

# Custom Program Signature Form

MBA/MBSA number


001-jendunn-S-901

Agreement number

**Note:** Enter the applicable active numbers associated with the documents below. Microsoft requires the associated active number be indicated here, or listed below as new.

For the purposes of this form, "Customer" means the signing entity (New York State Office of General Services) entering into a volume licensing program agreement.

This signature form and all contract documents identified in the table below are entered into between OGS and the Microsoft Affiliate signing, as of the effective date identified below.

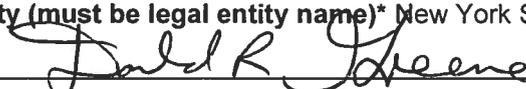
Contract Document	Number or Code
Microsoft Business Agreement for State of New York	CTM-A (New)
Enterprise Agreement	CTM-B (New)
Select Plus Agreement State and Local	CTM-C (New)
Academic Select Plus Agreement	CTM-D (New)
Campus and School Agreement	CTM-E (New)
Supplemental Contact Information Form	CTM-F (New)

THIS AGREEMENT (hereinafter "Centralized Contract", "Agreement" or "Contract") is made by and between the New York State Office of General Services (individually referred as "OGS" or "State" hereinafter) and Microsoft Licensing, GP (individually referred as "Microsoft" or "Contractor" hereinafter); collectively referred to as "the Parties." Hereinafter, this Centralized Contract shall be referenced as the Microsoft Business Agreement or "MBA".

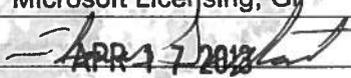
By signing below, OGS and the Microsoft Affiliate agree that both Parties (1) have received, read and understand the above contract documents, including any websites or documents incorporated by reference and any amendments and (2) agree to be bound by the terms of all such documents.

IN WITNESS WHEREOF, the Parties therefore hereby execute their mutual agreement to the terms of this Centralized Contract. This Centralized Contract shall be executed and shall be a binding contract between the Parties as set forth in this document. The State further warrants that, where Contractor is asked to execute multiple original copies of this signature page along with a complete original copy of the Centralized Contract, the approved signature page(s) will be affixed by the State, to additional copies of this Centralized Contract which conform exactly to the complete original copy as submitted by Contractor and executed simultaneously therewith.

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

Customer	
<b>Name of Entity (must be legal entity name)*</b>	New York State Office of General Services
<b>Signature*</b>	
<b>Printed First and Last Name*</b>	
<b>Printed Title*</b>	
<b>Signature Date*</b>	
<b>Tax ID</b>	

\* indicates required field

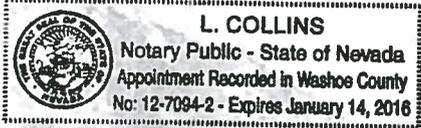
Microsoft Affiliate	
<b>Microsoft Licensing, GP</b>	 Microsoft Licensing, GP
<b>Signature</b>	
<b>Printed First and Last Name</b>	APR 17 2013 Thomas Swihart
<b>Printed Title</b>	Duly Authorized on behalf of Microsoft Licensing, GP
<b>Signature Date</b> (date Microsoft Affiliate countersigns)	
<b>Effective Date</b> July 1, 2013 (may be different than Microsoft's signature date)	
<b>Tax ID</b> 880443249	
<b>State of New York Vendor identification number</b> 1100005370	

**CORPORATE ACKNOWLEDGMENT**

STATE OF Nevada }  
 : ss.:  
COUNTY OF Washoe }

On the 17 day of April in the year 2013, before me personally came: Thomas Swihart, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in Darton NV; that he/she/they is (are) Signature Power of Attorney (the President or other officer or director or attorney in fact duly appointed) of Microsoft, the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by authority of the board of directors of said corporation.

[Handwritten Signature]



**Signature and Office of Person Taking Acknowledgment**

After this signature form is signed by the Customer, send it and the Contract Documents to Customer's channel partner or Microsoft account manager, who must submit them to the following address. When the signature form is fully executed by Microsoft, Customer will receive a confirmation copy.

**Microsoft Licensing, GP**  
Dept. 551, Volume Licensing  
6100 Neil Road, Suite 210  
Reno, Nevada 89511-1137  
USA

**Prepared By:** Jennifer Kelleher  
jennifer.kelleher@microsoft.com

000-jendunn-S-901 A

# Custom Business Agreement for State of New York

## Contents

<b>1. Background</b>	<b>2</b>
<b>2. Scope</b>	<b>2</b>
<b>3. Definitions</b>	<b>3</b>
<b>4. Contract Administration</b>	<b>6</b>
<b>5. Responsibilities</b>	<b>9</b>
<b>6. Terms and Conditions</b>	<b>9</b>
<b>7. Agreement and Program Agreement Term</b>	<b>9</b>
<b>8. Appendix B Amendments</b>	<b>9</b>
<b>9. Confidentiality</b>	<b>9</b>
<b>10. Termination</b>	<b>13</b>
<b>11. Warranties</b>	<b>15</b>
<b>12. Defense of infringement, misappropriation, and third party claims</b>	<b>16</b>
<b>13. Limitation of liability</b>	<b>17</b>
<b>14. Verifying compliance</b>	<b>20</b>
<b>15. Miscellaneous</b>	<b>29</b>

This Microsoft Business Agreement is entered into between the entities identified on the signature form.

This Agreement consists of the: (1) Business Agreement with Appendixes A,B,C,D and J (2) Enterprise Agreement with Appendix E; (3) Select Plus Agreement State and Local with Appendix F; (4) Academic Select Plus Agreement with Appendix G; (5) Campus and School Agreement with Appendix H; (6) the Product List; (7) the Product Use Rights ("PUR") applicable to the Products licensed under the Agreement; (8) any Enrollment or Affiliate Registration entered under this Agreement; and (9) any order submitted under this Agreement. In the event of a conflict between the terms and conditions in any of the documents identified above, such conflict shall be resolved by giving precedence in the following order:

1. Appendix A – Standard Clauses (12/12 version)
2. Business Agreement
3. Appendix B - General Specifications (7/06 version)
4. Appendix C – Contract Modification Procedure
5. Appendix J - Qualified Educational User Definition
6. The following Program Agreements: Enterprise Agreement Program Agreement, Select Plus License Program Agreement (both Academic and State and Local Government), and Campus and School Agreement, also to include appendixes with applicable sample Enrollment and amendments
7. Product List 60
8. Product Use Rights
9. Any executed and accepted Select Plus Affiliate Registration Forms or Enrollments
10. Any orders
11. Appendix D – Contractor Administration

Collectively, the foregoing is referred to as the "Agreement".

## BACKGROUND

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

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

WHEREAS, as part of Governor Cuomo's Procurement Transformation, the Office of General Services undertook the development of this centralized contract to acquire Microsoft Products. New York State Agencies, local governments and others authorized by law to use OGS centralized contracts may obtain Microsoft Products through this Centralized Contract.

WHEREAS, there is a substantial pre-existing install base of Microsoft software Product within New York State Authorized Users. OGS determined that Authorized Users may need additional Products, and has determined it is in the best interest of Authorized Users to establish this single source centralized contract.

WHEREAS, Contractor does not sell directly to government customers, but rather sells exclusively through its authorized reseller network. The Parties acknowledge that OGS shall issue a competitive solicitation to acquire the services of one authorized reseller to fulfill its needs and that such authorized reseller shall be certified by Contractor as both an Authorized Education Reseller (AER) and Large Account Reseller (LAR).

WHEREAS, since the Contractor does not sell directly to governmental customers, it does not set the actual price paid by governmental customers. In order to allow "comparison shopping" it provides a "reference price".

WHEREAS, OGS provided notification of its intention to enter into a single source contract with Contractor by placing a notice in the March 27, 2013 edition of the New York State Contract Reporter;

WHEREAS, Contractor agrees to the terms and conditions set forth in this Centralized Contract, and

WHEREAS, the State has determined that the Contractor reference pricing and terms and conditions are equal to or better than similarly situated government entities. The Contractor is willing to provide the products as set forth herein to the reseller.

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

### SECTION 1. SCOPE OF AGREEMENT

**Effective Date.** The effective date of this Agreement and the Program Agreements shall be July 1, 2013.

The OGS contract number (unique identifier) is PS66034.

#### 1.1 Scope

The Agreement, including all Appendices and the associated Program Agreements, establish a Customer's overall licensing framework and the applicable terms and conditions. Under the Program Agreements, Customer may License Products by entering into Enrollments and/or Affiliate Registration forms and placing orders with the reseller. The Parties acknowledge the actual Products available for acquisition by an Authorized User will be set forth in the contract between OGS and a reseller that results from a separate competitive procurement by OGS to establish a reseller.

The Agreement and these Program Agreements may be updated at the mutual agreement of the Parties in accordance with the contractual terms and conditions to incorporate new offerings, make price level revisions, modify terms and conditions and delete items. Further, the Parties reserve the right to amend the Centralized Contract to add new and other offerings. If Contractor requests amendment of the Program Agreement, Enrollment or Registered Affiliate Form and the Parties do

not reach mutual agreement, such Product cannot be acquired under the Centralized Contract. Microsoft reserves the right to not accept an Enrollment, Affiliate Registration, or an Order for valid business reasons.

Contractor asserts and the State acknowledges that (1) no direct payment shall be made by an Authorized User directly to Contractor under this Agreement, and (2) under this Agreement, Contractor does not engage in direct sales of its Products with an Authorized User.

At Agreement execution, Contractor's offering under the Agreement does not include the provision of hardware products. Unless and until the Parties agree to amend the Agreement to include the provision of hardware products hereunder, Appendix B sections 51, 53 and 72 (e) are reserved.

### **1.2 Acquiring Contractor Product and Payments/Pricing**

An Authorized User acquires Contractor Product under this Centralized Contract through a contract that will be established by a separate competitive procurement by OGS to establish its Reseller. The Reseller and the Customer will determine the Enrolled Customer's actual price and payment terms.

Prices shall be calculated and paid in accordance with terms of the separate, definitive agreement with OGS's named reseller in effect at the time of order placement.

### **1.3. Centralized Contract Amendment**

During the term of the Centralized Contract, the Centralized Contract may be amended. OGS reserves the right to consider amendments which are not specifically covered by the terms of the Centralized Contract, but are judged to be in the best interest of the State. OGS, an Authorized User, or the Contractor may suggest amendments. Except as specifically provided herein, amendments or modifications to the terms and conditions set forth herein may only be made with mutual written agreement of the Parties.

### **1.4. Out-of-Scope Work**

The Parties agree that the following are expressly excluded from the scope of this Centralized Contract unless the Parties agree to amend the scope of this Contract:

- Hardware
- Consulting services, which includes deliverable and hourly-based
- Technical support services
- Premier support services
- Supplies
- Development or customization work
- Systems or projects

The Parties also agree that no public works or building services work can be provided by the Contractor under this Centralized Contract. Further, the Parties agree that no remanufactured, recycled, recyclable or recovered materials can be provided by the Contractor under this Centralized Contract.

### **1.5 Definitions**

The terms used in this Microsoft Business Agreement shall be defined in accordance with Appendix B (Part 1, §5 Definitions). In addition, the following definitions shall apply. Additional definitions are set forth in the attached Program Agreements.

**"Affiliate"** means

A. with regard to Customer

- i) any government agency, department, office, instrumentality, division, unit or other entity of the state or local government that is supervised by or is part of Customer, or which supervises Customer or of which Customer is a part, or which is under common supervision with Customer;
- ii) any county, borough, commonwealth, city, municipality, town, township, special purpose district, or other similar type of governmental instrumentality established by the laws of Customer's state and located within Customer's state jurisdiction and geographic boundaries; and
- iii) any other entity in Customer's state expressly authorized by the laws of Customer's state to purchase under state contracts; provided that a state and its Affiliates shall not, for purposes of this definition, be considered to be Affiliates of the federal government and its Affiliates (for clarity details on other entities can located here, or a successor site: <http://www.ogs.ny.gov/purchase/snt/othersuse.asp>); and

B. with regard to Microsoft, any legal entity that Microsoft owns, that owns Microsoft, or that is under common ownership with Microsoft

C. with regard to Institution for the purpose of Academic Program Agreements,

- i) for a non-public entity, any qualified educational user identified in Appendix J, that Institution owns and/or controls, that owns and/or controls Institution, or that is under common ownership and/or control with Institution; "ownership" means, for purposes of this definition, more than 50% ownership, and
- ii) for a state or local government entity,
  - (1) any qualified educational user identified in Appendix J, as of the effective date of this agreement that is an agency, department, office, bureau, division, or entity of the state or local government, and
  - (2) any qualified educational user expressly authorized by the laws of the state to purchase under state education contracts; provided that the state and its Affiliates shall not, for purposes of this definition, be considered to be Affiliates of the federal government and its Affiliates; and

**"Available"** means Microsoft has made Licenses for that Product available on the Product List for ordering under a particular licensing program.

**"Customer"** means: (1) for the purpose of the Select Plus License Program Agreement and Enterprise Agreement Program Agreement, the entity that has entered into a Program Agreement and its Affiliates; (2) for the purpose of the Academic Select Plus License Program Agreement and Campus and School Program Agreement, "Customer" means the Institution that has entered into a Program Agreement or its Affiliates that has entered into an Enrollment under a Program Agreement; and (3) for Appendix A and/or Appendix B, "Customer" means the Authorized User that has entered into such transaction and its Affiliates.

**"Customer Data"** means all data, including all text, sound, software, or image files that are provided to Microsoft by, or on behalf of, Customer through Customer's use of the Online Services.

**"Enrolled Customer"** means an entity, Customer or anyone of Customer's Affiliates that has entered into an Enrollment or Affiliate Registration Form.

**"Enterprise"** shall mean with respect to the Enterprise Agreement Program only, the Enrolled Affiliate and the Affiliates it chooses on its Enrollment to include in its enterprise;

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

**"Fixes"** means Product fixes, modifications or enhancements, or their derivatives, that Microsoft releases generally (such as Commercial Product service packs).

**"Hot fixes"** means a fix that Contractor makes available to a specific Authorized User to address a specific problem that is unique to said Authorized User. Sometimes Contractor makes the hotfix available to other customers if they report the same problem. If a large number of customers report the same problem, the hotfix can get elevated to a General Distribution Release (Service Pack).

**"L&SA"** means a License and Software Assurance for any Product ordered.

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

**"Microsoft"** means the Microsoft Affiliate that has entered into this Agreement or a Program Agreement and its Affiliates, as appropriate;

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

**"NYS Holidays:** refers to the legal holidays for State Employees in the Classified Service of the Executive Branch, as more particularly specified on the website of the NYS Department of Civil Service. This includes the following: New Year's Day; Martin Luther King Day; Washington's Birthday (observed); Memorial Day; Independence Day; Labor Day; Columbus Day; Veteran's Day; Thanksgiving Day; and Christmas Day. A copy of the NYS Holidays for 2013 is available at [http://www.cs.ny.gov/attendance\\_leave/2013\\_legal\\_holidays.cfm](http://www.cs.ny.gov/attendance_leave/2013_legal_holidays.cfm).

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

**"Online Service"** means the Microsoft-hosted services identified in the Online Services section of the Product List.

**"Product"** means all software, Online Services and other web-based services identified on the Product List.

**"Product List"** means, with respect to any licensing program, the statement published by Microsoft from time to time on the World Wide Web at <http://www.microsoft.com/licensing/contracts>, or at a successor site that Microsoft identifies, which identifies the Products that are or may be made available under the program (which availability may vary by region) and any Product-specific conditions or limitations on the acquisition of licenses for those Products;

**"Program Agreements"** shall mean the following Agreements, with applicable appendices, which contain terms and conditions that apply solely to Enrollments and Affiliate Registration forms made pursuant to the Contractor's License programs to which they apply. The program agreements that are included herewith, as of the effective date, are as follows:

- Enterprise Agreement Program Agreement
- Select Plus License Program Agreement, (State and Local and Academic)
- Campus and School Agreement Program Agreement

**"Product Use Rights"** means, with respect to any licensing program, the use rights or terms of service for each Product and version published for that licensing program at <http://www.microsoft.com/licensing/contracts> or at a successor site.

**"Reseller"** means a large account reseller authorized by Microsoft to resell Product and Software Assurance in an Enrolled Customer's region under this Agreement;

**"Service Level Agreement"** means the document specifying the standards Microsoft agrees to adhere to and by which it measures the level of service for an Online Service.

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

**"Software Assurance"** means an annuity offering that provides new version rights and other benefits for Products as described in the Product List;

**"use"** or **"run"** means to copy, install, use, access, display, run or otherwise interact

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

**"Vendor"** means any third party supplier or other provider of computer technology or related services.

## SECTION 2. CONTRACT ADMINISTRATION

### 2.1 Contract Administrator

Contractor must provide a dedicated Contract administrator to support the updating and management of the Centralized Contract on a timely basis. Information regarding the Contract administrator shall be set forth in Appendix D, Contract Administration.

### 2.2 Contract Modifications

The Contractor shall submit all requests to add Products in the form and format contained in Appendix C, Contract Modification Procedure. In connection with any Contract modification, OGS reserves the right to: request additional information, reject Contract updates, remove Products from Contract updates, and request additional discounts for new or existing Products.

The form contained within Appendix C is subject to change at the sole discretion of OGS.

### 2.3 Price Level Changes

A Price level change that results in price increases are processed as an amendment. A Price level change that results in a price decrease is processed as an update. The Parties agree that price level changes that result in price increases can only occur once a year. The Parties agree that the price level cannot result in a price increase during the first year of the Centralized Contract. A Price level change that results in a price increase shall be effective thirty days after the date on which OGS approves.

### 2.4. Dispute Resolution Policy

#### INFORMAL DISPUTE RESOLUTION PROCESS

A. It is the policy of OGS New York State Procurement (NYSPro) to provide vendors with an opportunity to administratively resolve disputes, complaints or inquiries related to NYSPro bid solicitations or contract awards. If the Parties are not able to resolve their dispute between themselves as set forth below, NYSPro encourages vendors to seek resolution of disputes through consultation with NYSPro staff. Such consultation is voluntary. All such matters will be accorded impartial and timely consideration. Interested parties may also file formal written disputes. A copy of the Dispute Resolution Procedures for Vendors may be obtained by contacting the person shown above under "Notices" or through the OGS website ([www.ogs.ny.gov](http://www.ogs.ny.gov)).

B. 1. In the event there is a dispute or controversy under this Centralized Contract, the Contractor, OGS and Authorized User agree to exercise their best efforts to resolve the dispute as soon as possible. The Contractor, OGS and Authorized User shall, without delay, continue to perform their respective obligations under this Centralized Contract which are not affected by the dispute. Primary responsibility for resolving any dispute arising under this Centralized Contract shall rest with the Authorized User's Contractor Coordinators and the Contractor's Account Executive and the State & Local Government Regional General Manager.

2. In the event the Authorized User is dissatisfied with the Contractor's Products provided under this Centralized Contract, the Authorized User shall notify the Contractor in writing pursuant to Section 4.18 (Notices). In the event the Contractor has any disputes with the Authorized User, the Contractor shall so notify the Authorized User in writing. If either party notifies the other of such dispute or controversy, the other party shall then make good faith efforts to solve the problem or settle the dispute amicably, including meeting with the party's representatives to attempt diligently to reach a satisfactory result.

3. If negotiation between such persons fails to resolve any such dispute to the satisfaction of the parties within 14 business days or as otherwise agreed to by the Contractor and Authorized User, of

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

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

C. This Section 2.4 does not apply to any breach by an Authorized User of Contractor's or its licensor's intellectual property rights.

## FORMAL DISPUTES

### A. Definitions

1. Filed means the complete receipt of any document by NYSPPro before its close of business.
2. Dispute means a written objection by Contractor to any of the following:
  - a. A solicitation or other request by NYSPPro for offers for a contract for the procurement of commodities or services.
  - b. The cancellation of the solicitation or other request by NYSPPro.
  - c. An award or proposed award of the contract by NYSPPro.
  - d. A termination or cancellation of an award of the contract by NYSPPro.
  - e. Changes in the Scope of the Centralized Contract by the Commissioner of OGS.
  - f. Determination of "materiality" in an instance of nonperformance or contractual breach.
  - g. An equitable adjustment in the Centralized Contract terms and/or pricing made by the Commissioner during a force majeure event.

### B. Submission of Disputes

1. A formal dispute by Contractor must be filed in writing to NYSPPro by mail, email or facsimile.
2. The dispute must include:
  - a. Name, address, e-mail address, fax and telephone numbers of the filer.
  - b. Solicitation or contract number.
  - c. Detailed statement of the legal and factual grounds for the dispute, including a description of resulting prejudice to the filer.
  - d. Copies of relevant documents.
  - e. Request for a ruling by the agency.
  - f. Statement as to the form of relief requested.
  - g. All information establishing that the filer is an interested party for the purpose of filing a dispute.

- h. All information establishing the timeliness of the dispute.

Disputes must be filed with the Director of NYSPRO at the following address:

**New York State Office of General Services**

**Director, NYSPRO**

38th Floor, Corning Tower

Empire State Plaza

Albany, NY 12242

Facsimile: (518) 486-6099

3. Disputes concerning the administration of the contract after award must be filed within twenty (20) business days by Contractor after the Authorized User and Contractor fails to reach resolution through the Informal Dispute Resolution Process.

**C. Agency Response**

1. OGS will consider all information relevant to the dispute, and may, at its discretion, suspend, modify, or cancel the disputed procurement/contract action prior to issuance of a formal dispute decision.
2. OGS reserves the right to require the Contractor to meet or participate in a conference call with OGS to discuss the dispute when, in its sole judgment, circumstances so warrant.
3. OGS reserves the right to waive or extend the time requirements for decisions and final determination on appeals herein prescribed when, in its sole judgment, circumstances so warrant.
4. NYSPRO reserves the right to consider or reject the merits of any dispute.
5. Notice of Decision: A copy of the decision, stating the reason(s) upon which it is based and informing the filer of the right to appeal an unfavorable decision to the Chief Procurement Officer shall be sent to the filer or its agent by regular mail within thirty (30) business days of receipt of the dispute.

**D. Appeals**

1. Should the filer be dissatisfied with the dispute determination, a written appeal may be directed to:

**Chief Procurement Officer**

**New York State Office of General Services**

**NYSPRO**

38th Floor, Corning Tower

Empire State Plaza

Albany, NY 12242

Facsimile: (518) 486-9166

2. Written notice of appeal of a determination must be received at the above address no more than ten (10) business days after the date the decision is received by the filer. The decision of the Director of NYSPRO shall be a final and conclusive agency determination unless appealed to the Chief Procurement Officer within such time period.

3. The Chief Procurement Officer shall hear and make a final determination on all appeals or may designate a person or persons to act on his/her behalf. The final determination on the appeal shall be issued within twenty (20) business days of receipt of the appeal.

4. An appeal of the decision of the Director of NYSPRO shall not include new facts and information unless requested in writing by the Chief Procurement Officer.

5. The decision of the Chief Procurement Officer shall be a final and conclusive agency determination.

#### **E. Legal Appeals**

Nothing contained in these provisions is intended to limit or impair the rights of Contractor to seek and pursue remedies of law through the judicial process.

### **SECTION 3. RESPONSIBILITIES**

#### **3.1 Internet Access To Centralized Contract & Pricing Information**

Access by Authorized Users to Centralized Contract terms and pricing information shall be made available and posted on the Internet by OGS. Contractor does not currently post the Centralized Contract on its Internet site.

#### **3.2 Determination Of Compliance With Statutory And Regulatory Requirements**

It is the responsibility of each Authorized User to evaluate the Contract offerings and determine if an offering complies with its statutory and regulatory requirements prior to acquisition. Contractor shall provide Contractor-specific available information, as appropriate, to the Authorized User in order to facilitate such determination. This includes, but is not limited to, Microsoft's data protection and privacy protocols.

### **SECTION 4. TERMS AND CONDITIONS**

#### **4.1 Centralized Contract Term**

**Term.** This Agreement and the Program Agreements will remain in effect for thirty-six (36) full calendar months, with the option of two twelve (12) full calendar month extensions, unless it is terminated by either party as described in Termination (Appendix B section 60 as amended). OGS and Microsoft acknowledge that from a system's limitation perspective, the Agreement will not automatically expire after 36 months. The term for the Program Agreement Enrollment or Affiliate Registration Form will be determined by the applicable Program Agreement Enrollment or Affiliate Registration Form.

#### **4.2 Appendix B Amendments**

Appendix B is amended as follows:

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

*Intentionally omitted.*

2. The definition of "Product" set forth in Section 5, Definitions, is hereby deleted.

3. Section 14, Confidential/Trade Secret Materials, is hereby deleted and replaced with the following:

**Appendix B §14 Confidential/Trade Secret Materials.**

This provision is subject to NYS Freedom of Information Law (Public Officers Law Article 6), specifically §87 and §89, which authority would take precedence over this provision should there be any conflict.

a. As used in this Section, "Disclosing Party" means the State or an Authorized User when disclosing its Confidential Information (defined below) to the Contractor, or the Contractor when disclosing its Confidential Information to the State or an Authorized User, and "Receiving Party" means the State or an Authorized User when receiving disclosure of Confidential Information from the Contractor, or the Contractor when receiving disclosure of Confidential Information from the State or an Authorized User. "Confidential Information" means all confidential information disclosed by a party (the "Disclosing Party") to the other party (the "Receiving Party") either orally, visually, written or electronically after the effective date of this Contract including, without limitation, information relating to the Disclosing Party's operations, processes, plans or intentions, know-how, design rights, trade secrets or business affairs. Information when disclosed to Receiving Party shall be considered Confidential Information only to the extent marked or otherwise identified by Disclosing Party as "confidential," "proprietary," "restricted" or similar designation at the time of original disclosure. Confidential Information shall be clearly marked as "confidential," "proprietary," "restricted" or some similar designation. Except as provided in this Contract and specifically in clause 14(d) hereunder, the Receiving Party further agrees that any Confidential Information obtained by the Receiving Party from the Disclosing Party, its agents, subcontractors, officers, or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the Disclosing Party hereunder, will not be divulged to any third parties. The State and the Authorized User acknowledge that the Source Code to the Licensed Software and the Documentation are Confidential Information of Contractor.

b. The Receiving Party:

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

The Receiving Party's confidential obligation shall end five years after time of original disclosure, to the extent permitted by applicable law. Receiving Party shall comply with record retention requirements to the extent Confidential Information is subject to State audit requirements.

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

- i. it is required by law (such as the New York State Freedom of Information Law);
- ii. the information has come into the public domain, otherwise than through (a) a breach of this Clause by the Receiving Party, (b) a third party's breach of any duty of confidentiality owed to the Disclosing Party of which the Receiving Party was aware, or (c) a violation of law;
- iii. it was in the Receiving Party's lawful possession prior to the disclosure and had not been obtained by the Receiving Party either directly or indirectly from the Disclosing Party;
- iv. it is required by existing contractual obligations of which the Disclosing Party is aware;

- v. it is independently developed by the Receiving Party without reliance on the Confidential Information;
- vi. it is required by any securities exchange or regulatory or governmental body to which it is subject or by judicial process;
- vii. it is otherwise obtained under the Freedom of Information Law or other applicable New York State laws or regulations; or
- viii. the disclosure is to its professional advisers, auditors or banker; or to any of its directors, other officers, employees and sub-contractors (a "Recipient") to the extent that disclosure is reasonably necessary for the purposes of this Contract.

d. Suggestions and Feedback. Either party may provide suggestions, comments or other feedback to the other with respect to the other's products or services. Feedback is voluntary and the party receiving feedback may use it for any purpose without obligation of any kind except that the party receiving feedback will not disclose the source of feedback without the consent of the party providing it.

e. Knowledge Base. Contractor may use any technical information derived from providing services related to Contractor's products for problem resolution, troubleshooting, product functionality enhancements and fixes, for Contractor's knowledge base. Contractor agrees not to identify the Authorized User or disclose any of Authorized User's confidential information in any item in the knowledge base.

4. Section 17 (Prevailing Wages) is deleted and replaced with the following language:

*Intentionally omitted.*

5. Section 22 (Remanufactured, Recycled, Recyclable or Recovered Materials) is deleted and replaced with the following language:

*Intentionally omitted.*

6. Section 23 (Products Manufactured in Public Institutions) is deleted and replaced with the following language:

*Intentionally omitted.*

7. Section 24 (Pricing) is deleted and replaced with the following language:

*Intentionally omitted*

8. Section 27 (Procurement Card) is deleted and replaced with the following language:

*Intentionally omitted.*

9. Section 34 (Performance and Responsibility Qualifications) is deleted and replaced with the following language:

**34. PERFORMANCE AND RESPONSIBILITY QUALIFICATIONS** The Commissioner reserves the right to investigate or inspect at any time whether or not the Product, services, qualifications or facilities offered by the Bidder/Contractor meet the requirements set forth in the Bid Specifications/Contract or as set forth during Contract negotiations. Notwithstanding the foregoing, Microsoft does not agree to nor will Microsoft permit Commissioner or any of Commissioner's designees to investigate or inspect any Microsoft facilities, including Microsoft data centers, associated internal systems and applications related to its performance under this Agreement. Contractor shall at all times during the Contract term remain responsible and responsive. A Bidder/Contractor must be prepared, if requested by the Commissioner, to present evidence of legal authority to do business in New York State, integrity, experience, ability, prior performance, organizational and financial capacity as well as where applicable, a statement as to supply, plant, machinery and capacity of the manufacturer or source for the production, distribution and servicing of the Product offered/Bid. If the Commissioner

determines that the conditions and terms of the Bid Documents, Bid Specifications or Contract are not complied with, or that subject to the warranty provisions, Product proposed to be furnished do not meet the specified requirements, or that the legal authority, integrity experience, ability, prior performance, organization and financial capacity or facilities are not satisfactory, the Commissioner may reject such Bid or terminate the Contract.

