2	Petroleum Transfer Requirements.....	35
8.3	Topping Off Tanks.....	36
8.4	Trade Names.....	36
8.5	Automatic Replenishment .....	36
8.6	Requirements - Gasoline, Unleaded Formula (Conventional & OPRG (E) Types) .....	36
8.7	Octane Requirements - Unleaded Formula (Conventional, OPRG (E) & E-85 Types) .....	37
8.8	Gasoline Volatility Class (Conventional & OPRG (E) Types) .....	37
8.9	General Requirements, Unleaded Formula (Conventional & OPRG (E) Types).....	37
8.10	Limits, Unleaded Gasoline (All Types).....	37
8.11	General Requirements, Unleaded Gasoline OPRG (E).....	37
8.12	Reformulated Gasoline, OPRG Type for the NYC-CMSA Requirements.....	38
8.12.1	Gasoline, OPRG Type Reformulated (Alcohol/Ether/Oxygenated Blends) .....	38
8.12.2	Distribution, Gasoline, OPRG Type Reformulated (Alcohol/Ether/Oxygenated Blends) .....	38
8.13	OPRG (E) Type Gasoline, for the Ozone Non-Attainment Areas .....	39
8.13.1	Terminology, Gasoline, OPRG (E) Type.....	39
8.13.2	Requirements, Gasoline, Type Reformulated.....	39
8.14	Requirements – E-85 (Table).....	40
8.15	Related Requirements for Storage, Transfer, & Wholesale Purchaser-Consumer Posting .....	41
8.15.1	Tanks/S (Storage), Gasoline-Alcohol Blend .....	41
8.16	Labels.....	41
<b>APPENDIX B</b> .....		<b>8</b>
<b>GENERAL SPECIFICATIONS</b> .....		<b>8</b>

APPENDIX A  
APPENDIX B  
APPENDIX C

## ATTACHMENTS

- Attachment 1 - Price Pages
- Attachment 2 – Bidder Submittal Checklist and Information Questionnaire
- Attachment 3 - NYS Required Certifications
- Attachment 4 – Encouraging Use of NYS Business
- Attachment 5 - Insurance Requirements
- Attachment 6 - Report of Contract Usage
- Attachment 7 - Use of Service Disabled Veteran Owned Business Enterprises in Contract Performance
- Attachment 8 – Bidder Inquiries
- Attachment 9 - Delivery Schedule – State Agencies
- Attachment 10 – Delivery Schedule – Local Governments & Other Eligible non-State Agencies

## SECTION 1. INTRODUCTION

This Invitation for Bids (“IFB”) is issued by the New York State Office of General Services (“OGS” or the “State”) Procurement Services. The commodities Contracts awarded as a result of this IFB will be centralized Contracts for use by New York State Agencies and other Authorized Users (see Section 7.9 – Non-State Agencies Participation in Centralized Contracts). Accordingly, references to the State and its Agencies as Authorized Users under this Solicitation and the ensuing Contracts shall encompass and include all such entities within the definition of “Authorized User” set forth in Appendix B.

This IFB outlines the terms and conditions, and all applicable information required for submitting Bids for the commodities described herein. Bidders should pay strict attention to the Bid submission date and time to prevent disqualification. To ensure compliance with Solicitation requirements and prevent possible disqualification, Bidders must follow the format and instructions described in Section 5.

**IMPORTANT NOTICE TO POTENTIAL BIDDERS: Receipt of these Solicitation documents does not indicate that the Office of General Services' Procurement Services has pre-determined your company's qualifications to receive a contract award. Such determination will be made after the Bid opening and will be based on our evaluation of your Bid submission compared to the specific requirements and qualifications contained in these Solicitation documents.**

### 1.1 Overview and Scope

The purpose of this IFB and the resultant Contracts is to provide Authorized Users with a means of acquiring various grades of Gasoline and E-85 by bulk delivery to Authorized Users storage facility for use in the Authorized Users own pumps. The product shall be Contractor furnished, delivered and unloaded as specified herein.

Detailed information on the procurement process is set forth in Section 6, Method of Award.

It is the State's intent to award Contracts on the basis of lowest price to responsive and responsible Bidders who are able to meet the terms and conditions of this IFB and who offer the best overall pricing in accordance with the "Method of Award" clauses described herein.

The awarded Bidders will be granted two-year contracts with potential renewal options as further described herein.

It is the intent of this IFB to make one (1) award in the following counties only: Columbia, Hamilton, and Schoharie. No awards will be made for counties without any filed requirements. In the event that the same Bidder is awarded multiple counties, the awards will be combined into a single Contract.

### 1.2 Estimated Quantities

All dollar values and quantities quoted in the IFB and Attachments are based on Authorized Users' estimated use for a 12 month volume. The estimates by Fuel Type and County are specified in Attachment 1 – Price Pages, Attachment 8 - Delivery Schedule – State Agencies, and Attachment 9 - Delivery Schedule – Non-State Agencies.

By providing an estimate to OGS for a location, the Authorized User has agreed to purchase all of the Authorized User's needed and required bulk delivery gasoline and E-85 for that location under the terms of this IFB and any resulting Contract for the duration of the awarded Contracts. However, each Contract awarded under this IFB shall be for the quantities or dollar values actually ordered during the Contract period. The individual value of each Contract is indeterminate. OGS makes no guarantee as to how much fuel will actually be ordered and/or delivered. See §28. *Estimated/Specific Quantity Contracts* and §25 *Participation in Centralized Contracts* in Appendix B, OGS General Specifications.

### 1.3 Definitions and Acronyms

**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..

**Authorized User(s):** as defined in Appendix B.

**ASTM:** The acronym "ASTM" shall be used as a designation for the American Society for Testing and Materials.

**Bid Deviation:** shall refer to any variance submitted or proposed by a Bidder, which deviates from ,adds extraneous terms to, conflicts with or offers an alternative to any term, condition, specification or requirement of the Solicitation.

**BIDDER: BIDDER/OFFEROR:** 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."

**Business Day:** shall refer to Monday through Friday from 8:00 AM – 5:00 PM EST, excluding NYS Holidays and federal holidays.

**CMSA:** The acronym, "CMSA" shall be used as a designation for Consolidated Metropolitan Statistical Area.

**CONVENTIONAL GASOLINE:** shall be any gasoline which has not been certified under 40\CFR, section 80.40.  
**NOTE: MAY CONTAIN UP TO 10% ETHANOL**

**DEC:** The acronym, "DEC" shall be used as a designation for Dept. of Environmental Conservation.

**E-85:** A blend of 85% ethanol and 15% conventional regular unleaded gasoline by volume.

**ETBE:** The acronym, "ETBE" shall be used as a designation for Ethyl Tertiary Butyl Ether.

**GASOLINE/S:** shall be a volatile mixture of liquid hydrocarbons, generally containing small amounts of additives, suitable for use as a fuel in spark-ignition, internal combustion engines.

**GASOLINE-ALCOHOL BLEND:** shall be a blend consisting primarily of gasoline and an amount of one or more alcohols as described below:

Methanol: at least 1% by volume or 0.15% by mass if methanol is only alcohol present.  
Other alcohols (i.e. ethanol, TBA): at least 1% by volume or 0.35% by mass.

**GASOLINE-ETHER BLEND:** shall be a blend consisting primarily of gasoline and a substantial amount (more than 0.35 mass percent oxygen) of one or more ethers.

**GRAND TOTAL BID PER COUNTY:** shall be the total of the number of gallons requested in a county for each type of gasoline ordered, multiplied by the price offered by the Bidder for each of the requested types. The sum of total price for each type of gasoline requested in a county shall result in the Grand Total Bid per County. Pricing information will be entered on the Bid Price Submittal tab, while the Grand Total Bid Per County will be calculated in the Combined Bid Price Per County tab of Attachment 1.

**Example - Bid Price Submittal tab:**

County	Fuel Type	QTY Based on Filed Requirements for 12 Mos. Volume	Price Per Gallon	Total Price	Volume Discounts Offered for Orders Greater Than or Equal to 5,500 gallons (\$ off per gallon)
Albany	Gas Reg	1,285,489	\$3.4000	\$4,370,662.60	\$0.1000
Albany	Flex Fuel (E-85)	54,000	\$3.3700	\$181,980.00	\$0.2300

**Grand Total Bid Per County tab:**

Item	County Name	Grand Total Bid Per County
Items 1 & 2	Albany	\$4,552,642.60

**INVITATION FOR BIDS (IFB):** as defined in Appendix B.

**IP:** The acronym "IP" shall be used as a designation for the Institute of Petroleum.

**LUST:** Leaking Underground Storage Tank

**MAY:** denotes the permissive in a Contract clause or specification. "May" does not mean "required." See also "Shall" and "Must."

**MON:** The acronym, "MON" shall be used as a designation for Motor Octane Number.

**MSA:** The acronym, "MSA" shall be used as a designation for Metropolitan Statistical Area.

**MUST:** denotes the imperative in a Contract clause or specification. "Must" is synonymous with "required." See also "Shall" and "May."

**MWBE:** shall refer to a business NYS certified as a Minority and/or Women-owned Business Enterprise by Empire State Development (ESD).

**NYCRR:** The acronym, "NYCRR" shall be used as a designation for New York Codes, Rules, and Regulations.

**NYS:** The acronym, "NYS" shall be used as a designation for New York State.

**NYS Holiday:** 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; Labor Day; Columbus Day; Veteran's Day; Thanksgiving; and Christmas Day.

**NYS VENDOR FILE:** A centralized repository to maintain timely and reliable information on all Contractors registered to do business with the State.

**NYS Vendor ID:** shall mean the ten-character identifier issued by New York State when a vendor is registered on the Vendor File.

**OPRG (E):** The acronym "OPRG (E)" shall be used as a designation for Oxygenated fuels Program Reformulated Gasoline Ethanol.

**OXYGENATED REFORMULATED GASOLINE (OPRG {E}):** shall be a blend consisting of gasoline-alcohol, in a reformulated gasoline which is intended for use in an Oxygenated fuels Program Reformulated Gasoline control area during a program control period (i.e., 6NYCRR225.-3.4, Table 1 on page 140.2m CN 8-31-93, or latest revision thereof).

**PROCUREMENT SERVICES:** shall mean a division of the New York State Office of General Services (OGS) which is authorized by law to issue centralized, statewide Contracts for use by New York State agencies, political subdivisions, schools, libraries and others authorized by law to participate in such Contracts.

**PROMPT DELIVERY:** shall refer to any delivery that is completed within the Contractor's specified guaranteed delivery time.

**PROPOSAL, 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.

**RBOB:** The acronym, "RBOB" shall be used as a designation for Reformulated gasoline Blendstock for Oxygenate Blending.

**RFG:** The acronym, "RFG" shall be used as a designation for ReFormulated Gasoline.

**RON:** The acronym, "RON" shall be used as a designation for Research Octane Number.

**RVP:** The acronym, "RVP" shall be used as a designation for Reid Vapor Pressure.

**SDVOB:** The acronym "SDVOB" shall be used as a designation for Service-Disabled Veteran-Owned Business

**SHALL:** denotes the imperative in a Contract clause or specification. "Shall" is synonymous with "required." See also "Must" and "May."

**TBA:** The acronym, "TBA" shall be used as a designation Tertiary Butyl Alcohol.

**VOLUME DISCOUNT:** shall refer to the Cents Per Gallon Discount for Orders 5,500 Gallons or Greater that a Bidder enters in Attachment 1 – Price Pages. If no Volume Discount is entered this will be calculated as \$0.0000. In a situation where Bidders are tied, the volume discount will be used as a tie breaker to determine a winner.

## 1.4 Order of Precedence

### 1.4.1 Conflict of Terms/Order of Precedence

Conflicts among the documents in the IFB shall be resolved in the following Order of Precedence:

1. Appendix A, Standard Clauses for New York State Contracts;
2. The Invitation for Bids, and all Attachments;
3. Appendix B, General Specifications;
4. The Bidder's Bid.

## SECTION 2. PROCUREMENT SCHEDULE

### 2.1 Inquiries and Issuing Office

All inquiries concerning this IFB must be addressed to the following OGS Designated Contacts:

DESIGNATED CONTACTS:	
PRIMARY CONTACT: Jeffery Giocondo <a href="mailto:Jeffery.Giocondo@ogs.ny.gov">Jeffery.Giocondo@ogs.ny.gov</a>	SECONDARY CONTACT: James Jasiewicz <a href="mailto:james.jasiewicz@ogs.ny.gov">james.jasiewicz@ogs.ny.gov</a>
NYS Office of General Services	
Procurement Services	
Corning Tower – 38 <sup>th</sup> Floor	
Empire State Plaza	
Albany, New York 12242	

All questions must be submitted in writing using Attachment 7 – Inquiries Template, citing the applicable IFB document name and document section. The completed Attachment 7 – Inquiries Template must be emailed to [OGS.sm.PS\\_CM\\_FleetFuelRoads@ogs.ny.gov](mailto:OGS.sm.PS_CM_FleetFuelRoads@ogs.ny.gov) by the “Closing Date for Inquiries” indicated in Section 2.2. A Bidder is strongly encouraged to submit questions at the earliest convenience. A Bidder should note that all clarifications and exceptions, including those relating to the terms and conditions of the resultant Contract, are to be resolved prior to the submission of a Bid. A Bidder entering into a Contract with the State is expected to comply with all terms and conditions contained herein. Answers to all questions of a substantive nature will be provided to all prospective Bidders in the form of a question and answer document which will be posted and released through the OGS website and the New York State Contract Reporter.

### 2.2 Key Events and Dates

The schedule for this IFB is set forth in the table below. A Bidder should pay strict attention to the Bid Submission/Bid Opening date and time to prevent disqualification.

#### Procurement Schedule

<u>Event</u>	<u>Date</u>	<u>Time</u>
IFB Release	10/24/2016	
Closing Date for Inquiries	10/31/2016	11:59 P.M. ET
OGS Responses to Bidder Inquiries (estimated)	11/4/2016	
Submission of Bids Due/Bid Opening	11/15/2016	11:00 A.M ET
Evaluation and Tentative Awardee Notification (estimated)	11/18/2016	
Contract Award (estimated)	12/12/2016	

### 2.3 Summary Of Policy and Prohibitions On Procurement Lobbying

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

Procurement Lobbying: [http://ogs.ny.gov/aboutOgs/regulations/defaultSFL\\_139j-k.asp](http://ogs.ny.gov/aboutOgs/regulations/defaultSFL_139j-k.asp)

## 2.4 Pre-Bid Conference

There will be no Pre-Bid conference for this IFB.

## 2.5 New York State Contract Reporter

Bidders must register with the New York State Contract Reporter (“NYSCR”) at <https://www.nyscr.ny.gov> in order to receive notifications about this Solicitation. Navigate to the “I want to find contracts to bid on” page to register for your free account. In order to receive e-mail notifications regarding updates to the content or status of a particular ad, you must choose the option “send me notification updates on this,” located in the lower right hand corner of the particular ad. Answers to all questions of a substantive nature will be posted in the form of a question and answer document and released through the NYSCR. Any updates to Solicitation documents will also be posted and released through the NYSCR. If you do not opt-in to receive notification updates regarding a particular ad, you will not receive e-mail notifications regarding updates, including e-mail notifications regarding the posting of the question and answer document and updates to Solicitation documents. **Be advised that submission of responses to the Solicitation that do not reflect and take into account updated information may result in your Bid being deemed non-responsive to the Solicitation.**

# SECTION 3. QUALIFICATIONS AND REQUIREMENTS

## 3.1 Qualifications of Prospective Bidders

A Bidder shall meet the following minimum qualifications. No Bid will be considered unless the Bidder can meet the following conditions:

1. The Bidder must either own or operate a permanently established bulk storage plant with stationary tankage from which delivery will be made.

OR

2. The Bidder must be an established refiner or authorized dealer of a distributor, which distributor owns and operates, or leases and operates a bulk storage plant with stationary tankage. A Bid from an authorized dealer of a distributor may require that a certificate be executed by the distributor, stating that the Bidder is an authorized dealer of the distributor and that all qualifications, requirements and specifications of the IFB will be met. The Bidder must also be registered as a distributor with the New York State Department of Taxation and Finance and/or be a licensed importer, transporter or terminal operator, if applicable.

AND

3. The Bidder’s or distributor’s bulk storage plant(s) must have sufficient capacity and/or other facilities which, in the opinion of the Commissioner of General Services shall protect the interests of the State. Such facilities are subject to inspection prior to award, and if found not to be in compliance with these requirements, the Bid may be rejected.
4. The bulk storage plant must be located within a reasonable distance from the place or point to which deliveries are to be made.
5. The Bidder’s source of supply is with a reputable oil refiner either directly or through the refiner’s authorized distributor. If requested, Bidder must supply a certificate from the refiner that guarantees the refiner will furnish the Bidder/Contractor fuel for the life of the Contract.
6. The Bidder’s delivery trucks for regular, mid, premium and E-85 gasoline fuel types, except motor transports, are equipped with meters to accurately measure the quantity gasoline. Motor transports for the delivery of gasoline shall be accurately gauged as to shell capacity and sealed by the State Bureau of Weights and Measures or the local authority having jurisdiction. Tank wagons used for the delivery of gasoline fuel types must have a meter with ticket printer which will provide a printed receipt giving an

accurate accounting of the amount of fuel delivered. Delivery ticket shall be locked in the printer from the start of delivery until the delivery is completed and recorded.

7. Vendors furnishing gasoline to New York State must be registered in accordance with applicable provisions of the New York State Tax Law amendments effective September 1, 1998 or as may be amended. Also, if vendors intend to supply gasoline, they must possess a valid IRS Form 637UV.
8. Each Bidder is advised that the State's intent in having the requirements listed above is to ensure that a qualified and reliable Bidder is awarded a Contract. OGS reserves the right to request any additional information regarding a Bidder's abilities, qualifications and procedures as it deems necessary to ensure safe and satisfactory work under a Contract. This includes but is not limited to the following:
  - Satisfactory evidence that a Bidder has maintained an organization capable of performing the work specified herein, through submission of a Dun & Bradstreet Business Information Report or other equivalent evidence.
  - Evidence of business establishment with adequate inventories of the product(s) offered, and capacity to process and ship large numbers of orders to the awarded Region(s). The Commissioner may require a certificate from the Bidder showing the number of years the Bidder has been active in supplying the product(s) offered and the size and location of the inventories regularly maintained.
  - References that demonstrate the ability of the Bidder to perform jobs similar in scope to the size, nature and complexity of the applicable Lot(s).
  - Documentation to demonstrate a Bidder's ability to service the geographic Region(s) on which they bid in order to meet the delivery requirements set forth in Sections 7.18, Delivery.
  - The State reserves the right to conduct pre-award meetings with individual Bidders to determine their capability of meeting any of the requirements of the IFB specifications.

The Commissioner reserves the right to investigate or make any inquiry into the capabilities of any Bidder to properly perform under any resultant Contract.

Note: Failure by a Bidder to meet any of the above qualifications in whole or in part may result in a rejection of that Bidder's Bid and no further consideration for award.

### 3.2 Price Page Details

Price Pages contain the estimated quantities and fuel types that have been requested in each county. For any County in which a Bidder submits a Bid, the Bidder must submit its proposed pricing for ALL Items contained within the County in Attachment 1 – Pricing Pages

#### 3.2.1 Price Sheet Instructions

A Bidder must enter a Price Per Gallon for all Items within a County they bid on. A Bidder may also enter a Volume Discount in Cents Per Gallon (for orders 5,500 gallons or greater). If a Bidder does not specify a Volume Discount, a discount of \$0.0000 will be assumed. Any Volume Discount offered by a Bidder will not factor into the cost evaluation, however it may be used to determine a winner in case of a tie Bid.

The tabs will auto-populate the Grand Total Bid per County for each County that is bid.

For all Counties that a Bidder elects to bid, a Bidder must specify the following:

Column Title	Price Per Gallon	Volume Discount (for orders 5,500 gallons or greater)
Description	Specify the Price Per Gallon for each type of fuel requested	Specify the Cents Per Gallon Discount for Orders 5,500 Gallons or Greater (if this is not specified by a Bidder, this will be calculated as \$0.0000)

### 3.2.2 Price Sheet Rounding Details

Attachment 1 – Price Pages will limit the number of decimal places that a Bidder can enter (or bid) in the cells to four (4) decimal places.

Each Price Page will calculate a Grand Total Bid per County for each County bid by multiplying the Bid Price (Price Per Gallon) by the Estimated Quantities for each grade of fuel (Fuel Type) listed in Attachment 1 by County.

### 3.2.3 OPIS Posting Location Pricing

OPIS Posting Locations have been established for all counties. The pricing based on the weekly average published prices on October 17, 2016 for N.Y. Harbor Barge and Linden are shown in the table below, by fuel grade:

Fuel Grade	Price Based on Linden Weekly Average	NY Harbor Barge
Regular Unleaded	\$1.5486	N/A
Mid Unleaded	\$1.5936	N/A
Premium Unleaded	\$1.6611	N/A
OPRG(E) Regular	N/A	\$1.5126
Mid OPRG(E)	N/A	\$1.5783
OPRG(E) Premium	N/A	\$1.6440
E-85	N/A	\$1.6328

Should postings differ from current description and/or format, a posting determined, by the Commissioner in his/her sole discretion; to be most reflective of market conditions will be used.

### 3.2.4 Volume Discount

A Bidder may provide a Volume Discount within a given Lot for all individual orders 5,500 gallons or greater in Attachment 1 – Price Pages. The Volume Discount will not be used in the evaluation except in cases of a tie Bid. Should 2 or more Bidders submit identical pricing for an Item, the amount offered as a Volume Discount shall be used as a tie-breaker. The vendor offering the Volume Discount that is the most advantageous to the State will be awarded the Item.

Upon Contract award, the Volume Discount bid for a given county shall be applied to the invoice for each individual order placed by an Authorized User in such Lot/Region which results in a single delivery of 5,500 gallons or greater.

### 3.3 Product Requirements

The Bidder guarantees that the product supplied will meet or exceed the minimum specifications listed in Section 8 – Fuel Specifications.

### 3.4 M/WBE Interest in Partnership

If a New York State certified MWBE would like to indicate its interest in working with participating Bidders, please send an e-mail entitled “Solicitation 23020 MWBE INTEREST [Your company name]” to [OGS.sm.PS\\_CM\\_FleetFuelRoads@ogs.ny.gov](mailto:OGS.sm.PS_CM_FleetFuelRoads@ogs.ny.gov) on or before the date and time indicated in “Closing Date for Inquires”, in Section 2.2 *Key Events and Dates*. The e-mail should include:

1. Company Name
2. Contact Name, Phone Number, Mailing Address, E-Mail Address
3. Brief description of company type (for example “Company ABC is an Authorized Dealer for XYZ”).
4. NYS Empire State Development Certification Type (Minority- and/or Women-Owned Business Enterprise)

A list of all NYS certified MWBEs who have expressed interest in this Solicitation through the timely submission of such e-mail, will be included in a Purchasing Memorandum posted through the New York State Contract Reporter in accordance with the *New York State Contract Reporter* Section, 2.5.

### 3.5 Bid Deviations

Bids must conform to the terms set forth in the Solicitation. As set forth in [Inquiries and Issuing Office](#), if Bidder intends to submit a Bid that deviates from the requirements of the Solicitation in any way, the proposed deviations should be submitted during the *Questions* period so that they may be given due consideration prior to the submission of Bids. Material deviations (including additional, inconsistent, conflicting, or alternative terms) submitted with the Bid may render the Bid non-responsive and may result in rejection of the Bid.

Bidder is advised that OGS will not entertain any exceptions to Appendix A (*Standard Clauses for New York State Contracts*). OGS will also not entertain exceptions to the Solicitation or Appendix B (*General Specifications*) that are of a material and substantive nature.

Extraneous terms 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.

### 3.6 Financial Stability

If requested, Bidder must document its ability to service a contract with dollar sales volume similar to scope of this Solicitation through submission of financial statements documenting past sales history. The Bidder must be financially stable and able to substantiate the financial statements of its company. In addition to sales history, current financial statements may be requested and must be provided within five business days. The State reserves the right to request additional documentation from the Bidder and to request reports on financial stability from independent financial rating services. The State reserves the right to reject as non-responsive or non-responsible any Bidder who does not demonstrate financial stability sufficient for the scope of this Solicitation.

## SECTION 4. PROCUREMENT/ADMINISTRATIVE BACKGROUND

### 4.1 NYS Reserved Rights

In addition to the statutory and common law rights of the State, and the rights of the State and the duties of the Bidder as set out in this Invitation for Bids, New York State reserves the right to:

New York State reserves the right, in its sole discretion, to:

1. Reject any or all proposals received in response to the IFB;
2. Withdraw the IFB at any time, at the Agency's sole discretion;
3. Make an award under the IFB in whole or in part;
4. Disqualify any Bidder whose conduct and/or proposal fails to conform to the requirements of the IFB;
5. Seek clarifications and revisions of Bids;
6. Prior to the Bid opening, amend the IFB specifications to correct errors or oversights, or to supply additional information, as it becomes available;
7. Prior to the Bid opening, direct Bidders to submit proposal modifications addressing subsequent IFB amendments;
8. Change any of the schedule dates with notification through the New York State Contract Reporter;
9. Eliminate any mandatory, non-material specifications that cannot be complied with by all of the prospective Bidders;
10. Waive any requirements that are not material;
11. Utilize any and all ideas submitted in the Bids received;
12. Adopt all or any part of a Bidder's proposal in selecting the optimum configuration;
13. Negotiate with the Bidder within the IFB requirements to serve the best interests of the State. This includes requesting clarifications of any or all Bids:

14. Require clarification at any time during the procurement process and/or require correction of arithmetic or other apparent errors for the purpose of assuring a full and complete understanding of a Bidder's Bid and/or to determine a Bidder's compliance with the requirements of the Solicitation;
15. Select and award the Contract to other than the selected Bidder in the event of unsuccessful contract execution or in other specified circumstances as detailed in the IFB requirements;
16. Request additional documentation from the Bidder or request reports on financial stability from independent financial rating services;
17. In the event that any item(s) does not receive a Bid the State reserves the right to evaluate any late Bids or other submissions in order to satisfy the need for that particular item(s);
18. In the event that no complete Bids are received for a county, the State reserves the right to make an award for specific items within the county.
19. Accept and consider for Contract award Bids with non-material Bid Deviations or non-material Bid defects such as errors, technicalities, irregularities, or omissions;
20. Use any information which OGS obtains or receives from any source and determines relevant, in OGS's sole discretion, for the purpose of bid evaluation and Contractor selection;
21. Make no award for any Product, region, or lot, as applicable, for reasons including, but not limited to, unbalanced, unrealistic or excessive Bidder pricing, a change in Authorized User requirements and/or Products, or an error in the Solicitation (e.g., use of incorrect reference, pack size, description, etc.). In such case, evaluation and ranking of Bids may be made on the remaining Products, regions, or lots.

## SECTION 5. FORMAT AND CONTENT OF BID SUBMITTAL

### 5.1 Responsiveness

To be considered responsive, a Bidder must submit a complete Bid that satisfies and addresses all requirements stated in this IFB.

**A BID THAT FAILS TO CONFORM TO ALL REQUIREMENTS MAY BE CONSIDERED NON-RESPONSIVE AND MAY BE REJECTED.**

### 5.2 Incorporation

Portions of the successful Bidder's proposal and of this IFB shall be incorporated into a final Contract, with a separate document executed by the Contractor and OGS. Therefore, the proposal must be signed by a partner, corporate officer, or other person authorized to commit its firm to all provisions of the IFB and its proposal as submitted.

Once the Contracts resulting from this IFB are executed and approved, they will be posted on the OGS website.

### 5.3 General Bid Content

This Invitation for Bids contains the following files:

<b>Name</b>	<b>Format</b>
Invitation for Bids # 23020	PDF
Attachment 1 – Price Pages	Microsoft Excel
Attachment 2 – Bidder Submittal Checklist and Information Questionnaire	Microsoft Excel
Attachment 3 – NYS Required Certifications	Microsoft Word
Attachment 4 – Encouraging Use of NYS Businesses	Microsoft Word
Attachment 5 – Insurance Requirements	PDF
Attachment 6 – Report of Contract Purchases (Sales Report)	Microsoft Excel
Attachment 7 – Use of Service Disabled Veteran Owned Business Enterprises in Contract Performance	Microsoft Word
Attachment 8 – Inquiries Template	Microsoft Excel
Attachment 9 – Delivery Schedule – State Agencies	PDF
Attachment 10 – Delivery Schedule – Locals and Political Subdivisions	PDF

It is recommended that the Bidder open, review and save/download all electronic files to the Bidder's hard drive and/or to a secure back-up. Only completed files (in the specified format) should be saved to portable electronic media. **Do not return copies of Appendix A and B with your Bid.** Please note that submitting a Bid by fax or e-mail is not acceptable.

It is required that each Bidder submit the entire offering on portable electronic media (CD, DVD, memory stick, etc.) in accordance with the instructions below. **Only those items listed below in Part 2 are required in paper copy with original signatures.**

**A complete Bid consists of One (1) copy of each of the following:**

1. Portable electronic media containing:
  - a. Pages 1 and 2 of the IFB (signed and scanned) (PDF);
  - b. Completed Attachment 1 – Price Pages for all Items which are being bid (Microsoft Excel);
  - c. Completed Attachment 2 – Bidder Submittal Checklist and Information Questionnaire (all tabs) (Microsoft Excel);
  - d. Completed Attachment 3 – NYS Required Certifications (signed and scanned) (PDF);
  - e. Completed Attachment 4 – Encouraging Use of NYS Businesses
  - f. Completed Attachment 7 - Use of Service Disabled Veteran Owned Business Enterprises in Contract Performance
  - g. Completed, notarized and signed Contractor Certification, ST-220-CA  
[http://www.tax.ny.gov/pdf/current\\_forms/st/st220ca\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220ca_fill_in.pdf) (signed and scanned) (PDF);
  - h. All necessary proof of insurance (see Attachment 5 – *Insurance Requirements* for the detailed insurance requirements (scanned) (PDF);
  - i. Appendix C (signed and scanned) (PDF)
2. Bound, original versions of each of the following (Preferred to be in a loose leaf binder and tabbed):
  - a. Pages 1 and 2 of the IFB with original ink signatures;
  - b. Completed Attachment 3 – *NYS Required Certifications* with original ink signatures;
  - c. Completed Attachment 4 – Encouraging Use of NYS Businesses
  - d. Completed Attachment 7 - Use of Service Disabled Veteran Owned Business Enterprises in Contract Performance
  - e. Completed, notarized and signed Contractor Certification, ST-220-CA  
[http://www.tax.ny.gov/pdf/current\\_forms/st/st220ca\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220ca_fill_in.pdf)
  - f. all necessary proof of insurance (see Attachment 5 – *Insurance Requirements* for the detailed insurance requirements);
  - g. Appendix C with original ink signatures
  - h. Completed Vendor Responsibility Questionnaire, if not completed on-line using VendRep, if Bidder has completed on-line, Bidder should provide a copy of its certification page showing certification of information within the last six (6) months.

**Bidder should note that any paper copy submission of the Attachment 1 – Price Pages will be rejected**

**Only Electronic copies of this attachment will be accepted unless expressly written otherwise elsewhere in this IFB or in an IFB update**

Also, please note that in the case of discrepancies between paper copies and electronic media submissions of the documents required in both formats, the original hard copy shall take precedence over the electronic copy.

A Bidder should note that any indicators or messages that have been built into Attachment 1 – *Price Pages* and Attachment 2 – Bidder Submittal Checklist and Information Questionnaire are informational only and provided solely for the purpose of assisting Bidders in completing the Attachments. The presence or absence of notes or indicators is not a determination by the State as to the sufficiency of the Attachments with respect to the IFB requirements. Bidders remain responsible for reviewing the Attachments to ensure compliance with the IFB requirements.

**BIDDERS SHOULD TAKE SPECIAL NOTE OF THE FOLLOWING:**

- **E-Mail or Facsimile Bid Submissions Are NOT Acceptable**
- The complete Bid package must be received by this office by the date and time of the Bid opening. Late Bids shall be rejected except as provided in Appendix B, Section 5.
- Any Bid pricing not submitted in Excel format on electronic media shall be rejected.
- Any Bid pricing or portion(s) thereof submitted on electronic media that is incomplete or that cannot be opened/accessed may be rejected.
- Procurement Services reserves the right to reject any Bid submission or portion(s) thereof determined to have been altered or modified from the original format by the Bidder. Such alterations or modifications include but are not limited to: any change(s) to document header(s), footer(s) and/or cell(s); unprotecting worksheet(s)/workbook(s); hiding/unhiding cell(s)/column(s)/row(s)/worksheet(s); and locking/unlocking cell(s).
- Only those cells provided for entering Bid pricing and vendor information are to be accessed by the Bidder.

**5.4 Bid Delivery**

A Bidder assumes all risk for timely, properly submitted deliveries. A Bidder is strongly encouraged to arrange for delivery of Bids to OGS prior to the date of the Bid opening. Late Bids shall be rejected except as provided in Appendix B, §5 *Late Bids*. E-mail or fax Bid submissions are NOT acceptable and shall not be considered.

**5.4.1 Bid Envelopes and Packages**

All Bids must have a label on the outside of the box or package itemizing the following information:

1. BID ENCLOSED (preferably bold, large print, all capital letters)
2. Bid number (IFB #23020)
3. Bid Opening Date and Time
4. The number of boxes or packages (i.e., 1 of 2; 2 of 2)

Failure to complete all information on the Bid envelope and/or packages may necessitate the premature opening of the Bid and may compromise confidentiality. Bids shall be delivered to:

State of New York Executive Department  
Office of General Services  
Procurement Services  
Corning Tower - 38th Floor Reception Desk  
Empire State Plaza  
Albany, NY 12242

**5.4.2 Hand Deliveries**

A Bidder must allow extra time to comply with the building access procedures in effect at the Empire State Plaza when hand delivering Bids or using deliveries by independent courier services. A Bidder assumes all risks for timely, properly submitted hand deliveries. Bidders are strongly encouraged to arrange for delivery of Bids to OGS prior to the Bid Opening date.

**5.5 Bid Liability**

The State of New York will not be held liable for any cost incurred by the Bidder for work performed in the preparation and production of a Bid or for any work performed prior to the formal execution of a Contract. Bids must be received in the above office on or before 11:00 AM EST on the Bid Opening date referenced in Section 2.2. Bidder assumes all risks for timely, properly submitted deliveries. A Bidder is strongly encouraged to arrange for delivery of Bids to OGS prior to the date of the bid opening. **LATE BIDS shall be rejected except as provided in Appendix B, Section 5, Late Bids Rejected.**

**E-mail or faxed Bid submissions are not acceptable and shall not be considered.** The received time of proposals will be determined by OGS by the clock at the above noted location.

## 5.6 Important Building Access Procedures

To access the Corning Tower, all visitors must check in by presenting photo identification at the Information Desk.

A Bidder who elects to hand deliver its proposal or attend Bid Opening is encouraged to pre-register for building access by contacting the NYS Procurement receptionist at 518-474-6262 at least 24 hours prior to the Bid Submission date.

Visitors who are registered can check in directly with the Information Desk. Visitors who are not pre-registered will be directed to a designated phone to call the NYS Procurement Receptionist. The Receptionist will register the visitor at that time but delays may occur. Bidders who intend to deliver Bids or conduct NYS Procurement business should allow extra time to comply with these procedures. Building Access procedures may change or be modified at any time. Note: Bids not received by the Bid Opening/Bid Submission date shown on the front page of this IFB will be considered late.

## SECTION 6. METHOD OF AWARD

### 6.1 Method of Award

Award shall be made by Grand Total Bid per County to the lowest responsive and responsible Bidder for each county. The Bidder **MUST** submit a Bid for all items within the county in order for their Bid to be considered complete. If no complete Bids are received for a county, the State reserves the right to make a partial award for specific items within the county to the lowest responsible Bidder for a specific Item. Financial review is solely based on information submitted in Attachment 1 – Price Pages, which includes ranking of Bids and may be completed prior to Qualifications and Requirements review. “Grand Total Bid per County” is computed on Attachment 1.

All pricing recommended for award will be subject to comparison to the previous year’s pricing and/or current market trends, as applicable, in order to gauge the reasonableness of price. Pricing found not to be in line with current and historical trends may be removed from consideration for an Award.