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

*Intentionally omitted.*

11. Section 40 (Modification of Contract Terms) is deleted and replaced with the following language:

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

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

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

The Product List and Product Use Rights referenced in the Program Agreements, but not attached to the Program Signature Form, may be found at: <http://www.microsoft.com/licensing/contracts> and are incorporated by reference. The Enrolled Customer agrees to be bound by and accept all provisions in the Product List and Product Use Rights (as changed from time to time), to the extent such provisions do not conflict with the provisions set forth in the Agreement.

12. Section 45 (Product Delivery) is deleted and replaced with the following language:

The software downloads associated with product delivery for Customers and/or Authorized Users for products on orders will be made available in accordance with terms of the associated Program Agreement. Within 30 days after the effective date of the Program Agreement Enrollment or Affiliate Registration Form, the contact(s) identified for this purpose will be provided access to Microsoft's Volume Licensing Service Center ("VLSC") web site (or successor site) at: <https://www.microsoft.com/licensing/servicecenter>.

The decision of the Commissioner as to compliance with delivery terms shall be final. Such decision shall be reasonable and not delayed, withheld, or conditioned. In all instances of a potential or actual delay in delivery, the Contractor shall immediately notify the Commissioner and the Authorized User, and confirm in writing the explanation of the delay, and take appropriate action to avoid any subsequent late deliveries. Any extension of time for delivery must be requested in writing by the Contractor and approved in writing by the Authorized User. Failure to meet such delivery time schedule may be grounds for cancellation of the order or, in the Commissioner's discretion, the Contract.

The media associated with product delivery for Enrolled Customers for products on orders will be made available in accordance with terms of the associated Program Agreement. The software downloads and product delivery for Student and Work at Home Media will be made available in accordance with terms of the associated Program Agreement.

13. Section 46 (Weekend and Holiday deliveries) is deleted and replaced with the following language:

*Intentionally omitted*

14. Section 47 (Shipping/Receipt of Product) is deleted and replaced with the following language:

Contractor does not set pricing for media shipping charges, and all shipping charges, if applicable, will be determined by your Reseller. Student and Work at Home Media with regards to packaging and receipts will be made available in accordance with terms of the associated Program Agreement.

15. Section 48 (Title and Risk of Loss) is deleted and replaced with the following language:

Notwithstanding the form of shipment, title or other property interest, risk of loss shall not pass from the Contractor to the Authorized User until the Products have been received, inspected and accepted by the receiving entity. Acceptance shall occur within a reasonable time or in accordance with such other defined acceptance period as may be specified in the Bid Specifications or Purchase Order.

Notwithstanding the foregoing, any delivery of Product that does not comply with the Contract terms and conditions, as it relates to how the product performs is subject to the warranties section.

Any delivery of Product that does not comply with the Contract terms and conditions, may be rejected or accepted on an adjusted price basis as determined between the Commissioner and the Reseller in the associated Program Agreement.

16. Section 51 (Rejected Product) is deleted and replaced with the following language:

*Intentionally omitted.*

17. Section 53 (Repaired or Replaced Parts / Components) is deleted and replaced with the following language:

*Intentionally omitted.*

18. Section 55 (Employee, Subcontractors & Agents) is deleted and replaced with the following language:

**55. EMPLOYEES, SUBCONTRACTORS & AGENTS** All employees, Subcontractors or agents performing work under the Contract must be trained staff or technicians who meet or exceed the professional, technical and training qualifications set forth in the Bid Specifications or the Bid Documents, whichever is more restrictive, and must comply with all facilities security and administrative requirements of the Authorized User; provided, however, that any Microsoft employees, subcontractors, and agents (collectively, "Microsoft") are (1) may request to review such facilities security and administrative requirements in advance, and (2) permitted to request a waiver from the Authorized User for those specific requirements to which Microsoft is unable to comply. The Commissioner reserves the right to conduct a security background check or otherwise approve any employee, Subcontractor or agent furnished by Contractor and to refuse access to or require replacement of any personnel for cause based on, including but not limited to, professional, technical or training qualifications, quality of work or change in security status or non-compliance with Authorized User's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract terms. The Commissioner reserves the right to reject and/or bar from the facility for cause any employee, Subcontractor, or agents of the Contractor.

19. Section 59 (Suspension of Work) ) is deleted and replaced with the following language:

*Intentionally omitted.*

20. Section 60 (Termination) is deleted and replaced with the following language:

**a. Termination without cause.** (i) Either Party may terminate this Agreement, without cause, upon 60 days written notice. Such termination will merely terminate both Parties and its Affiliates' ability to

enter into new Program Agreements, Enrollments, or Affiliate Registrations Forms under this Agreement. Such termination will not affect any Enrollment, Affiliate Registrations or orders not otherwise terminated, and any terms of this Agreement applicable to any Enrollment, Affiliate Registrations or orders not otherwise terminated will continue in effect. (ii) An Enrolled Customer may terminate an Enrollment or Affiliate Registration Form without liability, penalty or further obligation to make payments if funds to make payments under the Enrollment or Affiliate Registrations Form are not appropriated or allocated for such purpose.

**b. Termination for cause.** (i) Either Party to this Agreement or a Program Agreement may terminate it if the other party materially breaches its obligations under this Agreement, including any obligation to submit orders or pay invoices. Except where the breach is by its nature not curable within 60 days, the terminating party must give the other party 60 days' notice and opportunity to cure. (ii) Either Microsoft or Enrolled Customer may terminate an Enrollment or Affiliate Registration if the other party materially breaches its obligations under this Agreement, including any obligation to submit orders or pay invoices. Except where the breach is by its nature not curable within 60 days, the terminating party must give the other party 60 days' notice and opportunity to cure.

If Microsoft gives such notice to an Enrolled Customer, Microsoft will, at the same time it gives notice to Enrolled Customer, give OGS a copy of that notice as well and OGS agrees to assist in attempting to resolve the breach. If the breach also affects other Enrollments or Affiliate Registration Forms, Microsoft shall give such notice to each affected Enrolled Customer and so advise OGS. If the breach cannot be resolved between Microsoft and Customer within a reasonable period of time, Microsoft may terminate all the affected Enrollment(s) that received actual notification.

If an Enrolled Affiliate ceases to be Customer's Affiliate, Customer must promptly notify Microsoft, and Microsoft may terminate its Enrollment.

Microsoft and OGS agree that this termination for cause provision is subject to the Dispute resolution section set forth above.

**c. Enrolled Customer Termination.** Additional Terms and Conditions for an Enrolled Customer's expiration, early termination, and termination and for an Enrollment or Affiliate Registration are set forth in the applicable Program Agreement.

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

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

**f. For Failure to Provide Required Documentation:** The Commissioner reserves the right to terminate the contract in the event Microsoft fails to provide OGS with proof of its exemption from disability insurance coverage in New York, as it does not have employees in NYS, within 120 days of execution of the Contract. Upon such finding, the Commissioner may exercise its termination right by providing written notification to the Contractor.

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

*Intentionally omitted.*

22. Section 63 (Default – Authorized User) is hereby deleted and replaced with the following:

*Intentionally omitted.*

23. Section 64 (Interest on Late Payments) is hereby deleted and replaced with the following:

*Intentionally omitted.*

24. Section 65 (Remedies for Breach) is deleted and replaced with the following language:

*Intentionally omitted.*

25. Section 69 (Security) is deleted and replaced with the following language:

**Privacy and security.** Microsoft and Enrolled Affiliate will each comply with all applicable privacy and data protection laws and regulations (including applicable security breach notification law). However, Microsoft is not responsible for compliance with any laws applicable to Enrolled Affiliate or Enrolled Affiliate's industry that are not also generally applicable to information technology services providers. Enrolled Affiliate consents to the processing of personal information by Microsoft and its agents to facilitate the subject matter of this agreement. Enrolled Affiliate may choose to provide personal information to Microsoft on behalf of third parties (including Enrolled Affiliate's contacts, resellers, distributors, administrators, and employees) as part of this agreement. Enrolled Affiliate will obtain all required consents from third parties under applicable privacy and data protection law before providing personal information to Microsoft. The personal information Enrolled Affiliate provides in connection with this agreement will be processed according to the privacy statement available at <https://www.microsoft.com/licensing/servicecenter>, except that Product-specific privacy statements are in the Product use rights. Personal data collected through Products may be transferred, stored and processed in the United States or any other country in which Microsoft or its service providers maintain facilities. By using the Products, Customer consents to the foregoing. Microsoft abides by the EU Safe Harbor and the Swiss Safe Harbor frameworks as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of data from the European Union, the European Economic Area, and Switzerland. For Online Services, additional privacy and security details are in the Product use rights.

26. Section 72 (Product Performance) is hereby deleted and replaced with the following:

**Warranties.**

**a. Limited warranty.** Microsoft warrants that:

- (i) Online Services will perform in accordance with the applicable Service Level Agreement;
- (ii) Products other than Online Services will perform substantially as described in the applicable Product List and Product Use Rights; and
- (iii) The Contractor represents and warrants that Product contains no known viruses. Contractor is not responsible for viruses introduced at Enrolled Customer's site.

**b. Limited warranty term.** The limited warranty for:

- (i) Online Services is for the duration of Customer's or Institution's use of the Online Service, subject to the notice requirements in the applicable Service Level Agreement;
- (ii) Products other than Online Services is one year from the date Customer first uses the Product; and

**c. Limited warranty exclusions.** This limited warranty is subject to the following limitations:

- (i) any implied warranties, guarantees or conditions not able to be disclaimed as a matter of law last for one year from the start of the limited warranty;
- (ii) the limited warranty does not cover problems caused by accident, abuse or use in a manner inconsistent with this Agreement or the Product Use Rights, or resulting from events beyond Microsoft's reasonable control;
- (iii) the limited warranty does not apply to components of Products that Customer or Institution is permitted to redistribute;

- (iv) the limited warranty does not apply to free, trial, pre-release, or beta products; and
- (v) the limited warranty does not apply to problems caused by the failure to meet minimum system requirements as identified at <http://technet.microsoft.com/en-us/library/jj134246.aspx> or at a successor site.

d. **Remedies for breach of limited warranty.** If Microsoft fails to meet any of the above limited warranties and Customer notifies Microsoft within the warranty term, then Microsoft will:

- (i) for Online Services, provide the remedies identified in the Service Level Agreement for the affected Online Service;
- (ii) for Products other than Online Services, at its option either (1) return the price paid or (2) repair or replace the Product; and

These are Customer's or Institution's only remedies for breach of the limited warranty, unless other remedies are required to be provided under applicable law.

e. **DISCLAIMER OF OTHER WARRANTIES. OTHER THAN THIS LIMITED WARRANTY, MICROSOFT PROVIDES NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS. MICROSOFT DISCLAIMS ANY IMPLIED REPRESENTATIONS, WARRANTIES OR CONDITIONS, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SATISFACTORY QUALITY, TITLE OR NON-INFRINGEMENT. THESE DISCLAIMERS WILL APPLY UNLESS APPLICABLE LAW DOES NOT PERMIT THEM.**

27. Section 73 (Legal Compliance) is hereby deleted and replaced with the following:

Contractor represents and warrants that it shall secure all notices and comply with all laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract generally applicable to information technology services providers. Prior to award and during the Contract term and any renewals thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Bid and Contract and any applicable laws, including but not limited to, permits, licensing, and shall provide such proof as required by the Commissioner. Failure to comply or failure to provide proof may constitute grounds for the Commissioner to cancel or suspend the Contract, in whole or in part, or to take any other action deemed necessary by the Commissioner. Contractor also agrees to disclose information and provide affirmations and certifications to comply with Sections 139-j and 139-k of the State Finance Law.

28. Section 74 (Indemnification) is hereby deleted and replaced with the following:

*Intentionally omitted.*

29. Section 75 (Indemnification Relating to Third Party Rights) is deleted and replaced with the following language:

***Defense of infringement, misappropriation, and third party claims.***

- a. **Microsoft's agreement to protect.** Microsoft will defend Customer against any claims made by an unaffiliated third party that any Product or Fix that is made available by Microsoft for a fee infringes that party's patent, copyright, or trademark or makes unlawful use of its Trade Secret. Microsoft will also pay the amount of any resulting adverse final judgment (or settlement to which Microsoft consents). This section provides Customer's or Institution's exclusive remedy for these claims.
- b. **Limitations on defense obligation.** Microsoft's obligations will not apply to the extent that the claim or award is based on:
  - (i) Customer Data, non-Microsoft software, modifications Customer makes to, a Product or Fix;

- (ii) Customer's combination of the Product or Fix with a non-Microsoft product, data or business process; or damages based on the use of a non-Microsoft product, data or business process;
- (iii) Customer's use of either Microsoft Trademarks or the use or redistribution of a Product or Fix in violation of this Agreement incorporating its terms or;
- (iv) Customer's use of a Product or Fix after Microsoft notifies Customer and Enrolled Customer to discontinue that use due to a third party claim.

To the extent permitted by applicable law, Customer will be responsible to Microsoft for any reasonable costs or damages that result from any of the above actions.

- c. **Customer's agreement to protect.** To the extent authorized by applicable law and, to the extent applicable, subject to lawful appropriations and consistent with Section 8 of the New York State Court of Claims Act, Customer will hold harmless and indemnify Microsoft and its Affiliates against any claims made by an unaffiliated third party that:
  - (i) any Customer Data or non-Microsoft software Microsoft hosts on Customer's behalf infringes the unaffiliated third party's patent, copyright, or trademark or makes unlawful use of its Trade Secret; or
  - (ii) Arises from violation of the Acceptable Use Policy, which is described in the Product Use Rights.

Customer will be responsible for the amount of any resulting adverse final judgment (or settlement to which Customer consents). This Section provides Microsoft's exclusive remedy for these claims.

**d. Rights and remedies in case of possible infringement or misappropriation.**

- (i) **Microsoft's offerings.** If Microsoft reasonably believes that a Product or Fix may infringe or misappropriate an unaffiliated third-party's intellectual property rights, Microsoft will seek to: (1) procure for Customer the right to continue to use the Product or Fix; or (2) modify or replace it with a functional equivalent to make it non-infringing and notify Customer and Enrolled Customer to discontinue use of the prior version, which Customer must do immediately. If the foregoing options are not commercially reasonable for Microsoft, or if required by a valid judicial or government order, Microsoft may terminate Customer's license or access rights in the Product or Fix. In such a case, Microsoft will provide Customer and Enrolled Customer with notice and refund any amounts Enrolled Customer has paid for those rights to the Product or Fix (or for Online Services, any amount Enrolled Customer has paid in advance for unused Online Services).
- (ii) **Customer Data or use of non-Microsoft software with Online Services.** If an unaffiliated third party asserts that Customer Data or non-Microsoft software or any other non-Microsoft technology used by Customer with the Online Services violates their intellectual property rights, Microsoft may ask Customer to remove the allegedly infringing item. If Enrolled Customer fails to do so within a reasonable period of time, Microsoft may suspend or terminate the Online Service to which the Customer Data or non-Microsoft software relates.
- e. **Obligations of protected party.** Customer must notify Microsoft promptly in writing of a claim subject to the Subsection titled "Microsoft's agreement to protect" and Microsoft must notify Customer promptly in writing of a claim subject to the Subsection titled "Customer's agreement to protect." The party invoking its right to protection must: (1) give the other party sole control over the defense or settlement; and (2) provide reasonable assistance in defending the claim. The party providing the protection will reimburse the other party for reasonable out of pocket expenses that it incurs in providing assistance. Notwithstanding the above, the State and the Authorized User reserve the right to join an action, at its sole expense, when it determined there is an issue involving a significant public interest.

30. Section 76 (**Limitation of Liability**) is deleted and replaced with the following:

- a. **Limitation on liability.** To the extent permitted by applicable law, the liability of Microsoft and Enrolled Customer, their respective Affiliates and Vendors arising under this agreement is limited to direct damages up to (1) for Products other than Online Services, two times (2x) the amount Enrolled Customer was required to pay for the Product giving rise to that liability and (2) for Online Services, other than Office 365 Services, the amount Enrolled Customer paid

for the Online Service giving rise to that liability during the prior 12 months. In the case of Products provided free of charge, or code that Enrolled Customer is authorized to redistribute to third parties without separate payment to Microsoft, Microsoft's liability is limited to U.S. \$5,000. These limitations apply regardless of whether the liability is based on breach of contract, tort (including negligence), strict liability, breach of warranties, or any other legal theory. However, these monetary limitations will not apply to:

- (i) Microsoft's and Enrolled Customer's obligations under the section titled "Defense of infringement, misappropriation, and third party claims";
  - (ii) liability (including damage to real or personal tangible property) for damages caused by either party's gross negligence or willful misconduct, or that of its employees or its agents, and awarded by a court of final adjudication (provided that, in jurisdictions that do not recognize a legal distinction between "gross negligence" and "negligence," "gross negligence" as used in this subsection shall mean "recklessness");
  - (iii) liabilities arising out of any breach by either party of its obligations under the section entitled "Confidentiality", except that Microsoft's liability arising out of or in relation to Customer Data shall in all cases be limited to the amount Enrolled Affiliate paid for the Online Service giving rise to that liability during the prior 12 months;
  - (iv) liability for personal injury or death caused by either party's negligence, or that of its employees or agents, or for fraudulent misrepresentation; and
  - (v) violation by either party of the other party's intellectual property rights.
- b. EXCLUSION OF CERTAIN DAMAGES. TO THE EXTENT PERMITTED BY APPLICABLE LAW, WHATEVER THE LEGAL BASIS FOR THE CLAIM, NEITHER PARTY, NOR ANY OF ITS AFFILIATES, OR VENDORS, WILL BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, OR INCIDENTAL DAMAGES, OR DAMAGES FOR LOST PROFITS, REVENUES, BUSINESS INTERRUPTION, OR LOSS OF BUSINESS INFORMATION ARISING IN CONNECTION WITH THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH POSSIBILITY WAS REASONABLY FORESEEABLE. HOWEVER, THIS EXCLUSION DOES NOT APPLY TO EITHER PARTY'S LIABILITY TO THE OTHER FOR VIOLATION OF ITS CONFIDENTIALITY OBLIGATIONS (EXCEPT TO THE EXTENT THAT SUCH VIOLATION RELATES TO CUSTOMER DATA), THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS, OR THE PARTIES' RESPECTIVE OBLIGATIONS IN THE SECTION TITLED "DEFENSE OF INFRINGEMENT, MISAPPROPRIATION, AND THIRD PARTY CLAIMS."**
- c. Affiliates and Vendors.** Neither Microsoft nor Enrolled Customer shall bring any action against the other's Affiliates or Vendors in respect of any matter disclaimed on their behalf in this Agreement.
- d. Limitation of Liability for Office 365 Services.**

The following additional definitions shall apply to this Section 13(d):

- (i) *"Covered Data Loss," means loss of Customer Data that is not (a) attributable to the instructions, acts or omissions of Enrolled Affiliate or its users or (b) within the published recovery point objective for the Office 365 Services published in the "Service Continuity Management" section of the Office 365 Service Descriptions; and*
- (ii) *"Covered Disclosure," means disclosure of Customer Data as a result of a successful Security Incident, as defined in Section 2 of the Office 365 Security Incident Notification amendment (M91).*

Solely for purposes of clarity related to the Office 365 Services, Section 76(a) of this Agreement, above, titled "Limitation of Liability," is hereby amended as follows.

- a.** the revision to the monetary limitation of liability for the Office 365 Services will apply to Microsoft's liability arising out of or in relation to its breach of its obligations under this Agreement related to Customer Data;

the maximum amount of either party's liability to the other for direct damages associated with the Office 365 Services will be the amount Enrolled Customer paid for the Online Service giving rise

to that liability during the prior 24 months (subject to the exclusions set forth above in Section 76 b).

For purposes of this Section 76d, the following shall be deemed to be "direct damages" not subject to the exclusion of indirect or consequential damages set forth above in Section 76b:

(1) The following costs related to affected individuals whose Personally Identifiable Information (PII) is disclosed pursuant to a Covered Disclosure:

- a. Authorized User's reasonable costs in notifying affected individuals of Covered Disclosure in which the data subjects' personally-identifiable information has been disclosed;
- b. Credit monitoring for up to twelve (12) months for affected individuals;
- c. Damages and fines assessed against Enrolled Customer by a court of competent jurisdiction and awarded to individuals whose Personally Identifiable Information is subject to a Covered Disclosure.
- d. Any additional reasonable and documented costs of any mitigation, remedies or plans to the extent that such mitigation, remedies or plans are customary, reasonable, and expected to be paid by Authorized Users, given the nature and scope of the Security Incident involving a Customer Data breach of PII, as validated by an independent accounting firm chosen by both entities .

In all other respects, the Limitation of Liability section of the MBA shall continue to apply as written.

31. Section 78 (**Software License Grant**) is deleted and replaced with the following language:

- a. **License Scope.** Customer rights to run the current version of the ordered Product is temporary until it has paid the Reseller for that License in full. Thereafter, Customer shall have a perpetual license to run the number of copies ordered in the version ordered. Perpetual Licenses received through Software Assurance supersede and replace the underlying perpetual Licenses for which Software Assurance coverage was ordered. Some Products may be licensed on a fixed term or subscription basis. The right to use products licensed on a Subscription basis terminates upon expiration if it is not renewed. Subscription Licenses are not perpetual under any circumstance. The use rights for Enrolled Customers on orders will be made available in accordance with terms of the associated Program Agreement.
- b. **License Term.** The license term shall commence upon the License Effective Date, provided, however, that where an acceptance or trial period applies to the Product, the License Term shall be extended by the time period for testing, acceptance or trial.
- c. **Licensed Documentation.** Customer may acquire the quantity of media as necessary to distribute the Products for use in accordance with the Program Agreement. In certain cases, re-imaging is permitted using the Product media. Re-imaging is conditional upon compliance with applicable terms in the Program Agreement.
- d. **Product Technical Support & Maintenance.** Licensee shall have the option of electing Software Assurance as set forth in the applicable Program Agreement. Software Assurance coverage and any renewal(s) thereof are independent of the expiration of the Centralized Contract term and will not automatically renew. Software Assurance shall include Fixes, new version rights, and may include other benefits including 24x7 Problem Resolution Support for Products as further described in the Product List. In the Select Plus Program Agreement Customer 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.
- e. **Permitted License Transfers.** License Transfer for fully-paid perpetual Licenses are sometimes permitted and are conditional upon compliance with applicable terms in the Program Agreement.
- f. **Restricted Use by Outsourcers / Facilities Management, Service Bureaus / or Other Third Parties.** Outsourcers, facilities management or service bureaus retained by Licensee shall have the right to use the Product to maintain Licensee's business operations, including data processing, for the time period that they are engaged in such activities, provided that: 1) Licensee gives notice to Contractor of such party, site of intended use of the Product, and means of access; and 2) such party has executed, or agrees to execute, the Product manufacturer's standard nondisclosure or restricted use agreement which executed agreement shall be accepted by the Contractor ("Non-Disclosure Agreement"); and 3) if such party is engaged in the business of

facility management, outsourcing, service bureau or other services, such third party will maintain a logical or physical partition within its computer system so as to restrict use and access to the program to that portion solely dedicated to beneficial use for Licensee. In no event shall Licensee assume any liability for third party's compliance with the terms of the Non-Disclosure Agreement, nor shall the Non-Disclosure Agreement create or impose any liabilities on the State or Licensee.

- g. Archival Back-Up and Disaster Recovery.** Customers with Software Assurance for qualifying server products and related CALs are eligible for complimentary server licenses for those products for disaster recovery (DR) purposes.

For each qualifying server license (i) a customer has enrolled in SA and (ii) for which the customer has all related CALs (if required by the product) enrolled in SA, the customer will be deemed to have a second server license under which it may deploy the same product on a "cold" back-up server solely for DR purposes during the term of its Software Assurance coverage. Customers' deployment and use of software under the DR licenses is subject to the terms and conditions of their license agreement.

- h. Confidentiality Restrictions.** The Product is a trade secret, copyrighted and proprietary product. Licensee and its employees will keep the Product strictly confidential, and Licensee will not disclose or otherwise distribute or reproduce any Product to anyone other than as authorized under the terms of Contract. Licensee will not remove or destroy any proprietary markings of Contractor.

- i. Restricted Use by Licensee.** Enrolled Customer must not:

- a. separate and use the components of a Product on two or more computers, upgrade or downgrade components at different times, or transfer components separately, except as provided in the Product Use Rights;
- b. reverse engineer, decompile or disassemble any Product or Fix, except where applicable law permits it despite this limitation; or
- c. distribute, sublicense, rent, lease, lend, or commercially host any Product or Fix except as permitted in the Product Use Rights or in a separate written agreement.

Additional Restricted Use requirements will be made available in accordance with terms of the associated Program Agreement.

32. Section 79 (Product Acceptance) is deleted and replaced with the following language:

*Intentionally omitted.*

33. Section 80 (Audit of Licensed Product Usage) is deleted and replaced with the following language:

**Verifying compliance.**

- a. **Right to verify compliance.** Enrolled Customer must keep records relating to the Products it and its Affiliates use or distribute. Microsoft has the right, to the extent permitted by applicable law, to verify compliance with the license terms for Products, at Microsoft's expense.
- b. **Verification process and limitations.** Microsoft will provide Enrolled Customer at least 30 days' written notice of its intent to verify compliance. Microsoft will engage a nationally recognized independent auditor, which will be subject to a confidentiality obligation. Verification will take place during normal business hours and in a manner that does not interfere unreasonably with Customer's operations. Customer must promptly provide the independent auditor with any information it reasonably requests in furtherance of the verification, including access to systems running the Products and evidence of licenses for Products. Microsoft shall permit the Customer to have complete visibility into the independent auditor's access to Customer's systems to validate the auditor's actions. Customer hosts, sublicenses, or distributes to third parties. As an alternative, Microsoft may require Customer to complete Microsoft's self-audit process relating to the Products Customer and any of its Affiliates use or distribute. Such information will be used solely for purposes of determining compliance.

c. Remedies for non-compliance. If verification or self-audit reveals any unlicensed use, Customer must within 30 days order sufficient licenses to cover its use. If there is no unlicensed use, Microsoft will not undertake another verification of the same Customer for at least one year. By exercising the rights and procedures described above, Microsoft does not waive its rights to enforce this Agreement or to protect its intellectual property by any other means permitted by law. Once such additional licenses are purchased, Enrolled Customer shall be deemed to be in compliance with its obligations under the Agreement to be properly licensed, and Enrolled Customer shall have no further financial liability with respect to the unlicensed use, for the Product paid in full.

d. Additional Terms and Conditions for Enrolled Customers compliance for Users is set forth in the applicable Program Agreement.

34. Section 81, Ownership/Title to Project Deliverables, is deleted and replaced with the following language:

*Intentionally omitted.*

35. Section 82 (Proof of License) is deleted and replaced with the following language:

This Agreement and applicable Program Agreement (soft copy or web link to location is acceptable), the applicable Enrollment or Affiliate Registration Form(soft copy is acceptable), the Enrolled Customer's order confirmation, and any documentation evidencing transfers of Licenses, together with proof of payment, will be the Enrolled Customer's evidence of all Licenses obtained.

36. Section 83 (Product Version) is deleted and replaced with the following language:

*Intentionally omitted.*

37. Section 84 (Changes to Product Support or Service Offerings) is deleted and replaced with the following language:

**Supportability.** Contractor may add support for new products or discontinue support for existing products from time-to-time. If Contractor discontinues support for a product, Contractor will inform Authorized User six months in advance of the discontinuation by posting the information at <http://support.microsoft.com> or any successor site. If Contractor sells a product to another company, Contractor will give Authorized User notice of the sale and at the time of such notice will either (i) arrange for the other company to continue the support; or (ii) continue support itself for 90 days to give Authorized User time to make alternative arrangements.

Contractor shall offer a minimum of 10 years of support for MS products. Mainstream Support for MS products shall be provided for 5 years or for 2 years after the successor product (N+1) is released, whichever is longer. Pursuant to the terms of the Centralized Contract, Contractor shall also provide Extended Support for the 5 years following Mainstream support or for 2 years after the second successor product (N+2) is released, whichever is longer. Finally, most MS products will receive at least 10 years of online self-help support.