### 6.2 Evaluation Process

After the Bid opening and financial evaluation, each Bid in line for an award will be screened for completeness and conformance with the stated requirements for Bid submission as set forth in Section 5 of this IFB. Any Bid not meeting these requirements may be deemed nonresponsive and denied further consideration for award.

Pursuant to §16 *Bid Evaluation* of Appendix B, OGS reserves the right to waive technicalities, irregularities, or omissions. In this case, OGS may request missing or incomplete forms or information. Failure to provide requested information may result in a rejection of a Bid.

Bids will be reviewed to ensure that the Bidder has responded to all questions in Attachment 2 – Bidder Submittal Checklist and Information Questionnaire.

### 6.3 Notification of Award

The successful Bidder(s) shall be advised by OGS in accordance with Appendix B, § 22 *Contract Creation/Execution*. Tentative award of the Contract shall consist of written notice to that effect by OGS to a successful Bidder, who shall thereupon be obligated to execute a formal Contract.

It is the intent of this IFB to make one (1) award in the following counties only: Columbia, Hamilton, and Schoharie. No awards will be made for counties without any filed requirements. In the event that the same Bidder is awarded multiple counties, the awards will be combined into a single Contract.

## 6.4 Vendor Responsibility on Accuracy

Bidders are responsible for the accuracy of their Bids. All Bidders are directed to take extreme care in developing their Bids. Bidders are cautioned to carefully review their Bids prior to Bid submittal, as requests for Bid withdrawals of any type are not likely to be granted. Bidders, in the preparation of their Bids, should maintain complete and accurate calculation worksheets, which clearly support their submissions.

If an incorrect reference, parameter, model, code number, component, product, etc. is stated by OGS or by the Bidders, the correct reference shall prevail, and the proper alternative or corrected reference may be considered. Bidders are advised to raise any issues or questions regarding any such incorrect references during the Bidder Inquiry period so that it may be addressed by OGS prior to the deadline for submission of Bids.

## 6.5 No Award on Individual Item

The State reserves the right to make "NO AWARD" for any Item. This may be because:

- Bid pricing is deemed to be unbalanced or excessive (the determination of an unbalanced Bid shall be at the sole discretion of the State) OR,
- An Authorized User no longer has a need for a stated product and/or requirement OR,
- A requirement changed OR,
- An error in the Solicitation becomes evident (i.e., use of incorrect reference, description, product designation, etc.) OR,
- For other substantive reason.

In any such case, evaluation and ranking of Bids may be made on the remaining Items.

## 6.6 Electronic Bid Opening Results

OGS posts Bid opening results on the OGS website. The website makes available Bids received by OGS for scheduled Bid openings. Such information is anticipated to be available online after the Bid opening.

The Bid Opening Results Page is available at: <http://www.ogs.ny.gov/purchase/bidresults/bidresults.asp>.

# SECTION 7. TERMS AND CONDITIONS

## 7.1 Appendix A

Appendix A, Standard Clauses for New York State Contracts, dated January 2014, attached hereto, is hereby expressly made a part of this Bid Document as set forth at length herein. Please retain this document for future reference and do not return to OGS as part of the Bid submission.

## 7.2 Appendix B

Appendix B, Office of General Services General Specifications, dated April 2016, attached hereto, is hereby expressly made a part of this Bid Document as fully as set forth at length herein and shall govern any situations not covered by this Bid Document or Appendix A. Please retain this document for future reference and do not return to OGS as part of the Bid submission.

## 7.3 Appendix C

Appendix C, Equal Employment Opportunity Staffing Plan (EEO100), is hereby expressly made a part of this Bid Document as fully set forth at length herein.

## 7.4 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

### 7.4.1 Policy Statement

The New York State Office of General Services (“OGS”), 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 Disparity Study 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. The recommendations from the Disparity Study culminated in the enactment and the implementation of New York State Executive Law Article 15-A, which requires, among other things, that OGS establish goals for maximum feasible participation of New York State certified minority- and women-owned business enterprises (“MWBE”) and the employment of minority groups members and women in the performance of New York State contracts.

### 7.4.2 General Provisions

- A. OGS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 (“MWBE Regulations”) for all State contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The Contractor agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to OGS, to fully comply and cooperate with OGS in the implementation of New York State Executive Law Article 15-A. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for New York State certified minority- and women-owned business enterprises (“MWBEs”). Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) or other applicable federal, State or local laws.
- C. The Contractor further agrees to be bound by the provisions of Article 15-A and the MWBE Regulations. If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.
- D. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility, breach of contract, withholding of funds, suspension or termination of the Contract and/or such other actions or enforcement proceedings as allowed by the Contract.

### 7.4.3 Equal Employment Opportunity (EEO)

- A. Contractor shall comply with the provisions of Article 15-A set forth below. These provisions apply to all Contractors, and any subcontractors, awarded a subcontract over \$25,000, for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials, or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting State agency (the “Work”) except where the Work is for the beneficial use of the Contractor.
  - 1. Contractor and subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion,

upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation. This requirement does not apply to: (i) the performance of work or the provision of services or any other activity that is unrelated, separate or distinct from the Contract; or (ii) employment outside New York State.

2. By entering into this Contract, Contractor certifies that the text set forth in clause 12 of Appendix A, attached hereto and made a part hereof, is Contractor's equal employment opportunity policy.

B. Form EEO 100 – Staffing Plan

To ensure compliance with this section, the Contractor agrees to submit or has submitted with the Bid a staffing plan on Form EEO 100 to OGS to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and federal occupational categories.

C. Form EEO - 101 - Workforce Utilization Reporting Form (Commodities and Services) ("Form EEO-101-Commodities and Services")

1. The Contractor shall submit, and shall require each of its subcontractors to submit, a Form EEO-101-Commodities and Services to OGS to report the actual workforce utilized in the performance of the Contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The Form EEO-101-Commodities and Services must be submitted electronically to OGS at EEO\_CentCon@ogs.ny.gov on a quarterly basis during the term of the Contract by the 10th day of April, July, October, and January.
2. Separate forms shall be completed by Contractor and any subcontractor.
3. In limited instances, the Contractor or subcontractor may not be able to separate out the workforce utilized in the performance of the Contract from its total workforce. When a separation can be made, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided relates to the actual workforce utilized on the Contract. When the workforce to be utilized on the Contract cannot be separated out from the Contractor's or subcontractor's total workforce, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided is the Contractor's or subcontractor's total workforce during the subject time frame, not limited to work specifically performed under the Contract.

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

#### 7.4.4 Contract Goals

- A. For purposes of this procurement, OGS conducted a comprehensive search and determined that the Contract does not offer sufficient opportunities to set goals for participation by MWBEs as subcontractors, service providers and suppliers to Contractor. Contractor is, however, encouraged to make every good faith effort to promote and assist the participation of MWBEs on this Contract for the provision of services and materials. The directory of New York State Certified MWBEs can be viewed at:

<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528>

Additionally, following Contract execution, Contractor is encouraged to contact the Division of Minority and Women's Business Development ((518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

- B. Good Faith Efforts

Pursuant to 5 NYCRR §142.8, evidence of good faith efforts shall include, but not be limited to, the following:

- (1) A list of the general circulation, trade and MWBE-oriented publications and dates of publications in which the Contractor solicited the participation of certified MWBEs as subcontractors/suppliers and copies of such solicitations and any responses thereto.
- (2) A list of the certified MWBEs appearing in the Empire State Development MWBE directory that were solicited for this Contract. Provide proof of dates or copies of the solicitations and copies of the responses made by the certified MWBEs. Describe specific reasons that responding certified MWBEs were not selected.
- (3) Descriptions of the Contract documents/plans/specifications made available to certified MWBEs by the Contractor when soliciting their participation and steps taken to structure the scope of work for the purpose of subcontracting with or obtaining supplies from certified MWBEs.
- (4) A description of the negotiations between the Contractor and certified MWBEs for the purposes of complying with the MWBE goals of this Contract.
- (5) Dates of any pre-bid, pre-award or other meetings attended by Contractor, if any, scheduled by OGS with certified MWBEs whom OGS determined were capable of fulfilling the MWBE goals set in the Contract.
- (6) Other information deemed relevant to the request.

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

## **7.5 Contract Term and Renewal, and Short Term Extension**

### **7.5.1 Contract Term**

The Contract term shall be from December 19, 2016 or the date of all necessary approvals (the later of the two) until December 18, 2018. The Contract(s) resulting from this IFB shall commence after all necessary approvals and shall become effective upon mailing of the final executed Contracts by OGS (see Appendix B, §22 *Contract Creation/Execution*).

### **7.5.2 Contract Renewal**

If mutually agreed upon between OGS and the Contractor, the Contract may be extended under the same terms and conditions for up to one (1) additional one (1) year period. Filed requirements and Delivery Schedules may be updated for any Renewal period.

### **7.4.3 Short Term Extension**

In the event a 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 three months upon notice to the Contractor with the same terms and conditions as the original Contract including, but not limited to, prices and delivery requirements. Filed requirements and Delivery Schedules may be updated for any Extension. With the concurrence of the Contractor, the extension may be for a period of up to six months in lieu of three months. However, this extension terminates should the replacement contract be issued in the interim.

## **7.5 Conflict of Terms / Order of Precedence**

Conflicts among the documents in the IFB shall be resolved in the following Order of Precedence:

5. Appendix A, Standard Clauses for New York State Contracts;
6. The Invitation for Bids, including all Attachments;
7. Appendix B, General Specifications;
8. The Bidder's Bid.

## 7.6 Extension of Use

Any Contract resulting from this Solicitation may be extended to additional States or governmental jurisdictions upon 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.

## 7.7 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 interests of the State. Contract amendments shall take effect upon mutual written agreement of OGS and the Contractor.

## 7.8 Non-State Agencies Participation in Centralized Contracts

New York State political subdivisions and others authorized by New York State law may participate in Centralized Contracts. 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 §25 *Participation in Centralized Contracts* in Appendix B, OGS General Specifications. 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), the terms of the "Price" clause shall be modified to include delivery to locations adjacent to New York State.

Upon request, all eligible non-State agencies must furnish Contractors 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 NYS Procurement Customer Services at 518-474-6717.

## 7.9 New York State Vendor File Registration

Prior to being awarded a Contract pursuant to this Solicitation, the Bidder(s) and any designated authorized reseller(s) who accept payment directly from the State must be registered in the New York State Vendor File (Vendor File) administered by the OSC. This is a central registry for all vendors who do business with New York State Agencies and the registration must be initiated by a State Agency. Following the initial registration, a unique New York State ten-digit vendor identification number (Vendor ID) will be assigned to your company and Vendor IDs will be assigned to each of your authorized resellers (if any) for usage on all future transactions with New York State. Additionally, the Vendor File enables vendors to use the Vendor Self-Service application to manage certain vendor information in one central location for all transactions related to the State of New York.

**If the Bidder is already registered in the Vendor File**, the vendor must enter the vendor's ten-digit Vendor ID on the first page of this Solicitation document. An authorized reseller already registered in the Vendor File must enter its ten-digit Vendor ID along with the authorized reseller's information on the first page of this Solicitation document.

**If the Bidder is not currently registered in the Vendor File**, the Bidder must request assignment of a Vendor ID number from OGS. Complete the OSC Substitute W-9 Form ([http://www.osc.state.ny.us/vendors/forms/ac3237\\_fe.pdf](http://www.osc.state.ny.us/vendors/forms/ac3237_fe.pdf)) and submit the form to OGS **in advance** of your Bid. Please send this document to the Designated Contact in the Solicitation. In addition, if an authorized reseller(s) is to be used that does not have a Vendor ID, an OSC Substitute W-9 form ([http://www.osc.state.ny.us/vendors/forms/ac3237\\_fe.pdf](http://www.osc.state.ny.us/vendors/forms/ac3237_fe.pdf)) should be completed by each designated authorized

reseller and submitted to OGS. **The OGS will initiate the vendor registration process** for all Bidders and their authorized resellers. Once the process is initiated, registrants will receive an e-mail identifying their unique ten-digit Vendor ID and instructions on how to enroll in the online Vendor Self-Service application. For more information on the Vendor File please visit the following website:  
[http://www.osc.state.ny.us/vendor\\_management/](http://www.osc.state.ny.us/vendor_management/).

## 7.10 New York State Vendor Responsibility

OGS conducts a review of prospective Contractors (“Bidders”) to provide reasonable assurances that the Bidder is responsive and responsible. A For-Profit Business Entity Questionnaire (hereinafter “Questionnaire”) is used for non-construction contracts and is designed to provide information to assess a Bidder’s responsibility to conduct business in New York based upon financial and organizational capacity, legal authority, business integrity, and past performance history. By submitting a Bid, Bidder agrees to fully and accurately complete the Questionnaire, in addition to all other information the State may obtain from other sources. The Bidder acknowledges that the State’s execution of the Contract will be contingent upon the State’s determination that the Bidder is responsible, and that the State will be relying upon the Bidder’s responses to the Questionnaire, in addition to all other information the State may obtain from other sources, when making its responsibility determination.

OGS recommends each Bidder file the required Questionnaire online via the New York State VendRep System. To enroll in and use the VendRep System, please refer to the VendRep System Instructions and User Support for Vendors available at the Office of the State Comptroller’s (OSC) website, [http://www.osc.state.ny.us/vendrep/vendor\\_index.htm](http://www.osc.state.ny.us/vendrep/vendor_index.htm) or to enroll, go directly to the VendRep System online at <https://portal.osc.state.ny.us>.

**Please note that a Vendor ID is required to enroll in the VendRep System.** Please see Section 7.11 for information on how to obtain a Vendor ID. Note: Allow up to four (4) business days to accommodate the verification process associated with assigning a Vendor ID and updating the OSC Online Services portal to allow a vendor to enroll to use the VendRep System.

OSC provides direct support for the VendRep System through user assistance, documents, online help, and a help desk. The OSC Help Desk contact information is located at <http://www.osc.state.ny.us/portal/contactbuss.htm>. Bidders opting to complete the paper questionnaire can access this form and associated definitions via the OSC website at: [http://www.osc.state.ny.us/vendrep/forms\\_vendor.htm](http://www.osc.state.ny.us/vendrep/forms_vendor.htm).

In order to assist the State in determining the responsibility of the Bidder prior to Contract Award, the Bidder must complete and certify (or recertify) the Questionnaire no more than six (6) months prior to the Bid due date. A Bidder’s Questionnaire cannot be viewed by OGS until the Bidder has certified the Questionnaire. It is recommended that all Bidders become familiar with all of the requirements of the Questionnaire in advance of the Bid opening to provide sufficient time to complete the Questionnaire.

The Bidder agrees that if it is awarded a Contract the following shall apply:

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

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

The Contractor agrees that if it is found by the State that the Contractor’s responses to the Questionnaire were intentionally false or intentionally incomplete, on such finding, the Commissioner may terminate the Contract.

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

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

### **7.11 New Accounts**

Contractor may ask State agencies and other Authorized Users to provide information in order to facilitate the opening of a customer account, including documentation of eligibility to use New York State contracts, agency code, name, address, and contact person. Authorized Users shall not be required to provide credit references.

### **7.12 Websites and Online Ordering**

The State recommends that the successful Bidder have a designated NYS contract website for direct access by an Authorized User. This website will be listed under the Contractor information on the OGS website. The Contractor's website will be the responsibility of the Contractor to maintain and keep updated. Changes in product line or pricing must be approved by NYS Procurement in accordance with any terms included in this Solicitation prior to addition to the website.

### **7.13 New York State Statewide Financial System**

New York State is currently operating on an Enterprise Resource Planning (ERP) system, Oracle PeopleSoft software, referred to as the Statewide Financial System (SFS). SFS is currently on PeopleSoft Financials version 9.2 Bundle 18, operating on PeopleTools version 8.55.08. SFS supports requisition-to-payment processing and financial management functions. The State is also implementing an eProcurement application that supports the requisitioning process for State Agencies to procure goods and services in SFS. This application provides catalog capabilities. Vendors with centralized contracts have the ability to provide a "hosted" or "punch-out" catalog that integrates with SFS and is available to Authorized Users via a centralized eMarketplace website. There are no fees required for a Vendor's participation in the catalog site development or management. Upon completion and activation of an on-line catalog, State agencies will process their orders through the SFS functionality and other Authorized Users can access the catalog site to fulfill orders directly. The State is also implementing the PeopleSoft Inventory module in the near future to track inventory items within the item master table. Further information regarding business processes, interfaces, and file layouts may be found at: [www.sfs.ny.gov](http://www.sfs.ny.gov) and <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

### **7.14 Price Page Details**

Price Pages contain the estimated quantities and fuel types that have been requested in each county. For any County in which a Bidder submits a Bid, the Bidder must submit its proposed pricing for ALL Items contained within the County in Attachment 1 – Pricing Pages

#### **7.14.1 Price Page Instructions**

A Bidder must enter a Price Per Gallon for all Items within a County they bid on. A Bidder may also enter a Volume Discount in Cents Per Gallon (for orders 5,500 gallons or greater). If a Bidder does not specify a Volume Discount, a discount of \$0.0000 will be assumed. Any Volume Discount offered by a Bidder will not factor into the cost evaluation, however it may be used to determine a winner in case of a tie Bid.

The tabs will auto-populate the Grand Total Bid per County for each County that is bid.

For all Counties that a Bidder elects to bid, a Bidder must specify the following:

Column Title	Price Per Gallon	Volume Discount (for orders 5,500 gallons or greater)
Description	Specify the Price Per Gallon for each type of fuel requested	Specify the Cents Per Gallon Discount for Orders 5,500 Gallons or Greater (if this is not specified by a Bidder, this will be calculated as \$0.0000)

**7.14.2 Price Sheet Rounding Details**

Attachment 1 – Price Pages will not limit the number of decimal places for a dollar amount that a Bidder enters. However, only four (4) decimal places will be displayed in the cells.

Each Price Page will calculate a Grand Total Bid per County for each County bid by multiplying the Bid Price (Price per Gallon) by the Estimated Quantities for each grade of fuel (Fuel Type) listed in Attachment 1 by County.

**7.15 Volume Discount**

A Bidder may provide a Volume Discount within a given Lot for all individual orders 5,500 gallons or greater in Attachment 1 – Price Pages. The Volume Discount will not be used in the evaluation except in cases of a tie Bid. Should 2 or more Bidders submit identical pricing for an Item, the amount offered as a Volume Discount shall be used as a tie-breaker. The vendor offering the Volume Discount that is the most advantageous to the State will be awarded the Item.

Upon Contract award, the Volume Discount bid for a given county shall be applied to the invoice for each individual order placed by an Authorized User in such Lot/Region which results in a single delivery of 5,500 gallons or greater.

**7.16 Minimum Order Size**

Minimum delivery shall be not less than 500 gallons to each delivery location (site) as determined by the delivery schedule. Minimum order for Motor Transport deliveries shall be 5,500 gallons. Deliveries under 500 gallons are at the Contractor’s option, except for tank top-offs for testing. All deliveries requested by an Authorized User of less than the minimum order size, including tank top-offs for tank testing, shall qualify for contract pricing. The following tiered schedule may be utilized by the Contractor:

TANK CAPACITY (in gallons)	AMOUNT DELIVERED	OPTIONAL SURCHARGE
Equal or more than 1,000	Less than 500	\$50.00
	Under 350	\$75.00
Less than 1,000	Under 500	\$25.00
	Under 350	\$50.00

An Authorized User shall have one (1) delivery per tank per year for tank top-off testing that is exempt from any minimum order surcharge.

Determination for total gross tank capacity shall include all manifolded tanks. All locations granted a request from the Contractor for “Automatic Replenishment” per section 8.5, shall be exempt from minimum order requirements, including other factors out of the control of Authorized Users (e.g., short filling, mechanical issues, inadequate fuel supply). In no case shall a surcharge be applied to a location while on “Automatic Replenishment”.

If delivering to same “delivery location”, but two separate tanks, minimum delivery charge will only be applicable if total delivery to “delivery location” is less than the minimum order size.

**7.17 Unanticipated Excessive Purchase**

The State reserves the right to negotiate lower pricing, or to advertise for Bids any unanticipated excessive purchase. For purposes of this IFB and resulting Contract, an “unanticipated excessive purchase” is defined as an unexpected order for a Contract product(s) totaling more than \$50,000.

## 7.18 Shipping Charges

Prices bid for all Lots and Regions shall include all customs duties and charges for delivery, and shall be net F.O.B. destination for delivery to any location designated by the Authorized User within a given County or Region in New York State. In addition, upon mutual agreement, delivery locations may be expanded per the Section 7.6 – Extension of Use.

## 7.19 Delivery

Contractor must be prepared, at all times, to make prompt delivery. Every Contractors' bid states what the maximum time a delivery will take from the moment of order, but the time shall never exceed forty-eight (48) hours. In state declared emergencies, fuel must be delivered within twenty-four (24) hours of notification. Delivery shall be made in accordance with instructions on the Purchase Order from each Authorized User. If there is a discrepancy between the Purchase Order and what is listed on the Contract, it is the Contactor's obligation to seek clarification from the ordering Authorized User and, if applicable, from OGS, NYS Procurement. On occasion, to prevent fuel run outs during storms or other emergency situations, the Contractor must allow Authorized Users the flexibility to manually schedule deliveries to top-off tanks inventories. Normal deliveries are considered to be Monday thru Friday (8:00 am – 5:00 pm). Saturday/Sunday deliveries are not standard and are to be made on an emergency basis (and not a regular basis) ONLY or if a run out is imminent before the next delivery day. Delivery of fuel should give first priority to Human needs customers.

Failure to make prompt delivery may result in an Authorized User's submission of a Contract Performance Report to OGS. The Authorized User shall have the right to purchase sufficient fuel on the open market to fill such tank(s) and to charge any increase in price paid over the current contract price to the account of the Contractor.

Authorized Users shall be responsible to insure that tanks are accessible by the contractor. Failure of the Authorized Users to make appropriate arrangements, preventing delivery of product upon contractor's arrival at delivery site, may result in a charge to the Authorized User for the Contractor's transportation, provided supporting documentation for that particular trip is substantiated. Authorized Users should also make certain that receiving personnel are available at time of delivery.

## 7.20 Delivery Schedules

In accordance with the "NON-STATE AGENCIES PARTICIPATION IN CENTRALIZED CONTRACTS" and "EXTENSION OF USE" clauses herein, the contracts issued as a result of this Invitation for Bids are extended to Political Subdivisions and others authorized by law as well as State agencies. The delivery schedules (based on Requirement Letter RL 201) are available as a guide to indicate proposed delivery points and estimated annual requirements.

Bidders are advised that these delivery schedules may be revised up to the date of the Bid opening to accommodate the addition of delivery points and quantities. Bidders should therefore make note of the revisions. This information is available to clarify delivery conditions, where possible. Any specific questions regarding the site conditions should be directed to the end-user via any communication available as shown on the delivery schedule. The latest electronic version of the Delivery Schedule is available upon request by notifying the Contract Person listed on the most recent contract update or by emailing to, OGS.sm.PS\_CM\_FleetFuelRoads@ogs.ny.gov.

Contractors shall be obligated to deliver under the resulting contract to any State agency which places a Purchase Order (as defined in Appendix B § 2, Definitions, letter W, Purchase Order) under said contract, whether or not such delivery location is identified in the delivery schedules. Any political subdivision or other non-State entity which has not filed a requirement with OGS as of the date of Award, shall be eligible to receive deliveries and/or be added to the Delivery Schedule at Contractor's option. This is being done upon placement of a valid purchase order to the Contractor's address as indicated in the award. Contractors must notify OGS of any new business and OGS Procurement Services may make adjustments to the delivery schedules to capture these new accounts. All cases shall require Contractors to notify OGS of any locations not identified on the Delivery Schedule within 30 days after the first delivery.

At any time during the contract, Contractors may be advised in writing by OGS regarding political subdivisions or other Non-State entities which have filed on a timely basis but do not appear, through no fault of their own, on the delivery schedule. Note that on occasion entities may appear on the wrong delivery schedule as entities self-report. For example, a Non-State entity may appear on the Agency schedule on occasion or vice versa. OGS does review and seek clarification of information on the delivery schedules but does not catch all errors.

Contracts created by OGS in response to receipt of Filed Requirements are considered to be binding.

## 7.21 Price

Prices quoted shall be billed net per gallons, F.O.B. agency storage tanks, including all applicable customs, duties, taxes, including LUST, license fees and surcharges, and as designated by the ordering Authorized User. Bid prices must be expressed in U.S. currency and shall be submitted to four (4) decimal places (priced in dollars per gallon).

Pricing for contract purchases shall be based on the pricing in effect at the time the Authorized User places the order. Authorized Users that are on automatic delivery, shall be priced on the day of delivery, unless the Authorized User requests a delivery. The price shall then reflect the day of the order.

It shall be the Contractor's responsibility to satisfy Authorized User requirements by furnishing blended product when called for during the time period indicated in the IFB.

Any special allowances should not be included in the Bid price as they cannot be considered in evaluating Bids. However, if the Bidder extends such allowances during the term of the Contract to Federal, State, Local Governments or to commercial users in the normal course of doing business, New York State requires that such allowances will also be available to the State in the maximum amount extended to others who contract to purchase fuel under similar contractual terms and conditions. Bid prices shall be firm except that price revisions shall be permitted in accordance with the PRICE REVISIONS clause and with respect to certain taxes and duties as follows:

**"After-imposed tax"** means any new or increased Federal, State and local excise tax or duty, except social security or other employment taxes, on fuel purchased under any contract to be awarded hereunder which the Contractor is required to pay or bear the burden of as the result of legislative, judicial, or administrative action taking effect after the date of contract award.

**"After-relieved tax"** means any amount of Federal, State and local excise tax or duty, except social security or other employment taxes, that would otherwise have been payable on fuel purchased under any contract to be awarded hereunder which the Contractor is not required to pay or bear the burden of, or for which the Contractor obtains a refund or drawback, as the result of legislative, judicial or administrative action taking effect after the date of contract award.

The Bid price shall include all applicable customs, duties, taxes, license fees and surcharges as stated in Appendix B §8 Taxes.

**NOTE:** The State of New York and its political subdivisions are exempt from New York State and local sales taxes and federal excise taxes.

The price for fuel under any contract to be awarded hereunder shall be increased by the amount of any after-imposed tax, unless the legislative, judicial or administrative act says otherwise, if the Contractor states in writing that such contract price does not include any contingency for such after-imposed tax. Such increase shall be prospective only and becomes effective upon such written notice and on the effective date of the next scheduled price revision.

The price for gasoline under any contract to be awarded hereunder shall be decreased by the amount of any after-relieved tax. Such decrease shall be effective when realized or by no later than the next scheduled price revision.

The contract price shall also be decreased by the amount of any excise tax or duty, except social security or other employment taxes that the Contractor is required to pay or bear the burden of or does not obtain a refund of through the Contractor's fault or negligence.

The Contractor shall promptly notify the Procurement Services Contract Management Specialist of all matters relating to any excise tax or duty that reasonably may be expected to result in either an increase or decrease in the contract price for gasoline.

## 7.22 Price Revisions

Bid prices shall be firm except that price revisions will be permitted in accordance with the following procedure:

Revisions to the original contract price shall be based on prices published in the OIL PRICE INFORMATION SERVICE (OPIS) under the heading In Cash Markets, weekly average Spot report under "N.Y. Harbor Spot Barge Weekly Average" and Ethanol Spot Market Prices (New York).

The weekly average of the daily high and low prices shown in the publication for each of the three conventional unleaded gasoline fuel types, RBOB, PreRBOB and Ethanol will be used to compute price revisions during the contract period.

Procurement Services will compute any price revisions by determining the difference between the weekly average of the daily high and low prices (base prices) published in the "N.Y. Harbor Spot Barge Weekly Average" on August 8, 2016 and the weekly average of the daily high and low prices published on Monday every week during the contract period beginning with the publication on December 19, 2016 or the publication immediately following the start date of the contract, whichever occurs first. This differential (adjustment) + or - will be added to the base bid prices. Applicable price changes will be effective as of the start of business on the Friday immediately preceding the day of publication. Generally, the weekly average published in OPIS represents a 5-day average of high and low prices; however, as holidays occur which would eliminate a given daily range of prices, the weekly average may represent less than a 5-day average. Regardless of the number of days represented in the weekly average, the published weekly average will be utilized as the basis for price revisions. Final price shall be calculated by applying the above stated price revision to the base bid price.

The State reserves the right to change to a daily, bi-weekly or monthly schedule in price revisions if the market conditions so warrant.

Should postings differ from current description and/or format, a posting determined by the Commissioner of the Office of General Services in his sole discretion, to be most reflective of market conditions, will be used.

Corrections to posted prices previously published will be considered when caused by a typographical or clerical error on the part of said publisher.

The following clauses shall apply to all price adjustments under any contract awarded:

- (1) Price increases are limited to changes in pre-selected postings as noted above. Increases in contract costs or prices to compensate for other increases in the cost of doing business, regardless of where such cost increases are attributable, will not be allowed during the contract period.
- (2) Should the price structure utilized by the parties become unworkable, detrimental or injurious to the State or result in prices which are not truly reflective of current market conditions and are deemed unreasonable or excessive by the Commissioner and no adjustment in price is mutually agreeable, the Commissioner reserves the sole right upon 10 days written notice mailed to the contractor to terminate any contract resulting from this bid opening. If the contractor is unable or unwilling to meet contractual requirements in whole or in part it shall immediately notify the State of such in order that the State may take appropriate action. Such notification shall be in writing and shall be addressed to the Office of General Services, NYSPRO.
- (3) The federal government has determined that gasoline sold in certain counties: Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester [in the New York City

Consolidated Metropolitan Statistical Area (CMSA)], and Dutchess County as an "opt-in," are subject to regulations mandating the use of OPRG(E) gasoline year round. Recognizing that pricing differentials occur on a regular basis, the State will incorporate the following methodology in the determination of the weekly price revision.

**EXAMPLE: METHODOLOGY FOR RBOB AND ETHANOL ADJUSTMENTS  
(OPRG (E) UNLEADED FUEL TYPES)**

Posted Date: (hypothetical) August 10, 2015

**RBOB x .90 + Ethanol x .10 = Blended Average**

$$1.7482 \times .90 = 1.5733(8)$$

$$1.5620 \times .10 = 0.1562$$

Blended Average

$$1.5733 + .1562 = 1.7295$$

Posted Date: (Hypothetical) December 21, 2015

**RBOB x .90 + Ethanol x .10 = Blended Average**

$$1.7820 \times .90 = 1.6038(0)$$

$$1.1063 \times .10 = 0.1106$$

Blended Average

$$1.6038 + .1106 = 1.7144$$

**ADJUSTMENT CALCULATION**

December 21, 2015 Blended Average  $\pm$  August 10, 2015 Base Blended Average =  
Adjustment

$$1.7144 - 1.7295 = -.0151^*$$

\*This figure being a negative number will be subtracted from the base Bid price. If the figure is a positive number it would be added to the base Bid price. For the OGS web based posted pricing this adjustment will be added or subtracted to the base Bid price.

**EXAMPLE: METHODOLOGY FOR E-85 ADJUSTMENTS**

Posted Date: (Hypothetical) August 10, 2015

**RBOB x .15 + Ethanol x .85 = Blended Average**

$$1.7482 \times .15 = .2622(3)$$

$$1.5620 \times .85 = 1.3277$$

Blended Average

$$.2622 + 1.3277 = 1.5899$$

Posted Date: (Hypothetical) December 21, 2015

**RBOB x .15 + Ethanol x .85 = Blended Average**

$$2.2944 \times .15 = .3441(6)$$

$$1.9063 \times .85 = 1.6203(5)$$

Blended Average

$$.3441 + 1.6203 = 1.9644$$

**ADJUSTMENT CALCULATION**

December 21, 2015 Blended Average  $\pm$  August 10, 2015 Base Blended Average = Adjustment

$$1.9644 - 1.5899 = +.3745^*$$

\*This figure being a positive number will be added to the base Bid price. If the figure is a negative number it would be subtracted from the base Bid price. For the OGS web based posted pricing this adjustment will be added or subtracted to the base Bid price.

**ALL FIGURES ARE TRUNACTED TO FOUR DECIMAL PLACES IN DOLLARS PER GALLON.**

(4) Bidders shall designate in their Bid an individual, the individual's position in the company and telephone number, who will be responsible for and authorized to act on behalf of the company with respect to these price adjustments.

### **7.23 Method of Payment / Invoices**

Invoicing and payment shall be made in accordance with the terms set forth in Appendix B, Clause 45. Contract Invoicing Contractor invoices must include detailed line item information to allow Authorized Users to verify that delivered pricing matches the correct price on the date of order.

### **7.24 New York State Procurement Card**

All Bidders shall indicate (via Attachment 2 – Bidder Submittal Checklist and Information Questionnaire, question number 13) if they will accept the NYS Purchasing Card for orders not to exceed \$15,000.

### **7.25 Billing/Ordering Systems**

Cost centers or branch offices within an Authorized User may require separate invoicing as specified by each Authorized User. The Contractor's billing system shall be flexible enough to meet the needs of varying ordering systems in use by different Authorized Users.

### **7.25 Samples**

At any time prior to or after award of a Contract, a Bidder or a Contractor may be required to submit samples.

**a. 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 the 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 Solicitation 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.

**b. 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.

**c. Conformance with Samples** 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 Solicitation. 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 Solicitation, the Commissioner may reject the Bid. If an award has been made, the Commissioner may cancel the Contract at the expense of the Contractor.

**d. 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 Solicitation, Bidder samples consumed or rendered useless by testing will not be returned to the Bidder. Testing costs for samples that fail to meet Contract requirements may be at the expense of the Contractor.

**e. 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.

## 7.26 DISCREPANCIES

The Contractor shall resolve all order and invoice discrepancies (e.g., shortages, breakages, etc.) within five business days from notification.

## 7.27 EMERGENCY PURCHASING

In the event that a disaster emergency is declared by Executive Order under Section 28 of Article 2-B of the Executive Law, or that 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 products or services, the Commissioner reserves the right to obtain such products or services from any source, including but not limited to a Contract, 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 products or services procured from other sources pursuant to this paragraph.

## 7.28 ADMINISTRATIVE AND REPORTING REQUIREMENTS

Contractor shall furnish a report of all Products and services provided under the Contract at the conclusion of each semi-annual period, no later than the 20<sup>th</sup> of the month following the close of each 6 month period. The semi-annual periods are January 1 – June 30 and July 1 – December 31. Purchases by Non-State agencies, political subdivisions and others authorized by law shall be reported in the same report and indicated as required. **A template for such report is included herein as Attachment 5 – Report of Contract Purchases.** The report must be submitted electronically via electronic mail utilizing the template provided. All fields of information shall be accurate and complete. The report is to be submitted electronically in Microsoft Excel 2007 or 2003 (or as otherwise directed by OGS), via electronic mail to the attention of the individual identified on the front page of the Contract Award Notification and shall reference the Group Number, the Award Number, Contract Number, sales period, and Contractor's (or other authorized agent) name, and all other fields required, using the report template provided. OGS reserves the right to amend the report template.

Additional related sales information and/or detailed Authorized User purchases may be required by OGS and must be supplied within 20 days upon request.

In addition to Contractor direct sales, Contractor shall submit information regarding any subcontractors used. A Contractor shall verify if each subcontractor is a NYS Certified Minority (MBE) or Women (WBE) Owned Business. A Contractor shall verify such status through the Empire State Development Minority and Women Owned Businesses Database web site at: <http://www.nylovesmwbe.ny.gov/cf/search.cfm>

### PERFORMANCE SURVEYS

Contractor shall be required, upon request, to provide performance surveys to Authorized Users. Contract performance measures may include, but not be limited to, the following: delivery time, fill rate, response time to inquiries, resolution of problems, employee courtesy, staff knowledge and overall performance.

## 7.29 Guarantee

The Contractor guarantees to furnish adequate protection from damage to Authorized User's buildings, grounds and/or equipment occurring on account of or in connection with, or occasioned by, or resulting from the furnishing and delivering of fuel under the resultant Contract and shall be liable for any damages for which he or his employees are responsible.

This liability includes but is not limited to oil spills occurring during delivery. The Contractor shall provide constant surveillance during delivery by having a person in attendance at all times at the point of transfer. Fuel spills of any size shall be immediately reported to the agency Business Office as well as with a representative of the

Department of Environmental Conservation. More information can be viewed here:  
<http://www.dec.ny.gov/chemical/8428.html>.

A call can be placed twenty-four hours a day with the New York State Oil Spill Hotline at 1-800-457-7362.