#### **4.6 Short Term Extension**

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

#### **4.7 Performance and Bid Bonds**

There are no bonds for this Centralized Contract. In accordance with Appendix B, Clause 58 "Performance/Bid Bond," the Commissioner of OGS has determined that no performance, payment or Bid bond, or negotiable irrevocable letter of credit or other form of security for the faithful performance

of the Centralized Contract shall be required at any time during the Initial Term, or any renewal term, for this Centralized Contract. The Parties reserve the right to amend this clause when consulting services or technical services are added to the scope of contract.

#### **4.8 Non-State Agencies Participation in Centralized Contracts And Extension Of Use**

New York State political subdivisions and others authorized by New York State law may participate in Contracts resulting from this solicitation. These include, but are not limited to local governments, public authorities, public school and fire districts, public and nonprofit libraries, and certain other nonpublic/nonprofit organizations. See State Finance Law §§160(9) and 163(1) (k). For purchase orders issued by the Port Authority of New York and New Jersey (or any other authorized entity that may have delivery locations adjacent to New York State), services to be provided may include locations adjacent to New York State.

#### **4.9 Contractor Requirements And Procedures For Business Participation Opportunities For New York State Certified Minority And Women-Owned Business Enterprises And Equal Employment Opportunities For Minority Group Members And Women**

##### **New York State Law**

Pursuant to New York State Executive Law Article 15-A, OGS recognizes its obligation under the law to promote opportunities for maximum feasible participation of certified minority and women-owned business enterprises and the employment of minority group members and women 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" ("Disparity Study"). The report found evidence of statistically significant disparities between the level of participation of minority and women-owned business enterprises in state procurement contracting versus the number of minority and women-owned business enterprises that were ready, willing and able to participate in state procurements. As a result of these findings, the Disparity Study made recommendations concerning the implementation and operation of the statewide certified minority and women-owned business enterprises program. 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 establishes 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.

##### **Equal Employment Opportunity Requirements**

Contractor agrees with all of the terms and conditions of Appendix A including Clause 12 - Equal Employment Opportunities for Minorities and Women. The Contractor is required to ensure that it and any subcontractors awarded a subcontract over \$25,000 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor, shall undertake or continue programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, equal opportunity shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, termination, and rates of pay or other forms of compensation. This requirement does not apply to: (i) work, goods, or services unrelated to the Contract; or (ii) employment outside New York State.

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

Further, pursuant to Article 15 of the Executive Law (the "Human Rights Law"), all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor and sub-contractors will 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 conviction and prior arrest.

#### **Business Participation Opportunities for MWBEs**

For purposes of this procurement, OGS has conducted a comprehensive search and has determined that the Contract does not offer sufficient opportunities to set goals for participation by MWBEs as subcontractors, service providers and suppliers to the awarded Contractors. Contractors are, 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. To locate MWBEs, the Directory of Certified Businesses can be viewed at: <http://www.esd.ny.gov/MWBE/directorySearch.html>

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

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

#### **4.10 New York State Vendor File Registration**

Prior to being awarded a Contract, the Contractor 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 Contractor is already registered in the Vendor File, the Contractor must enter its ten-digit Vendor ID on this Contract.

If the Contractor is not currently registered in the Vendor File, it 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. 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 companies 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/).

#### **4.11 New York State Vendor Responsibility Questionnaire For-Profit Business Entity**

OGS conducts a review of Bidders to provide reasonable assurances that the Bidder is responsive and responsible. A New York State Vendor Responsibility Questionnaire For-Profit Business Entity (hereinafter the "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 proposal, the Contractor agrees to fully and accurately complete the Questionnaire. The Contractor acknowledges that the State's execution of the Contract will be contingent upon the State's determination that the Contractor is responsible, and that the State will be relying upon the Contractor's responses to the Questionnaire when making its responsibility determination.

OGS recommends each Contractor 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 OSC's 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 4.10 for information on how to obtain a Vendor ID. 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>. A Contractor that opts 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 Contractor, the Contractor must complete and certify (or recertify) the Questionnaire no more than six (6) months prior to the execution date. A Questionnaire cannot be viewed by OGS until the Contractor has certified the Questionnaire

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

#### **4.12 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 DTF that they are registered to collect New York State and local sales and compensating use taxes. The law applies to Contracts where the total amount of such Contractors' sales delivered into New York State are in excess of \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made, and with respect to any affiliates and subcontractors whose sales delivered into New York State exceeded \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made.

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 NYS Department of Taxation and Finance (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 No. 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/>.

#### **4.13 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 notice of intent to solicit offers/bids through final award and approval of the Procurement Contract by OGS and, if applicable, the Office of the State Comptroller ("restricted period") to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in State Finance Law §139-j (3) (a). Designated staff, as of the date hereof, is identified on the first page of this solicitation. OGS employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the 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:

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

#### **4.14 Iran Divestment Act**

By entering into this Contract, Contractor certifies 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" list ("Prohibited Entities List") posted on the OGS website at: <http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf> and further certifies that it will not utilize on such 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 the Contract will be required to certify that it is not on the Prohibited Entities List before OGS may approve a request for Assignment of Contract.

During the term of the Contract, should OGS receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, OGS 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 OGS shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, seeking compliance, recovering damages, or declaring the Contractor in default. OGS reserves the right to reject any request for renewal, extension, or assignment for an entity that appears on the Prohibited Entities List prior to the renewal, extension, or assignment of the Contract, and to pursue a responsibility review with Contractor should it appear on the Prohibited Entities List hereafter.

#### 4.15 Insurance

The Contractor shall procure at its sole cost and expense, and shall maintain in force at all times during the term of this Contract, a program of self-insurance or policies of insurance as herein below set forth, written by companies licensed or authorized by the New York State Department of Financial Services to issue insurance in the State of New York ("Authorized Carriers") with an A.M. Best Company rating of "A-" Class "VII" or better. If, during the term of the policy, an Authorized Carrier's rating falls below "A-" Class "VII", the insurance must be replaced no later than the renewal date of the policy with an insurer acceptable to the New York State Office of General Services ("OGS") and rated at least "A-" Class "VII" or better in the most recently published Best's Insurance Report.

The Contractor shall deliver to OGS evidence of such policies in a form acceptable to OGS. These policies must be written in accordance with the requirements of the paragraphs below, as applicable. Acceptance and/or approval by OGS does not and shall not be construed to relieve Contractor of any obligations, responsibilities or liabilities under the Contract.

##### 4.15.1 General Conditions

###### A. Conditions Applicable to Insurance

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

1. Coverage Types and Policy Limits. The types of coverage and policy limits required from the Contractor are specified in Paragraph B Insurance Requirements below.
2. Policy Forms. Except as may be otherwise specifically provided herein or agreed in writing by OGS, policies must be written on an occurrence basis.
3. Certificates of Insurance/Notices. Contractor shall provide a Certificate or Certificates of Insurance, in a form satisfactory to OGS, upon award, and thereafter within fifteen (15) business days of request. Certificates shall reference the Contract Number. As applicable, the requested forms must name the New York State Office of General Services, Procurement Services Group, 38th Floor, Corning Tower, Albany, New York 12242 as the entity requesting proof of coverage (the entity being listed as the Certificate Holder). Certificates shall be submitted to the Office of General Services, Procurement Services Group, Corning Tower- 38th Floor, Empire State Plaza, Albany, NY 12242.

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

Certificates of Insurance shall:

- Be in the form approved by OGS;
- Refer to this Contract by number and any other attachments on the face of the certificate; and
- Be signed by an authorized representative of the insurance carrier or producer.

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

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

5. Policy Renewal/Expiration. Thirty (30) days after the expiration of any policy required by this Contract, evidence of renewal of insurance with terms no less favorable to OGS than the expiring policies shall be delivered to OGS in the manner required for service of notice in the above paragraph

entitled "Certificates of Insurance/Notices". If, at any time during the term of this Contract, the coverage provisions and limits of the policies required herein do not meet the provisions and limits set forth in the Contract or proof thereof is not provided to OGS, the Contractor shall immediately cease work. The Contractor shall not resume work until authorized to do so by OGS. Any delay, time lost, or additional cost incurred as a result of the Contractor not having insurance required by the Contract or not providing proof of same in a form acceptable to OGS, shall not give rise to a delay claim or any other claim against OGS. Should the Contractor fail to provide or maintain any insurance required by this Contract, or proof thereof is not provided, OGS or the Authorized Users may withhold further contract payments, treat such failure as a breach or default of the contract. Contractor may at its option, meet the insurance requirements set forth in this Centralized Contract via commercial insurance, self insurance, alternative risk financing solutions or a combination of these options.

6. Self-Insured Retention/Deductibles. The Contractor shall be solely responsible for all claim expenses and loss payments within the deductible or self-insured retention.

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

#### B. Insurance Requirements

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

a) Commercial General Liability Insurance with a limit of not less than \$2,000,000 each occurrence. Such liability shall be written on the ISO occurrence form CG 00 01 01 96, or a substitute form providing equivalent coverages and shall cover liability arising from premises operations, independent contractors, products-completed operations, broad form property damage, personal & advertising injury, cross liability coverage, liability assumed in a contract (including the tort liability of another assumed in a contract) and explosion, collapse & underground coverage.

1. For construction contracts only: If such insurance contains an aggregate limit, it shall apply separately on a per job basis.

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

- General Aggregate \$3,000,000
- Personal and Advertising Injury \$1,000,000
- Each Occurrence \$3,000,000

Coverage shall include, but not be limited to, the following:

- Premises liability;
- Independent contractors;
- Blanket contractual liability, including tort liability of another assumed in a contract;
- Defense and/or indemnification obligations, including obligations assumed under this contract;
- Cross liability for additional insureds;
- Explosion, collapse and underground hazards; and

- Contractor means and methods.

The following ISO forms must be endorsed to the policy:

- a) CG 00 01 01 96 or an equivalent Commercial General Liability Coverage Form;

Limits may be provided through a combination of primary and umbrella/excess liability policies. The CGL aggregate shall be endorsed to apply on a per project basis for construction contracts.

- b) Comprehensive Business Automobile Liability Insurance with a limit of not less than \$1,000,000.00 each accident. Such insurance shall cover liability arising out of any automobile including owned, leased, hired and non-owned automobiles.

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

1. Such insurance shall apply to professional errors, acts, or omissions arising out of the scope of services covered by this Contract.

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

3. The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the Scope of Services of this contract.

Each Claim \$1,000,000

Annual Aggregate \$2,000,000

- d) Crime Insurance Policy Limit \$50,000.00

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

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

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

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

#### C. Workers' Compensation Insurance and Disability Benefits Requirements

Workers' Compensation Law (WCL) §57 & §220 requires the heads of all municipal and state entities to ensure that businesses applying for permits, licenses or contracts document it has appropriate workers' compensation and disability benefits insurance coverage. These requirements apply to both original contracts and renewals, whether the governmental agency is having the work done or is simply issuing the permit, license or contract. Failure to provide proof of such coverage or a legal exemption will result in OGS not executing the contract

1. Proof of Compliance with Workers' Compensation Coverage Requirements:

An ACORD form (certificate of insurance) is NOT acceptable proof of workers' compensation coverage. In order to provide proof of compliance with the requirements of the Workers' Compensation Law pertaining to workers' compensation coverage, a Contractor shall:

- A) Be legally exempt from obtaining Workers' Compensation insurance coverage; or
- B) Obtain such coverage from an insurance carrier; or
- C) Be a Workers' Compensation Board-approved self-insured employer or participate in an authorized self-insurance plan.

A Contractor seeking to enter into a contract with the State of New York shall provide one of the following forms to the Office of General Services at the time of bid submission or shortly after the opening of bids:

A) Form CE-200, Certificate of Attestation for New York Entities With No Employees and Certain Out of State Entities, That New York State Workers' Compensation and/or Disability Benefits Insurance Coverage is Not Required, which is available on the Workers' Compensation Board's website ([www.wcb.state.ny.us](http://www.wcb.state.ny.us)); (Reference applicable RFP and Group #s on the form.)

B) Certificate of Workers' Compensation Insurance:

1) Form C-105.2 (9/07) if coverage is provided by the Contractor's insurance carrier, Contractor must request its carrier to send this form to the New York State Office of General Services, or

2) Form U-26.3 if coverage is provided by the State Insurance Fund, Contractor must request that the State Insurance Fund send this form to the New York State Office of General Services.

C) Form SI-12, Certificate of Workers' Compensation Self-Insurance available from the New York State Workers' Compensation Board's Self-Insurance Office.

D) Form GSI-105.2, Certificate of Participation in Workers' Compensation Group Self-Insurance available from the Contractor's Group Self-Insurance Administrator. Workers' Compensation Insurance and Disability Benefits Requirements

2. Proof of Compliance with Disability Benefits Coverage Requirements:

In order to provide proof of compliance with the requirements of the Workers' Compensation Law pertaining to disability benefits, a Contractor shall:

- A) Be legally exempt from obtaining disability benefits coverage; or
- B) Obtain such coverage from an insurance carrier; or
- C) Be a Board-approved self-insured employer.

A Contractor seeking to enter into a contract with the State of New York shall provide one of the following forms to the Office of General Services before the Contract can take effect:

- a. Form CE-200, Certificate of Attestation for New York Entities With No Employees and Certain Out of State Entities, That New York State Workers' Compensation and/or Disability Benefits Insurance Coverage is Not Required, which is available on the Workers' Compensation Board's website ([www.wcb.state.ny.us](http://www.wcb.state.ny.us)); (Reference applicable RFP and Group #s on the form.)
- b. Form DB-120.1, Certificate of Disability Benefits Insurance. Contractor must request its business insurance carrier to send this form to the New York State Office of General Services; or
- c. Form DB-155, Certificate of Disability Benefits Self-Insurance. The Contractor must call the Board's Self-Insurance Office at 518-402-0247 to obtain this form.

## Miscellaneous

### 4.16 Entire Agreement

This Centralized Contract and the referenced appendices constitute the entire agreement between the Parties thereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and the Centralized Contract shall not be changed, modified or altered in any manner except by an instrument in writing executed by the Parties hereto, except as otherwise provided herein. Authorized Users shall not have the authority to modify the terms of the Centralized Contract, except as to better terms and pricing for a particular procurement than those set forth herein. No preprinted terms or conditions on a Purchase Order issued by an Authorized User, which seek to vary the terms of this Centralized Contract or impose new duties or obligations on the Contractor, shall have any force or effect.

### 4.17 Notices

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

OFFICE OF GENERAL SERVICES

Vivian Basile, Contract Administrator

38th Floor, Corning Tower

Empire State Plaza

Albany, NY 12242

Email: [Vivian.basile@ogs.ny.gov](mailto:Vivian.basile@ogs.ny.gov)

Phone: (518) 402-9400 Fax: (518) 486-6867

Supplemental Contact Form: This form provides the primary notice contact to Microsoft for administering the Business Agreement and the Program Agreements.

Notices to the Enrolled Customers: All notices, authorizations, and requests given or made in connection with this Centralized Contract must be sent by post, express courier, facsimile or email to the addresses indicated on the Enrollment or Affiliate Registration Form from the applicable Program Agreement. Notices will be deemed delivered on the date shown on the postal return receipt or on the courier, or facsimile or email confirmation of delivery.

Notices to the Contractor: If to Contractor, addressed to Contract Administrator at the address set forth in Appendix D (Contract Administration). Appendix D provides Contractor contact information to support the updating and management of the Centralized Contract on a timely basis. The Parties may from time to time, specify any address in the United States as its address for purpose of notices under this Contract by giving fifteen (15) days written notice to the other party. The Parties agree to mutually designate individuals as their respective representatives for purposes of this Contract.

Notices to Microsoft: Notices, authorizations, and requests in connection with this agreement must be sent by regular or overnight mail, express courier, or fax to the addresses and numbers listed on the signature form and in this agreement. Notices will be treated as delivered on the date shown on the return receipt or on the courier or fax confirmation of delivery.

**Copies should be sent to:**

Microsoft Corporation  
Legal and Corporate Affairs  
Volume Licensing Group  
One Microsoft Way  
Redmond, WA 98052  
USA  
Via Facsimile:(425) 936-7329

Microsoft may provide information about upcoming Enrollment deadlines and Online Services in electronic form. Such information may be provided by email to contacts provided by Enrolled Customer under an Enrollment or Affiliate Registration form, or through a web site Microsoft identifies. Notice by email is given as of the transmission date

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

**4.19 Waiver.** No waiver of any breach of this Centralized Contract shall be deemed a waiver of any other breach, and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party.

**4.20 Subcontractors.** Microsoft may use Vendors to perform and support Online Services. Microsoft will be responsible for their performance subject to the terms of this agreement.

**4.21 Severability.** If a court holds any provision of this agreement to be illegal, invalid or unenforceable, the rest of the document will remain in effect and this agreement will be amended to give effect to the eliminated provision to the maximum extent possible.

**4.22 This agreement is not exclusive.** Customer is free to enter into agreements to license, use or promote non-Microsoft software.

**4.23 Survival.** Provisions regarding ownership and license rights, fees, Product Use Rights, restrictions on use, evidence of perpetual licenses, transfer of licenses, warranties, defense of infringement and misappropriation claims, Microsoft's and Customer's obligations to protect each other, limitations of liability, confidentiality, compliance verification, obligations on termination or expiration and the other provisions in this section entitled "Miscellaneous" will survive termination or expiration of this agreement and of any agreement in which they are incorporated.

**4.24 No transfer of ownership.** Microsoft does not transfer any ownership rights in any licensed Product.

**4.25 Free Products.** It is Microsoft's intent that the terms of this agreement and the Product Use Rights be in compliance with all applicable federal law and regulations. Any free Product provided to Enrolled Customer is for the sole use and benefit of the Enrolled Affiliate, and is not provided for use by or personal benefit of any specific government employee.

**4.26 Resellers and other third parties cannot bind Microsoft.** Resellers and other third parties do not have authority to bind or impose any obligation or liability on Microsoft.

**4.27 Voluntary Product Accessibility Templates.** Microsoft supports the government's obligation to provide accessible technologies to its citizens with disabilities as required by Section 508 of the Rehabilitation Act of 1973, and its state law counterparts. The Voluntary Product Accessibility Templates ("VPATs") for the Microsoft technologies used in providing the online services can be found at Microsoft's VPAT page. Further information regarding Microsoft's commitment to accessibility can be found at <http://www.microsoft.com/enable>.

**4.28 Natural disaster.** In the event of a "natural disaster," Microsoft may provide additional assistance or rights by posting them on <http://www.microsoft.com> at such time.

**4.29 Copyright violation.** Except as set forth in the applicable Program Agreement entitled "Transferring and reassigning Licenses", the Enrolled Customer agrees to pay for, and comply with

the terms of this agreement and the Product Use Rights, for the Products it uses. Except to the extent Enrolled Customers licensed under this agreement, it will be responsible for its breach of this contract and violation of Microsoft's copyright in the Products, including payment of License fees specified in this agreement for unlicensed use.

**4.30 U.S. export jurisdiction.** Products and Fixes are subject to U.S. export jurisdiction. Customer will comply with all U.S. Export Administration Regulations and International Traffic in Arms Regulation requirements as well as all end-user, end-use, and destination restrictions issued by the U.S. and other governments applicable to this agreement. For additional information, see <http://www.microsoft.com/exporting>.

**4.31 How to know what Product Use Rights apply**

- a. **Product Use Rights.** The Product Use Rights in effect on the effective date of the Agreement will apply to Customer's use of then-current versions of each Product (excluding Online Services). For future versions, the Product Use Rights in effect when those future versions are first released will apply. In both cases, subsequent changes made by Microsoft to the Product Use Rights for a particular version will not apply to Customer's use of that version, unless Enrolled Affiliate chooses to have such changes apply. The use rights for Online Services and the process for updating them as the Online Services evolve are detailed in the Product Use Rights.
- b. **Product Use Rights for earlier versions (downgrade).** If Customer runs an earlier version of a Product than the version that was current on the Agreement effective date, the Product Use Rights for the version licensed, not the version being run, will apply. However, if the earlier version includes components that are not part of the licensed version, any Product Use Rights specific to those components will apply to Customer's use of those components.
- c. **Reservation of rights.** All rights not expressly granted are reserved.

Additional use rights and restrictions are set forth in the applicable Program Agreements.

**4.32 Non-Microsoft Software or Technology**

Enrolled Affiliate is solely responsible for any non-Microsoft software or technology that it installs or uses with the Products or Fixes. Microsoft is not a party to and is not bound by any terms governing Enrolled Affiliate's use of non-Microsoft software or technology.

If Enrolled Affiliate installs or uses any non-Microsoft software or technology with the Products or Fixes, it directs and controls the installation in and use of such software or technology in the Products or Fixes, through its actions (e.g., through Enrolled Affiliate's use of application programming interfaces and other technical means that are part of the Online Services). Microsoft will not run or make any copies of such non-Microsoft software or technology outside of its relationship with Enrolled Affiliate.

If Enrolled Affiliate installs or uses any non-Microsoft software or technology with the Products or Fix, it may not do so in any way that would subject Microsoft's intellectual property or technology to obligations beyond those included in the agreement.

# Enterprise Agreement

# State and Local

## Custom Program Agreement Terms and Conditions

### Contents

1. <b>Definitions.</b> .....	1
2. <b>How the Enterprise and Enterprise Subscription program works.</b> .....	3
3. <b>Licenses for Products.</b> .....	3
4. <b>How to know what Product Use Rights apply.</b> .....	4
5. <b>Making copies of Products and re-imaging rights.</b> .....	4
6. <b>Transferring and reassigning Licenses.</b> .....	5
7. <b>Term and termination.</b> .....	6
8. <b>Restrictions on use.</b> .....	7
9. <b>Non-Microsoft Software or Technology.</b> .....	7
10. <b>Confidentiality.</b> .....	7
11. <b>Warranties.</b> .....	8
12. <b>Defense of infringement, misappropriation, and third party claims.</b> .....	8
13. <b>Limitation of liability.</b> .....	8
14. <b>Verifying compliance.</b> .....	8
15. <b>Miscellaneous.</b> .....	8

This Microsoft Enterprise Agreement Program Agreement (Program Agreement) is entered into between the entities identified on the program signature form.

Effective date. *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*

This Program Agreement consists of (1) The associated Microsoft Business Agreement and these Program Agreement terms and conditions and the signature form and all attachments identified therein, (2) the Product List, (3) the Product Use Rights applicable to Products licensed under this Agreement, (4) any Affiliate Enrollment entered into under this Program Agreement, and (5) any order submitted under this Program Agreement.

Please note: Several documents referenced in this Program Agreement but not attached to the signature form may be found at: <http://www.microsoft.com/licensing/contracts> and are incorporated by reference, including the Product List and Product Use Rights. These documents may contain additional terms and conditions for Products licensed under this Program Agreement and may be changed from time to time in accordance with Appendix B, §40. Customer and/or its Affiliates should review such documents carefully, both at the time of signing and periodically, to ensure a full understanding of all terms and conditions applicable to Products licensed.

## Terms and Conditions

### 1. Definitions.

"Affiliate" means

- a. with regard to Customer,
  - (i) any government agency, department, office, instrumentality, division, unit or other entity of the state or local government that is supervised by or is part of Customer, or which supervises Customer or of which Customer is a part, or which is under common supervision with Customer;

- (ii) any county, borough, commonwealth, city, municipality, town, township, special purpose district, or other similar type of governmental instrumentality established by the laws of Customer's state and located within Customer's state jurisdiction and geographic boundaries; and
- (iii) any other entity in Customer's state expressly authorized by the laws of Customer's state to purchase under state contracts; provided that a state and its Affiliates shall not, for purposes of this definition, be considered to be Affiliates of the federal government and its Affiliates (for clarity details on other entities can located here, or a successor site: <http://www.ogs.ny.gov/purchase/snt/othersuse.asp>); and

- b. with regard to Microsoft, any legal entity that Microsoft owns, that owns Microsoft, or that is under common ownership with Microsoft;

"available" means Microsoft has made Licenses for that Product available on the Product List for ordering under a particular licensing program;

"Customer" means the entity that has entered into this Agreement and its Affiliates;

"Customer Data" means all data, including all text, sound, software, or image files that are provided to Microsoft by, or on behalf of, Enrolled Affiliate through its use of the Online Services.

"Enrolled Affiliate" means an entity, either Customer or any one of Customer's Affiliates, that has entered into an Enrollment under this Agreement;

"Enrollment" means the document that an Enrolled Affiliate submits under this Agreement to place its initial order;

"Enterprise" means the Enrolled Affiliate and the Affiliates it chooses on its Enrollment to include in its enterprise;

"Fixes" means Product fixes, modifications or enhancements, or their derivatives, that Microsoft releases generally (such as Commercial Product service packs).

"License" means Enrolled Affiliate's right to use the quantity of a Product ordered. For certain Products, a License may be available on a subscription basis ("Subscription License"). Licenses for Online Services will be considered Subscription Licenses under this Agreement;

"L&SA" means a License and Software Assurance for any Product ordered;

"Microsoft" means the Microsoft Affiliate that has entered into this Agreement or an Enrollment and its Affiliates, as appropriate;

"Online Service" means the Microsoft-hosted services identified in the Online Services section of the Product List.

"Product" means all software, Online Services and other web-based services, identified on the Product List.

"Product List" means the statement published by Microsoft from time to time on the World Wide Web at <http://www.microsoft.com/licensing/contracts> or at a successor site that Microsoft identifies, which identifies the Products that are or may be made available under a program (which availability may vary by region) and any Product-specific conditions or limitations on the acquisition of licenses for, or use of, those Products.

"Product Use Rights" means, with respect to any licensing program, the use rights or terms of service for each Product and version published for that licensing program at <http://www.microsoft.com/licensing/contracts> or at a successor site.

"Reseller" means a large account Reseller authorized by Microsoft to resell Licenses under this program;

"Service Level Agreement" means the document specifying the standards Microsoft agrees to adhere to and by which it measures the level of service for an Online Service.

“Software Assurance” means an offering that provides new version rights and other benefits for Products as further described in the Product List.

“Trade Secret” means information that is not generally known or readily ascertainable to the public, has economic value as a result, and has been subject to reasonable steps under the circumstances to maintain its secrecy;

“use” or “run” means to copy, install, use, access, display, run or otherwise interact.

## 2. **How the Enterprise and Enterprise Subscription program works.**

The Enterprise and Enterprise Subscription Program. The Enterprise and Enterprise Subscription programs establish a Customer’s overall licensing framework and the applicable terms and conditions. Under the Enterprise program, Customer may license Products by entering into Enrollments. The Enterprise Subscription program offers Customer the same options as the Enterprise Program, but on a subscription basis, with an optional buy-out to obtain perpetual Licenses.

- a. **Enrollments.** The Enterprise program gives Customer and/or its Affiliates the ability to enter into one or more Enrollments to order Products. Subscription Enrollments may be available for some of these Enrollments.
- b. **Licenses.** The types of Licenses available are L&SA, Licenses obtained under Software Assurance and Subscription Licenses. These License types as well as additional License Types are defined in the Product List.
- c. **How Enrolled Affiliates acquire Licenses.** An Enrolled Affiliate will acquire its Licenses through its chosen Reseller. Orders will be made out to and submitted to the Enrolled Affiliate’s Reseller. Microsoft will invoice that Reseller according to the terms in the applicable Enrollment.
- d. **Choosing and maintaining a Reseller.** Each Enrolled Affiliate must choose and maintain a Reseller authorized in the Enrolled Affiliate’s location.
- e. **Pricing.**

- (i) **Establishing Price Levels.** Each Product generally is assigned to a Product pool (e.g. applications, systems, or servers). With the exception of Enterprise Products listed the Discount Level table below and purchased under the Enterprise Agreement only, each Product pool will be assigned Level D. Enrolled Customer Price Level will be Level D for Enterprise Online Services, Online Services and Additional Products ordered under any Enrollment.

*The following Price Level Discounts are established for 36 months after the effective date of this Program Agreement:*

<b>Enterprise Product Pools</b>	<b>Discount Level</b>
Applications (Office Pro/Office Standard)	Level D less 7.5%
System (Windows Operating System & MDOP)	Level D less 9%
Servers (Core &, Enterprise Client Access License Suites)	Level D less 9%

The Discount Levels were determined by the amount of Enrolled Affiliates desktops and/or users with Enterprise Products from the following table:

Desktop and/or User Count	Level Discount
Below 40,000	none
40,000-59,999	2.00%
60,000- 79,999	4.00%
80,000-119,000	6.00%
120,000-299,999	7.50%
300,000-499,999	9.00%

(ii) **Placing Orders through Reseller.** Orders under an Enrollment will be made to the Reseller. Microsoft will invoice the Reseller according to the terms in the applicable Enrollment. Throughout this Agreement the term "price" refers to reference price. The Reseller and the Enrolled Affiliate will determine the Enrolled Affiliate's actual price and payment terms.

f. **Order Requirements.** Order Requirements are outlined in each Enrollment.

g. **Management and Reporting.** Customer and/or Enrolled Affiliate may manage account details (e.g., contacts, orders, Licenses, software downloads) on Microsoft's Volume Licensing Service Center ("VLSC") web site (or successor site) at: <https://www.microsoft.com/licensing/servicecenter>. Upon the effective date of this Program Agreement and any Enrollments, the contact(s) identified for this purpose will be provided access to this site and may authorize additional users and contacts.