### **7.30 Engineering Service**

Contractor must be prepared at all times to furnish engineering service when so requested and/or to investigate and report to the Authorized User and OGS on any complaint that might arise in connection with the use of Contractor's Fuel in State equipment. This engineering service will include but not be limited to the diagnosis of fuel related engine problems in the Authorized User's equipment.

### **7.31 Tax Law §5-A**

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

A Contractor is required to file the completed and notarized Form ST-220-CA with OGS certifying that the Contractor filed the ST-220-TD with DTF. Note: NYS DTF receives the completed Form ST-220-TD, not OGS. OGS ONLY receives the Form ST-220-CA. Form ST-220-CA must be filed with the Bid and submitted to the procuring covered Agency certifying that the Contractor filed the ST-220-TD with DTF. Contractor should complete and return the certification forms within five (5) business days of request (if the forms are not completed and returned with Bid submission). Failure to make either of these filings may render a Contractor non-responsive and non-responsible. Contractor shall take the necessary steps to provide properly certified forms within a timely manner to ensure compliance with the law.

Website links to the Contractor certification forms and instructions are provided below. Form ST-220-TD must be filed with and returned directly to DTF and can be found at [http://www.tax.ny.gov/pdf/current\\_forms/st/st220td\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220td_fill_in.pdf) Unless the information upon which the ST-220-TD is based changes, this form only needs to be filed once with DTF. If the information changes for the Contractor, its affiliate(s), or its subcontractor(s), a new Form ST-220-TD must be filed with DTF.

Form ST-220-CA must be submitted to OGS. This form provides the required certification that the Contractor filed the ST-220-TD with DTF. This form can be found at [http://www.tax.ny.gov/pdf/current\\_forms/st/st220ca\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220ca_fill_in.pdf)

Vendors may call DTF at 518-485-2889 for any and all questions relating to Section 5-a of the Tax Law and relating to a company's registration status with DTF. For additional information and frequently asked questions, please refer to the DTF web site: <http://www.tax.ny.gov/>.

### **7.32 Use of Recycled or Remanufactured Materials**

New York State supports and encourages vendors to use recycled, remanufactured 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 or safety requirements or product specifications contained herein. Refurbished or remanufactured components or products are required to be restored to original performance and regulatory standards and functions and are required to meet all other requirements of this Solicitation. Warranties on refurbished or remanufactured components or products must be identical to the manufacturer's new equipment warranty or industry's normal warranty when remanufacturer does not offer new equipment. See §11 Remanufactured, Recycled, Recyclable or Recovered Materials in Appendix B, OGS General Specifications.

### 7.33 Mercury-Added Consumer Products

Contractor agrees that it will not sell or distribute fever thermometers containing mercury or any products containing elemental mercury for any purpose under the Contract.

### 7.34 Environmental Attributes and NYS Executive Order 4

New York State is committed to environmental sustainability and endeavors to procure products with reduced environmental impact. One example of this commitment may be found in Executive Order No. 4 (Establishing a State Green Procurement and Agency Sustainability Program) (EO4), which imposes certain requirements on state agencies, authorities, and public benefit corporations when procuring commodities, services, and technology. More information on Executive Order No. 4, including specifications for offerings covered by this Contract, may be found at <http://www.ogs.ny.gov/EO/4/Default.asp>. State entities subject to Executive Order No. 4 are advised to become familiar with the specifications that have been developed in accordance with the Order, and to incorporate them, as applicable, when making purchases under this Contract.

### 7.35 NYS Required Certifications

A Bidder is required to submit the signed NYS Required Certifications (Attachment 3 – *NYS Required Certifications*) with its Bid certifying Bidder compliance with MacBride Fair Employment principles, Non-Collusive Bidding, the Diesel Emission Reduction Act and the Iran Divestment Act. Also, Attachment 2 – Bidder Submittal Checklist and Information Questionnaire also has certifications that must be responded to.

Failure to submit these documents may result in Bid being considered non-responsive and may result in Bid being REJECTED.

### 7.36 Encouraging Use of New York State Businesses in Contract Performance

New York State businesses have a substantial presence in State Contracts and strongly contribute to the economies of the state and the nation. In recognition of their economic activity and leadership in doing business in New York State, Bidders/proposers for this Contract for commodities, services or technology are strongly encouraged and expected to consider New York State businesses in the fulfillment of the requirements of the Contract. Such partnering may be as Subcontractors, suppliers, protégés or other supporting roles.

Bidders/proposers need to be aware that all authorized users of this Contract will be strongly encouraged, to the maximum extent practical and consistent with legal requirements, to use responsible and responsive New York State businesses in purchasing commodities that are of equal quality and functionality and in utilizing services and technology. Furthermore, Bidders/proposers are reminded that they must continue to utilize small, minority and women-owned businesses, consistent with current State law.

Utilizing New York State businesses in State Contracts will help create more private sector jobs, rebuild New York's infrastructure, and maximize economic activity to the mutual benefit of the Contractor and its New York State business partners. New York State businesses will promote the Contractor's optimal performance under the Contract, thereby fully benefiting the public sector programs that are supported by associated procurements.

Public procurements can drive and improve the State's economic engine through promotion of the use of New York businesses by its Contractors. The State therefore expects Bidders/proposers to provide maximum assistance to New York businesses in their use of the Contract. The potential participation by all kinds of New York businesses will deliver great value to the State and its taxpayers.

**Bidder certification of intent is found on the “Qualifying Criteria” tab in Attachment 2.**

## SECTION 8. FUEL SPECIFICATIONS

### 8.1 Fill and Vent Requirements/Vapor Recovery Systems

Agencies must ensure that fill and vent equipment adequately meet NYS Standards. Contractors have the responsibility of reporting faulty equipment to the end users and the appropriate NYS regulatory agencies.

The purchaser shall be responsible for having the proper fuel transfer vapor recovery system(s) operating on their storage tank in accordance with 6NYCRR Subpart 230. The transfers include delivery tank(er) to purchaser storage tank (Stage I) and purchaser storage tank to vehicle tank (Stage II) systems.

"The contractor shall properly use and operate fuel vapor recovery system and equipment whenever it is present on a purchaser's tank. The contractor must utilize the equipment if present regardless of whether regulations required it due to location and throughput thresholds."

NYS DOT supports the collection of vapors during transfer to prevent emissions and the use of controls whenever present. The Fire Code of New York State at Section 2205.1.3 requires that where tanks are equipped with any type of vapor recovery system, all connections required for the safe and proper functioning of the particular vapor recovery process shall be made.

## 8.2 Petroleum Transfer Requirements

It is the responsibility of the contractor to conduct deliveries in accordance with petroleum bulk storage (PBS) regulations including but not limited to 6 NYCRR part 613.3 a. An additional clarification is needed to specifically note that this will require compliance with unloading/loading provisions of the U.S. Hazardous Material Transportation Standards at 49 CFR part 177.843 as well as the obligation to report spills to the NYSDEC spills hotline and other provisions of the PBS regulation. The requirements of 49 CFR Part 177.843 specify that the transporter must ensure that the cargo tank truck is attended at all times during unloading by a "qualified person." A person is "qualified" if he/she has been made aware of the nature of the hazardous material which is to be loaded or unloaded, he/she has been instructed on the procedures to be followed in emergencies, he/she is authorized to move the tank truck, and has the means to do so. The transporter qualified person is considered to be attending the unloading operations if, throughout the process, he/she is alert and is within 25 feet of the tank truck and must have an unobstructed view of the tank truck and delivery hose to the maximum extent practicable during the unloading operation.

### NOTE:

Bidder's delivery trucks WILL BE EQUIPPED WITH CALIBRATED METERS with the exception of motor transport, to accurately measure quantities delivered. All deliveries must be accompanied by a Delivery Ticket showing Brand or Grade and Number of Gallons Delivered. Agencies may examine, upon request, a copy of the metered ticket showing gallons loaded into the vehicle making delivery.

Supplementing §31 *Product Delivery* and § 32 *Weekend and Holiday Deliveries*, of Appendix B, General Specifications, orders will call for delivery within a specified number of days after date of order. As much time as possible will be allowed to the contractor (with consideration for the stipulated guaranteed delivery) for making deliveries; however, the contractor shall be in a position to make bulk deliveries within 24 hours after receipt of order, especially in emergency situations.

Normal deliveries are considered to be Monday thru Friday. Saturday/Sunday deliveries are to be made on an emergency basis (and not a regular basis) ONLY.

Contractor's fuel delivery trucks will be equipped with tight fill connections for those facilities with compatible appurtenances. On any tanks installed through the OGS Tank Modification Program, a 2 inch dry disconnect female fitting shall be required for the contractor to connect to the fill port.

Deliveries will be made in accordance with petroleum bulk storage regulations including but not limited to 6 NYCRR Part 613.3a or latest revisions thereof.

Agencies shall be responsible to insure that tanks are accessible by the contractor, and it is strongly advised that an agency representative be present during the delivery.

Failure of the agency to make appropriate arrangements, preventing delivery of product upon contractor's arrival at delivery site, may result in a charge to the agency for the contractor's transportation costs for that particular trip. Agencies should also make certain that receiving personnel are available at time of delivery.

Agencies are responsible for the implementation of monitoring programs to insure compliance by gasoline suppliers with the specification requirements as outlined herein and in CL-831 dated August 1, 2016.

### 8.3 Topping Off Tanks

Agency requests to top-off tanks for testing purposes must be honored as described elsewhere herein. The requesting agency may be required to sign a waiver of liability and responsibility on behalf of the Contractor.

Bidder must maintain service facilities and have trained personnel qualified to service the product furnished at the using agency within 48 hours.

### 8.4 Trade Names

For convenience of ordering, delivering and servicing gasoline and E-85 under the contract, Bidder shall state the trade name for the gasoline and E-85 offered under each type. Such trade name, however, shall not in any way set aside the requirement of compliance with specifications.

### 8.5 Automatic Replenishment

Requests for automatic replenishment are preferred in WRITING from an Authorized User, and may be required by the Contractor. Subsequent WRITTEN notification back from the Contractor, will establish automatic replenishment for tanks equal to or larger than 1,000 gallons. Automatic replenishment for tanks less than 1,000 will be at the Contractor's discretion (see clause 7.16).

Automatic replenishment for tank capacities less than 1,000 gallons will be at the Contractor's option. If an Authorized User has not received written notification for automatic replenishment from the Contractor, a minimum order charge may apply (see section 7.16, Minimum Order).

Determination for total gross tank capacity shall include all manifolded tanks.

If the Contractor, after having accepted the request from an Authorized User and provided written notification back to the Authorized User for automatic replenishment, permits the level of the fuel to fall below the percentages of the total capacity of the purchaser's tank or tanks indicated in the following table, the purchaser shall have the right to purchase sufficient fuel on the open market to fill such tank or tanks and to charge any increase in price paid over the current contract price to the account of the Contractor.

#### MINIMUM LEVEL TOTAL – TANK CAPACITY/GALS

10%	500 TO 5,500
15%	5,501 – AND OVER

If requested in writing from the agency and subsequent written notification back to the agency from the contractor, the contractor will furnish automatic replenishment to the requesting agency. After receiving a written request from the purchaser for "automatic replenishment" the Contractor will comply at its option and shall notify agency accordingly.

The minimum order size of 500 gallons stipulated in Section 7.15 MINIMUM ORDER SIZE shall not apply to deliveries being made to Authorized Users on an automatic delivery schedule as the contractor controls the frequency, delivery dates, and quantities of the deliveries being made.

### 8.6 Requirements - Gasoline, Unleaded Formula (Conventional & OPRG (E) Types)

The gasoline/s provided shall be volatile hydrocarbon fuels, free from water, suspended matter, and shall conform to ASTM Standard D4814-15a and its annexes, appendixes, or latest revision/s thereof.

**8.7 Octane Requirements - Unleaded Formula (Conventional, OPRG (E) & E-85 Types)**

The Octanes specified herein shall be provided throughout the calendar year regardless of monthly climate changes and shall be determined by:

$$\frac{\text{RON} + \text{MON}}{2}$$

<u>Engine grade/application requirement</u>	<u>MON (minimum)</u>	<u>(RON + MON)/2 (minimum)</u>
Regular grade unleaded gasoline: (REG)	82	87
Mid-range grade unleaded gasoline: (MID)	82	89
Premium grade unleaded gasoline: (PREM)	82	91
E-85		96

**8.8 Gasoline Volatility Class (Conventional & OPRG (E) Types)**

All gasoline shall comply with Federal regulation, U.S. EPA, Clean Air Act (CAA) - 1990, Title 40 of Code of Federal Regulations (40CFR) and New York State regulations [6NYCRR, Subpart 225-3.3] for Reid Vapor Pressure and Volatility Class [as defined under ASTM D4814-15a, Tables 1 and 2 and Seasonal Volatility Classes, as per Table 4], or latest amendment thereof, at its seasonal time of delivery.

**8.9 General Requirements, Unleaded Formula (Conventional & OPRG (E) Types)**

All fuel supplied under this contract shall be provided in full accordance with New York Code of Rules and Regulations (NYCRR), Title 6 Environmental Conservation Law, Chapter III Air Resources, Subchapter A, Part 225, (Statutory Authority: New York State Law, Article 19, Title 3, Section 19-0301, NYS Dept. of Environmental Conservation); Agriculture. & Markets. 1NYCRR, Part 224; and meet/exceed the requirements of Title 40 of the Code of Federal Regulations (40 CFR) sections 40CFR52 through 40CFR86. **This requirement includes the providing of appropriate records at the time of gasoline delivery.**

Contractors must keep all records pertaining to this contract, including delivery tickets, purchase orders etc., for the year of the transaction and for six years thereafter. Vendors must also provide a copy of the written certifications to the agency representative at the time of order or purchase for Reid Vapor pressure, fuel content. Volatility classes as defined under ASTM D4814-15a, Tables 1, 2, and 4, and quality, etc. which they must receive from their refiner or distributor pursuant to 1 NYCRR Part 224.

**8.10 Limits, Unleaded Gasoline (All Types)**

The maximum ethanol content shall be ten (10%) percent by volume [equivalent to three and seven tenths (3.7%) percent oxygen by weight]. To be considered for a one (1 psi) pound per square inch increase in Reid vapor pressure, the gasoline/s must have a nine (9%) to ten (10%) percent ethanol content by volume and the Bidder must provide copies of the State, NYS/DEC, approval/s when the State’s requirement is stricter.

**8.11 General Requirements, Unleaded Gasoline OPRG (E)**

OPRG (E) gasolines shall be manufactured by EPA registered producer or supplied via a registered importer. Additionally, all OPRG (E) gasoline supplied under this Solicitation’s contracts shall be certified under 40CFR section 80.40 to meet the standards and requirements prescribed within section 80.41. Additive packages for OPRG (E) gasoline shall comply with the standards and be certified on a stand-alone basis.

Contractor shall provide documentation confirming registration and certification details for each OPRG (E) gasoline at the Bid opening, or as the registered, certified, fuels become available within EPA guidelines.

In the event the EPA registration & certification program (final rule) is in place and a Contractor/Bidder cannot document registration & certification requirements, then the State reserves the right to consider the next ranking Bidder qualified to supply the OPRG (E) type for period of supply that is required. When an existing certification is found by EPA to be non-conforming product, then the EPA reserves the right to revoke that certification. If a certification is revoked the contractor shall immediately discontinue use of that OPRG (E) gasoline and notify the

NYS OGS purchasing officer. Documentation for a replacement formulation shall also be provided to OGS. If certification is not provided, OGS will act to ensure a replacement formulation via another contractor within the terms of this Solicitation.

Additionally, when the Bidder is supplying only OPRG (E) gasoline for an area which is designated as requiring only conventional gasoline, then the State reserves the right to consider the next ranked Bidder that is qualified/offering to supply the conventional gasoline to that area for the balance of the period of supply that is required.

## 8.12 Reformulated Gasoline, OPRG Type for the NYC-CMSA Requirements

### 8.12.1 Gasoline, OPRG Type Reformulated (Alcohol/Ether/Oxygenated Blends)

This section of the detailed specification shall describe the Oxygenated fuels Program Reformulated (OPRG) Gasolines including the following: gasoline-alcohol, gasoline-ether, and gasoline-oxygenate blend(s) (of) fuel(s), or combination blends thereof which are formulated for use in the New York City CMSA, or other designated [severe non-attainment] MSA's (if any). These blends SHALL NOT be supplied or offered for the conventional or reformulated gasoline specified elsewhere herein, except as superseded by Federal & State regulation. Its use shall be limited to the counties specified hereinafter. ASTM Test Method D4815-15b shall be used to determine ether and oxygenate content of the fuel, until it is replaced or updated by the U.S. EPA test method (i.e., final rule action).

Alcohol-ether-blend/oxygenated OPRG gasoline shall meet or exceed the requirements stated previously herein for Conventional Unleaded Formula Gasoline and its own specific requirements as stated hereinafter.

It is noted that availability may be limited at the time of this Bid opening. Therefore, this Solicitation shall be for conventional unleaded gasoline. The quantities of conventional gasoline will be reduced proportionally in the controlled areas (counties) for the months stated elsewhere herein.

However, the State reserves the right to adjust quantities and negotiate pricing for these blends as they become available in those counties (or others).

### 8.12.2 Distribution, Gasoline, OPRG Type Reformulated (Alcohol/Ether/Oxygenated Blends)

Per Federal and State regulation, oxygenated (OPRG) gasoline shall be provided in the New York City Consolidated Metropolitan Statistical Area (New York City CMSA), if applicable.

These control/distribution areas shall include the following counties:

New York City CMSA:

Bronx	Kings	Nassau	New York
Orange	Putnam	Queens	Richmond
Rockland	Suffolk	Westchester	

The control/distribution areas serviced by this Solicitation/specification shall be amended as required to comply with the latest revision of Federal regulation, U.S. EPA, Clean Air Act (CAA) - 1990, Title 40 of Code of Federal Regulations (40CFR), or latest amendment thereof, and State regulation, NYCRR, Title 6, Chapter III, Subchapter A, Part 225; and Agriculture. & Markets. 1NYCRR, Part 224.

---

## **8.13 OPRG (E) Type Gasoline, for the Ozone Non-Attainment Areas**

### **8.13.1 Terminology, Gasoline, OPRG (E) Type**

Product provided shall be in accordance with ASTM D4814-15a, Section 3 Terminology, ASTM D4815-15b (when applicable), and as defined under the heading “ACRONYMS AND DEFINITIONS” previously herein.