### 3. **Licenses for Products.**

a. **General.** Enrolled Affiliate will have the number of Licenses ordered for the latest version of a Product, and may use prior versions as permitted in the Product Use Rights, so long as Microsoft receives timely orders from Reseller for all required Licenses for such Products and complies with applicable license terms. The Licenses obtained under an Enrollment are not related to any order or fulfillment of software media. The ability to use a Product ordered may be affected by minimum hardware or software requirements.

b. **Use by Affiliates.** The Enrolled Affiliate may sublicense the right to use the Products to any Affiliates covered under its Enrollment, but Affiliate recipient of these Licenses may not sublicense these rights and their use must be consistent with the License terms contained in this Agreement.

c. **When Licenses become perpetual.** The right to run any Product licensed under an Enrollment is temporary unless and until it becomes perpetual as follows:

(i) A License is temporary until Enrolled Affiliate's Reseller has paid for a License in full and the applicable initial Enrollment or renewal term during which the License was ordered must have expired or been terminated as permitted in this Agreement.

(ii) Subscription Licenses are never perpetual. If a buy-out option is available, Enrolled Affiliate may obtain a perpetual License by exercising the buy-out option and paying for the License in full.

(iii) Enrolled Affiliate will have perpetual Licenses to use the Products ordered in the latest version available (or any prior version) as of the date of expiration, termination, or renewal.

(iv) All perpetual Licenses acquired under this Program Agreement remain subject to the terms of this Program Agreement and such terms survive expiration or termination of this Program Agreement or an Enrollment.

- d. **Perpetual Licenses through Software Assurance.** Perpetual Licenses received through Software Assurance supersede and replace the underlying perpetual Licenses for which Software Assurance coverage was ordered. In the case of Early Termination, the terms in Section 7 titled "Term and Termination will apply."
- e. **License confirmation.** This Program Agreement (*soft copy or web link to location is acceptable*), the applicable Enrollment (*soft copy is acceptable*), the Enrolled Affiliate's order confirmation, and any documentation evidencing transfers of Licenses, together with proof of payment, will be the Enrolled Affiliate's evidence of all Licenses obtained under its Enrollment.
- f. **Reorganizations, consolidations, and privatizations.** If the number of Qualified Devices or Qualified Users covered by an Enrollment changes by more than ten percent as a result of a reorganization, consolidation, or privatization of an Enrolled Affiliate, Microsoft will work with the Enrolled Affiliate in good faith to determine how to accommodate its changed circumstances in the context of this Program Agreement. If an Enrolled Affiliate consolidates with a third party with an existing Agreement or enrollment, Microsoft will work with the Enrolled Affiliate in good faith to accommodate its changed circumstances in the context of this Program Agreement.

#### **4. How to know what Product Use Rights apply.**

*Intentionally omitted, this section is included in the associated Microsoft Business Agreement*

#### **5. Making copies of Products and re-imaging rights.**

- a. **General.** Enrolled Affiliate may make as many copies of Products, if applicable, as it needs to distribute them within its organization. Copies must be true and complete (including copyright and trademark notices) from master copies obtained from a Microsoft approved fulfillment source. Enrolled Affiliate may use a third party to make these copies, but Enrolled Affiliate agrees it will be responsible for any third party's actions. Enrolled Affiliate agrees to use reasonable efforts to notify its employees, agents, and any other individuals who use the Products that the Products are licensed from Microsoft and subject to the terms of this Agreement.
- b. **Copies for training/evaluation and back-up.** For all Products other than Online Services, Enrolled Affiliate may: (1) use up to 20 complimentary copies of any licensed Products in a dedicated training facility on its premises for purposes of training on that particular Product, (2) use up to 10 complimentary copies of any Products for a 60 day evaluation period, and (3) use one complimentary copy of any licensed Product for back-up or archival purposes for each of its distinct geographic locations. Trials for Online Services may be available if specified in the Product Use Rights.
- c. **Right to re-image.** In certain cases, re-imaging is permitted using the Product media. If the Microsoft Product is licensed (1) from an original equipment manufacturer (OEM), (2) as a full packaged Product through a retail source, or (3) under another Microsoft program, then media provided under this Program Agreement may generally be used to create images for use in place of copies provided through that separate source. This right is conditional upon the following:
  - (i) Separate Licenses must be owned from the source for each Product that is re-imaged.
  - (ii) The Product, language, version, and components of the copies made must be identical to the Product, language, version, and all components of the copies they replace and the number of copies or instances of the re-imaged Product permitted remains the same.

- (iii) Except for copies of an operating system and copies of Products licensed under another Microsoft program, the Product type (e.g., upgrade or full License) must be identical to the Product type from the separate source.
- (iv) Enrolled Affiliate must adhere to any Product-specific processes or requirements for re-imaging identified in the Product List.
- (v) Re-images made under this subsection remain subject to the terms and use rights provided with the License from the separate source.
- (vi) This subsection does not create or extend any warranty or support obligation.

## 6. **Transferring and reassigning Licenses.**

- a. **License transfers.** You may transfer fully-paid perpetual Licenses:
  - (i) if you are an agency of the U.S. Government, to another agency of the U.S. Government or to an unaffiliated third party in connection with (i) a privatization of the government agency or of an operating division of an Enrolled Affiliate or one of its government agency affiliates, (ii) a reorganization, or (iii) a consolidation; or
  - (ii) if you are an agency of a state or local government to: (a) any other government agency, department, instrumentality, division, unit or other office of your state or local government that is supervised by or is part of you, or which supervises you or of which you are a part, or which is under common supervision with you; (ii) any county, borough, commonwealth, city, municipality, town, township, special purpose district, or other similar type of governmental instrumentality established by the laws of your state and located within your state's jurisdiction and geographic boundaries; and (iii) any other entity expressly authorized by the laws of your state to purchase under state contracts, or (b) an unaffiliated third party in connection with a privatization of an affiliate of agency as set forth in (a) above or of an operating division of the Enrolled Affiliate or one of its affiliates as set forth in (a) above, a reorganization, or a consolidation.
- b. Customer must notify Microsoft of a transfer of license by completing a transfer notice form, which can be obtained from <http://www.microsoft.com/licensing/contracts> and send the completed form to Microsoft before the license transfer. No License transfer will be valid unless Customer provides to the transferee, and the transferee accepts in writing, the applicable Product Use Rights, use restrictions, limitations of liability (including exclusions and warranty provisions), and the transfer restrictions described in this section. Any license transfer not made in compliance with this section will be void.
- c. **Internal Assignment of Licenses and Software Assurance.** Licenses and Software Assurance must be assigned to a single user or device within the Enterprise. Licenses may be reassigned within the Enterprise as described in the Product Use Rights.

## 7. **Term and termination.**

- a. **Term.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
- b. **Termination without cause.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
- c. **Mid-term termination for non-appropriation of Funds.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
- d. **Termination for cause.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*

**e. Early termination.** If (1) an Enrolled Affiliate terminates its Enrollment as a result of a breach by Microsoft, or (2) if Microsoft terminates an Enrollment because the Enrolled Affiliate has ceased to be an Affiliate of Customer, or (3) Enrolled Affiliate terminates an Enrollment for non-appropriation of funds, or (4) Microsoft terminate an Enrollment for non-payment due to non-appropriation of funds, then the Enrolled Affiliate will have the following options:

- (i) It may immediately pay the total remaining amount due, including all installments, in which case, the Enrolled Affiliate will have perpetual rights for all Licenses it has ordered; or
- (ii) It may pay only amounts due as of the termination date, in which case the Enrolled Affiliate will have perpetual Licenses for:
  - 1) all copies of Products (including the latest version of Products ordered under SA coverage in the current term) for which payment has been made in full, and
  - 2) the number of copies of Products it has ordered (including the latest version of Products ordered under Software Assurance coverage in current term) that is proportional to the total of installment payments paid versus total amounts due (paid and payable) if the early termination had not occurred.
- (iii) In the case of Early Termination under Subscription Enrollments, Enrolled Affiliate will have the following options:
  - 1) For eligible products Enrolled Affiliate may obtain perpetual Licenses as described in the section titled "Buy-out option," provided that Microsoft receives the buy-out order for those Licenses within 60 days after Enrolled Affiliate provides notice of termination.
  - 2) Where not exercising buy-out option, in the event of breach by Microsoft, Microsoft will issue Reseller a credit for any amount paid in advance that would apply after the date of termination.

Nothing in this section shall affect perpetual License rights acquired either in a separate Agreement or in a prior term of the terminated Enrollment.

**f. Effect of termination or expiration.** When an Enrollment expires or is terminated,

- (i) Enrolled Affiliate must order Licenses for all copies of Products it has run for which it has not previously submitted an order. Any and all unpaid payments or any order of any kind, including subscription services, remain due and payable. Except as provided in the subsection titled "Early termination," all unpaid payments for Licenses immediately become due and payable.
- (ii) Enrolled Affiliate's right to Software Assurance benefits under this Agreement ends if it does not renew Software Assurance.

**g. Modification or termination of an Online Service for regulatory reasons.** Microsoft may modify or terminate an Online Service where there is any current or future government requirement or obligation that: (1) subjects Microsoft to any regulation or requirement not generally applicable to businesses operating there; (2) presents a hardship for Microsoft to continue operating the Online Service without modification; and/or (3) causes Microsoft to believe these terms or the Online Service may be in conflict with any such requirement or obligation. For example, Microsoft may modify or terminate an Online Service in connection with a government requirement that would cause Microsoft to be regulated as a telecommunications provider.

8. **Restrictions on use.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
9. **Non-Microsoft software or technology.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
10. **Confidentiality.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
11. **Warranties.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
12. **Defense of infringement, misappropriation, and third party claims.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
13. **Limitation of liability.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
14. **Verifying compliance.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement.*
15. **Miscellaneous.** *All of the following sections are intentionally omitted, and are included in the associated Microsoft Business Agreement.*
  - a. **Notices to Microsoft.**
  - b. **Assignment.**
  - c. **Severability.**
  - d. **Waiver.**
  - e. **Applicable law; Dispute resolution.**
  - f. **This Agreement is not exclusive.**
  - g. **Survival.**
  - h. **No transfer of ownership.**
  - i. **Free Products.**
  - j. **Amending the Agreement.**
  - k. **Resellers and other third parties cannot bind Microsoft.**
  - l. **Privacy and security.**
  - m. **Voluntary Product Accessibility Templates.**
  - n. **Natural disaster.**
  - o. **Copyright violation.**
  - p. **U.S. export jurisdiction.**

# Appendix F- Sample Custom EA Enrollment



Volume Licensing

Enterprise Enrollment number <i>(Microsoft to complete)</i>		Proposal ID/Framework ID	NY001
Previous Enrollment number <i>(Reseller to complete)</i>		Earliest expiring previous Enrollment end date <sup>1</sup>	

**This Enrollment must be attached to a signature form to be valid.**

This Microsoft Enterprise Enrollment is entered into between the entities as identified in the signature form as of the effective date. Enrollment Affiliate represents and warrants it is the same Customer, or an Affiliate of the Customer, that entered into the Enterprise Agreement identified on the program signature form.

This Enrollment consists of: (1) the terms and conditions of the Agreement, (2) the terms of the Enterprise Program Agreement identified on the signature form, (3) the terms and conditions of this Enrollment, (4) the Product Selection Form, (5) any supplemental contact information form or Previous Program Agreement/Enrollment form that may be required, and (6) any order submitted under this Enrollment.

**Effective date.** If Enrolled Affiliate is renewing Software Assurance or Subscription Licenses from one or more previous Enrollments or Program Agreements, then the effective date will be the day after the first prior Enrollment or Program Agreement expires or terminates. Otherwise, the effective date will be the date this Enrollment is accepted by Microsoft. If renewing Software Assurance, the Reseller will need to insert the previous enrollment or Program Agreement number and end date in the respective boxes above.

**Term.** This Enrollment will expire on the last day of the month, 36 full calendar months from the effective date unless otherwise renewed. Any reference in this Enrollment to "day" will be a calendar day.

**Product order.** The Reseller will provide Enrolled Affiliate with Enrolled Affiliate's Product pricing and order. Prices and billing terms for all Products ordered will be determined by agreement between Enrolled Affiliate and the Reseller. The Reseller will provide Microsoft with the order separately from this Enrollment.

**Prior Enrollment(s).** If renewing Software Assurance or Subscription Licenses from another Enrollment or Program Agreement, the previous Enrollment or Program Agreement number and end date must be identified in the respective boxes above. If renewing from multiple Enrollments or Program Agreements, or transferring Software Assurance or MSDN details, the Previous Program Agreement/Enrollment form must be used.

## Terms and Conditions

### 1. Definitions.

Terms used but not defined in this Enrollment will have the definition in the Enterprise Program Agreement. The following definitions are used in this Enrollment:

"Additional Product" means any Product identified as such in the Product List and chosen by Enrolled Affiliate under this Enrollment.

"Enterprise Online Service" means any Online Service designated as an Enterprise Online Service in the Product List and chosen by Enrolled Affiliate under this Enrollment. Enterprise Online Services are treated as Online Services, except as noted.

"Enterprise Product" means any Desktop Platform Product that Microsoft designates as an Enterprise Product in the Product List and chosen by Enrolled Affiliate under this Enrollment. Enterprise Products may only be licensed for all Qualified Devices and Qualified Users on an Enterprise-wide basis under this program.

"Expiration Date" means the date upon which the Enrollment expires.

"Industry Device" (also known as line of business device) means any device that: (1) is not useable in its deployed configuration as a general purpose personal computing device (such as a personal computer), a multi-function server, or a commercially viable substitute for one of these systems; and (2) only employs an industry or task-specific software program (e.g. a computer-aided design program used by an architect or a point of sale program) ("Industry Program"). The device may include features and functions derived from Microsoft software or third-party software. If the device performs desktop functions (such as email, word processing, spreadsheets, database, network or Internet browsing, or scheduling, or personal finance), then the desktop functions: (1) may only be used for the purpose of supporting the Industry Program functionality; and (2) must be technically integrated with the Industry Program or employ technically enforced policies or architecture to operate only when used with the Industry Program functionality.

"Qualified Device" means any device that is used by or for the benefit of Enrolled Affiliate's Enterprise and is: (1) a personal desktop computer, portable computer, workstation, or similar device capable of running Windows Professional locally (in a physical or virtual operating system environment), OR (2) a device used to access a virtual desktop infrastructure ("VDI"). Qualified Devices do not include any device that is: (1) designated as a server and not used as a personal computer, OR (2) an Industry Device, OR (3) not managed (as defined in the Product List at the start of the applicable initial or renewal term of the Enrollment) as part of Enrolled Affiliate's Enterprise. At its option, the Enrolled Affiliate may designate any device excluded above (e.g., Industry Device) as a Qualified Device for all or a subset of Enterprise Products or Online Services the Enrolled Affiliate has selected.

"Qualified User" means a person (e.g., employee, consultant, contingent staff) who: (1) is a user of a Qualified Device, or (2) accesses any server software requiring an Enterprise Product Client Access License or any Enterprise Online Service. It does not include a person who accesses server software or an Online Service solely under a License identified in the Qualified User exemptions in the Product List.

"Reserved License" means for an Online Service identified as eligible for true-ups in the Product List, the License reserved by Enrolled Affiliate prior to use and for which Microsoft will make the Online Service available for activation.

"Transition" means the conversion of one or more License to or from another License(s). Products eligible for Transition and permitted Transitions are identified in the Product List.

"Transition Period" means the time between the Transition and the next Enrollment anniversary date for which the Transition is reported.

## **2. Purpose.**

This Enrollment enables Enrolled Affiliate's Enterprise to obtain, or subscribe to, Licenses for Enterprise Products, Enterprise Online Services, and Additional Products. Enrolled Affiliate may choose between on-premise software and Online Services as well as the ability to transition Licenses to Online Services while maintaining Enterprise-wide coverage. Additionally, Enterprise Online Services may be purchased without Enterprise-wide coverage.

### **3. Product Use Rights, Qualifying Systems Licenses and Transitions.**

In addition to applicable terms of the Enterprise Program Agreement, the following terms apply to this Enrollment:

- a. Product Use Rights.** For Enterprise Products, if a new Product version has more restrictive use rights than the version that is current at the start of the applicable initial or renewal term of the Enrollment, those more restrictive use rights will not apply to the Enrolled Affiliate's use of that Product during the term.
- b. Qualifying systems Licenses.** The operating system Licenses granted under this program is upgrade Licenses only. Full operating system Licenses are not available under this program. If Enrolled Affiliate selects any Desktop Platform, Windows Desktop Operating System Upgrade, or Windows Intune, all Qualified Devices on which Enrolled Affiliate expects to run the Windows Desktop Operating System Upgrade must be licensed to run, and have installed on them, one of the qualifying operating systems identified in the Product List. Note that the list of operating systems that qualify for the Windows Desktop Operating System Upgrade varies with the circumstances of the order. That list is more extensive at the time of the initial order than it is for some subsequent orders and system refreshes during the term of this Enrollment. Exclusions are subject to change when new versions of Windows are released.

For example: The following are not considered qualifying operating systems: (1) ANY Windows Home or Starter edition; (2) Embedded Systems; and (3) Linux. These are examples of exclusions only and may change. Please see Product List for all current qualifying operating systems.

- c. Transitions.** The following requirements apply to Transitions:
  - (i)** Licenses with active Software Assurance or Subscription Licenses may be Transitioned at any time if permitted in the Product List. While Enrolled Affiliate may Transition any time, it will not be able to reduce Licenses or associated Software Assurance prior to the end of the Transition Period.
  - (ii)** Enrolled Affiliate must order the Licenses to which it is transitioning for the year(s) following the Transition Period
  - (iii)** If a Transition is made back to a License that had active Software Assurance as of the date of Transition, then Software Assurance will need to be re-ordered for all such Licenses on a prospective basis following the Transition Period. Software Assurance coverage may not exceed the quantity of perpetual Licenses for which Software Assurance was current at the time of any prior Transition. Software Assurance may not be applied to Licenses transferred by Enrolled Affiliate.
  - (iv)** If a device-based License is Transitioned to a user-based License, all users of the device must be licensed as part of the Transition.
  - (v)** If a user-based License is Transitioned to a device-based License, all devices accessed by the user must be licensed as part of the Transition.
- d. Effect of Transition on Licenses.** Transition will not affect Enrolled Affiliate's rights in perpetual Licenses paid in full.
  - (i)** New version rights will be granted for perpetual Licenses covered by Software Assurance up to the end of the Transition Period.
  - (ii)** For L&SA not paid in full at the end of the Transition Period, Enrolled Affiliate will have perpetual Licenses for a proportional amount equal to the total of installments paid versus total amounts due (paid and payable) for the Transitioned Product.

- (iii) For L&SA not paid in full or granted a perpetual License in accordance with the above or Subscription Licenses, all rights to Transitioned Licenses cease at the end of the Transition Period.

#### **4. Pricing.**

- a. **Price Levels.** For both the initial and any renewal term Enrolled Affiliate's Price Level for all Products ordered under this Enrollment will be set at the Agreement Program Level.
- b. **Setting Prices.** Enrolled Affiliate's prices for each Product will be established by its Reseller. Microsoft's prices for Resellers are fixed throughout the Enrollment term based upon current prices at the time of the initial order for the Product. This includes the following:
  - (i) Any future pricing (if applicable); and
  - (ii) Prices for Transitions, including any prices related to the use of a Product during the Transition Period (if applicable).

#### **5. Order requirements.**

- a. **Minimum Order Requirements.** Enrolled Affiliate's Enterprise must have a minimum of 250 Qualified Users or Qualified Devices.
  - (i) **Initial Order.** Initial order must include at least 250 Licenses from one of the four groups outlined in the Product Selection Form.
  - (ii) **If choosing Enterprise Products.** If choosing Enterprise Products in a specific group outlined in the Product Selection Form, Enrolled Affiliate's initial order must include an Enterprise-wide selection of one or more Enterprise Products or a mix of Enterprise Products and corresponding Enterprise Online Services for that group.
  - (iii) **Additional Products.** Upon satisfying the minimum order requirements above, Enrolled Affiliate may order Additional Products.
  - (iv) **Country of Usage.** Enrolled Affiliate must specify the countries where Licenses will be used on its initial order and on any additional orders.
- b. **Adding Products.**
  - (i) **Adding new Products not previously ordered.** Enrolled Affiliate may add new Enterprise Products by entering into a new Enrollment or as part of a renewal. New Enterprise Online Services may be added by contacting a Reseller. New Additional Products, other than Online Services, may be used if an order is placed in the month the Product is first used. For Additional Products that are Online Services, an initial order for the Online Service is required prior to use.
  - (ii) **Adding Licenses for previously ordered Products.** Additional Licenses for previously ordered Products must be included in the next true-up order. Enrolled Affiliate must order Licenses for Online Services prior to use, unless the Online Services are (1) identified as eligible for true-up in the Product List or (2) included as part of other Licenses (e.g., Enterprise CAL).
- c. **True-up orders.** Enrolled Affiliate must submit an annual true-up order that accounts for changes since the initial order or last true-up order, including: (1) any increase in Licenses, including any increase in Qualified Devices or Qualified Users and Reserved Licenses; (2) Transitions (if permitted); or (3) Subscription License quantity reductions (if permitted). Microsoft, at its discretion and as permitted by applicable law, may validate the customer true-up data submitted through a formal product deployment assessment, using an approved Microsoft partner, as set forth in Appendix B, §80.

The true-up order must be received by Microsoft between 60 and 30 days prior to the Enrollment anniversary date. The third-year anniversary true-up order is due within 30 days prior to the Expiration Date. Enrolled Affiliate may true-up more often than at each Enrollment anniversary date except for Subscription License reductions.

- (i) **Enterprise Products.** Enrolled Affiliate must determine the current number of Qualified Devices and Qualified Users (if ordering user-based Licenses) and order the License difference (if any), including any Enterprise Online Services.
- (ii) **Additional Products.** For Products which have been previously ordered, Enrolled Affiliate must determine the Additional Products used and order the License difference (if any).
- (iii) **Online Services.** For Online Services identified as eligible for true-up orders in the Product List, Enrolled Affiliate must first reserve the additional Licenses prior to use. Microsoft will provide a report of Reserved Licenses in excess of existing orders to Enrolled Affiliate and its Reseller. Reserved Licenses will be invoiced retroactively for the prior year based upon the month in which they were reserved.
- (iv) **Late true-up order.** If the true-up order is not received when due:
  - 1) Microsoft will invoice Reseller for all Reserved Licenses not previously ordered.
  - 2) Transitions and Subscription License reductions cannot be reported until the following Enrollment anniversary date (or at Enrollment renewal, as applicable).
- (v) **Transitions.** Enrolled Affiliate must report all Transitions. Transitions may result in an increase in Licenses to be included on the true-up order and a reduction of Licenses for prior orders. Reductions in Licenses will be effective at end of the Transition Period. Associated invoices will also reflect this change. For Licenses paid upfront, Microsoft will issue a credit for the remaining months of Software Assurance or Subscription Licenses that were reduced as part of the Transition.
- (vi) **Subscription License Reductions.** Enrolled Affiliate may reduce the quantity of Subscription Licenses on a prospective basis if permitted in the Product List as follows:
  - 1) For Subscription Licenses part of an Enterprise-wide commitment, Licenses may be reduced if the total quantity of Licenses and Software Assurance for an applicable group meets or exceeds the quantity of Qualified Devices identified on the Product Selection Form. Step-up Licenses do not count towards this total count.
  - 2) For Enterprise Online Services not a part of an Enterprise-wide commitment, Licenses can be reduced as long as the initial order minimum requirements are maintained.
  - 3) For Additional Products available as Subscription Licenses, Enrolled Affiliate may reduce the Licenses. If the License count is reduced to zero, then Enrolled Affiliate's use of the applicable Subscription License will be cancelled.Invoices will be adjusted to reflect any reductions in Subscription Licenses at the true-up order Enrollment anniversary date and effective as of such date.
- (vii) **Update statement.** An update statement must be submitted instead of a true-up order if, as of the initial order or last true-up order, Enrolled Affiliate's Enterprise has not: (1) changed the number of Qualified Devices and Qualified Users licensed with Enterprise Products or Enterprise Online Services; and (2) increased its usage of Additional Products. This update statement must be signed by Enrolled Affiliate's authorized representative. The update statement must be received by Microsoft between 60 and 30 days prior to the Enrollment anniversary date. The last update statement is due at least 30 days prior to the Expiration Date.

**d. Step-up Licenses.** For Licenses eligible for a step-up under this Enrollment, Enrolled Affiliate may step-up to a higher edition or suite as follows:

- (i) For step-up Licenses included on an initial order, Enrolled Affiliate may order according to the true-up process.
- (ii) If step-up Licenses are not included on an initial order, Enrolled Affiliate may step-up initially by following the process described in the Section titled "Adding new Products not previously ordered," then for additional step-up Licenses, by following the true-up order process.
- (iii) If Enrolled Affiliate has previously ordered an Online Service as an Additional Product and wants to step-up to an Enterprise Online Service eligible for a Transition, the step-up may be reported as a Transition.
- (iv) If Enrolled Affiliate Transitions a License, it may be able to further step-up the Transitioned License. If Enrolled Affiliate chooses to step-up and the step-up License is separately eligible to be Transitioned, such step-up Licenses may result in a License reduction at the Enrollment anniversary date following the step-up.

## **6. Payment terms.**

For the initial or renewal order, Enrolled Affiliate may pay upfront or elect to spread its payments over the applicable Enrollment term. If spread payments are elected, unless indicated otherwise, Microsoft will invoice Enrolled Affiliate's Reseller in three equal annual installments. The first installment will be invoiced upon Microsoft's acceptance of this Enrollment and on each Enrollment anniversary date. Subsequent orders are invoiced upon acceptance of the order and Enrolled Affiliate may elect to pay annually or upfront for Online Services and upfront for all other Licenses.

## **7. End of Enrollment term and termination.**

- a. **General.** At the Expiration Date, Enrolled Affiliate must immediately order and pay for Licenses for Products it has used but has not previously submitted an order, except as otherwise provided in this Enrollment.
- b. **Renewal Option.** At the Expiration Date, Enrolled Affiliate can renew Products by renewing the Enrollment for one additional 36 full calendar month term or signing a new Enrollment. Microsoft must receive a Product Selection Form and renewal order prior to or at the Expiration Date. The renewal term will start on the day following the Expiration Date. Microsoft will not unreasonably reject any renewal.
- c. **If Enrolled Affiliate elects not to renew.**
  - (i) **Software Assurance.** If Enrolled Affiliate elects not to renew Software Assurance for any Product under its Enrollment, then Enrolled Affiliate will not be permitted to order Software Assurance later without first acquiring L&SA.
  - (ii) **Online Services eligible for an Extended Term.** For Online Services identified as eligible for an Extended Term in the Product List, the following options are available at the end of the Enrollment initial or renewal term.
    - 1) **Extended Term.** Licenses for Online Services will automatically expire in accordance with the terms of the Enrollment. An extended term feature that allows Online Services to continue month-to-month ("Extended Term") is available. During the Extended Term, Online Services will be invoiced monthly at the then-current published price for Enrolled Affiliate's price level as of the Expiration Date plus a 3% administrative fee for up to one year. If Enrolled Affiliate does want an Extended Term, Reseller must submit a request to Microsoft. Microsoft must receive the request not less than 30 days prior to the Expiration Date.
    - 2) **Cancellation during Extended Term.** If Enrolled Affiliate has opted for the Extended Term and later determines not to continue with the Extended Term, Reseller must

submit a notice of cancellation for each Online Service. Cancellation will be effective at the end of the month following 30 days after Microsoft has received the notice.

**(iii) Online Services not eligible for an Extended Term.** If Online Services are not identified as eligible for an Extended Term in the Product List, the Licenses will be cancelled and will terminate as of the Expiration Date. Any associated media must be uninstalled and destroyed and Enrolled Affiliate's Enterprise must discontinue use. Microsoft may request written certification to verify compliance.

**(iv) Customer Data.** Upon expiration or termination of a License for Online Services, Enrolled Affiliate must tell Microsoft whether to:

- 1) disable its account and then delete its Customer Data ("Data Deletion"); or
- 2) retain its Customer Data in a limited function account for at least 90 days after expiration or termination of the License for such Online Service (the "Retention Period") so that Enrolled Affiliate may extract its Customer Data.
- 3) *If Enrolled Affiliate indicates Data Deletion, Enrolled Affiliate will not be able to extract its Customer Data. If Enrolled Affiliate indicates it wants a Retention Period, Microsoft will initiate a Retention Period and Enrolled Affiliate will be able to perform its extraction of its Customer Data at any time during the Retention Period using Microsoft's provided self-serve Online Service features for Customer Data download. Customer acknowledges that it is advised that data download time is dependent on Internet speeds, quantity of data and other technical factors and that End Users will not have access to Online Service features during the Retention Period and that it should plan accordingly. The duration of the Retention Period is a technical Online Service feature and cannot be adjusted by Microsoft. If Enrolled Affiliate does not indicate either Data Deletion or a Retention Period, Microsoft will retain Enrolled Affiliate's Customer Data in accordance with the Retention Period.*
- 4) Following the expiration of the Retention Period, Microsoft will disable Enrolled Affiliate's account and then delete its Customer Data.
- 5) Enrolled Affiliate agrees that, other than as described above, Microsoft has no obligation to continue to hold, export or return Enrolled Affiliate's Customer Data. Enrolled Affiliate agrees Microsoft has no liability whatsoever for deletion of Enrolled Affiliate's Customer Data pursuant to these terms.

**d. Termination for cause.** Any termination for cause of this Enrollment will be subject to the "Termination for cause" Section of the Agreement.

**e. Early termination.** Any Early termination of this Enrollment will be subject to the "Early Termination" Section of the Enterprise Agreement.

For Subscription Licenses, in the event of a breach by Microsoft, Microsoft will issue Reseller a credit for any amount paid in advance that would apply after the date of termination.

## Enrollment Details

### 1. Enrolled Affiliate's Enterprise.

Use this section to identify which Agency Affiliates are included in the Enterprise. (Required) Enrolled Affiliate's Enterprise must consist of entire offices, bureaus, agencies, departments or other entities of Enrolled Affiliate, not partial offices, bureaus, agencies, or departments, or other partial entities. Enrolled Affiliate's organization includes . Check only one box in this section:

Enrolled Affiliate

Enrolled Affiliate and the following Affiliate(s):

Enrolled Affiliate and all Affiliates, with following Affiliate(s) excluded:

Please indicate whether the Enrolled Affiliate's Enterprise will include all new Affiliates acquired after the start of this Enrollment: <Choose One>

### 2. Contact information.

Each party will notify the other in writing if any of the information in the following contact information page(s) changes. The asterisks (\*) indicate required fields. By providing contact information, Enrolled Affiliate consents to its use for purposes of administering this Enrollment by Microsoft, its Affiliates, and other parties that help administer this Enrollment. The personal information provided in connection with this Enrollment will be used and protected in accordance with the privacy statement available at <https://www.microsoft.com/licensing/servicecenter>.

- a. **Primary contact.** This contact is the primary contact for the Enrollment from within Enrolled Affiliate's Enterprise. This contact is also an Online Administrator for the Volume Licensing Service Center and may grant online access to others.

**Name of entity (must be legal entity name)\***

**Contact name\* First Last**

**Contact email address\***

**Street address\***

**City\***

**State/Province\***

**Postal code\* -**

(For U.S. addresses, please provide the zip + 4, e.g. xxxxx-xxxx)

**Country\***

**Phone\***

**Tax ID**

*\* indicates required fields*

- b. **Notices contact and Online Administrator.** This contact (1) receives the contractual notices, (2) is the Online Administrator for the Volume Licensing Service Center and may grant online access to others, and (3) is authorized for applicable Online Services to add or reassign Licenses, step-up, and initiate Transitions prior to a true-up order.

Same as primary contact

**Name of entity\***

**Contact name\* First Last**

**Contact email address\***

**Street address\***

**City\***

**State/Province\***

**Postal code\***

(For U.S. addresses, please provide the zip + 4, e.g. xxxxx-xxxx)

**Country\***

**Phone\***

**Language preference.** Choose the language for notices. English

This contact is a third party (not the Enrolled Affiliate). Warning: This contact receives personally identifiable information of the Customer and its Affiliates.

*\* indicates required fields*

- c. **Microsoft Account Manager.** Microsoft Account Manager for this Enrolled Affiliate is:

**Microsoft account manager name:**

**Microsoft account manager email address:**

- d. **Online Services Manager.** This contact is authorized to manage the Online Services ordered under the Enrollment and (for applicable Online Services) to add or reassign Licenses, step-up, and initiate Transitions prior to a true-up order.

Same as notices contact and Online Administrator

**Name of entity\***

**Contact name\*: First Last**

**Contact email address\***

**Street address\***

**City\***

**State/Province\***

**Postal code\***

**Country\***

**Phone\***

This contact is from a third party organization (not the entity). Warning: This contact receives personally identifiable information of the entity.

*\* indicates required fields*

e. **Reseller information.** Reseller contact for this Enrollment is:

**Reseller company name\***

**Street address (PO boxes will not be accepted)\***

**City\***

**State/Province\***

**Postal code\***

**Country\***

**Contact name\***

**Phone\***

**Contact email address\***

*\* indicates required fields*

The undersigned confirms that the information is correct.

**Name of Reseller\***

**Signature\*** \_\_\_\_\_

**Printed name\***

**Printed title\***

**Date\***

*\* indicates required fields*

**Changing a Reseller.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*

If Enrolled Affiliate requires a separate contact for any of the following, attach the Supplemental Contact Information form. *Otherwise, the notices contact and Online Administrator remains the default.*

- (i) Additional notices contact
- (ii) Software Assurance manager
- (iii) Subscriptions manager
- (iv) Customer Support Manager (CSM) contact

### **3. Financing elections.**

Is a purchase under this Enrollment being financed through MS Financing? No

# Enterprise and Enterprise Subscription Enrollment Product Selection Form – State and Local

Enrollment Number  
 Microsoft to complete for initial term  
 Reseller to complete for renewal

**Step 1. Please indicate whether Enrolled Affiliate is ordering Enterprise Products or Enterprise Online Services on the initial enrollment order. Choose both if applicable.**

**Enterprise Products.** Choose platform option: <Choose One>

**Qualified Devices:**

**Qualified Users:**

**Enterprise Online Services<sup>1</sup>**

**Step 2. Select the Products and Quantities Enrolled Affiliate is ordering on its initial Enrollment Order.** Quantity may not include any Licenses which Enrolled Affiliate has selected for optional future use, or to which it is transitioning or stepping up within enrollment term. Products for which the Enrolled Affiliate has an option to transition or step-up should be listed in Step 3.

Products <sup>2</sup>	Quantity
<b>Office Professional Plus</b>	
Office Pro Plus	
Office Pro Plus for Office 365	
Office Standard	
<b>Office 365 Plans<sup>1</sup></b>	
Office 365 (Plan E1)	
Office 365 (Plan E2)	
Office 365 (Plan E3)	
Office 365 (Plan E4)	

Products <sup>2</sup>	Quantity
<b>Client Access License (CAL). Choose 1 option for either Core CAL or Enterprise CAL</b>	
<input type="checkbox"/> Core CAL, including Bridge CAL's (if applicable)	
Core CAL	
Core CAL Bridge for Office 365	
Core CAL Bridge for Windows Intune	
Core CAL Bridge for Office 365 and Windows Intune	
<input type="checkbox"/> Enterprise CAL (ECAL)	
ECAL	
ECAL Bridge for Office 365	
ECAL Bridge for Windows Intune	
ECAL Bridge for Office 365 and Windows Intune	
The Client Access License selection must be the same across the Enterprise. Specify whether licensing CAL per Device or User: User	
<b>Enterprise Product Components. Choose 1 or multiple Components</b>	
<input type="checkbox"/> Windows CAL	
<input type="checkbox"/> Exchange Standard CAL	
<input type="checkbox"/> SharePoint Standard CAL	
<input type="checkbox"/> Lync Server Standard CAL	
<input type="checkbox"/> System Center Configuration Manager Client ML	
<input type="checkbox"/> Forefront End Point Protection	
<input type="checkbox"/> Windows Remote Desktop Services CAL	
<input type="checkbox"/> Exchange Enterprise CAL	
<input type="checkbox"/> SharePoint Enterprise CAL	
<input type="checkbox"/> Lync Server Enterprise CAL	
<input type="checkbox"/> System Center Client Management Suite ML	
<input type="checkbox"/> Forefront Protection Suite	
<input type="checkbox"/> Forefront Unified Access Gateway CAL	
The Client Access License selection must be the same across the Enterprise. Specify whether licensing CAL per Device or User: User	
<b>Windows Desktop</b>	
Windows OS Upgrade	
Windows VDA	
<b>Windows Intune</b>	
Windows Intune	
Windows Intune Add-on <sup>3</sup>	

Products <sup>2</sup>	Quantity
<b>Other Enterprise Products</b>	
Microsoft Desktop Optimization Pack (MDOP) <sup>4</sup>	

If selecting Windows Desktop or Windows Intune option, Enrolled Affiliate acknowledges the following:

- a. The Windows Desktop Operating System Upgrade licenses offered through this Enrollment are not full licenses. The Enrolled Affiliate and any included Affiliates have qualifying operating system licenses for all devices on which the Windows Desktop Operating System Upgrade or Windows Intune licenses are run.
- b. In order to use a third party to reimage the Windows Operating System Upgrade, Enrolled Affiliate must certify that Enrolled Affiliate has acquired qualifying operating system licenses. See the Product List for details.

**Step 3. Indicate new Enterprise Products and Online Services Enrolled Affiliate has selected for optional future use where not selected on the initial enrollment order (above):**

Products <sup>2</sup>
<input type="checkbox"/> Office Pro Plus for Office 365
<input type="checkbox"/> Office 365 (Plan E1)
<input type="checkbox"/> Office 365 (Plan E2)
<input type="checkbox"/> Office 365 (Plan E3)
<input type="checkbox"/> Office 365 (Plan E4)
<input type="checkbox"/> Enterprise CAL (ECAL) Step-up, including Bridge CALs
<input type="checkbox"/> Windows Intune
<input type="checkbox"/> Windows Intune Add-on <sup>3</sup>

**This form must be attached to a signature form to be valid.**

# Select Plus License Program Agreement State and Local Custom Program Agreement Terms and Conditions

## Contents

1.	<b>Definitions.</b>	1
2.	<b>How the Select Plus License program works.</b>	3
3.	<b>How to establish price level.</b>	3
4.	<b>License grant — what Registered Affiliates are licensed to run.</b>	3
5.	<b>How to know what Product Use Rights apply.</b>	5
6.	<b>How to order Product Licenses.</b>	5
7.	<b>Making copies of Products and re-imaging rights.</b>	6
8.	<b>Transferring and reassigning Licenses.</b>	6
9.	<b>Term and termination.</b>	7
10.	<b>How to renew an Order.</b>	8
11.	<b>Restrictions on use.</b>	8
12.	<b>Confidentiality.</b>	8
13.	<b>Warranties.</b>	8
14.	<b>Defense of infringement, misappropriation, and third party claims.</b>	8
15.	<b>Limitation of liability.</b>	8
16.	<b>Verifying compliance.</b>	8
17.	<b>Non-Microsoft Software or Technology.</b>	8
18.	<b>Miscellaneous.</b>	8

This Microsoft Select Plus Program Agreement (Program Agreement) is entered into between the entities identified on the signature form.

**Effective date.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*

This Program Agreement consists of (1) the associated Microsoft Business Agreement and these Program Agreement terms and conditions and the signature form and all attachments identified therein, (2) the Product List, (3) the Product Use Rights applicable to Products licensed under this Agreement, (4) any Affiliate registration entered into under this Program Agreement, and (5) any Order submitted under this Program Agreement.

The Parties agree to be bound by the terms of this Program Agreement.

## **Terms and Conditions**

### **1. Definitions.**

In this Program Agreement, the following definitions apply:

“Affiliate” means

**a. with regard to Customer**

- (i) any government agency, department, office, instrumentality, division, unit or other entity of the state or local government that is supervised by or is part of Customer, or which supervises Customer or of which Customer is a part, or which is under common supervision with Customer;
- (ii) any county, borough, commonwealth, city, municipality, town, township, special purpose district, or other similar type of governmental instrumentality established by the laws of

Customer's state and located within Customer's state jurisdiction and geographic boundaries; and

(iii) any other entity in Customer's state expressly authorized by the laws of Customer's state to purchase under state contracts; provided that a state and its Affiliates shall not, for purposes of this definition, be considered to be Affiliates of the federal government and its Affiliates (for clarity details on other entities can located here, or a successor site: <http://www.ogs.ny.gov/purchase/snt/othersuse.asp>); and

b. with regard to Microsoft, any legal entity that Microsoft owns, that owns Microsoft, or that is under common ownership with Microsoft

"available" means, with respect to a Product, that Microsoft has made Licenses for that Product available for ordering under a particular licensing program;

"Commercial Product" means any Product Microsoft makes available for license for a fee;

"Customer" means the entity that has entered into this agreement and its Affiliates;

"Customer Data" means all data, including all text, sound, software, or image files that are provided to Microsoft by, or on behalf of, Customer through Customer's use of the Online Services.

"Fixes" means Product fixes, modifications or enhancements or their derivatives that Microsoft releases generally (such as Commercial Product service packs);

"License" means Registered Affiliate's right to use the quantity of a Product ordered. For certain Products, a License may be available on a subscription basis ("Subscription License"). Licenses for Online Services will be considered Subscription Licenses under this agreement;

"L&SA" means a License and Software Assurance for any Product ordered;

"Microsoft" means the Microsoft entity that has entered into this agreement by accepting Customer's registration;

"Order" means the document Customer or Customer's Affiliate submits under this Program Agreement to acquire Licenses or Online Services;

"Online Services" means the Microsoft-hosted services identified in the Online Services section of the Product List.

"Product" means all software, Online Services and other web-based services, identified on the Product List.

"Product List" means, with respect to any licensing program, the statement published by Microsoft from time to time on the World Wide Web at <http://www.microsoft.com/licensing/contracts>, or at a successor site that Microsoft identifies, which identifies the Products that are or may be made available under the program (which availability may vary by region) and any Product-specific conditions or limitations on the acquisition of licenses for those Products;

"Product Use Rights" means, with respect to any licensing program, the use rights for each Product and version published for that licensing program at <http://www.microsoft.com/licensing/contracts> or at a successor site.

"Qualifying Contract," means (1) an Enterprise Enrollment under a Microsoft Enterprise Agreement; (2) any Enterprise Subscription Enrollment entered into under a Microsoft Enterprise Subscription Agreement, or a Select Agreement.

"Registered Affiliate" means an entity, either Customer or any one of Customer's Affiliates, identified on an affiliate registration form that has been accepted by Microsoft and has submitted an Order under this Program agreement;

"Reseller" means a large account reseller authorized by Microsoft to resell Licenses in a Registered Affiliate's region under this program;

"Service Level Agreement" means the document specifying the standards Microsoft agrees to adhere to and by which it measures the level of service for an Online Service.

"Software Assurance" means an annuity offering that provides new version rights and other benefits for Products as described in the Product List;

"Trade Secret" means information that is not generally known or readily ascertainable to the public, has economic value as a result, and has been subject to reasonable steps under the circumstances to maintain its secrecy.

"use" or "run" means to copy, install, use, access, display, run or otherwise interact.

"Vendor" means any third party supplier or other provider of computer technology or related services.

## **2. How the Select Plus License program works.**

The Select Plus License Program Agreement allows Registered Affiliates to acquire Licenses at discount pricing. Customer and Customer's Affiliates can participate in this program if Customer or Customer's Affiliate (1) submits an Order meeting the initial minimum order quantity, (2) maintains at least one active Qualifying Contract, or (3) has purchased the minimum order quantity during the 12 months preceding the effective date of this Program Agreement. Notwithstanding any other provision of this Program Agreement, only Registered Affiliates identified in a Registration Form will be responsible for complying with the terms of that registration, including the terms of this Program Agreement incorporated by reference in that registration.

- a. **How Registered Affiliates acquire Licenses.** A Registered Affiliate will acquire its Licenses through its chosen Reseller. Orders will be made out to and submitted to the Registered Affiliate's Reseller. Microsoft will invoice that Reseller according to the terms in the applicable registration. *The Reseller and the Registered Affiliate will determine the Registered Affiliate's actual price and payment terms.*
- b. **Choosing and maintaining a Reseller.** Each Registered Affiliate must choose and maintain a Reseller authorized in the Registered Affiliate's region.
- c. **Online Services.** Online Services are provided as subscription services and are subject to the unique terms set forth in the Product Use Rights and the Product List.

## **3. How to establish price level.**

**Establishing price levels.** Each Product offering is assigned a point value on the Product List and is assigned to a Product pool. The Customer's price level for a pool applies to purchases made by all Registered Affiliates under this Program Agreement. Throughout the term of this program Agreement, the Customer's price level for each Product and its associated Pool (Applications, Systems and Servers) will be level "D." Customer does not need to acquire Products in all pools. The price Microsoft will invoice Reseller will be based on Customer's price level for the pool of the Product ordered. *Throughout this Program Agreement the term "price" refers to reference price.*

## **4. License grant — what Registered Affiliates are licensed to run.**

Registered Affiliates have the rights below once their registration is accepted by Microsoft. These rights apply to the Licenses obtained under this Program Agreement and are not related to any order of, or fulfillment of, software media.

The ability to run current or later versions of a Product licensed under this Program Agreement could be affected by minimum system requirements or other factors (e.g., hardware or other software).

- a. **General.** At any time after their registration has been accepted by Microsoft, a Registered Affiliate may run for its own benefit as many copies as it chooses, of any available Products it chooses, provided that it submits Orders for all copies in the month in which those copies are first run.
- b. **Use by Affiliates.** A Registered Affiliate may sublicense the right to use the Products ordered under this Program Agreement to any of its Affiliates, but Affiliates may not sublicense these rights and their use must be consistent with the License terms contained in this Program Agreement.
- c. **When Licenses become perpetual.**
- (i) **License only.** Registered Affiliate's right to run copies of any Product for which it orders only a License is temporary until the Registered Affiliate has paid for that License in full and Microsoft has collected such payment. Thereafter, Registered Affiliate will have a perpetual License to run the number of copies ordered in the version ordered.
- (ii) **L&SA or Software Assurance.** Registered Affiliate's right to run copies of any Product for which it orders L&SA or Software Assurance is temporary until:
- 1) the Registered Affiliate has paid all installments of the price for such coverage and the Order or renewal term during which such Product Licenses were ordered has expired or been renewed or
  - 2) the Registered Affiliate is otherwise eligible for perpetual Licenses as provided in this agreement.
- Thereafter, the Registered Affiliate will have perpetual Licenses to run the Products ordered in the latest versions available as of the date of expiration, renewal, or termination (or any prior version) for the number of copies ordered or renewed.
- (iii) **Subscription Licenses.** Subscription Licenses are not perpetual under any circumstances.
- d. **Perpetual Licenses through Software Assurance.** Any perpetual Licenses received through Software Assurance supersede and replace the underlying perpetual Licenses for which that Software Assurance coverage was ordered. All perpetual Licenses acquired under this Program Agreement remain subject to the terms of this Program Agreement and the applicable Product Use Rights.
- e. **Non-Perpetual Licenses.** Some Products may be licensed on a fixed term or subscription basis. The right to Use Products licensed on a subscription basis terminates upon expiration of the subscription agreement if it is not renewed.
- f. **License confirmation.** This Program Agreement (*soft copy or web link to location is acceptable*), the applicable Order, the Registered Affiliate's Order confirmation, and any documentation evidencing transfers of Licenses, together with proof of payment, will be the Registered Affiliate's evidence of all Licenses obtained under its Order as described in this Program Agreement.
- g. **Prior version rights.** A Registered Affiliate may run prior versions of any Product it Licenses under this Program Agreement. A Registered Affiliate may run different language versions of any Product it Licenses under this Program Agreement, provided that the License, L&SA, or Software Assurance for that different language version is available at the same, or lower price, than the price paid for the language version ordered of the same Product and License type.

## 5. **How to know what Product Use Rights apply.**

*Intentionally omitted, this section is included in the associated Microsoft Business Agreement*

## 6. **How to order Product Licenses.**

- a. **Placing Orders.** Registered Affiliate may purchase Licenses and Online Services Microsoft makes available under this program by placing Orders with Registered Affiliate's authorized Reseller. The price and payment terms for all Orders will be determined by agreement between Registered Affiliate and its Reseller. When placing orders, a Registered Affiliate must specify the country or countries where the Registered Affiliate will use the Licenses.
- b. **When is the Registered Affiliate eligible to order just Software Assurance?** A Registered Affiliate may order Software Assurance for copies of a Product, without the need to simultaneously order a new License for those copies, in each of the following circumstances:
  - (i) Registered Affiliate may order Software Assurance for copies of Products for which the Registered Affiliate has previously obtained perpetual Licenses through Upgrade Advantage, Software Assurance, or any similar upgrade protection, so long as the Order for Software Assurance under this Program Agreement becomes effective no later than one day following the expiration of that upgrade protection, and (2) Registered Affiliate submits an order for another term of Software Assurance for those Licenses prior to or at the expiration of the previous term.
  - (ii) During the term of the Program Agreement (including any renewal term), a Registered Affiliate may be eligible to order Software Assurance for copies of certain Products licensed through retail sources or from an original equipment manufacturer ("OEM"), provided that the Registered Affiliate places its Order within the required time frame. The Product List at <http://www.microsoft.com/licensing/contracts> identifies those Products that may be enrolled in Software Assurance and the applicable time frame for placing an Order.
  - (iii) A Registered Affiliate may also order Software Assurance in any other circumstances expressly permitted in the Product List.
  - (iv) A Registered Affiliate may renew Software Assurance ordered under this Program Agreement at the time it renews its Order as described in the section titled "How to renew an Order."
- c. **How to confirm Orders.** Information about Orders, including an electronic confirmation of each Order, will be provided in a password-protected site on the World Wide Web at <https://www.microsoft.com/licensing/servicecenter/> or a successor site that will be identified. Upon Microsoft's acceptance of this agreement, Registered Affiliate's contact identified for this purpose will be provided access to this site.
- d. **Invoices and payments.** For any Orders for Software Assurance or L&SA, if the Registered Affiliate elects to spread its payments over three years rather than payment in a lump sum, it may make this election with its Reseller. In such cases, Microsoft will invoice the Registered Affiliate's Reseller in installments, the first installment upon receipt of the Order and subsequent installments on each anniversary of the Order or the Affiliate anniversary month. Any amounts for Licenses only (i.e. without accompanying Software Assurance) will be invoiced to the Registered Affiliate's Reseller in full upon receipt of the Order.
- e. **Changing a Reseller.** If Microsoft or the Reseller chooses to discontinue doing business with one another, Customer must choose a replacement Reseller. If Registered Affiliate or Reseller intends to terminate their relationship, the initiating party must notify Microsoft and the other using a form provided by Microsoft at least 90 days prior to the date on which the change is to take effect.

## **7. Making copies of Products and re-imaging rights.**

- a. **General.** The Registered Affiliate may make as many copies of the Products as it needs to distribute them within its organization. Copies must be true and complete (including copyright and trademark notices), from master copies obtained from a Microsoft approved fulfillment source. The Registered Affiliate may use a third party to make these copies, but the Registered Affiliate agrees that it will be responsible for that third party's actions. The Registered Affiliate agrees to use reasonable efforts to make its employees, agents and any other individuals that it allows to use the Products aware that the Products are licensed from Microsoft and can only be transferred subject to the terms of this agreement.
- b. **Copies for training, evaluation, and back-up.** The Registered Affiliate may (1) use up to 20 complimentary copies of any Product in a dedicated training facility on its premises, (2) use up to 10 complimentary copies of any Product for a 60-day evaluation period, and (3) use one complimentary copy of any licensed Product for back-up or archival purposes for each of its distinct geographic locations.
- c. **Right to "re-image."** In certain cases, re-imaging is permitted using the volume licensing program Product media. If the Microsoft Product(s) is licensed (1) from an original equipment manufacturer (OEM), (2) as full packaged Product through a retail source, or (3) under another Microsoft program, then media provided under this agreement may be generally used to create images for use in place of copies provided through that separate source. This right is conditional upon the following:
  - (i) Separate Licenses must be owned from the source for each Product that is re-imaged.
  - (ii) The Product, language, version and components of the copies made must be identical to the Product, language, version and all components of the copies they replace and the number of copies or instances of the re-imaged Product permitted remains the same.
  - (iii) Except for copies of an operating system and copies of Products licensed under another Microsoft program, the Product type (e.g., upgrade or full License) must be identical to the Product type from the separate source.
  - (iv) Any Product-specific requirements for re-imaging identified in the Product List.
  - (v) Re-images made under this subsection remain subject to the terms and use rights provided with the License from the separate source. This subsection does not create or extend any warranty or support obligation.

## **8. Transferring and reassigning Licenses.**

- a. **License transfers.** License transfers are not permitted, except that Customer may transfer fully-paid perpetual licenses to:

**Transferring Licenses to third parties.** You may transfer fully-paid perpetual Licenses:

- (i) if you are an agency of a state or local government to: (a) any other government agency, department, instrumentality, division, unit or other office of your state or local government that is supervised by or is part of you, or which supervises you or of which you are a part, or which is under common supervision with you; (ii) any county, borough, commonwealth, city, municipality, town, township, special purpose district, or other similar type of governmental instrumentality established by the laws of your state and located within your state's jurisdiction and geographic boundaries; and (iii) any other entity expressly authorized by the laws of your state to purchase under state contracts, or (b) an unaffiliated third party in connection with a privatization of an affiliate of agency as set forth in (a) above or of an operating division of the Enrolled Affiliate or one of its affiliates as set forth in (a) above, a reorganization, or a consolidation.

Customer must notify Microsoft of a transfer of license by completing a transfer notice form, which can be obtained from <http://www.microsoft.com/licensing/contracts> and send the completed form to Microsoft before the license transfer. No License transfer will be valid unless Customer provides to the transferee, and the transferee accepts in writing, the applicable Product Use Rights, use restrictions, limitations of liability (including exclusions and warranty provisions), and the transfer restrictions described in this section. Any license transfer not made in compliance with this section will be void.

**b. Internal Reassignment of Licenses and Software Assurance.**

- (i) **For Products other than the desktop operating system upgrade.** For Products other than the desktop operating system upgrade, Registered Affiliate may internally reassign Licenses to an Affiliate. However, Registered Affiliate may not reassign Licenses on a short-term basis (90 days or less), or reassign Software Assurance or other upgrade coverage separately from the underlying License, except as provided otherwise in this agreement.
- (ii) **For desktop operating systems.** The Registered Affiliate may not reassign desktop operating system upgrade Licenses from one computer to another. The Registered Affiliate may internally reassign Software Assurance coverage on desktop operating systems upgrades from the original computer to a replacement computer internally, as long as (1) the replacement computer is licensed to run the latest version of that operating system, and (2) the Registered Affiliate removes any desktop operating system upgrades from the original computer.

**9. Term and termination.**

- a. **Term.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
- b. **Termination without cause.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
- c. **Mid-term termination for non-appropriation of Funds.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
- d. **Termination for cause.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
- e. **Affiliate termination.** If (1) a Registered Affiliate terminates its registration as a result of a breach by Microsoft, or (2) if Microsoft terminates Registered Affiliate's registration because it has ceased to be an Affiliate of Customer, or (3) Registered Affiliate terminates a registration for non-appropriation of funds, or (4) Microsoft terminates a registration for non-payment due to non-appropriation of funds, then the Registered Affiliate will have the following options with regard to any Orders it has under the Program Agreement:
  - (i) For Licenses available on a perpetual basis, it may immediately pay the total remaining amount due, including all installments, in which case the Registered Affiliate will have perpetual Licenses for all copies of the Products it has ordered, or
  - (ii) It may pay only amounts due as of the termination date, in which case the Registered Affiliate will have perpetual Licenses for:
    - 1) all copies of all Products for which payment has been made in full (including the latest version of Products under Software Assurance coverage), and
    - 2) the number of copies of Products it has ordered (including the latest version of Products under Software Assurance) for which payment has been made in installments that is proportional to the total of payments made versus total amounts due if the early termination had not occurred.

Nothing in this section shall affect perpetual License rights acquired either in a separate agreement or in a prior term of the terminated registration.

- f. **Effect of termination.** When this agreement, a registration or an Order is terminated,
- (i) Each affected Registered Affiliate must order Licenses for all copies of Products it has run for which it has not previously submitted an Order. Except for the options provided above in the event of termination of a Registered Affiliate's registration, any and all unpaid payments or any order of any kind, including subscription services, immediately become due and payable.
  - (ii) Registered Affiliate's right to Software Assurance benefits under this agreement ends for all Software Assurance for which payment has not been made in full.

## **10. How to renew an Order.**

Microsoft will provide prior notice of expiration of any Software Assurance ordered under the Program Agreement advising Customer of its Software Assurance renewal options. Microsoft may make a change to this program that will make it necessary for Customer to enter into a new agreement to renew Software Assurance.

To maintain Software Assurance coverage for any copies previously ordered under this Program Agreement, Registered Affiliate must submit an Order for another term of Software Assurance for those Licenses prior to or on the expiration of the previous term.