### **8.13.2 Requirements, Gasoline, Type Reformulated**

This section of the detailed specification shall describe the OPRG (E) Gasolines which shall meet the emissions reduction for 2000 and beyond using the applicable formula standard/s stated in 40\CFR section 80.41.

OPRG (E) gasoline shall meet or exceed the requirements stated previously herein for Conventional & OPRG (E) Unleaded Gasoline and its own specific requirements as stated hereinafter.

However, the State reserves the right to adjust quantities and establish (adjust via contractual terms elsewhere within the specifications of this Solicitation) the pricing for these blends as they become available in the specified counties (or others).

The control/distribution areas serviced by this Solicitation/specification shall be amended as required to comply with the latest revision of Federal regulation, U.S. EPA, Clean Air Act (CAA) - 1990, Title 40 of Code of Federal Regulations (40CFR), Part 80 Regulation of Fuels & Fuel Additives, Standards for OPRG(E) & Conventional Gasoline, (Final Rule), or latest amendment thereof; and State regulations: Title 6, NYCRR, Chapter III, Subchapter A, Part 225; and Agriculture. & Markets. 1NYCRR, Part 224

**8.14 Requirements – E-85 (Table)**ASTM D5798-15 STANDARD SPECIFICATION FOR FUEL ETHANOL (E<sub>d</sub>75-E<sub>d</sub>85)  
FOR AUTOMOTIVE SPARK-IGNITION ENGINES

PROPERTY	VALUE FOR CLASS			TEST METHOD
	1	2	3	
ASTM volatility class*	1	2	3	N/A
Ethanol, plus higher alcohols (minimum, volume %)	79	74	70	ASTM D5501-12e1
Hydrocarbons (including denaturant)/(volume %)	17-21	17-26	17-30	ASTM D4815-15b
Vapor pressure at 37.8°C kPa psi	38-59 5.5-8.5	48-65 7.0-9.5	66-83 9.5-12.0	ASTM D4953-15, D5191-15
Lead (maximum, mg/L)	2.6	2.6	3.9	ASTM D5059-14
Phosphorus (maximum, mg/L)	0.3	0.3	0.4	ASTM D3231-13
Sulfur (maximum, mg/kg)	210	260	300	ASTM D3120-08 (2014), D1266-13, D2622-10
Methanol (maximum, volume %)		0.5		N/A
Higher aliphatic alcohols, C3-C8 (max., volume %)		2		N/A
Water (maximum, mass %)		1.0		ASTM E203-08
Acidity as acetic acid (maximum, mg/kg)		50		ASTM D1613-06 (2012)
Inorganic chloride (maximum, mg/kg)		1		ASTM D512-12, D2988-96 (2015)
Total chlorine as chlorides (maximum, mg/kg)		2		ASTM D4929-15a
Gum, unwashed (maximum, mg/100 mL)		20		ASTM D381-12
Gum, solvent-washed (maximum, mg/100 mL)		5.0		ASTM D381-12
Copper (maximum, mg/L)		0.07		ASTM D1688-12
Appearance  N/A = Not applicable	Product shall be visibly free of suspended or precipitated contaminants (shall be clear and bright).			Appearance determined at ambient temperature or 21°C (70°F), whichever is higher.
Octane (R+M)/2	Minimum of 96 for E-85			

\*For seasonal and geographic volatility specifications for E-85 reference specification ASTM D5798-15.

---

## **8.15 Related Requirements for Storage, Transfer, & Wholesale Purchaser-Consumer Posting**

### **8.15.1 Tanks/S (Storage), Gasoline-Alcohol Blend**

The storage tank(s) for gasoline-alcohol blend fuel shall be clean the first time this blend of fuel is placed in the tank. The tank shall be new or cleaned [all water and precipitated-accumulated material (i.e., dyes, lacquers, varnishes, gums, etc.) shall be removed from the tank]. This tank cleaning shall be provided in full compliance with 1NYCRR, Subpart 224.8.

### **8.16 Labels**

The contractor shall provide fuel content labels/signs for each pumping station.

These labels shall identify significant amounts of alcohols in the fuel and satisfy the requirements of 1NYCRR, Part 224 and 6NYCRR, Part 225. An environmental awareness decal/label shall be provided and displayed on each affected pump.

APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

PLEASE RETAIN THIS DOCUMENT  
FOR FUTURE REFERENCE.

January 2014



TABLE OF CONTENTS

	<b>Page</b>
<b>1. Executory Clause</b>	<b>3</b>
<b>2. Non-Assignment Clause</b>	<b>3</b>
<b>3. Comptroller's Approval</b>	<b>3</b>
<b>4. Workers' Compensation Benefits</b>	<b>3</b>
<b>5. Non-Discrimination Requirements</b>	<b>3</b>
<b>6. Wage and Hours Provisions</b>	<b>3</b>
<b>7. Non-Collusive Bidding Certification</b>	<b>4</b>
<b>8. International Boycott Prohibition</b>	<b>4</b>
<b>9. Set-Off Rights</b>	<b>4</b>
<b>10. Records</b>	<b>4</b>
<b>11. Identifying Information and Privacy Notification</b>	<b>4</b>
<b>12. Equal Employment Opportunities For Minorities and Women</b>	<b>4-5</b>
<b>13. Conflicting Terms</b>	<b>5</b>
<b>14. Governing Law</b>	<b>5</b>
<b>15. Late Payment</b>	<b>5</b>
<b>16. No Arbitration</b>	<b>5</b>
<b>17. Service of Process</b>	<b>5</b>
<b>18. Prohibition on Purchase of Tropical Hardwoods</b>	<b>5-6</b>
<b>19. MacBride Fair Employment Principles</b>	<b>6</b>
<b>20. Omnibus Procurement Act of 1992</b>	<b>6</b>
<b>21. Reciprocity and Sanctions Provisions</b>	<b>6</b>
<b>22. Compliance with New York State Information Security Breach and Notification Act</b>	<b>6</b>
<b>23. Compliance with Consultant Disclosure Law</b>	<b>6</b>
<b>24. Procurement Lobbying</b>	<b>7</b>
<b>25. Certification of Registration to Collect Sales and Compensating Use Tax by Certain State Contractors, Affiliates and Subcontractors</b>	<b>7</b>
<b>26. Iran Divestment Act</b>	<b>7</b>

## **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). However, such pre-approval shall not be required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

**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 (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence victim 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) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, 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 the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, 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  
Albany, New York 12245  
Telephone: 518-292-5100  
Fax: 518-292-5884  
email: [opa@esd.ny.gov](mailto:opa@esd.ny.gov)

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  
633 Third Avenue  
New York, NY 10017  
212-803-2414  
email: [mwbcertification@esd.ny.gov](mailto:mwbcertification@esd.ny.gov)  
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>

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.

**26. IRAN DIVESTMENT ACT.** By entering into this Agreement, Contractor certifies in accordance with State Finance Law §165-a that it is not on the “Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012” (“Prohibited Entities List”) posted at:

<http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited

Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension 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.

# **APPENDIX B**

## **GENERAL SPECIFICATIONS**

## TABLE OF CONTENTS

<u>GENERAL</u>	<u>PAGE</u>	<u>TERMS &amp; CONDITIONS (CONT.)</u>	<u>PAGE</u>
1. Ethics Compliance	1	34. Title and Risk of Loss for Products Other than Technology Products	7
2. Definitions	1	35. Product Substitution	8
<b><u>BID SUBMISSION</u></b>		36. Rejected Product	8
3. International Bidding	3	37. Installation	8
4. Bid Opening	3	38. Repaired or Replaced Products, Parts, or Components	8
5. Late Bids	3	39. Employees, Subcontractors and Agents	8
6. Confidential/Trade Secret Materials	3	40. Assignment	8
7. Prevailing Wage Rates - Public Works and Building Services Contracts	3	41. Subcontractors and Suppliers	8
8. Taxes	4	42. Suspension of Work	8
9. Expenses Prior to Contract Execution	4	43. Termination	9
10. Product References	4	44. Savings/Force Majeure	9
11. Remanufactured, Recycled, Recyclable, or Recovered Materials	4	45. Contract Invoicing	10
12. Products Manufactured in Public Institutions	4	46. Default - Authorized User	10
13. Pricing	4	47. Prompt Payments	10
14. Site Inspection	5	48. Remedies for Breach	10
15. Purchasing Card	5	49. Assignment of Claim	11
<b><u>BID EVALUATION</u></b>		50. Toxic Substances	11
16. Bid Evaluation	5	51. Independent Contractor	11
17. Tie Bids	5	52. Security	11
18. Quantity Changes Prior to Award	5	53. Cooperation with Third Parties	11
19. Timeframe for Offers	5	54. Warranties	11
20. Debriefings	5	55. Legal Compliance	12
21. Contract Publicity	5	56. Indemnification	12
<b><u>TERMS &amp; CONDITIONS</u></b>		57. Indemnification Relating to Infringement	13
22. Contract Creation/Execution	6	58. Limitation of Liability	13
23. Contract Term – Extension	6	59. Dispute Resolution Procedures	13
24. Official Use Only/No Personal Use	6	<b><i>To the extent the scope of the Solicitation or Contract includes the sale, development, maintenance, or use of information technology Products such as software, computer components, systems, or networks for the processing, and distribution, or storage, or storage of data, the following clauses shall govern, as applicable.</i></b>	
25. Participation in Centralized Contracts	6	60. Software License Grant	14
26. Modification of Contract Terms	6	61. Product Acceptance	15
27. Scope Changes	6	62. Audit of Licensed Product Usage	16
28. Estimated/Specific Quantity Contracts	6	63. No Hardstop or Passive License Monitoring	16
29. Emergency Contracts	6	64. Ownership/Title to Project Deliverables	16
30. Purchase Orders	7	65. Proof of License	17
31. Product Delivery	7	66. Changes to Product or Service Offerings	17
32. Weekend and Holiday Deliveries	7		
33. Shipping/Receipt of Product	7		

**GENERAL**

**1. 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.

**2. DEFINITIONS** Terms used herein shall have the following meanings:

**a. AUTHORIZED USER** Authorized User shall have the meaning set forth in State Finance Law Section 163(1)(k) and includes, but is not limited to, New York State Agencies, political subdivisions, local governments, public authorities, public school and fire districts, public and nonprofit libraries, and certain other nonpublic/nonprofit organizations.

**b. BID** A response to the Solicitation submitted by a Bidder to provide Products.

**c. BIDDER** Any person or entity who submits a response to the Solicitation. At the time that a Bidder executes a Contract with the State, the Bidder shall become a "Contractor." See also "Contractor."

**d. BID SPECIFICATIONS** A written description drafted by OGS or an Authorized User setting forth the specific terms of the intended procurement, which may include: physical or functional characteristics, the nature of a Product, 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 this Appendix B is incorporated in negotiated Contracts that have not been competitively solicited, the term "Bid Specifications" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

**e. COMMISSIONER** The Commissioner of OGS or his or her designee, or, in the case of Bid Specifications issued by an Authorized User, the head of such Authorized User or his or her authorized representative.

**f. CONTRACT** The writings that contain the agreement of the Commissioner and the Contractor setting forth the total legal obligation between the parties as determined by applicable rules of law, and which most typically include the following classifications of public procurements:

- 1. Agency Specific Contracts** Contracts where the written description for a Product or a particular scope of work is described and defined to meet the needs of one or more Authorized Users.

- 2. Centralized Contracts** Single- or multiple-award Contracts where the written description for a Product or general scope of work is described and defined by OGS 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 Contractors without further competition or Mini-Bid unless otherwise required by the Contract.

- 3. Back-Drop Contracts** Multiple-award Centralized Contracts where OGS provides a written description 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 Solicitation. Selection of a Contractor from among Back-Drop contract holders for an actual Product, project or particular scope of work may be subsequently made as set forth in the Contract.

- 4. 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 group of states that is adopted and extended for use by OGS in accordance with the requirements of the State Finance Law.

- 5. Contract Award Letter** A letter to the successful Bidder 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 the Contractor should not take any action with respect to actual Contract deliveries except on the basis of Purchase Orders sent from Authorized Users.

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

**h. CONTRACTOR** Any successful Bidder to whom a Contract has been awarded by the Commissioner.

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

**j. ENTERPRISE** The total business operations in the United States of an Authorized User without regard to geographic location where such operations are performed or the entity actually performing such operations on behalf of the Authorized User.

**k. 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.

**l. 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.

**m. GROUP** A classification of a Product that is designated by OGS.

**n. INVITATION FOR BIDS (IFB)** A type of Solicitation that is most typically used for procurements where requirements can be stated and award will be made based on lowest price to the responsive and responsible Bidder or Bidders.

**o. LICENSED SOFTWARE** Software transferred upon the terms and conditions set forth in the Contract. "Licensed Software" includes Error Corrections, upgrades, or enhancements, and any deliverables due under a technical support/maintenance or service contract (e.g., Patches, programs, code or data conversion, or custom programming).

**p. LICENSEE** An Authorized User who acquires 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 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.

**q. 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.

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

**s. MINI-BID** A document used by an Authorized User containing transaction-specific requirements soliciting responses from Contractors previously qualified under a Centralized Contract for such Products.

**t. OGS** The New York State Office of General Services.

**u. PATCH** Software designed to update, fix, or improve the Product or its supporting data. This includes fixing security vulnerabilities and other bugs, including hot fixes, to improve usability or performance.

**v. PRODUCTS** Items or deliverables under any Solicitation or Contract and may include commodities, services and/or technology.

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

**x. REQUEST FOR PROPOSALS (RFP)** A type of Solicitation that is used for procurements where factors in addition to cost are considered and weighted in awarding the contract and where the award will be made based on "best value," as defined

by the State Finance Law, to one or more responsive and responsible Bidders.

**y. REQUEST FOR QUOTATION (RFQ)** A procurement method that can be used in situations such as discretionary, sole source, single source, or emergency purchases and certain Centralized Contracts.

**z. 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.

**aa. RESPONSIVE BIDDER** A Bidder meeting the specifications or requirements prescribed in the Solicitation, as determined by the OGS Commissioner.

**bb. 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.

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

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

**ee. SOLICITATION** Writings by the State setting forth the scope, terms, conditions and technical specifications for a procurement of Product. The procurement may be undertaken on a competitive or non-competitive basis. Such writings typically include, but are not limited to: Invitation for Bids (IFB), Request for Quotations (RFQ), Request for Proposals (RFP), addenda or amendments thereto, and terms and conditions that are incorporated by reference, including but not limited to Appendix A (Standard Clauses for NYS Contracts), Appendix B (General Specifications), and identified attachments. Where the procurement is undertaken on a non-competitive basis, the term "Solicitation" shall be deemed to refer to all the terms and conditions identified by the State.

**ff. 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.

**gg. STATE** State of New York.

**hh. STATE 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.

**ii. SUBCONTRACTOR** Any individual or 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.

**jj. 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.

**kk. THIRD-PARTY SOFTWARE** Any software that is developed independently of Contractor and which may be governed by a separate license.

**ll. 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. Virus shall also include any malware, adware, or other computer code, whether or not written or conceived by Contractor, that allows data or metrics to be copied, redirected, or modified without the express consent of the Authorized User.

### **BID SUBMISSION**

**3. INTERNATIONAL BIDDING** All Bids, including 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 Bids submitted which do not meet the above criteria will be rejected.

**4. 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.

**5. LATE BIDS** Bids must be received at the location designated in the Solicitation at or before the date and time established in the Solicitation for the Bid opening or receipt of Bids.

Any Bid received at the designated location after the established time will be considered a Late Bid. A Late Bid may be rejected and disqualified from award. Notwithstanding the foregoing, a Late Bid may be accepted in the Commissioner's sole discretion where (i) no timely Bids meeting the requirements of the Solicitation are received, (ii) in the case of a multiple award, an insufficient number of timely Bids are received to satisfy the multiple award, or (iii) the Bidder has demonstrated to the satisfaction of the Commissioner that the Late Bid was caused solely by factors outside the control of the Bidder. However, in no event shall the Commissioner be under any obligation to accept a Late Bid.

The basis for any determination to accept a Late Bid shall be documented in the procurement record.

### **6. CONFIDENTIAL/TRADE SECRET MATERIALS**

**a. BIDDER/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/Contractor. 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/Contractor. 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. The Commissioner's or Authorized User's receipt/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/Contractor 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 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 without the written consent of the Commissioner or Authorized User. 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 Law or other applicable New York State laws and regulations. This warranty shall survive termination of this Contract. Contractor further agrees to take commercially reasonable steps to inform its agents, Subcontractors, officers, distributors, resellers or employees of the obligations arising under this clause to ensure such confidentiality.

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

**a. PREVAILING WAGE RATE APPLICABLE TO BIDS** A copy of the applicable prevailing wage rate schedule is incorporated into the Solicitation and may also be obtained by visiting [www.labor.ny.gov](http://www.labor.ny.gov) and typing in the search box: Prevailing Wage Schedule Request. Bidders must submit Bids which are based upon the prevailing hourly wages, and supplements in cash or equivalent benefits (e.g., 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 rates 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.

**b. 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 for its

employees as required by law and is responsible for ensuring any Subcontractors utilized on the Contract also comply with the prevailing wage provisions of the New York State Labor Law.

**c. ARTICLE 8 CONSTRUCTION/PUBLIC WORKS**

**CONTRACTS** 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 the 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 Contracts must submit monthly payroll transcripts to the Authorized User issuing the Purchase Order for the work. This provision does not apply to Article 9 of the Labor Law building services contracts.

**iv. Day's Labor** 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.

**d. ARTICLE 9 BUILDING SERVICES CONTRACTS** In compliance with Article 9, Section 230 of the New York State Labor Law:

**i. 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. Where the Contractor or Subcontractor maintains no regular place of business in New York State, such records must be kept at the work Site while work is being performed.

**ii. Overtime** Employees of Contractors and Subcontractors who work in excess of eight hours in a day or forty hours in a week shall be paid at the overtime rate identified by the New York State Department of Labor.

**8. TAXES**

**a.** Unless otherwise specified in the Solicitation, 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.** 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.

**9. EXPENSES PRIOR TO CONTRACT EXECUTION** The Commissioner and any Authorized Users are not liable for any costs incurred by a Bidder or Contractor in the preparation and production of a Bid, Mini-Bid, cost proposal revision, or for any work performed prior to Contract execution.