**Consequences of non-renewal.** If Registered Affiliate elects not to place another Order for Software Assurance and it otherwise allows Software Assurance for any copies of any Products licensed to lapse, then the Registered Affiliate will not be permitted to order Software Assurance for those copies later without first acquiring L&SA.

**Renewing Software Assurance.** If Registered Affiliate is placing an Order for Software Assurance from multiple Select programs or is consolidating multiple previous Enrollments or agreements into this agreement, please complete the multiple previous Enrollment form.

11. **Restrictions on use.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
12. **Confidentiality.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
13. **Warranties.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
14. **Defense of infringement, misappropriation, and third party claims.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
15. **Limitation of liability.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
16. **Verifying compliance.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
17. **Non-Microsoft Software or Technology.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
18. **Miscellaneous.** *All of the following sections are intentionally omitted, and are included in the associated Microsoft Business Agreement*
  - a. Notices to Microsoft.
  - b. Assignment.
  - c. Severability.
  - d. Waiver.
  - e. Applicable law; Dispute resolution.
  - f. This Agreement is not exclusive.
  - g. Survival.
  - h. No transfer of ownership.
  - i. Free Products.
  - j. Amending the Agreement.
  - k. Resellers and other third parties cannot bind Microsoft.
  - l. Privacy and security.
  - m. Voluntary Product Accessibility Templates.
  - n. Natural disaster.
  - o. Copyright violation.
  - p. U.S. export jurisdiction.

# Appendix F- Sample Custom Affiliate Registration Form

Proposal ID	NY002
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## Select Plus Affiliate Registration Form

## State and Local

Registration Type <i>Reseller to complete</i>	Lead Affiliate <input type="checkbox"/> Additional Affiliate <input type="checkbox"/>	Lead Affiliate Public Customer Number (PCN) <i>Reseller to complete</i>	
Agreement Number Microsoft or Reseller to complete		Additional Affiliate Public Customer Number (PCN) <i>Reseller to complete</i>	
Qualifying Contract <i>Reseller to complete</i>		Change Affiliate Anniversary Month <i>Reseller to complete</i>	Choose Month

By registering, Registered Affiliate accepts and agrees to be bound by the terms of the Business Agreement, Program Agreement and any applicable attachments, and will be allowed to acquire Products in accordance with the Business Agreement.

If Registered Affiliate registers as an Additional Affiliate, Registered Affiliate represents that the Additional Affiliate is an eligible entity of the Lead Affiliate identified above.

This registration is valid when accepted by Microsoft and until it is terminated or until the Program agreement expires. Registered Affiliate will receive an acceptance notification confirming the effective date of this registration. Microsoft may refuse to accept a registration if there is a business reason for doing so. Either party may terminate this registration for any reason with 60 days advance written notice. Terminating this registration will terminate the Registered Affiliate's ability to place Orders under the Program Agreement.

Each Registered Affiliate may qualify for and receive additional benefits by electing Software Assurance membership. By electing Software Assurance membership, the Registered Affiliate is committing to include Software Assurance with every eligible Order. To make this election, complete and submit the Select Plus Software Assurance Membership Election Form.

**Qualifying systems Licenses.** The operating system Licenses granted under this program are upgrade Licenses only. *Full operating system Licenses are not available under this program.* If Customer selects the Windows Desktop Operating System Upgrade, all qualified desktops on which the Customer runs the Windows Desktop Operating System Upgrade must be licensed to run one of the qualifying operating systems identified in the Product List at <http://www.microsoft.com/licensing/contracts>. Exclusions are subject to change when new versions of Windows are released.

In order to use a third party to reimage the Windows Operating System Upgrade, Registered Affiliate must certify that it has acquired qualifying operating system licenses. See the Product List for details.

### 19. Primary Contact Information.

Registered Affiliate must identify an individual from inside its organization to serve as the primary contact. This contact is also an Online Administrator for the Volume Licensing Service Center and may grant online access to others.

Name of entity\*  
Contact name\*: First Last  
Contact email address\*  
Street address\*  
City\*  
State\*  
Postal code\*  
Country\*  
Phone\*  
Tax ID  
*\* indicates required fields*

## 20. Notices and online administrator.

This individual receives contractual notices. They are also the online Administrator for the Volume Licensing Service Center and may grant online access to others.

Same as primary contact

Name of entity\*  
Contact name\*: First Last  
Contact email address\*  
Street address\*  
City\*  
State\*  
Postal code\*  
Country\*  
Phone\*

This contact is a third party (not the Registered Affiliate). Warning: This contact receives personally identifiable information of the Registered Affiliate.

*\* indicates required fields*

## 21. Language preference.

Select the language for notices. English

## 4. Reseller information.

Reseller company name\*  
Street address (PO boxes will not be accepted)\*  
City\*  
State\*  
Postal code\*  
Country\*  
Contact name\*  
Phone\*  
Contact email address\*  
*\* indicates required fields*

The undersigned confirms that the information is correct.

<b>Name of Reseller*</b>
<b>Signature*</b> _____
<b>Printed name*</b>
<b>Printed title*</b>
<b>Date*</b>

\* indicates required fields

- a. **Changing a Reseller.** *Intentionally omitted, this section is included in the associated Program Agreement and Microsoft Business Agreement*

## 5. Supplemental Contacts.

Customer's Notices Contact identified above is the default contact for administrative and other communications. However, Customer may designate additional contacts using the Supplemental Contact Information form.

## 6. Software Assurance Membership Election.

Each Registered Affiliate may qualify for and receive additional benefits with Software Assurance membership. By electing Software Assurance membership below, Registered Affiliate is committing for a minimum period of one year to include Software Assurance with every eligible Order, and to maintain Software Assurance for all copies of Products licensed under this program for at least one Product pool.

Product pools	Yes	No
Applications	<input type="checkbox"/>	<input type="checkbox"/>
Systems	<input type="checkbox"/>	<input type="checkbox"/>
Servers	<input type="checkbox"/>	<input type="checkbox"/>

**Note:** If "Yes" is marked, orders for Licenses without Software Assurance will not be accepted.

**Only valid if attached to a signature form.**

Proposal ID	001-jendunn-S-901 D
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# Academic Select Plus Agreement

## Custom Program Agreement Terms and Conditions

### Contents

1. <b>Definitions.</b> .....	1
2. <b>How the Academic Select Plus License program works.</b> .....	3
3. <b>How to establish price level.</b> .....	3
4. <b>License grant — what Registered Affiliates are licensed to run.</b> .....	4
5. <b>How to know what Product Use Rights apply.</b> .....	5
6. <b>How to order Product Licenses.</b> .....	6
7. <b>Making copies of Products and re-imaging rights.</b> .....	7
8. <b>Work at home Product use rights.</b> .....	8
9. <b>Distributing media.</b> .....	9
10. <b>Transferring and reassigning Licenses.</b> .....	9
11. <b>Term and termination.</b> .....	10
12. <b>How to renew an Order.</b> .....	11
13. <b>Restrictions on Use.</b> .....	11
14. <b>Confidentiality.</b> .....	11
15. <b>Warranties.</b> .....	11
16. <b>Defense of infringement, misappropriation, and third party claims.</b> .....	11
17. <b>Limitation of liability.</b> .....	11
18. <b>Verifying compliance.</b> .....	12
19. <b>Miscellaneous.</b> .....	12

This Microsoft Academic Select Plus Program Agreement is entered into between the entities identified on the signature form.

**Effective date.** The effective date of this agreement is July 1, 2013.

This Program Agreement consists of (1) the associated Microsoft Business Agreement and these Program Agreement terms and conditions and the signature form and all attachments identified therein, (2) the Product List, (3) the Product Use Rights applicable to Products licensed under this Program Agreement, (4) any Affiliate registration entered into under this Program Agreement, and (5) any Order submitted under this Program Agreement.

The Parties agree to be bound by the terms of this Program Agreement.

### Terms and Conditions

**A Note on Section Summaries.** Some sections of this Program Agreement have a summary at the beginning. These summaries are intended for ease of reference and are not part of the Program Agreement. If any summary conflicts with the section it is summarizing, the section of the Program Agreement, and not the summary, controls.

#### 1. Definitions.

In this Program Agreement, "Institution or Institution's Affiliate" means the entity that is a qualified educational user identified at <http://www.microsoft.com/licensing/contracts> as of the effective date of this

Program Agreement and that has entered into this Program Agreement with Microsoft by submitting an Affiliate registration form, and "Microsoft" means the Microsoft entity that has entered into this Program Agreement by accepting Institution's registration and its Affiliates, as appropriate. In addition, the following definitions apply:

Affiliate" means

- a. with regard to Institution,
  - (i) if Institution is a non-public entity, any qualified educational user identified at Appendix J that Institution owns and/or controls, that owns Institution and/or controls Institution, or that is under common ownership and/or control with Institution; "ownership" means, for purposes of this definition, more than 50% ownership, and
  - (ii) if Institution is a state or local government entity,
    - any other qualified educational user identified at Appendix J as of the effective date of this Program Agreement that is an agency, department, office, bureau, division, or other entity of Institution's state or local government, and
    - any other qualified educational user expressly authorized by the laws of Institution's state to purchase under state education contracts;provided that Institution and its Affiliates shall not, for purposes of this definition, be considered to be Affiliates of the federal government and its Affiliates; and
- b. with regard to Microsoft, any legal entity that Microsoft owns, that owns Microsoft, or that is under common ownership with Microsoft;

"available" means Microsoft has made Licenses for that Product available on the Product List for ordering under a particular licensing program.

"Fix(es)" means Product fixes, modifications or enhancements, or their derivatives, that Microsoft releases generally (such as Commercial Product service packs).

"Institution" means the entity that is a qualified educational user identified at <http://www.microsoft.com/licensing/contracts> as of the effective date of this Program Agreement and that has entered into this Program Agreement with Microsoft;

"License" means, for any one of the Products identified in the Product List (including standard Licenses, and upgrades for desktop operating systems), the right to run the version of the Product ordered;

"L&SA" means a License and Software Assurance for any Product ordered;

"Order" means the document Institution or Institution's Affiliate submits under this Program Agreement to acquire Licenses or Online Services;

"Product" means all software, Online Services and other web-based services identified on the Product List.

"Product List" means, with respect to any licensing program, the statement published by Microsoft from time to time on the World Wide Web at <http://www.microsoft.com/licensing/contracts>, or at a successor site that Microsoft identifies, which identifies the Products that are or may be made available under the program (which availability may vary by region) and any Product-specific conditions or limitations on the acquisition of licenses for those Products

"Product Use Rights" means, with respect to any licensing program, the use rights or terms of service for each Product and version published for that licensing program at <http://www.microsoft.com/licensing/contracts> or at a successor site.

"Qualifying Contract," means a Campus or School Enrollment under a Microsoft Campus and School Program Agreement or an Academic Select Agreement.

"Qualified Desktop" means any personal desktop computer, portable computer, workstation, or similar device that is used by or for the benefit of Institution's organization (or by or for the benefit of Students

enrolled in Institution's organization, if applicable) and that meets the minimum requirements for running any of the Desktop Platform Products. Qualified Desktops do not include: (1) any computers that are designated as servers and not used as a personal computer, (2) Industry Devices, or (3) any devices running an embedded operating system (e.g. Windows Vista for embedded, Windows XP embedded) that do not access a virtual desktop infrastructure;

"Registered Affiliate" means an entity, either Institution or any one of Institution's Affiliates, identified on an Affiliate registration form that has been accepted by Microsoft and has submitted an Order under this Program Agreement;

"Reseller" means a large account reseller authorized by Microsoft to resell Product and Software Assurance in an Enrolled Customer's region under this Agreement;

"run" or "use" means to copy, install, use, access, display, run, or otherwise interact with;

"Software Assurance" means an annuity offering that provides new version rights and other benefits for Products as described in the Product List, and

"Trade Secret" means information that is not generally known or readily ascertainable to the public, has economic value as a result, and has been subject to reasonable steps under the circumstances to maintain its secrecy.

## **2. *How the Academic Select Plus License program works.***

**Summary:** Under the Academic Select Plus License Program Agreement, Institution and its Affiliates can license Products at discount pricing based on the volume of Licenses they purchase.

The Academic Select Plus License Program Agreement allows Registered Affiliates to acquire Licenses and services at discount pricing. Institution and Institution's Affiliate can participate in this program if Institution or Institution's Affiliate (1) submits an Order meeting the initial minimum order quantity, (2) maintains at least one active Qualifying Contract, or (3) purchased the minimum order quantity during the 12 months preceding the effective date of this Program Agreement. Regarding public qualified educational users, only Registered Affiliates identified in a registration will be responsible for complying with the terms of that registration, including the terms of this Program Agreement incorporated by reference in that registration. Online services are provided as subscription services and are subject to unique terms set forth in the Product Use Rights and the Product List.

## **3. *How to establish price level.***

**Summary:** Institution's price level for each Product category is based on their purchase volume for that category. Price levels will be reviewed each year on the anniversary of this Program Agreement.

- a. **Price level.** Each Product offering is assigned a point value on the Product List and is assigned to one of the following pools: applications, systems, and servers. In order for Registered Affiliates to qualify for academic level pricing and be eligible to acquire Licenses from any particular pool under this Program Agreement, Institution must represent to Microsoft that Institution reasonably expects its Registered Affiliates, in the aggregate, to acquire from that pool, during the initial term of this Program Agreement. Institution's price level will be used to determine the prices Microsoft will invoice each Registered Affiliate's Reseller for Product Licenses that Registered Affiliate orders.
- b. **Compliance check.** Each calendar year, on the Program Agreement anniversary date, Microsoft will review Institution's purchases to count the number of points earned by all Registered Affiliates for each pool during the preceding term.

If Institution does not maintain a Qualifying Contract or earn enough points during an annual term to qualify for program participation, Registered Affiliates will not be able to place

additional Orders under this Program Agreement until Institution has placed a minimum qualifying Order.

#### **4. License grant — what Registered Affiliates are licensed to run.**

**Summary:** Registered Affiliate can use the latest version of the Products ordered, or choose to use any earlier version. Except for subscription licenses, use rights become permanent once Registered Affiliate has completed all payments. At that time, Registered Affiliate will have perpetual Licenses for the number of desktops, users, or copies for which Registered Affiliate submitted Orders during the term.

Registered Affiliates have the rights described below once their registration is accepted by Microsoft. These rights apply to the Licenses obtained under this Program Agreement and are not related to any order of fulfillment of media.

The ability to run current or later versions of a Product licensed under this Program Agreement could be affected by minimum system requirements or other factors (e.g., hardware or other software).

- a. **General.** At any time after its registration has been accepted by Microsoft, a Registered Affiliate may run copies of available Products, provided that it submits Orders for all Licenses in the month in which those copies are first run.
- b. **Use by Affiliates.** A Registered Affiliate may sublicense the right to use the Products ordered under this Program Agreement to any of its Affiliates, but Affiliates may not sublicense these rights and their use must be consistent with the license terms contained in this Program Agreement.
- c. **When Licenses become perpetual.** The right to run any Product licensed under an Order is temporary until the applicable License, Software Assurance, or L&SA are paid for in full. Thereafter, a perpetual License is granted to run the number of copies ordered in the version ordered (or the latest version in the case of Software Assurance).
- d. **Perpetual Licenses through Software Assurance.** Any perpetual Licenses received through Software Assurance supersede and replace the underlying perpetual Licenses for which that Software Assurance coverage was ordered. All perpetual Licenses acquired under this Program Agreement remain subject to the terms of this Program Agreement and the applicable Product Use Rights.
- e. **Non-Perpetual Licenses.** Some Products may be licensed on a fixed term or subscription basis. The right to use Products licensed on a subscription basis terminates upon expiration of the subscription Program Agreement if it is not renewed.
- f. **License confirmation.** This Program Agreement (*soft copy or web link to location is acceptable*), the applicable Enrollment (*soft copy is acceptable*), the Enrolled Affiliate's order confirmation, and any documentation evidencing transfers of Licenses, together with proof of payment, will be the Enrolled Affiliate's evidence of all Licenses obtained under its Enrollment.
- g. **Benefits limited to qualified educational user.** Products licensed under this Program Agreement may be used only by and for the benefit of a qualified educational user. Client Access Licenses that the Registered Affiliates acquire solely to enable their students to access their servers are, for the purposes of this restriction, deemed to be used by and for the benefit of a qualified educational user. For each such student Client Access License the Registered Affiliate acquires, it does not need to acquire a separate Client Access License for the parent(s) or legal guardian(s) of the licensed student user. Licenses obtained under this Program Agreement may not be transferred, sublicensed, rented, leased, or loaned to any person or entity that is not a qualified educational user.
- h. **Prior version rights.** A Registered Affiliate may run prior versions of any Product it licenses under this Program Agreement. A Registered Affiliate may run different language versions of

any Product it Licenses under this Program Agreement, provided that the License, L&SA, or Software Assurance for that different language version is available at the same, or lower price, than the price paid for the language version ordered of the same Product and License type.

## 5. **How to know what Product Use Rights apply.**

**Summary:** Generally, Microsoft agrees to lock-in the Product Use Rights at the start of the Program Agreement, for current versions, and on the date of first release, for new versions, so that any subsequent changes Microsoft makes to the Product Use Rights will not affect any Registered Affiliates. A special rule applies in the case of downgrades, as described below.

- a. **Product Use Rights** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
  - (i) **Product Use Rights for current and future versions of Products.** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
  - (ii) **Product Use Rights for earlier versions (downgrade).** *Intentionally omitted, this section is included in the associated Microsoft Business Agreement*
- b. **Alternative Product use rights: deploying licenses in academic settings.** For each copy of Microsoft Developer Products a Registered Affiliate licenses for instructional purposes in connection with a class or other educational program, the Registered Affiliate may, as an alternative to deploying the Product pursuant to the licensing model described in the Product Use Rights, either
  - (i) permit an unlimited number of its student users to run the Product on a single computer or similar device, provided that all such users comply with all other terms of this Program Agreement; or
  - (ii) if the Registered Affiliate has licensed multiple copies of the Product, then, at any time, its students or faculty may run as many copies of the Product as it has licensed, provided that those users comply with all other terms of this Program Agreement. If the anticipated number of users of the Product will exceed the number of copies the Registered Affiliate has licensed, it must have a reasonable mechanism or process in place to ensure that the number of persons running the product at any given point in time does not exceed the number of copies licensed.
- c. **Redistribution of Software Updates to students.**
  - (i) **License grant.** From time to time Microsoft may make available to the general public additional or replacement code of any portion of our licensed Products without a fee ("Software Updates"). Microsoft grants Institution a limited, non-exclusive, royalty-free, non-assignable, non-transferable, revocable License to distribute the Software Updates to Institution's students in accordance with the terms of this Section 5(d). Institution's students must use the Software Updates solely for their personal benefit in accordance with the end-user license Program Agreement with Microsoft ("EULA") included with each Software Update.
  - (ii) **Redistribution of Software Updates.** Institution may redistribute Software Updates to Institution's students by electronic means provided that Institution's method of electronic distribution is adequately licensed and incorporates access control and security measures designed to prevent modification of the Software Updates and prevent access by the general public, or, where available, through acquiring authorized copies on fixed media from a fulfillment source approved by Microsoft.
- d. **Limitations.** Institution may not: (1) produce or replicate Software Updates onto CDs or other distributable storage media; (2) combine the Software Updates with other non-Microsoft

software; (3) distribute any Software Updates as a stand-alone component via email attachment; (4) charge for the Software Updates, but Institution may recover any reasonable costs incurred in providing the updates to Institution's students; (5) remove, modify, or interfere with the EULA or the EULA acceptance functionality included by Microsoft with any Software Update; or (6) alter the Software Updates in any way. Microsoft is not responsible for any cost related to the acquisition, distribution, or recall of the Software Updates.

- e. **Tracking and recall; replacement Software Updates.** Institution must track the quantity and method of distribution of the Software Updates by means that will allow Institution to provide notice of a recall and offer replacements as provided in this subsection. Institution agrees to stop redistributing Software Updates within 10 days of receipt of a notice of recall from Microsoft, and within 30 days of that notice, Registered Affiliate agrees to (1) return to Microsoft or destroy all copies of Software Updates in Registered Affiliate's possession, and (2) notify Registered Affiliate's students of the recall by same or similar means in which they were notified of the availability of the Software Updates.

If Microsoft makes available to Registered Affiliate a replacement Software Update, Registered Affiliate agrees to make the replacement available to its students within 10 days of receipt and in the same quantity and method of distribution as Registered Affiliate made the original Software Update available. Institution's distribution of replacement Software Updates is subject to the same conditions and restrictions as Software Updates under this section.

- f. **No warranties; exclusion of indirect, special, incidental, consequential and certain other damages.** Notwithstanding anything to the contrary in this Program Agreement, and to the extent permitted by law, Software Updates that Registered Affiliate redistributes to Institution's students are provided "as-is" without any warranties. Institution and its Registered Affiliates acknowledge that the provisions of this paragraph with regard to the Software Updates are reasonable based on, among other things, the fact that they are complex computer software and their performance will vary depending upon hardware, platform and software interactions and configurations.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL MICROSOFT BE LIABLE FOR ANY SPECIAL, INCIDENTAL, PUNITIVE, CONSEQUENTIAL, OR INDIRECT DAMAGES THAT ARISE OUT OF OR ARE IN ANY WAY RELATED TO INSTITUTION'S REDISTRIBUTION OF THE SOFTWARE UPDATES TO INSTITUTION'S STUDENTS. FURTHERMORE, IN NO EVENT SHALL MICROSOFT BE LIABLE FOR ANY SUCH DAMAGES BASED DIRECTLY OR INDIRECTLY UPON THE PROVISION OF SOFTWARE UPDATES OR UNAVAILABILITY OF SOFTWARE UPDATES -- INCLUDING WITHOUT LIMITATION, DAMAGES DUE TO BUSINESS INTERRUPTION, LOSS OF PROFITS, REVENUE OR BUSINESS OPPORTUNITY, LOSS OF DATA AND THE LIKE, FAILURE TO MEET ANY DUTY, OR NEGLIGENCE.

- (i) **Limitation of liability.** With respect to Registered Affiliate's redistribution of the Software Updates, the Limitation of Liability provisions in Section 17 of this Program Agreement shall apply in those situations in which Institution or a Registered Affiliate have a right to claim damages or payment from Microsoft.

- (ii) **No support.** Software Updates that Registered Affiliate redistributes to its students are provided without any support obligation by Microsoft, including any benefits accruing from Software Assurance.

- g. **Reservation of rights.** All rights not expressly granted are reserved by Microsoft.

## 6. **How to order Product Licenses.**

**Summary:** Registered Affiliate must place Orders with an authorized Reseller who will determine price and other payment terms. Registered Affiliate Order information can be found at a dedicated

website. For Orders that include Software Assurance, Microsoft may invoice Registered Affiliate's Reseller in three annual payments.

- a. **Placing Orders.** Registered Affiliate may purchase Licenses and services Microsoft makes available under this program by placing Orders with Registered Affiliate's authorized Reseller. The price and payment terms for all Orders will be determined by Program Agreement between Registered Affiliate and Registered Affiliate's Reseller. When placing Orders, a Registered Affiliate must specify the country or countries where the Registered Affiliate will use the Licenses.
- b. **How to confirm Orders.** Information about Orders, including an electronic confirmation of each Order, will be provided in a password-protected site on the World Wide Web at <https://licensing.microsoft.com> or a successor site that will be identified. Upon Microsoft's acceptance of this Program Agreement, Registered Affiliate's contact identified for this purpose will be provided access to this site.
- c. **Invoices and payments.** For any Orders for Software Assurance or L&SA, if the Registered Affiliate elects to spread its payments over three years rather than payment in a lump sum, it may make this election with its Reseller. In such cases, Microsoft will invoice the Registered Affiliate's Reseller in installments, the first installment upon receipt of the Order, and subsequent installments on each anniversary of the Order or on the Affiliate anniversary month, whichever the Registered Affiliate chooses. Any amounts for Licenses only (i.e. without accompanying Software Assurance) will be invoiced to the Registered Affiliate's Reseller in full upon receipt of the Order.
- d. **When is Registered Affiliate eligible to only order Software Assurance?** Registered Affiliate may order Software Assurance for copies of a Product without the need to simultaneously order a new License for those copies in each of the following circumstances:
  - (i) Registered Affiliate may order Software Assurance for copies of Products for which the Registered Affiliate has previously obtained perpetual Licenses through Upgrade Advantage, Software Assurance, or any similar upgrade protection, so long as the Order for Software Assurance under this Program Agreement becomes effective no later than one day following the expiration of that upgrade protection.
  - (ii) During the term of the Program Agreement (including any renewal term), Registered Affiliate may be eligible to order Software Assurance on behalf of Registered Affiliates for copies of certain Products licensed through retail sources or from an original equipment manufacturer ("OEM"), provided that the Registered Affiliate places the Order within the required time frame. The Product List at <http://www.microsoft.com/licensing/contracts> identifies those Products that may be enrolled in Software Assurance and the applicable time frame for placing an Order.
  - (iii) Registered Affiliate may also Order Software Assurance for the benefit of a Registered Affiliate in any other circumstances expressly permitted in the Product List.
  - (iv) Registered Affiliate may renew Software Assurance ordered for the benefit of a Registered Affiliate under this Program Agreement at the time it renews its Order as described in the section titled "How to renew an Order."

## **7. Making copies of Products and re-imaging rights.**

**Summary:** Registered Affiliate can make as many copies as it needs. The copies must be complete from master copies obtained from an authorized source. If Registered Affiliate uses third parties to make copies, Registered Affiliate is responsible for them. Registered Affiliate can make a specified number of complimentary copies for training, evaluation, and back-up. In certain circumstances, Registered Affiliate can use the media that it obtains under this program to make copies of Products that it is licensing through some other channel. Generally, this is only allowed where the Product,

version, language, type, and components that are being copied are identical to those licensed through that other channel.

- a. **General.** The Registered Affiliate may make as many copies of the Products as it needs to distribute them within its organization. Copies must be true and complete (including copyright and trademark notices), from master copies obtained from a Microsoft approved fulfillment source. The Registered Affiliate may use a third party to make these copies, but the Registered Affiliate agrees that it will be responsible for that third party's actions. The Registered Affiliate agrees to use reasonable efforts to make its employees, agents, and any other individuals that it allows to use the Products aware that the Products are licensed from Microsoft and can only be transferred subject to the terms of this Program Agreement.
- b. **Copies for training, evaluation, and back-up.** The Registered Affiliate may (1) use up to 20 complimentary copies of any Product in a dedicated training facility on its premises, (2) use up to 10 complimentary copies of any Product for a 60-day evaluation period, and (3) use one complimentary copy of any licensed Product for back-up or archival purposes for each of its distinct geographic locations.
- c. **Right to re-image.** In certain cases, re-imaging is permitted using the Product media. If the Microsoft Product(s) is licensed (1) from an original equipment manufacturer (OEM), (2) as full packaged Product through a retail source, or (3) under another Microsoft program, then media provided under this Program Agreement may be generally used to create images for use in place of copies provided through that separate source. This right is conditional upon the following:
  - (i) Separate Licenses must be owned from the source for each Product that is re-imaged.
  - (ii) The Product, language, version, and components of the copies made must be identical to the Product, language, version, and all components of the copies they replace and the number of copies or instances of the re-imaged Product permitted remains the same.
  - (iii) Except for copies of an operating system and copies of Products licensed under another Microsoft program, the Product type (e.g., upgrade or full License) must be identical to the Product type from the separate source.
  - (iv) Any Product-specific requirements for re-imaging identified in the Product List.
  - (v) Re-images made under this subsection remain subject to the terms and use rights provided with the License from the separate source. This subsection does not create or extend any warranty or support obligation.

## **8. Work at home Product use rights.**

**Summary:** Generally, the Registered Affiliate's faculty and staff users who are licensed to use Microsoft Office have the right, so long as this Program Agreement is active, to run one additional copy of that Product on another computer they own.

For each copy of Microsoft Office Registered Affiliate licenses, the primary user (who may be any of its faculty, staff, or other employee users but not any student user who is not also an employee user) of the computer or similar device on or from which such Product is run may also run a second copy, so long as this Program Agreement is active, for work-related purposes only from either a laptop or desktop computer that he or she owns or leases.

Registered Affiliates must make reasonable efforts to ensure that faculty, staff, or other employee users delete and remove such copies from the temporary memory (RAM) and permanent memory (e.g., hard disk) of their computers at the end of the term of this Program Agreement.

## 9. *Distributing media.*

**Summary:** Media that a Registered Affiliate distributes to its faculty and staff for work-at-home purposes and students under the Select Plus student licensing option must be acquired from a Microsoft-approved source. The Registered Affiliate can also distribute Product to faculty and staff for work-at-home purposes and students as described below.