**10. PRODUCT REFERENCES**

**a. "Or Equal"** In all Solicitations or 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 Solicitation or Bid Specifications and the written description of the Products that cannot be reconciled, then the written description shall prevail.

**11. REMANUFACTURED, RECYCLED, RECYCLABLE, OR RECOVERED MATERIALS** Upon the conditions specified in the Solicitation 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 Solicitation. Contractors are further encouraged to offer remanufactured Products to the maximum extent practicable without jeopardizing the performance or intended end use of the Product unless such use is precluded due to health, welfare, safety requirements, or by the Solicitation. Where such use is not practical, suitable, or permitted by the Solicitation,

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.

**12. PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS** Bids offering Products that are manufactured or produced in public institutions will be rejected.

**13. PRICING**

**a. Unit Pricing** If required by the Solicitation, 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 Solicitation. 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 Solicitation, prices shall be net, including transportation, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination indicated in the Solicitation or Purchase Order.

**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. Specific price decreases:**

**(i) GSA Changes:** Where net pricing under the Contract is based on an approved GSA schedule, price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after the date the approved GSA schedule pricing decreases during the Contract term; or

**(ii) Commercial Price List Reductions:** Where net pricing under the Contract is based on a discount from Contractor's list prices, price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after the date Contractor lowers its pricing on its commercial price lists 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 pricing

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 net pricing 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 Solicitation, Contractor may offer lower prices or better terms (see Modification of Contract Terms) on any specific Purchase Order from any Authorized User without being in conflict with, or having any obligation to comply on a global basis with, the terms of this clause.

**g. Cost Proposal Revisions** A Contractor may be solicited prior to Contract award to propose the best possible offer for the Product being bid on, in accordance with State Finance Law Section 163(9)(c). A cost proposal revision must be a lower price than the initial price.

**14. SITE INSPECTION** Where a Site inspection is required, Bidder shall be required to inspect the Site, including environmental or other conditions, for pre-existing deficiencies that may affect the installed Product or that 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 that 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 provide the required Product.

**15. PURCHASING CARD** The State's Purchasing Card program is designed to be an efficient and cost effective way to expedite purchases. The Purchasing Card (also referred to as the Procurement Card) is a credit card that enables Authorized Users to make authorized purchases directly from a Contractor without processing formal Purchase Orders. Purchasing Cards are issued to selected employees who are authorized to make purchases for the Authorized User. Cardholders can make purchases directly from any Contractor that accepts the Purchasing Card.

**BID EVALUATION**

**16. BID EVALUATION** The Commissioner reserves the right to accept or reject any and all Bids, or separable portions of Bids, and waive technicalities, irregularities, and omissions if the Commissioner determines the best interests of the State will be served. The Commissioner, in his or her sole discretion, may accept or reject illegible, incomplete or vague Bids, and the Commissioner's 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 Bid.

**17. TIE BIDS** In the event two Bids are found to be substantially equivalent, price shall be the basis for determining the award recipient. 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. 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.

**18. 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 Solicitation. In the event such right is exercised, the lowest responsible Bidder meeting the Solicitation requirements 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.

**19. TIMEFRAME FOR OFFERS** The Commissioner reserves the right to make awards within 60 days after the date of the Bid opening or such other period of time as set forth in the Solicitation. The Bids must remain firm until a Contract is awarded, but if a Contract is not awarded within 60 days or other time period set forth in the Solicitation, the Bidder may withdraw its Bid any time thereafter by delivering to the Commissioner written notice of the withdrawal of its Bid.

**20. DEBRIEFINGS** Pursuant to Section 163(9)(c) of the State Finance Law, any unsuccessful Bidder may request a debriefing regarding the reasons that the Bid submitted by the Bidder was not selected for award. Requests for a debriefing must be made within 15 calendar days of notification by OGS that the Bid submitted by the Bidder was not selected for award. Requests should be submitted in writing to a designated contact identified in the Solicitation.

**21. CONTRACT PUBLICITY** Any Contractor press or media releases, advertisements, or promotional literature, regardless of the medium, referring to an awarded Contract must be reviewed and approved by the Commissioner prior to issuance. In addition, Contractor shall not use, for any purpose, the New York State of Opportunity registered trademark or the New York State coat of arms without prior written approval from the State.

## **TERMS & CONDITIONS**

**22. 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 Solicitation, a Contract shall be deemed executed and created with the successful Bidders 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.

**23. CONTRACT TERM - EXTENSION** In addition to any stated extension periods in the Contract, any Contract or portion thereof awarded by the Commissioner may be extended by mutual agreement of the Commissioner and the Contractor for an additional period of up to one year. Such extension for up to an additional one-year period may be exercised on a month-to-month basis or in other stated periods of time.

**24. OFFICIAL USE ONLY/NO PERSONAL USE** The Contract is only for official use by Authorized Users. Use of the Contract for personal or private purposes is strictly prohibited.

### **25. PARTICIPATION IN CENTRALIZED CONTRACTS**

**a. State Agencies** All State Agencies may utilize and purchase under any Centralized Contract let by the Commissioner, unless the Solicitation limits purchases to specific State Agencies.

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

**c. Voluntary Extension** Purchase Orders issued against a Centralized Contract by any Authorized User not provided for in the Contract 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.

**d. Responsibility for Performance** Participation in 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 hold the State, its officers, agents and employees harmless from any liability that may be or is imposed by the non-State Agency Authorized User's or Contractor's 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 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.

**26. MODIFICATION OF CONTRACT TERMS** The terms and conditions set forth in the Contract shall govern all transactions by Authorized Users 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 any Authorized User 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 and Commissioner by the Contractor at the time of such offer.

Other than where such terms are more advantageous for the Authorized User 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 an Authorized User 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.

**27. SCOPE CHANGES** The Commissioner reserves the right to require, by written order, changes to the scope of the Contract, provided that such changes do not materially alter the general scope of the Contract. If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under the Contract, whether or not changed by the order, the Commissioner shall, upon notice from Contractor as hereafter stated, make an equitable adjustment in the Contract price, the delivery schedule or both and shall modify the Contract. The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Commissioner decides that the facts justify it, the Commissioner may provide an adjustment without receipt of a notice from Contractor. In the event of a dispute between the Contractor and the Commissioner, such dispute shall be resolved in accordance with the OGS Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from proceeding with the Contract as changed.

**28. ESTIMATED/SPECIFIC QUANTITY CONTRACTS** Estimated quantity contracts, also referred to as indefinite delivery/indefinite 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 is implied or given.

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.

**29. 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 or 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, as the Commissioner in his or her sole discretion determines will meet the needs of such emergency. Contractor shall not be entitled to any claim for lost profits for Product procured from other sources pursuant to this clause. The reasons underlying the finding that an emergency exists shall be included in the procurement record.

**30. 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 (i) in the case of formal written Purchase Orders, when placed in the mail prior to the termination of the Contract and addressed to the Contractor at the address for receipt of orders set forth in the Contract or in the Contract Award Notification or (ii) in the case of electronic Purchase Orders or Purchasing Card purchases, when electronically transmitted to the Contractor prior to the termination of the Contract.

All Purchase Orders issued pursuant to a Contract let by the Commissioner must be identified with 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 Contractor'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 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.

**31. 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. Delivery shall be made within 30 calendar days after receipt of a Purchase Order by the Contractor, unless otherwise agreed to by the Authorized User and 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 a 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. If compliance with the delivery time schedule is a material term of the Contract, failure to meet such delivery time schedule may be grounds for cancellation of the order or, in the Commissioner's discretion, the Contract.

**32. WEEKEND AND HOLIDAY DELIVERIES** Unless otherwise specified in the Contract 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.

**33. SHIPPING/RECEIPT OF PRODUCT**

**a. Packaging** 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 Contract, 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 the locations and/or personnel specified by the Authorized User in

the Purchase Order. Any losses or delays resulting from the Contractor's failure to deliver Product to the specified locations or personnel shall be borne exclusively by the Contractor.

**34. TITLE AND RISK OF LOSS FOR PRODUCTS OTHER THAN TECHNOLOGY PRODUCTS** Notwithstanding the form of shipment, title or other property interest, risk of loss for Products other than technology Products 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 Contract 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 Contract may be rejected or accepted on an adjusted price basis, as determined by the Commissioner. Title, risk of loss, and acceptance for technology Products shall be governed by the Product Acceptance clause.

**35. PRODUCT SUBSTITUTION** In the event a specified 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 termination of Contract.

**36. 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.

**37. 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 Product or render it 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 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.

**38. REPAIRED OR REPLACED PRODUCTS, PARTS, OR 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 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 manufacturers' 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.

**39. EMPLOYEES, SUBCONTRACTORS AND AGENTS** All employees, Subcontractors, or agents of the Contractor 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 Contract or the Purchase Order, and must comply with all security and administrative requirements of the Authorized User that are communicated to the Contractor. The Commissioner and the Authorized User reserve 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 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 or the Purchase Order. The Commissioner and the Authorized User reserve the right to reject and/or bar from any facility for cause any employee, Subcontractor, or agent of the Contractor.

**40. ASSIGNMENT** In accordance with Section 138 of the State Finance Law, 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); provided, however, any consent shall not be unreasonably withheld, conditioned, delayed or denied. The Commissioner may waive the requirement that such consent be obtained in advance where the Contractor verifies that the assignment, transfer, conveyance, sublease, or other disposition is due to, but not necessarily limited to, a reorganization, merger, or consolidation of the Contractor's business entity or enterprise.

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 assignments with the State Comptroller. Prior to a consent to assignment of a Contract, or portion thereof, becoming effective, the Contractor shall submit the request for assignment to the Commissioner and seek written agreement from the Commissioner which will be filed with the

State Comptroller. Commissioner shall use reasonable efforts to promptly respond to any request by Contractor for an assignment, provided that Contractor supplies sufficient information about the party to whom the Contractor proposes to assign the Contract.

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.

**41. SUBCONTRACTORS AND SUPPLIERS** The Commissioner reserves the right to reject any proposed Subcontractor or supplier for bona fide business reasons, including, but not limited to: the company failed to solicit New York State certified minority- and women-owned business enterprises as required in prior OGS Contracts; the fact that such Subcontractor or supplier is on the New York State Department of Labor's list of companies with which New York State cannot do business; the Commissioner's determination that the company is not qualified or is not responsible; or the fact that the company has previously provided unsatisfactory work or services.

**42. SUSPENSION OF WORK** The Commissioner, in his or her sole discretion, reserves the right to suspend any or all activities under the 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 in State spending, declaration of emergency, contract compliance issues or other 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.

**43. TERMINATION**

**a. For Cause** For a material breach that remains uncured for more than 30 calendar days or other longer period as specified by written notice to the Contractor, the Contract or Purchase Order may be terminated by the Commissioner or Authorized User respectively. Neither the State nor an Authorized User shall be liable for any of Contractor's costs arising from the failure to perform or the termination, including without limitation costs incurred after the date of termination. 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** This Contract may be terminated at any time by the Commissioner for convenience upon 60 calendar days or other longer period as specified by written notice, 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 fulfill any outstanding Purchase Orders.

**c. For Violation of 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 his or her termination right by providing written notification to the Contractor in accordance with the written notification terms of the Contract.

**d. For Violation of Section 5-a of the New York State Tax Law** 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 Section 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 his or her termination right by providing written notification to the Contractor in accordance with the written notification terms of the Contract.

**e. For Non-Responsibility** The Bidder agrees that if it is found by the State that the Bidder's responses to the Vendor Responsibility Questionnaire were intentionally false or intentionally incomplete, on such finding, the Commissioner may terminate the Contract.

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

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

**f. Upon Conviction of Certain Crimes** The Commissioner reserves the right to terminate the Contract in the event it is found that a member, partner, director or officer of Contractor is convicted of one or more of the following: Bribery Involving Public Servants and Related Offenses as defined in Article 200 of the New York State Penal Law; Corrupting the Government as defined in Article 496 of the New York State Penal Law; or Defrauding the Government as defined in Section 195.20 of the New York State Penal Law.

**44. SAVINGS/FORCE MAJEURE** A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled and is not due to the negligence or willful misconduct of the affected party. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, terrorism, 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 where non-performance, by exercise of reasonable diligence, cannot be prevented.

The affected party shall provide the other party with written notice of any force majeure occurrence as soon as the delay is known and provide the other party with a written contingency plan to address the force majeure occurrence, including, but not limited to, specificity on quantities of materials, tooling, people, and other resources that will need to be redirected to another facility and the process of redirecting them. Furthermore, the affected party shall use its commercially reasonable efforts to resume proper performance within an appropriate period of time. Notwithstanding the foregoing, if the force majeure condition continues beyond 30 days, the parties to the Contract shall jointly decide on an appropriate course of action that will permit fulfillment of the parties' objectives under the Contract.

The Contractor agrees that in the event of a delay or failure of performance by the Contractor under the Contract due to a force majeure occurrence:

- a. The Commissioner may 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
- b. The Contractor will provide Authorized Users with access to Products first in order to fulfill orders placed before the force majeure event occurred. The Commissioner agrees that Authorized Users shall accept allocated performance or deliveries during the occurrence of the force majeure event.

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 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 or 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 to the Contractor. In the event of a dispute between the Contractor and the Commissioner, such dispute shall be resolved in accordance with the OGS Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from performing in accordance with the Contract as changed.

#### 45. **CONTRACT INVOICING**

**a. Invoicing** Contractor and the dealers/distributors/resellers designated by the Contractor, if any, shall provide complete and accurate billing invoices to each Authorized User in order to receive payment. Billing invoices submitted to an Authorized User must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer.

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 a commercially reasonable manner as requested by the Commissioner. The Commissioner may direct the Contractor to provide the information to the State Comptroller or to any Authorized User of the Contract.

**b. Payment of Contract Purchases made by an Authorized User when the State Comptroller is responsible for issuing such payment**

The 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](http://www.osc.state.ny.us), by e-mail at [HelpDesk@sfs.ny.gov](mailto:HelpDesk@sfs.ny.gov), or by telephone at (518) 457-7737 or toll free (877) 737-4185. 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. Payment of Contract Purchases made by an Authorized User when the State Comptroller is not responsible for issuing such payment**

The 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 Authorized User. Such payments shall be as mandated by the appropriate governing law from the receipt of a proper invoice. Such Authorized User and Contractor are strongly encouraged to establish electronic payments.

#### 46. **DEFAULT – AUTHORIZED USER**

**a. Breach by Authorized User** 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 30

calendar days of such delivery and acceptance, the Contractor may, upon five business days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional provision of Products 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 business 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. Insufficient basis** If the Contractor's basis for declaring a breach is insufficient, the Contractor's declaration of breach and failure to provide Products to an Authorized User may constitute a breach of the Contract, and the Authorized User may thereafter seek any remedy available at law or equity.

#### 47. **PROMPT PAYMENTS**

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

**b. By Non-State Agencies** Upon acceptance of Product or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be 30 calendar days, excluding legal holidays, or as mandated by the appropriate governing law from the receipt of a proper invoice. The terms of Article 11-A of the State Finance Law apply only to procurements by and the consequent payment obligations of State Agencies. Neither expressly nor by any implication is the statute applicable to non-State agency 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.

**48. REMEDIES FOR BREACH** Unless otherwise specified by the Authorized User in a Mini-Bid or Purchase Order, in the event that Contractor fails to observe or perform any term or condition of the Contract and such failure remains uncured after 15 calendar days following written notice by the Commissioner or an Authorized User, the Commissioner or an Authorized User may exercise all rights and remedies available at law or in equity. Notwithstanding the foregoing, if such failure is of a nature that it cannot be cured completely within 15 calendar days and Contractor shall have commenced its cure of such failure within such period and shall thereafter diligently prosecute all steps necessary to cure such failure, such 15-day period may, in the sole discretion of the Commissioner or the

Authorized User, be extended for a reasonable period in no event to exceed 60 calendar days. It is understood and agreed that the rights and remedies available to the Commissioner and Authorized Users in the event of breach shall include but not be limited to the following:

**a. Cover/Substitute Performance** In the event of Contractor's material, uncured breach, the Commissioner or Authorized User may, with or without issuing a formal Solicitation: (i) purchase from other sources; or (ii) if the Commissioner or Authorized User is unsuccessful after making reasonable attempts, under the circumstances then-existing, to timely obtain acceptable replacement Product of equal or comparable quality, the Commissioner or Authorized User may acquire acceptable replacement Product of lesser or greater quality. Such purchases may be deducted from the Contract quantity without penalty or liability to the State.

**b. Withhold Payment** In any case where a reasonable question of material, uncured non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Authorized User.

**c. Bankruptcy** In the event that the Contractor files, or there is filed against Contractor, 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 their right to set-off against monies due the debtor or, under the doctrine of recoupment, be credited 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 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, 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 obtain replacement Product temporarily and the cost of the replacement Product shall be deducted from the Contract quantity without penalty or liability to the State.

**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, damages, etc., that arise from the administration of the Contract.

**49. ASSIGNMENT OF CLAIM** Contractor hereby assigns to the State any and all claims for overcharges associated with this Contract that 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.

**50. 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 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 Safety Data Sheet must be provided to and approved by the Authorized User.

**51. INDEPENDENT CONTRACTOR** It is understood and agreed that the legal status of the Contractor, its Subcontractors, 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.

**52. SECURITY** Contractor warrants, covenants and represents that, in the performance of the Contract, Contractor, its agents, Subcontractors, officers, distributors, resellers and employees will comply fully with all security procedures of the Authorized User set forth in the Contract or Purchase Order or otherwise communicated in advance to the Contractor including but not limited to physical, facility, documentary and cyber security rules, procedures and protocols.

**53. 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 or performance of Product.

**54. WARRANTIES**

**a. Product Performance** Contractor hereby warrants and represents that the Products acquired by the Authorized User under this Contract conform to the manufacturer's specifications, performance standards and Documentation and that the Documentation fully describes the proper procedure for using the Products.

**b. Title and Ownership** Contractor warrants and represents that it has (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver specified license rights to any Products acquired by Authorized User under this Contract. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor shall indemnify Authorized Users and hold Authorized Users harmless from any damages and liabilities (including reasonable attorneys' fees and costs) arising from any breach of Contractor's warranties as set forth herein.

**c. Product Warranty** Contractor further warrants and represents that Products, components or parts specified and furnished by or through Contractor, whether specified and furnished individually or as a system, shall be substantially free from defects in material and workmanship and will conform to all requirements of the Contract for the manufacturer's standard commercial warranty period, if applicable, or for a minimum of one year from the date of acceptance, whichever is longer (the "Product warranty period").

During the Product warranty period, defects in the materials or workmanship of Products, components, or parts specified and furnished by or through Contractor, whether specified and

furnished individually or as a system, shall be repaired or replaced by Contractor at no cost or expense to the Authorized User. Contractor shall extend the Product warranty period for individual Products, or for the system as a whole, as applicable, by the cumulative periods of time, after notification, during which an individual Product, or the system as a whole, requires repairs or replacement resulting in down time or is in the possession of the Contractor, its agents, officers, Subcontractors, distributors, resellers or employees ("extended warranty").

Any component or part replaced by the Contractor under the Contract warranties shall be guaranteed for the greater of: (i) the Product warranty period set forth herein; or (ii) the manufacturer's standard commercial warranty period offered for the component or part, if applicable.

All costs for materials, labor, and transportation incurred to repair or replace Products, parts, components, or systems as a whole 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.

Where Contractor, the Third-Party Software vendor, or other third-party manufacturer markets any Product 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 Product warranty and extended warranty periods. Where such standard commercial warranty covers all or some of the Product warranty or extended warranty periods, Contractor shall be responsible for the coordination during the Product warranty or extended warranty periods with Third-Party Software vendor or other third-party manufacturers for warranty repair or replacement of Third-Party Software vendor or other third-party manufacturer's Product.

Where Contractor, Third-Party Software vendor, or other third-party manufacturer markets any Product with a standard commercial warranty that goes beyond the Product warranty or extended warranty periods, Contractor shall notify the Authorized User and pass through the standard commercial warranty to Authorized User at no additional charge; provided, however, that Contractor shall not be responsible for coordinating services under the standard commercial warranty after expiration of the Product warranty and extended warranty periods.

Unless recycled, recyclable, or recovered materials are available in accordance with the Remanufactured, Recycled, Recyclable, 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. Contractor further warrants and represents that no component or part has been substituted or applied contrary to the manufacturer's recommendations and standard practice.

Contractor shall not be responsible for any modification of the Products made by an Authorized User without Contractor's approval.

**d. Virus Warranty** The Contractor represents and warrants that any Product acquired under the Contract by the Authorized

User does not contain any known Viruses. Contractor is not responsible for Viruses introduced at an Authorized User's Site.

**e. Date/Time Warranty** Contractor warrants that Product 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.

**f. Workmanship Warranty** Contractor warrants that the services acquired under this Contract will be provided in a professional and workmanlike manner in accordance with the applicable industry standards, if any. The Authorized User must notify Contractor of any services warranty deficiencies within 90 calendar days from performance of the services that gave rise to the warranty claim.

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

**h. Prompt Notice of Breach** The Authorized User shall promptly notify the Contractor and the Commissioner in writing of any claim of breach of any warranty provided herein.

**i. Additional Warranties** Where Contractor, Product manufacturer or service provider generally offers additional or more advantageous warranties than those set forth herein, Contractor shall offer or pass through any such warranties to Authorized Users.

**j. No Limitation of Rights** The rights and remedies of the State and the Authorized Users provided in this clause are in addition to and do not limit any rights afforded to the State and the Authorized Users by any other clause of the Contract.

**55. LEGAL COMPLIANCE** Contractor represents and warrants that it shall secure all notices and comply with all applicable 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 extensions thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Solicitation 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 terminate 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.

**56. INDEMNIFICATION** Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully defend, indemnify and hold the Authorized Users harmless from suits, actions, proceedings, claims, losses, damages, and costs (including reasonable attorney fees) 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, which shall arise from or result directly or indirectly from this Contract, without limitation; provided, however, that the Contractor shall not be obligated to indemnify an Authorized User for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Authorized User.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit, or other suit for which Contractor is required to fully indemnify an Authorized User, (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, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

In the event that an action or proceeding at law or in equity is commenced against the Authorized User arising out of a claim for death, personal injury or damage to real or personal tangible property caused by any intentional or willful act, gross negligence, or negligence of Contractor, its agents, employees, partners or Subcontractors, which shall arise from or result directly or indirectly from the Products supplied under this Contract, and Contractor is of the opinion that the allegations in such action or proceeding 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 New York State 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 and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the Authorized User and attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters.

**57. INDEMNIFICATION RELATING TO INFRINGEMENT** The Contractor shall also defend, indemnify and hold the Authorized Users harmless from all suits, actions, proceedings, claims, losses, damages, and costs of every name and description (including reasonable attorney fees), relating to a claim of infringement of a patent, copyright, trademark, trade secret or other proprietary right provided such claim arises solely out of

the Products as supplied by the Contractor, and not out of any modification to the Products made by the Authorized User or by someone other than Contractor at the direction of the Authorized User without Contractor's approval; provided, however, that the Contractor shall not be obligated to indemnify an Authorized User for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Authorized User.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit alleging infringement, (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, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

If usage of a Product 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 such Product or parts thereof, as applicable, with non-infringing 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 that the Authorized User is given a refund for any amounts paid for the period during which usage was not feasible.

In the event that an action or proceeding at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the Product under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action or proceeding 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 New York State 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 and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the Authorized User and attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters. This constitutes the Authorized User's sole and exclusive remedy for infringement of a patent, copyright, trademark, trade secret, or other proprietary right.

**58. LIMITATION OF LIABILITY** Except as otherwise set forth in the Indemnification clause and the Indemnification Relating to Infringement clause, 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 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 forming the basis of the Authorized User's claim or (ii) five hundred thousand dollars (\$500,000), 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.

#### **59. DISPUTE RESOLUTION PROCEDURES**

It is the policy of OGS to provide interested parties, as defined in the OGS Dispute Resolution Procedures, with an opportunity to administratively resolve disputes, complaints or inquiries related to Solicitations, contract awards and contract administration. OGS encourages interested parties to seek resolution of disputes through consultation with OGS staff. All such matters shall be accorded impartial and timely consideration. Interested parties may also file formal written disputes. A copy of the OGS Dispute Resolution Procedures may be obtained by contacting the designated contact for the Solicitation, the Contract manager, or at the OGS website. OGS reserves the right to change the procedures set forth in the Dispute Resolution Procedures without seeking a Contract amendment.

***To the extent the scope of the Solicitation or Contract includes the sale, development, maintenance, or use of information technology Products such as software, computer components, systems, or networks for the processing, and distribution, or storage, or storage of data, the following clauses shall govern, as applicable.***

**60. 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 (e.g., payroll size, number of employees, CPU, MIPS, MSU, concurrent user, workstation, virtual partition). Licensee shall have the right to use those modifications or customizations of the Product that have been purchased by Licensee and to distribute such modifications or customizations for use by any Authorized Users otherwise licensed to use the Product, provided that any modifications or customizations, 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.

Licensee and Contractor may agree to alternative licensing rights (e.g., subscription, term, virtual) for specific Products used by the Contractor in performing the services, provided such agreement is reached prior to Bid, Mini-Bid, RFQ, or Contract award, as applicable. Such licensing rights will be specified in an applicable Purchase Order or other document approved by Licensee and Contractor.

**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. Product Documentation** Contractor shall provide Product Documentation electronically to Licensee at no charge. If Product Documentation is made available to customers in hard copy, Contractor shall provide at no charge one hard copy.

Contractor hereby grants to Licensee a non-exclusive, fully paid-up, royalty-free perpetual license in the Product Documentation to make, reproduce, and distribute, either electronically or otherwise, copies of the Product Documentation as necessary to enjoy full use of the Product in accordance with the Contract.

**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. Contractor shall fully disclose all terms and conditions of maintenance available to Licensee, including the extent to which updates, upgrades, revisions, and new releases are included in maintenance. Maintenance terms and any renewals thereof are independent of the expiration of the Centralized Contract term and shall not automatically renew.

Unless otherwise provided by written agreement between the Contractor and Licensee, maintenance offered shall include, at a minimum, (i) the provision of Error Corrections, updates, enhancements, revisions, Patches, and upgrades to Licensee, and (ii) help desk assistance at no additional cost, either by toll-free telephone or on-line functionality. Contractor shall maintain the Product so as to provide Licensee with the ability to utilize the Product in accordance with the Product Documentation without significant functional downtime to its ongoing business operations during the maintenance term.

Licensee 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 Licensee 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 that would have been due under the Contract for the period of time that such maintenance had lapsed, at then current NYS net maintenance rates. Contractor shall submit written notification to Licensees of the upcoming maintenance end date no later than 60 calendar days prior to such maintenance end date.

**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 within Agencies, between Agencies, and pursuant to governmental restructuring or reorganization ("permitted license transfers"). Licensees do not have to obtain the approval of Contractor for permitted license transfers, but must give 30 days prior written notice to Contractor of such moves 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 Third Parties** Third parties 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: (i) Licensee gives notice to Contractor of such third party, Site of intended use of the Product, and means of access; and (ii) such third 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 (iii) such third party maintains 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.

**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; (ii) reproducing a reasonable number of copies of the Product and related Documentation for cold site storage; (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. The phrase "cold site storage" means a restorable back-up copy of the Product not to be installed until the need for disaster recovery arises. The phrase "disaster recovery" means 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. Contractor shall fully disclose all archival back-up and disaster recovery options available to Licensee (e.g., cold, warm, and hot back-up), including all terms and conditions, additional charges, or use authorizations associated with such options.

**h. Confidentiality Restrictions** If any portion of the Product or Product Documentation contains confidential, proprietary, or trade secret information, the Contractor shall identify such information in writing to the Licensee. The terms of Licensee's use and disclosure of such information shall be governed by a written agreement between the Contractor and the Licensee, which, in the case of Licensees that are State or local governmental entities, recognizes that they are subject to the New York Freedom of Information Law.

**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; or (iii) export the Licensed Software in violation of the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR).

**61. PRODUCT ACCEPTANCE** Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, an Authorized User shall have 30 days from the date of delivery to accept hardware Products and 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. Title or other property interest and risk of loss shall not pass from Contractor to the Authorized User until the Products have been accepted. 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 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 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 to be specified by Authorized User. Where using its own data or tests, Authorized User must have the tests or data available upon delivery. This demonstration will take the

form of a documented installation test, capable of observation by the Authorized User, which shall be made part of the Contractor's standard documentation and shall be covered by the Product warranty. 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 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.

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, 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 30 days to correct the deficiency, and the Authorized User shall have an additional 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. When Product is not accepted, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of non-acceptance by the Authorized User. Rejected items not removed by the Contractor within the ten calendar day period 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 costs incurred in storage or effecting removal or disposition after the ten calendar day period.

**62. AUDIT OF LICENSED PRODUCT USAGE** Contractor shall have the right to periodically audit, no more than annually, at Contractor's expense, use of licensed Product at any Site where a copy of the Product resides. Contractor may conduct such audits remotely or on Site. If conducted remotely and if Contractor makes a license management program available, the Licensee agrees to install such program and use it within a reasonable period of time, provided such program meets Licensee's security or other requirements. If conducted on Site: (i) Contractor shall give Licensee at least 30 days advance written notice, (ii) such audit shall be conducted during Licensee's normal business hours, (iii) the audit shall be conducted by an independent auditor chosen on mutual agreement of the parties. Contractor shall recommend a minimum of three auditing/accounting firms from which the Licensee will select one; and (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. 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 net pricing in effect under the Contract 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.

In the event of an on-Site audit, the Software Alliance, Software Publishers Association (SPA), Software and Industry Information Association (SIIA) or Federation Against Software Theft (FAST) may not be used directly or indirectly to conduct such audit, nor may such entities be recommended by Contractor.

**63. NO HARDSTOP OR PASSIVE LICENSE MONITORING**

Unless otherwise expressly agreed to by the Licensee, the Product and all upgrades shall 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). Any Contractor access to the Product agreed to by Licensee as provided above shall be in accordance with Licensee's security or other requirements. Contractor agrees that in the event of a breach of this provision that Licensee shall not have an adequate remedy at law, including monetary damages, and that Licensee 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 Licensee shall be entitled.

**64. OWNERSHIP/TITLE TO PROJECT DELIVERABLES**

This clause shall apply where Contractor is commissioned by the Authorized User to furnish project deliverables as detailed in the Purchase Order.

**a. Definitions**

(i) For purposes of this clause, "Products" means deliverables 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 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 clause, "Existing Products" means 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 clause, "Custom Products" means Products, preliminary, final, or otherwise, that are created or developed by Contractor, its Subcontractors, partners, employees, or agents for Authorized User under the Contract.

**b. Title to Project Deliverables** Unless otherwise specified in writing in the Purchase Order, the Authorized User shall have ownership and license rights as follows:

**(i) Existing Products:**

**1. Hardware** - Title and ownership of Existing hardware Products shall pass to Authorized User upon acceptance.

**2. Software** - Title and ownership to Existing software Products delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other Third-Party Software vendor ("Existing Licensed Product"), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with Contractor or the Third-Party Software vendor. Effective upon acceptance, such Product shall be licensed to Authorized User in accordance with the Contractor or Third-Party Software vendor'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 purposes stated in the Solicitation 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 Third-Party Software vendor'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 clause.

**(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 Products, 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 purposes 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 purchases 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 Products, 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 clause.

**e. Contractor's Obligation with Regard to Third-Party Software**

Where Contractor furnishes Existing Licensed Products as a project deliverable, and sufficient rights necessary to effect the purposes of this section are not otherwise provided in the Contractor or the Third-Party Software vendor's standard license agreement, Contractor shall be responsible for obtaining from the Third-Party Software proprietary owner/developer the rights set forth herein to the benefit of the Authorized User at Contractor's sole cost and expense.

**65. 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; (ii) a written confirmation from the proprietary owner accepting Product invoice as proof of license; or (iii) other similar proof of license. All proofs of license must be in a form acceptable to the Licensee.

**66. 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 and each Licensee 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 similarly situated, supported customer, or (b) not less than 12 months from the date of notice; and (iii) at Licensee's option, and in order to enable Licensee to continue the use and maintenance of the Product, provide Licensee with a Product replacement or migration path with at least equivalent functionality at no additional charge, provided that Licensee is under contract for maintenance on the date of notice and Contractor is offering such replacement or migration path to all of its similarly situated, supported customers without additional charge.

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 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 Commissioner and each Licensee 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 similarly situated, supported customer, or (b) not less than 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.

**INDEX**

<u>Clause</u>	<u>No.</u>	<u>Clause</u>	<u>No.</u>
<u>A</u>		<u>P</u>	
Assignment	40	Participation in Centralized Contracts	25
Assignment of Claim	49	Prevailing Wage Rates - Public Works and Building Services Contracts	7
Audit of Licensed Product Usage	62	Pricing	13
<u>B</u>		Product Acceptance	61
Bid Evaluation	16	Product Delivery	31
Bid Opening	4	Product References	10
<u>C</u>		Product Substitution	35
Changes to Product or Service Offerings	66	Products Manufactured in Public Institutions	12
Confidential/Trade Secret Materials	6	Prompt Payments	47
Contract Invoicing	45	Proof of License	65
Contract Creation/Execution	22	Purchase Orders	30
Contract Publicity	21	Purchasing Card	15
Contract Term - Extension	23	<u>Q</u>	
Cooperation with Third Parties	53	Quantity Changes Prior to Award	18
<u>D</u>		<u>R</u>	
Debriefings	20	Rejected Product	36
Default - Authorized User	46	Remanufactured, Recycled, Recyclable, or Recovered Materials	11
Definitions	2	Remedies for Breach	48
Dispute Resolution Procedures	59	Repaired or Replaced Products, Parts, or Components	38
<u>E</u>		<u>S</u>	
Emergency Contracts	29	Savings/Force Majeure	44
Employees, Subcontractors and Agents	39	Scope Changes	27
Estimated/Specific Quantity Contracts	28	Security	52
Ethics Compliance	1	Site Inspection	14
Expenses Prior to Contract Execution	9	Shipping/Receipt of Product	33
<u>I</u>		Software License Grant	60
Indemnification	56	Subcontractors and Suppliers	41
Indemnification Relating to Infringement	57	Suspension of Work	42
Independent Contractor	51	<u>T</u>	
Installation	37	Taxes	8
International Bidding	3	Termination	43
<u>L</u>		Tie Bids	17
Late Bids	5	Timeframe for Offers	19
Legal Compliance	55	Title and Risk of Loss for Products Other than Technology Products	34
Limitation of Liability	58	Toxic Substances	50
<u>M</u>		<u>W</u>	
Modification of Contract Terms	26	Warranties	54
<u>N</u>		Weekend and Holiday Deliveries	32
No Hardstop or Passive License Monitoring	63		
<u>O</u>			
Official Use Only/No Personal Use	24		
Ownership/Title to Project Deliverables	64		



**APPENDIX C**

<b>PREPARED BY (Signature):</b>
<b>NAME AND TITLE OF PREPARER (Print or Type):</b>
<b>EEO100Staffing Plan (4/12)</b>

**General instructions:** Contact the Designated Contact(s) for the solicitation if you have any questions. Where the work force to be utilized in the performance of the State contract can be separated out from the Contractor's total work force, the Offeror shall complete this form only for the anticipated work force to be utilized on the State contract. Where the work force to be utilized in the performance of the State contract cannot be separated out from the Contractor's total work force, the Offeror shall complete this form for the Contractor's total work force.

**Instructions for completing:**

1. Enter the Solicitation Number that this report applies to along with the name and address of the Offeror.
2. Check off the appropriate box to indicate if the work force being reported is just for the contract or the Offerors' total work force.
3. Enter the total work force by EEO job category.
4. Break down the total work force by gender and enter under the heading "Work force by Gender."
5. Break down the total work force by race/ethnic background and enter under the heading "Work force by Race/Ethnic Identification." Enter the name, title, phone number and email address for the person completing the form. Sign and date the form in the designated boxes.

**RACE/ETHNIC IDENTIFICATION**

Race/ethnic designations as used by the Equal Employment Opportunity Commission do not denote scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than one race/ethnic group. The race/ethnic categories for this survey are:

**WHITE** - (Not of Hispanic origin) All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East.

**BLACK** - A person, not of Hispanic origin, who has origins in any of the black racial groups of the original peoples of Africa.

**HISPANIC** - A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.

**ASIAN & PACIFIC ISLANDER** - A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

**AMERICAN INDIAN OR ALASKAN NATIVE (Not of Hispanic Origin)** - A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.