Access to media by the Registered Affiliate's faculty and staff for work-at-home purposes must be restricted and regulated by the Registered Affiliate. All media for Product distributed to the Registered Affiliate's faculty and staff for work-at-home purposes must be acquired from a Microsoft approved fulfillment source, and such Product may be distributed to such users only in the following ways:

- a. if the Registered Affiliate acquires media for work-at-home, the Registered Affiliate may distribute one copy of such media directly to each authorized work-at-home user. Work-at-home media may contain Product activation features that limit the number of installations; Reseller can identify media and Product that contains Product activation features. The Registered Affiliate can get details on ordering and distributing work-at-home media at <http://www.microsoft.com/education/studentmedia.mspix>;
- b. Registered Affiliate may use volume licensing media to electronically distribute copies via download from secure network server(s) or other storage device(s), provided Registered Affiliate controls the download to ensure that the number of permitted copies is not exceeded and that parties making the download are licensed to do so. Registered Affiliate may engage a Microsoft approved entity to electronically distribute Products on its behalf. If Registered Affiliate uses a third party entity Registered Affiliate must enter into a separate Program Agreement with the entity selected to provide electronic software delivery that is no less protective of Microsoft rights than this Program Agreement; or
- c. utilizing volume licensing media via (1) controlled download from the Registered Affiliate's secure network server(s) or other storage device(s) or (2) manual installation by the Registered Affiliate at a central location that the Registered Affiliate controls.

## 10. *Transferring and reassigning Licenses.*

**Summary:** Registered Affiliate can transfer perpetual Licenses to an Affiliate and to third parties in connection with a divestiture, merger, or consolidation — Registered Affiliate only needs to provide notice to Microsoft. Registered Affiliate cannot transfer Licenses to third parties under other circumstances without Microsoft's prior written consent. Transferees must agree to be bound by the applicable terms. License transfers must be permanent; with certain exceptions, SA cannot be transferred but may be reassigned to another device within the same enterprise under certain conditions; all versions of upgrades must be transferred together, desktop operating system Licenses and upgrades must stay with the computer system on which they were first installed. Generally, Registered Affiliate can reassign Licenses internally, from one user to another, or from one desktop device to another. Resale of Licenses is prohibited.

- a. **Transferring Licenses to third parties.** License transfers are not permitted except as explicitly set forth in this section.
  - (i) **Right to transfer.** Registered Affiliate may transfer fully-paid perpetual Licenses to (1) a Registered Affiliate, or (2) another unaffiliated third party in connection with a divestiture of an Affiliate or of an operating division of the Registered Affiliate or one of its Affiliates, or a merger or consolidation. To do so, the Registered Affiliate must complete and send to Microsoft a transfer notice in a form which can be obtained from <http://www.microsoft.com/licensing/contracts> before the transfer. No License transfer will be valid unless the Registered Affiliate provides to the transferee, and the transferee accepts in writing, the applicable Product Use Rights, use restrictions, limitations of

liability, and the transfer restrictions described in this section. Any transfer not made in compliance with this section will be void and Registered Affiliate must either return or destroy the licensed copies.

**(ii) Limitations.** Even in the event of a merger, consolidation or divestiture, the following types of transfers are not permitted:

- Licenses on a short-term basis (90 days or less);
- temporary rights to use Products;
- Software Assurance coverage;
- perpetual Licenses for any version of any Product acquired through Software Assurance separately from the underlying perpetual Licenses for which that Software Assurance coverage was obtained;
- an upgrade License for a desktop operating system Product separately from the underlying desktop operating system License, or from the computer system on which the Product is first installed;
- full version desktop operating system licenses, unless transferred with the sale of the device for which it operates; or
- any Software Assurance benefits or online services.

**(iii) No resale.** The resale of Licenses including any transfer by a Customer or its Affiliate with a primary purpose to enable the transfer of those Licenses to an unaffiliated third party is prohibited.

**b. Internal reassignment of Licenses and Software Assurance.**

**(i) For Products other than the desktop operating system.** For Products other than the desktop operating system and upgrade, Registered Affiliate may reassign Licenses to an Affiliate. However, Registered Affiliate may not reassign Licenses on a short-term basis (90 days or less), or reassign Software Assurance or other upgrade coverage separately from the underlying License, except as provided otherwise in this Program Agreement.

**(ii) For desktop operating systems and upgrade.** Registered Affiliate may not reassign desktop operating system Licenses or upgrades from one computer to another. The Registered Affiliate may internally reassign Software Assurance coverage on desktop operating systems upgrades from the original computer to a replacement computer internally, as long as (1) the replacement computer is licensed to run the latest version of that operating system, and (2) the Registered Affiliate removes any desktop operating system upgrades from the original computer.

## **11. Term and termination.**

- a. **Term.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement*
- b. **Termination without cause.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement*
- c. **Termination for breach.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement*
- d. **Effect of termination.** When this Program Agreement is terminated, Registered Affiliate must order Licenses for all copies of Products it has run for which it has not previously

submitted an Order. Any and all unpaid payments or any order of any kind, including subscription services, remain due and payable.

## **12. How to renew an Order.**

**Summary:** Registered Affiliate can place Orders for Software Assurance for additional terms at its option. Orders for Software Assurance must be received prior to or on the expiration of the previous term.

Microsoft will provide prior notice of expiration of any Software Assurance ordered under the Program Agreement advising Institution of its Software Assurance renewal options.

To maintain Software Assurance coverage for any copies previously ordered under this Program Agreement, Registered Affiliate must submit an Order for another term of Software Assurance for those Licenses prior to or at the expiration of the previous term.

**Consequences of non-renewal.** If Registered Affiliate elects not to place another Order for Software Assurance and it otherwise allows Software Assurance for any copies of any Products licensed to lapse, then the Registered Affiliate will not be permitted to order Software Assurance for those copies later without first acquiring L&SA.

**Renewing Software Assurance.** If Institution is placing an Order for Software Assurance for a Registered Affiliate from multiple Select Plus programs or is consolidating multiple previous registration or Program Agreements into this Program Agreement, please complete the multiple previous registration form and attach it to this Program Agreement. The date of the earliest expiring order/registration/Program Agreement that contains Software Assurance will be the effective date of the new Software Assurance coverage.

## **13. Restrictions on Use.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

## **14. Confidentiality.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

## **15. Warranties.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

## **16. Defense of infringement, misappropriation, and third party claims.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

## **17. Limitation of liability.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

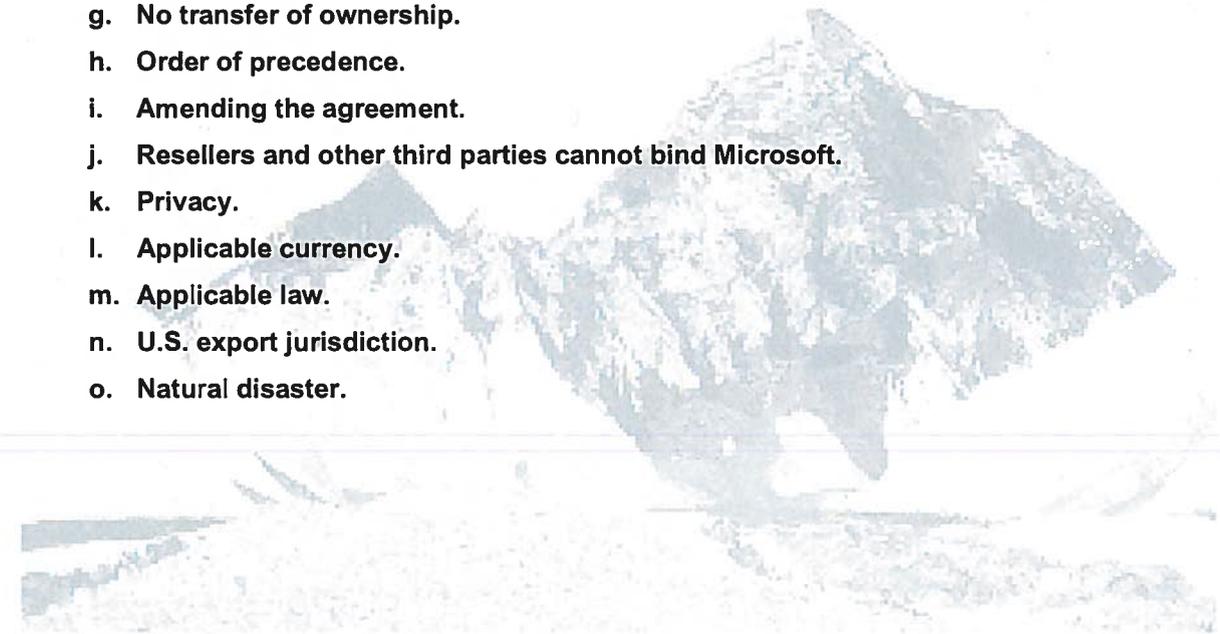
## **18. Verifying compliance.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

## **19. Miscellaneous.**

*All of the following sections are intentionally omitted, and are included in the associated Microsoft Business Agreement.*

- a. **Notices to Microsoft.**
- b. **Assignment.**
- c. **Severability**
- d. **Waiver.**
- e. **Force Majeure.**
- f. **Non-exclusivity.**
- g. **No transfer of ownership.**
- h. **Order of precedence.**
- i. **Amending the agreement.**
- j. **Resellers and other third parties cannot bind Microsoft.**
- k. **Privacy.**
- l. **Applicable currency.**
- m. **Applicable law.**
- n. **U.S. export jurisdiction.**
- o. **Natural disaster.**



# Appendix G - Sample Custom Affiliate Registration Form

## Select Plus Affiliate Registration Form

Registration Type <i>Reseller to complete</i>	Lead Affiliate <input type="checkbox"/> Additional Affiliate <input type="checkbox"/>	Organization Type <i>Reseller to complete</i>	Business <input type="checkbox"/> Government <input type="checkbox"/> Academic <input type="checkbox"/>
Additional Affiliate Public Customer Number (PCN) <i>Reseller to complete</i>		Lead Affiliate Public Customer Number (PCN) <i>Reseller to complete</i>	
Qualifying Contract <i>Reseller to complete</i>		Change Affiliate Anniversary Month <i>Reseller to complete</i>	<Choose Month>
Agreement Number <i>Microsoft or Reseller to complete</i>		Proposal ID/Framework	NY003

By registering, Registered Affiliate accepts and agrees to be bound by the terms of the Agreement and any applicable attachments (the "Agreement"), and will be allowed to acquire Licenses and services in accordance with the Agreement. If Registered Affiliate selects an Organization Type above other than Business, then the Qualifying Government Entity Form or Qualified Educational User Definition, as appropriate, is incorporated by reference. These are located at <http://www.microsoft.com/licensing/contracts>.

This registration is valid when accepted by Microsoft and until it is terminated, or until the Program Agreement expires. Registered Affiliate will receive an acceptance notification confirming the effective date of this registration. Microsoft may refuse to accept a registration if there is a business reason for doing so. Either party may terminate this registration for any reason with 60 days advance written notice. Terminating this registration will terminate the Registered Affiliate's ability to place Orders under the Agreement.

**Qualifying systems Licenses.** The operating system Licenses granted under this program are upgrade Licenses only. *Full operating system Licenses are not available under this program.* If Registered Affiliate selects the Windows Desktop Operating System Upgrade, all Qualified Desktops on which the Registered Affiliate runs the Windows Desktop Operating System Upgrade must be licensed to run one of the qualifying operating systems identified in the Product List at <http://www.microsoft.com/licensing/contracts>. Exclusions are subject to change when new versions of Windows are released.

In order to use a third party to reimage the Windows Operating System Upgrade, Registered Affiliate must certify that it has acquired qualifying operating system licenses. See the Product List for details.

### 1. Primary contact information.

Registered Affiliate must identify an individual from inside its organization to serve as the primary contact. This contact is also an Online Administrator for the Volume Licensing Service Center and may grant online access to others.

Name of entity\*

Contact name\* First Last

Contact email address\*

Street address\*

City \* State/Province\* Postal code\*

Country\*

Phone\* Fax

Tax ID

**2. Notices contact and online administrator.**

This individual receives contractual notices. They are also the Online Administrator for the Volume Licensing Service Center and may grant online access to others.

Same as primary contact

**Name of entity\***

**Contact name\* First Last**

**Contact email address\***

**Street address\***

**City\* State/Province\* Postal code\***

**Country\***

**Phone\* Fax**

This contact is a third party (not the Registered Affiliate). Warning: This contact receives personally identifiable information of the Registered Affiliate.

**3. Language preference.**

Select the language for notices. English

**4. Media delivery contact.**

If media election form is not completed, provide a ship to/download to location for applying sales tax.

Same as notices contact

**Name of entity\***

**Contact name\* First Last**

**Contact email address (required for online access)\***

**Street address (no PO boxes accepted)\***

**City\* State/Province\* Postal code\***

**County Country\***

**Phone\* Fax**

**In City Limits?**

**Estimated Tax Rate**

**5. Reseller information.**

**Reseller company name\***

**Street address (PO boxes will not be accepted)\***

**City\* State/Province\* Postal code\***

**Country\***

**Contact name\***

**Phone\* Fax**

**Contact email address\***

The undersigned confirms that the information is correct.

**Name of Reseller\***

**Signature\*** \_\_\_\_\_

**Printed name\***

**Printed title\***

**Date\***

**Changing a Reseller.** *Intentionally omitted, this section is included in the associated Program Agreement and Microsoft Business Agreement*

**6. Supplemental Contacts.**

Customer's Notices Contact identified above is the default contact for administrative and other communications. However, Customer may designate additional contacts using the Supplemental Contact Information form

**7. Software Assurance Membership Election.**

Each Registered Affiliate may qualify for and receive additional benefits with Software Assurance membership. By electing Software Assurance membership below, Registered Affiliate is committing for a minimum period of one year to include Software Assurance with every eligible Order, and to maintain Software Assurance for all copies of Products licensed under this program for at least one Product pool.

Product Pools	Yes	No
Applications	<input type="checkbox"/>	<input type="checkbox"/>
Systems	<input type="checkbox"/>	<input type="checkbox"/>
Servers	<input type="checkbox"/>	<input type="checkbox"/>

**Note:** If "Yes" is marked, orders for Licenses without Software Assurance will not be accepted.

**Only valid if attached to a signature form**

Proposal ID	001-jendunn-S-901 E
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# Campus and School Agreement

## Custom Program Agreement Terms and Conditions

### Contents

1.	Definitions .....	2
2.	How the Campus and School program works .....	3
3.	Subscription price .....	3
4.	License grant — what Institution and its Users are licensed to run.....	4
5.	Use rights and restrictions .....	4
6.	Making copies of Products and re-imaging rights.....	5
7.	Distributing media .....	6
8.	Redistribution of software updates to Students .....	7
9.	Transfer and reassigning Licenses.....	8
10.	Confidentiality .....	8
11.	Options upon completion of a Licensed Period .....	8
12.	Term and termination.....	99
13.	Warranties.....	100
14.	Defense of infringement, misappropriation, and third party claims .....	100
15.	Limitation of liability.....	100
16.	Verifying compliance.....	100
17.	Miscellaneous .....	111

This *Campus and School Program Agreement* is entered into between the entities identified on the signature form.

**Effective Date.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

This Program Agreement consists of (1) the associated Microsoft Business Agreement and these Agreement Program terms and conditions and the signature form and all attachments identified therein, (2) the Product List, (3) the Product use rights, (4) any Enrollment entered into under this Program Agreement, (5) any order submitted under this agreement, and (6) the eligibility criteria for Campus and School Agreement at Appendix J as of the effective date of this Program Agreement.

**Please note:** Documents referenced in this Program Agreement but not attached to the signature form may be found at <http://www.microsoft.com/licensing/contracts> and are incorporated by reference, including the Product List, Product use rights and the Qualified Educational User definition. These documents may contain additional terms and conditions for Products licensed under this Program Agreement and may be changed from time to time. Institution should review such documents carefully, both at the time of signing and periodically, to ensure a full understanding of all terms and conditions applicable to Products licensed.

## **Terms and Conditions**

### **1. Definitions.**

In this agreement, the following definitions apply:

"Affiliate" means

- a. with regard to Institution,
  - (i) for a non-public entity, any qualified educational user identified at *Appendix J* that Institution owns and/or controls, that owns and/or controls Institution, or that is under common ownership and/or control with Institution; "ownership" means, for purposes of this definition, more than 50% ownership, and
  - (ii) for a state or local government entity,
    - 1) any qualified educational user identified at *Appendix J*, as of the effective date of this agreement that is an agency, department, office, bureau, division, or entity of the state or local government, and
    - 2) any qualified educational user expressly authorized by the laws of the state to purchase under state education contracts;

provided that the state and its Affiliates shall not, for purposes of this definition, be considered to be Affiliates of the federal government and its Affiliates; and

- b. with regard to Microsoft, any legal entity that Microsoft owns, that owns Microsoft, or that is under common ownership with Microsoft;

"Customer Data" means all data, including all text, sound, software, or image files that are provided to Microsoft by, or on behalf of, Customer through Customer's use of the Online Services.

"Enrollment" means the form that Institution submits under this agreement to sign up for this program;

"Fix(es)" means Product fixes, modifications or enhancements, or their derivatives, that Microsoft releases generally (such as Commercial Product service packs).

"Institution" means the entity that is a qualified educational user identified at *Appendix J* as of the effective date of this agreement that has entered into this agreement with Microsoft or the Institution's Affiliate that has entered into an Enrollment under this agreement. If Institution is a school district, "Institution" includes all participating schools in the same district;

"License" means Institution's right to run the quantity of a Product ordered. Under this agreement, Licenses are available only on a subscription basis ("Subscription License"). Licenses for Online Services will be considered Subscription Licenses under this Program Agreement;

"Licensed Period" means the period of time beginning on the effective date specified in Institution's Enrollment and continuing for the period of time specified in Institution's Enrollment (either 12 or 36 calendar months);

"Microsoft" means the Microsoft Affiliate that has entered into this Agreement or a Program Agreement and its Affiliates, as appropriate;

"Online Services" means the Microsoft-hosted services identified in the Online Services section of the Product List;

"Product" means all software, Online Services and other web-based services identified on the Product List.

"Product List" means the statement published by Microsoft from time to time on the World Wide Web at <http://www.microsoft.com/licensing/contracts> or at a successor site that Microsoft identifies, which identifies the Products that are or may be made available to qualified educational users (which availability may vary by region) and any Product-specific conditions or limitations on the acquisition of Licenses for, or the use of, those Products;

"Product use rights" means the use rights or terms of service for each Product and version at <http://www.microsoft.com/licensing/contracts> or at a successor site;

"run" means to copy, install, use, access, display, run or otherwise interact with;

"Service Level Agreement" means the document specifying the standards Microsoft agrees to adhere to and by which it measures the level of service for an Online Service;

*"Software Assurance" means the document specifying the standards Microsoft agrees to adhere to and by which it measures the level of service for an Online Service.*

"Trade Secret" means information that is not generally known or readily ascertainable to the public, has economic value as a result, and has been subject to reasonable steps under the circumstances to maintain its secrecy; and

"Users" means Institution, faculty, staff, and students designated on the Enrollment to run the Products, and members of the public who access devices located in Institution's open access labs or libraries.

## **2. How the Campus and School program works.**

The Campus and School Agreement allows Institution to license one or more Products on a subscription basis. To license Products on a subscription basis means that the right to run the Product is non-perpetual and continues only during the Licensed Period.

Institution can participate in this program by submitting an Enrollment. This program allows a one-year Licensed Period or a three-year Licensed Period. The choice is indicated in the Enrollment.

**One-year Licensed Period.** An order must be submitted to indicate the Products Institution chooses to run. Thereafter, extension orders are submitted to continue the subscription each year. If an extension order is not received, the Enrollment will expire.

**Three-year Licensed Period.** An order must be submitted to indicate the Products Institution chooses to run. Thereafter, Institution must submit anniversary orders on the first and second anniversaries of the effective date of its Enrollment.

## **3. Subscription price.**

This provision shall not apply to Products licensed to Institution at special promotion prices to distributor or reseller, as applicable.

**One-year Licensed Period.** Microsoft will not increase the License prices charged to the reseller for an annual extension order by more than ten percent (10%) (as determined with reference to U.S. funds, regardless of the currency in which amounts are invoiced or payment is made) over the License prices charged for the immediately preceding 12-month Licensed Period if (1) Institution submits an extension order prior to the expiration of the Enrollment and (2) such order is confirmed for the same Products in the same quantities as ordered in the expiring Licensed Period.

**Three-year Licensed Period.** If Institution chooses this option and complies with the ordering requirements in the agreement, for any Products ordered during the Licensed Period, the price Microsoft charges the Distributor or Reseller on each anniversary order will be the same as the price for the Products when they are first ordered except for step-ups.

#### **4. License grant — what Institution and its Users are licensed to run.**

On the date of Microsoft's letter to Institution confirming Microsoft's acceptance of the Enrollment, Institution is temporarily licensed to have Users run the Products as permitted in the Product use rights located at <http://www.microsoft.com/licensing/contracts>.

The Institution's right to have its Users run the Products, *and* Fixes is expressly limited to the rights described in this agreement, including the following limitations:

- a. Neither Institution nor its Users may separate the components of Products made up of multiple components by running them on different computers by upgrading or downgrading them at different times or by transferring them separately except as otherwise provided in the Product use rights.
- b. Neither Institution nor its Users may rent, lease, commercially host or lend any copy of the Products or Fixes, except where agreed by separate agreement.
- c. Neither Institution nor its Users may reverse engineer, decompile or disassemble the Products, or Fixes - except to the extent expressly permitted by applicable law despite this limitation.
- d. Neither Institution nor its Users may make copies of the Products, Fixes or Services Deliverables and distribute them on media to student Users.
- e. The components of the Products may vary by platform. Institution may run only the components of the Products that are included on the platform Institution chooses to deploy.

Neither Institution nor its Users will be entitled to free telephone support for the Products, except as specified in writing in connection with Software Assurance membership or other Software Assurance offerings.

Institution may only sublicense the right to run Products to Affiliates that are included in its defined organization.

These rights apply to the Licenses obtained under an Enrollment and are not related to any order or fulfillment of media. The ability to run current or later versions of a Product licensed under this agreement could be affected by minimum system requirements or other factors (e.g. hardware or other Products).

The right to run any Product under this agreement is temporary unless Institution elects to obtain perpetual Licenses under the buy-out option.

#### **5. Use rights and restrictions.**

- a. **Product use rights.** The Product use rights in effect on the effective date of an Enrollment will apply to use of then-current versions of each Product (excluding Online Services). For future versions, the Product use rights in effect when those future versions are first released will apply. In both cases, subsequent changes made by Microsoft to the Product use rights for a particular version will not apply to use of that version, unless Institution chooses to have such changes apply.

The use rights for Online Services and the process for updating them as the Online Services evolve are detailed in the Product use rights.

- b. **Product use rights for earlier versions (downgrade).** If Institution runs an earlier version of a Product than the version that was current on the Enrollment effective date, the Product use rights for the version licensed, not the version being run, will apply. However, if the earlier version includes components that are not part of the licensed version, any Product use rights specific to those components will apply to Institution's use of those components.
- c. **Use rights for different language version.** Institution may run Products in any available language version. If Institution is using any different language version of any Product

licensed under its agreement, Institution's use of the different language version will be governed by the Product use rights for the version licensed under this agreement.

- d. **Fixes.** Use of any Fixes is defined by the Product use rights for the affected Products or, if the Fix is not provided for specific Products, any other use terms Microsoft provides. All Fixes are licensed, not sold.
- e. **FERPA.** Upon receipt of a judicial order or lawfully issued subpoena requiring the disclosure of personally identifiable information from education records related to Institution in Microsoft's possession, Microsoft or an Affiliate of Microsoft will attempt to redirect the request to Institution. If compelled to disclose personally identifiable information from education records related to Institution to a third party, Microsoft will use commercially reasonable efforts to notify Institution in advance of a disclosure unless legally prohibited. Institution understands that Microsoft may have no or limited contact information for Institution's students and students' parents in its possession. Consequently, Institution will convey notification on behalf of Microsoft to students (or, with respect to a student under 18 years of age and not in attendance at a postsecondary institution, to the student's parent) of such an order or subpoena as may be required under applicable law.
- f. **Non-Microsoft software and technology.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement*

## 6. **Making copies of Products and re-imaging rights.**

- a. **General.** Institution may make as many copies of the Products licensed as necessary to distribute the Products within its organization. All copies of any Product must be true and complete copies (including copyright and trademark notices) from master copies obtained from a Microsoft approved fulfillment source. Institution may also have a third party make or distribute copies but Institution is responsible for such third party's actions. Institution agrees to make reasonable efforts to notify its employees, agents, and other individuals running a Product that the Product is licensed from Microsoft and subject to the terms of this agreement.
- b. **Copies for evaluation.** During the term of its Enrollment, Institution may run up to 10 complimentary copies of any Product for a 60 day evaluation period.
- c. **Re-imaging rights.** In certain cases, re-imaging is permitted using the Product media. If the Microsoft Product(s) is licensed (1) from an original equipment manufacturer (OEM), or (2) as a full packaged Product through a retail source, then media provided under this agreement may generally be used to create images for use in place of copies provided through that separate source. This right is conditional upon the following:
  - (i) Separate Licenses must be owned from the separate source for each Product that is re-imaged.
  - (ii) The Product, language, version, and components of the copies made must be identical to the Product, language, version, and components of the copies they replace and the number of copies or instances of the re-imaged Product permitted remains the same.
  - (iii) Except for copies of an operating system and copies of Products licensed under another Microsoft program, the Product type (e.g., upgrade or full License) must be identical to the Product type from the separate source.
  - (iv) Any Product-specific processes or requirements for re-imaging identified in the Product List.
  - (v) Re-images made under this subsection remain subject to the terms and use rights provided with the License from the separate source. This subsection does not create or extend any warranty or support obligation.

## 7. **Distributing media.**

- a. To Faculty and Staff.** Institution may acquire the quantity of media as necessary to distribute the Products to Faculty and Staff for use in accordance with the agreement. All media for a particular Product must be acquired from a Microsoft-approved fulfillment source for that Product. Institution may also copy volume licensing media acquired from a Microsoft-approved fulfillment source for distribution to Faculty and Staff Users only. All copies must be true and complete copies (including copyright and trademark notices). Institution must maintain the security of any volume licensing keys provided with volume licensing media in accordance with applicable Product use rights and other restrictions and may disclose them only to employees authorized to engage in the installation and support of the Products. Institution may not disclose volume licensing keys to Faculty and Staff work-at-home Users or to Students or to any other unauthorized third party.
- b. To Faculty and Staff work at home Users and to Student licensing option Users.** If Institution exercises Faculty and Staff work at home rights for selected Products or selects the Student licensing option in an Enrollment, access to media by Faculty and Staff for work at home purposes and by Students must be restricted and regulated by Institution. All media for Products distributed to Faculty and Staff for work at home purposes and to Students must be acquired from a Microsoft-approved fulfillment source, and such Products may be distributed to such Users only in the following ways:
- (i) if individual student-media CD-ROM or disk sets (collectively, "Student Media") is purchased for a particular Product, Institution may distribute one copy of such Student media directly to each authorized work at home User or Student (Student Media may contain Product activation features that limit the number of installations); the reseller can identify media and Products that contain Product activation features. Details on ordering and distributing Student Media, including a list of the Products for which Student Media is currently available, is at <http://www.microsoft.com/education/StudentMedia.aspx>; or
  - (ii) for Products for which a volume licensing key is not required, using volume licensing media acquired pursuant to this agreement via (1) controlled download from a secure network server(s), (2) manual installation at a central location that Institution controls or (3) a system of controlled short-term checkout of applicable volume licensing media solely for purposes of individual user installation.
  - (iii) Institution may also use a Microsoft-approved entity selected by Institution to electronically distribute copies via download from secure network server(s) or other storage device(s), provided Institution or the Microsoft-approved entity controls the download to ensure that the number of permitted copies is not exceeded and those making the download are licensed to do so. For more information on this download option, Institution is advised to contact its reseller who may manage this on Institution's behalf.
- c. To Students.** Institution may order media to distribute the Products to Students for use in accordance with this agreement. Institution's order for media must specify version number and country of usage. Institution may only use the media received under its Enrollment to transfer Products to eligible Student Users. Products may only be transferred in the same media format that Institution receives under its Enrollment. Orders must be placed with the reseller named on the Enrollment. Institution may use a third party to complete and process eligible Student Users' orders for media under its Enrollment and to distribute media to eligible Student Users. Institution is responsible for the third party's actions. Price and payment terms for media ordered are determined by agreement with Institution's designated reseller. Institution's designated reseller is authorized to purchase media Products from the Microsoft-authorized replicator identified by Microsoft from time to time solely for the purpose of fulfilling orders placed under the Enrollment. Institution's designated reseller may purchase from Microsoft-authorized replicators media and documentation only for those Products available under the Enrollment.

## 8. **Redistribution of software updates to Students.**

- a. **License grant.** From time to time, Microsoft may make available to the general public additional or replacement code of any portion of Microsoft's licensed Products without a fee ("software updates"). Microsoft grants Institution a limited, non-exclusive, royalty-free, non-assignable, non-transferable, revocable License to distribute the software updates to Institution's Students in accordance with the terms of this section. Institution's Students must use the software updates solely for their personal benefit in accordance with the end-user License Agreement with Microsoft ("EULA") included with each software update.
- b. **Redistribution of software updates.** Institution may redistribute software updates to its Students (1) by electronic means provided that Institution's method of electronic distribution is adequately licensed and incorporates access control and security measures designed to prevent modification of the software updates and access by the general public or (2) through acquiring authorized copies on fixed media from a fulfillment source approved by Microsoft.
- c. **Limitations.** Institution may not (1) produce or replicate software updates on to CDs or other distributable storage media, (2) combine the software updates with other non-Microsoft software, (3) distribute any software updates as a stand-alone component via email attachment, (4) charge for the software updates, other than to recover any reasonable costs incurred in providing the updates to its Students; (5) remove, modify, or interfere with the EULA or the EULA acceptance functionality included by Microsoft with any software update; or (6) alter the software updates in any way. Microsoft is not responsible for any cost related to the acquisition, distribution, or recall of the software updates.
- d. **Tracking and recall, replacement software updates.** Institution must track the quantity and method of distribution of the software updates by means that will allow it to provide notice of a recall and offer replacements as provided in this subsection. Institution agrees to stop redistributing software updates within 10 days of receipt of a notice of recall from Microsoft and within 30 days of that notice Institution agrees to (1) return to Microsoft or destroy all copies of software updates in Institution's possession and (2) notify Institution's Students of the recall by the same or similar means in which they were notified of the availability of the software updates.

If Microsoft makes available to Institution a replacement software update, Institution agrees to make the replacement available to its Students, within 30 days of receipt in the same quantity and method(s) of distribution, if available, as Institution made the original software update available. The distribution of replacement software updates is subject to the same conditions and restrictions as software updates under this section.

- e. **No warranties, exclusion of indirect, special, incidental, consequential, and certain other damages.** Notwithstanding anything to the contrary in this agreement, and to the extent permitted by law, software updates that Institution redistributes to its Students are provided "as is" without any warranties. Institution acknowledges that the provisions of this paragraph with regard to the software updates are reasonable having regard to, among other things, the fact that they are complex computer Products, and their performance will vary depending upon hardware, platform and Products interactions, and configurations.

**TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL MICROSOFT BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE, CONSEQUENTIAL, OR INDIRECT DAMAGES THAT ARISE OUT OF OR ARE IN ANY WAY RELATED TO INSTITUTION'S REDISTRIBUTION OF THE SOFTWARE UPDATES TO ITS STUDENTS. FURTHERMORE, IN NO EVENT SHALL MICROSOFT BE LIABLE FOR ANY SUCH DAMAGES BASED DIRECTLY OR INDIRECTLY UPON THE PROVISION OF SOFTWARE UPDATES OR UNAVAILABILITY OF SOFTWARE UPDATES INCLUDING WITHOUT LIMITATION, DAMAGES DUE TO BUSINESS INTERRUPTION, LOSS OF PROFITS, REVENUE OR BUSINESS OPPORTUNITY, LOSS OF DATA AND THE LIKE, FAILURE TO MEET ANY DUTY, OR NEGLIGENCE.**

- f. **Limitation of liability.** With respect to Institution's redistribution of the software updates, the limitation of liability provisions in this agreement shall apply in those situations in which Institution or its Users have a right to claim damages or payment from Microsoft.
- g. **No support.** Software updates that Institution redistributes to its students are provided without any support obligation by Microsoft, including any benefits accruing from Software Assurance.
- h. **Applicability.** The provisions of this section shall not apply to distribution of Fixes to Students so long as (1) those Students are licensed under the Student licensing option, and (2) the Fix provided to those Students is for Products licensed to them under Student licensing option. All other redistribution to Students of additional or replacement code is subject to the provisions of this section.

## 9. **Transfer and reassigning Licenses.**

- a. **License transfers.** License transfers are not permitted, except that Institution may transfer fully-paid perpetual licenses to:
  - (i) an Affiliate, or
  - (ii) a third party solely in connection with the transfer of hardware or employees to whom the licenses have been assigned as part of (1) a divestiture of an Affiliate or a division of an Affiliate or (2) a merger involving Institution or an Affiliate.

Institution must notify Microsoft of a transfer of license by completing a transfer notice form, which can be obtained from <http://www.microsoft.com/licensing/contracts> and send the completed form to Microsoft before the license transfer. No License transfer will be valid unless Institution provides to the transferee, and the transferee accepts in writing, the applicable Product use rights, use restrictions, limitations of liability (including exclusions and warranty provisions), and the transfer restrictions described in this section. Any license transfer not made in compliance with this section will be void.

- b. **Internal Assignment of Licenses and Software Assurance.** Licenses and Software Assurance must be assigned to a single user or device with the organization. Licenses may be reassigned within the organization as described in the Product use rights.

## 10. **Confidentiality.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

## 11. **Options upon completion of a Licensed Period.**

Microsoft will provide prior written notice of expiration of an Enrollment. The notice will advise Institution of the option to: (1) extend the Enrollment, (2) submit a new Enrollment, (3) exercise the buy-out option, or (4) allow the Enrollment to expire. Microsoft will not unreasonably reject any extension order or new Enrollment. Each Licensed Period will start the day following the expiration of the prior Licensed Period:

- a. **One-year Licensed Period.** Institution may elect to extend an initial one-year Licensed Period for either (1) up to five consecutive terms of 12 full calendar months by submitting an extension order for each such extension term or (2) one term of 36 full calendar months.
- b. **Three-year Licensed Period.** Institution may elect to extend an initial three-year Licensed Period for either (1) up to three consecutive terms of 12 full calendar months or (2) one term of 36 full calendar months.
- c. **Buy-out option.** Institution may elect to obtain perpetual Licenses for Products licensed under the Enrollment provided it has licensed such Products under one or more Enrollments (including any extensions) under the Agreement (or a predecessor agreement) for at least 36

full calendar months immediately preceding expiration of the Enrollment. Institution must submit a buy-out order at least 30 days prior to expiration of the Enrollment. The buy-out option is not available for Products licensed under the Student licensing option. The Enrollment may provide further information regarding the buy-out order.

- d. **License confirmation.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*
- e. **Allow the Enrollment to expire.** Institution may allow the Enrollment to expire. If the Enrollment expires, all Products must be deleted as provided in section titled "Term and termination."

Except as specifically provided otherwise in the Product use rights, perpetual Licenses acquired through the buy-out option are device Licenses. For example, a License is required for each PC on which Institution desires to run Office.

Because all Licenses acquired under this agreement are temporary, Institution will not be eligible to obtain Software Assurance for those Licenses under any other Microsoft volume licensing program without first acquiring a perpetual License or License and Software Assurance (L&SA).

## 12. **Term and termination.**

- a. **Term.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*
- b. **Termination of the agreement.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*
- c. **Termination of an Enrollment.** Either party may terminate any Enrollment(s) if the other party is in material breach of any obligation, which breach is not cured within 30 days written notice of such breach. Microsoft may terminate this agreement and any Enrollment(s) immediately if Institution fails to continue to qualify as a qualified educational user as identified at Appendix J. If no orders are received under an Enrollment, the Enrollment will be terminated 30 calendar days after the effective date of the Enrollment.
- d. **Effect of termination and Licensed Period expiration.** Users may only run the Products and Fixes according to the terms of this agreement. Users are only licensed to run the Products and Fixes during the Licensed Period. If this agreement is terminated, or if no extension or anniversary order is submitted prior to the expiration of the Licensed Period or the purchase of perpetual Licenses for the Products, then all Products and Fixes that run as a result of this agreement must be deleted when the Licensed Period expires or is otherwise earlier terminated.

Similarly, if Institution stops ordering any Products or Product quantities decrease upon an extension of a Licensed Period, it must delete those Products prior to the beginning of the extended Licensed Period. Institution must make reasonable efforts to ensure that Faculty and Staff work-at-home Users (1) delete and remove Products and Fixes copies from the temporary ram (RAM) and permanent memory (e.g., hard disk) of their home PCs, and (2) disconnect access to any server Products at the end of the Licensed Period.

- e. **Modification or termination of an Online Service for regulatory reasons.** Microsoft may modify or terminate an Online Service in any country where there is any current or future government requirement or obligation that (1) subjects Microsoft to any regulation or requirement not generally applicable to businesses operating there, (2) presents a hardship for Microsoft to continue operating the Online Service without modification, and/or (3) causes Microsoft to believe these terms or the Online Service may be in conflict with any such requirement or obligation. For example, Microsoft may modify or terminate an Online Service in connection with a government requirement that would cause Microsoft to be regulated as a telecommunications provider.

- f. **Program updates.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement*

**13. Warranties.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

**14. Defense of infringement, misappropriation, and third party claims.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

**15. Limitation of liability.**

*This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*

**16. Verifying compliance.**

- a. **Right to verify compliance.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*
- b. **Verification process and limitations.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement*
- c. **Remedies for noncompliance.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement.*
- d. Additionally, Institution must use reasonable efforts to make Users aware of the terms and conditions upon which they are allowed to run the Products. Accordingly, Institution must:
- (i) Notify all Users in advance of running the Products that:
    - 1) their use of the Products is subject to the terms of this agreement, including but not limited to limitations on liability, disclaimer of warranties and exclusion of remedies;
    - 2) they are allowed to run the Products only during the Licensed Period;
    - 3) if this agreement is terminated, or Institution does not submit an Enrollment or extension order prior to the expiration of the Licensed Period or purchase perpetual Licenses for the Products, then all Products run under this agreement must be deleted when the Licensed Period expires or is otherwise earlier terminated, whichever is first;
  - (ii) Periodically publish in an Institution wide publication and applicable web sites a reference to the location (either physical or on a computer network) where they can view the Product List and Product use rights. Microsoft publishes a copy of the Product List and Product use rights at <http://www.microsoft.com/licensing/>;
  - (iii) Notify Microsoft immediately if Institution becomes aware of any actual or potential violation of this agreement; and
  - (iv) Provide all reasonable assistance and cooperation as requested by Microsoft to investigate and remedy any unauthorized use of the Products by Users.

If Institution complies with this section, Institution will not be responsible for Student Users' failure to comply with the terms of this agreement.

**17. *Miscellaneous*** All of the following sections are intentionally omitted, and are included in the associated Microsoft Business Agreement

- a. **Notices to Microsoft.**
- b. **No transfer of ownership.**
- c. **Severability.**
- d. **Waiver.**
- e. **Resellers and other third parties cannot bind Microsoft.**
- f. **This agreement is not exclusive.**
- g. **Entire agreement.**
- h. **Assignment.**
- i. **Survival.**
- j. **Applicable law, venue, and jurisdiction.**
- k. **U.S. export.**
- l. **Privacy and security.**
- m. **Subcontractors.**
- n. **Natural disaster.**



# Appendix H- Sample Custom EES Enrollment

**Microsoft** | Volume Licensing

## Enrollment for Education Solutions

Enrollment Number <i>Microsoft to complete</i>		Qualifying Enrollment Number (if applicable) <i>Partner to complete</i>	
Previous Enrollment Number (if applicable) <i>Partner to complete</i>		Proposal ID/Framework	NY004

**This Enrollment must be attached to a signature form to be valid.**

Please note that by entering into this Enrollment for Education Solutions ("Enrollment") Institution, regardless of whether it is a primary/secondary school or a higher/further education entity, becomes part of the Campus Program. Institution's reseller will use the Campus Program tools and pricing infrastructure to register Institution for this Enrollment. All communications from Microsoft will indicate that Institution is part of the Campus Program.

This Enrollment is entered into between the entities identified in, and as of the effective date listed in, the signature form ("Enrollment Effective Date"). Institution represents and warrants that it is the same Institution that entered into the Campus and School Agreement identified on the signature form ("Agreement") or an Affiliate of Institution.

This Enrollment consists of (1) this document and the signature form, (2) the associated Microsoft Business Agreement and these Program Agreement terms and conditions and all attachments identified therein and (3) any supplemental contact information form.

**Enrollment Term.** This Enrollment will expire either 12 or 36 full calendar months from the Enrollment Effective Date, depending on Institution's election below and may be terminated earlier as provided in the Agreement. *Please select **only one** initial Enrollment term option:*

<input type="checkbox"/>	12 Full Calendar Months	<input type="checkbox"/>	36 Full Calendar Months
--------------------------	-------------------------	--------------------------	-------------------------

**Prior Enrollment.** If renewing Subscription Licenses from a Previous Enrollment or Agreement, the Previous Enrollment or Agreement number must be identified in the designated box above.

### 1. **Contact information.**

Each party will notify the other in writing if any of the information in the following contact information page(s) changes. *The asterisk ("\*") indicates required fields.* Microsoft may disclose contact information as necessary to administer this Enrollment.

- a. **Primary contact information.** Institution must identify an individual from inside its organization to serve as the primary contact. This contact is also the default online administrator for this Enrollment and will receive all notices unless Institution provides Microsoft written notice of a change. The online administrator may appoint other administrators and grant others access to online information.

**Name of entity (must be legal entity name)\***  
**Contact name\*:** First                      Last  
**Contact email address\***  
**Street address\***

**City\***  
**State/Province\***  
**Postal code\***  
**Country\***  
**Phone**  
**Tax ID**

*\* indicates required fields*

- b. **Notices and online access contact information.** Complete this only if Institution wants to designate a notices and online contact different from the primary contact. This contact will become the default online administrator for this Enrollment and receive all notices. This contact may appoint other administrators and grant others access to online information.

Same as primary contact

**Name of entity\***

**Contact name\*:** First Last

**Contact email address\***

**Street address\***

**City\***

**State/Province\***

**Postal code\***

**Country\***

**Phone**

This contact is a third party (not Institution)

Warning: This contact receives personally identifiable information of Institution.

*\* indicates required fields*

- c. **Online Services Manager.** This person will receive communications concerning registration for Online Services ordered under this Enrollment. This contact may appoint other administrators and grant others access to online information.

Same as primary contact

**Name of entity\***

**Contact name\*:** First Last

**Contact email address\***

**Street address\***

**City\***

**State/Province\***

**Postal code\***

**Country\***

**Phone**

*\* indicates required fields*

- d. **Language preference.** Select the language for notices. English

- e. **Microsoft account manager.** Provide the Microsoft account manager contact for Institution.

**Microsoft account manager name:**

**Microsoft account manager email address:**

- f. **Reseller information.**

**Reseller company name\***

**Street address (PO boxes will not be accepted)\***

**City\***

**State/Province\***

**Postal code\***

**Country\***  
**Contact name\***  
**Phone**  
**Contact email address\***  
*\* indicates required fields*

The undersigned confirms that the information is correct

<b>Name of Reseller*</b>
<b>Signature*</b> _____
<b>Printed name*</b>
<b>Printed title*</b>
<b>Date*</b>

*\* indicates required fields*

**Changing a reseller.** *This section is intentionally omitted and is included in the associated Microsoft Business Agreement*

## **2. Definitions.**

Capitalized terms used but not defined in this Enrollment shall have the meaning given to them in the Agreement.

"Additional Product" means any Product other than a Desktop Platform Product that Institution chooses to license under this Enrollment;

"Alumni" means any Graduate, or former Student, Faculty or Staff of the Institution.

"Desktop Platform Product" means any Product identified on the Product List as such and that Institution chooses to license under this Enrollment (Desktop Platform Products may only be licensed on an Organization-wide basis under this program);

"Faculty" means any employees, contractors and volunteers who teach or perform research for Institution and use an Institution Qualified Desktop;

"Graduate" means a Student who has completed (1) a grade or a level in a school or an educational institution in Institution's Organization that qualifies the Student for enrollment into college or university or (2) a diploma or degree from a college or university in Institution's Organization;

"Organization" means the organization as defined by Institution in the section of this Enrollment titled "Defining Institution's Organization";

"Organization-wide Count" means the total quantity of Faculty and Staff in Institution's Organization as listed in the table in the section of this Enrollment titled "Choosing licensing options; license grant.";

"Platform Online Service" means any Online Service identified on the Product List as such and that Institution chooses to license under this Enrollment. Platform Online Services are treated as Online Services, except as noted;

"Previous Enrollment or Agreement" means a School Subscription Enrollment, a Campus Subscription Enrollment, an Enrollment for Education Solutions, or an Open Value Subscription Agreement for Education Solutions;

"Qualified Desktop" means a device that is owned, leased or controlled by Institution (other than a Student Qualified Desktop) that is used for the benefit of Institution's Organization (or by or for the benefit of Students enrolled in Institution's Organization, if applicable) and is: (1) a personal desktop computer, portable computer, workstation, or similar device capable of running Windows Professional locally (in a physical or virtual operating system environment), or (2) a device used to access a virtual desktop infrastructure ("VDI"). Qualified Desktops do not include any device that is: (1) designated as a server

and not used as a personal computer or (2) an Industry Device or (3) not managed (as defined in the Product List at the start of the applicable initial or renewal term of the Enrollment) as part of Institution's Organization.

"Qualified User" means a User who (1) is a user of a Qualified Desktop or (2) accesses any server software or online services licensed within Institution's Organization. It does not include a person who accesses server software or online services solely under a license identified in the Qualified User Exemptions in the Product List;

"Qualifying Enrollment" means an Enrollment for Education Solutions, the minimum requirements of which were met (i.e., a Qualifying Enrollment was not used) and which was entered into by Institution or Institution's Affiliate, each active and valid upon signing of this Enrollment. Institution must have been included in the Organization under an Enrollment for Education Solutions that is used as the Qualifying Enrollment;

"Staff" means any non-Faculty employees, contractors and volunteers who perform work for Institution and use an Institution Qualified Desktop;

"Student" means any student enrolled in any educational institution that is part of Institution's Organization, whether on a full-time or part-time basis;

"Student Count" means the total quantity of Students in Institution's Organization as listed in the table in the section titled "Licensing options; license grant."; and

"Student Qualified Desktop" means a Qualified Desktop owned or leased by a Student or that is owned or leased by Institution's Organization and assigned for individual, dedicated use by a Student.

For the avoidance of doubt, the term "Customer" as used in certain supplemental forms (for example the program signature form) has the same meaning as "Institution."

### **3. Overview of the Enrollment for Education Solutions.**

This Enrollment allows Institution to license Products on a subscription basis across its Organization. Institution determines how it defines its Organization. Institution can select from two different licensing options, Faculty and Staff or Students, depending on the Users it wishes to cover.

The minimum requirements for this Enrollment are as follows:

Institution must order at least one Desktop Platform Product for Organization-wide Count of at least 250 OR

Institution must order at least one Platform Online Service for Staff / Faculty in a quantity of 250 OR

Institution must order at least one Desktop Platform Product for Student Count of at least 250 OR

Institution must order at least one Platform Online Service for Students in a quantity of 250

The minimum requirements listed above are waived if Institution has a Qualifying Enrollment.

Microsoft may refuse to accept this Enrollment if it has a business reason for doing so. At the end of the applicable term, Institution has the option to extend the Enrollment, enter into a new Enrollment, let the Enrollment expire, or, if applicable, buy out perpetual Licenses.

### **4. Defining Institution's Organization.**

Define the Organization by choosing one of the options below. *Please select only one option.*



Institution must provide an Organization-wide Count and/or Student FTE count even if only ordering Platform Online Services to meet Enrollment minimum requirements.

Category Licensed	Institution's Selection	Organization-wide Count and/or Student Count, as applicable
1. Faculty and Staff	<input type="checkbox"/>	
2. Students	<input type="checkbox"/>	

**License grant.** So long as Institution places orders pursuant to the agreement and this Enrollment for any required Licenses and pays per the agreement with its reseller, Institution (and/or its Students, as applicable) will have the following rights during the term of this Enrollment:

If the Faculty and Staff option is chosen, each Qualified User in Institution's Organization (including Students and public users of Qualified Desktops in an open lab) may run the Desktop Platform Products, and the Additional Products licensed on an Organization-wide basis, on any Institution Qualified Desktops. Institution is not required to count members of the public who access PCs that remain in Institution's open access lab(s) or libraries. Institution may not permit remote access to software installed on PCs in open access labs or libraries.

In the case of CALs, Institution may assign (1) a device CAL to each Institution Qualified Desktop and (2) a user CAL to each Faculty and Staff member, in both cases to access Institution's associated server software.

If the Student option is chosen, each Student in the Organization may run one license of the Desktop Platform Products, and one license of the Additional Products licensed Organization-wide, on a Student Qualified Desktop. In the case of CALs, Institution may assign a user CAL to each Student to access Institution's associated server software.

Institution may run as many copies of other Additional Product(s) it wishes so long as it places an order pursuant to the agreement and this Enrollment for required Licenses and pays per the agreement with its reseller. Order quantities must be equal to the number of copies Institution runs.

If Institution is licensing Office 2010 and SharePoint Server 2010 CAL (Enterprise or Standard) for Faculty and Staff in its Organization under this Enrollment, then Institution's Students and their parents may use Office Web Applications at no charge for the purpose of Students' education at Institution. There is no buy-out option for Office Web Applications.

## 6. Price levels and prices.

**Price levels.** Institution's Organization-wide Count determines the price level of Desktop Platform Products ordered under the Faculty and Staff option. Institution's Student Count determines the price level of Desktop Platform Products ordered under the Student option. If Institution chooses to extend this Enrollment, the price level will be reset at the start of the extension term based on Institution's Organization-wide Count and/or Student Count at the time the extension order is placed. There are no price levels for Additional Products. Institution's price level does not change during the term of the Enrollment.

Select Price Level that Applies to Faculty and Staff Option	Organization Wide Count	Price level (Only Applicable For Desktop Platform products)
<input type="checkbox"/>	250	A
<input type="checkbox"/>	3,000	B
<input type="checkbox"/>	10,000	C
<input type="checkbox"/>	25,000	D

Select Price Level that Applies to Student Option	Student Count	Price level (Only Applicable For Desktop Platform products)
<input type="checkbox"/>	250	A
<input type="checkbox"/>	3,000	B
<input type="checkbox"/>	10,000	C
<input type="checkbox"/>	25,000	D

**Prices.** Institution's actual prices will be determined by agreement between Institution and its reseller. However, Microsoft will provide the reseller with pricing at the outset of this Enrollment and agrees that it will not increase the prices that it charges the reseller for the Products during the term of the Enrollment from when they order the product for the first time under the enrollment.

## 7. **How to order Products.**

- a. **Price and payment terms.** Price and payment terms for all Licenses ordered will be determined by agreement between Institution and its reseller.
- b. **Placing the initial order.** Orders must be submitted within 30 days of the Enrollment Effective Date.
  - (i) The initial order under the Enrollment must contain at least one Desktop Platform Product for Organization-wide Count or Student Count OR at least one Platform Online Service for 250 licenses for either Faculty / Staff or Students
  - (ii) Orders for Desktop Platform Products and all component products that are part of the Desktop Platform Products must be for Institution's then-current Organization-wide Count.
  - (iii) Orders for Platform Online Services must be for at least 250 and must be ordered in the exact quantity needed.
  - (iv) Once the enrollment minimum requirements have been met, Other Online Services for Faculty/Staff must be ordered in the exact quantity (in any quantity).
  - (v) Additional Products must be ordered in exact quantities needed (in any quantity.) Certain Additional Products may instead be ordered for the Organization-wide Count, as described in the Product List.
  - (vi) Products offered under the Student Offering must be ordered for the full Student Count except Online Services. Once the enrollment minimum requirements have been met, Other Online Services under the Student Offering must be ordered in the exact quantity needed (in any quantity).
- c. **Adding new Products not previously ordered (non-anniversary).** Orders can be submitted for Products that were not part of the initial order. The order must be placed in the month in which copies of the Product(s) are first run.
  - (i) Orders for Desktop Platform Products and all component products that are part of the Desktop Platform Products must be for Institution's then-current Organization-wide Count.
  - (ii) Orders for Platform Online Services must be for at least 250 and must be ordered in the exact quantity needed.
  - (iii) Once the enrollment minimum requirements have been met, Other Online Services for Faculty/Staff must be ordered in the exact quantity (in any quantity).

- (iv) Additional Products must be ordered in exact quantities needed (in any quantity.) Certain Additional Products may instead be ordered for the Organization-wide Count, as described in the Product List.
- (v) Products offered under the Student Offering must be ordered for the full Student Count except Online Services. Once the enrollment minimum requirements have been met, Other Online Services under the Student Offering must be ordered in the exact quantity needed (in any quantity).

The Licensed Period for additional orders will be the same as the Enrollment Licensed Period.

**d. Adding more copies of Products previously ordered (non-anniversary).**

- (i) For Desktop Platform Products, and Additional Products licensed Organization-wide, Institution does not need to submit orders to increase the number of copies run. However, increases in Organization-wide Count and/or Student Count, as applicable, must be reported at each anniversary of the Enrollment Effective Date.
- (ii) Except as provided in subsection d(i) above, Additional Products and Online Services are licensed based on the number of Licenses acquired. At any time during the Licensed Period (including any extension), Institution may run additional copies of any previously ordered Additional Products, provided it submits orders for such copies. The order must be placed in the month in which those copies are first run.

Microsoft will invoice the reseller for the Products ordered on a pro-rated basis corresponding to the number of full calendar months remaining in the Licensed Period to a minimum of 6 months. Online Services will be invoiced on a pro-rated basis corresponding to the full calendar months remaining in the Licensing Period to a minimum of 1 month. Microsoft will use the price list in effect on the date of the invoice to charge Institution's reseller for the additional Licenses. When adding more copies of products previously ordered, Microsoft will use the pricelist in effect when the product was initially ordered to charge Institution's reseller for the additional Licenses.

**e. Extension orders and subsequent annual orders.** Institution must submit orders based on the following:

- (i) **One-year Licensed Period.** An extension order must be submitted to extend the Enrollment for another Licensed Period. The extension order must be received by Microsoft prior to the expiration of the Licensed Period. The Product selection and quantity ordered can be changed at each extension order.
- (ii) **Three-year Licensed Period.** An anniversary order must be received by Microsoft prior to each anniversary of the Enrollment Effective Date of the three-year Licensed Period, and a subsequent extension order must be received by Microsoft prior to the expiration of the initial three-year Licensed Period. Each anniversary order must be for at least the same Product selection and total quantity as ordered during the one-year period in which the Product was first ordered, except for step-ups.

**f. Buy-out order.** If a buy-out option is available, a buy-out order quantity for Licenses for Desktop Platform Products, and Additional Products licensed Organization-wide, shall be at least equal to the Organization-wide Count but shall not exceed the total quantity of Qualified Desktops in Institution's Organization on the date of the buy-out order. The buy-out order quantity for other Additional Products shall be the lowest total quantity of copies ordered during any of the three 12 month periods immediately preceding expiration of the Enrollment.

**g. How to confirm orders.** Microsoft will publish information about orders placed by Institution, including an electronic confirmation of each order on a password-protected site on the World Wide Web at <https://www.microsoft.com/licensing/servicecenter> or a successor site. Upon Microsoft's acceptance of this Enrollment, the contact identified for this purpose will be provided access to this site.

- h. **Step up to a higher Product edition.** If a previously ordered Product has multiple editions, Institution may migrate to the higher edition by stepping up (e.g. from Core CAL to Enterprise CAL or from SQL Server Standard Edition to SQL Server Enterprise Edition.) The order requirements set forth in subsection 7c above apply.

## **8. Work at home rights.**

During the Licensed Period, Faculty and Staff members who are the primary users of an Institution Qualified Desktop running a Product licensed by Institution may run one copy of that Product on a home PC that they own or lease (or, for work at home rights for a Client Access License, to access the server Product(s) licensed by Institution from a home PC that they own or lease), for work-related purposes only; provided that in the case of work at home rights for Desktop Platform Products and Additional Products licensed Organization-wide the total number of Faculty and Staff members exercising work at home rights may not exceed Institution's Organization-wide Count and for other Additional Products the total number of Faculty and Staff members may not exceed the number of Licenses acquired for such Additional Products. If Institution upgrades the Product on the Qualified Desktop used by the Faculty or Staff member, the latter may upgrade the corresponding copy on the home PC. If the Faculty or Staff member leaves Institution, the work at home rights for such member end and the copy of the Product must be removed from the home PC. Though Microsoft may offer both work at home rights and home use program rights under Software Assurance for a Product, Institution must choose either work at home rights or home use program rights for such Product.

## **9. Perpetual Licenses for Graduates.**

For any Students licensed to run any Products on a Student Qualified Desktop, Institution may at any time during the Enrollment term transfer to any Graduate the perpetual right to run each such Product. Institution must provide each such Graduate with a license agreement in the form provided by Microsoft. Institution must secure the Graduate's acceptance of the terms of the license agreement. Upon acceptance of the license agreement, the Graduate's right to run the Products identified in the license confirmation becomes perpetual. These rights do not apply to access licenses, including CALs, or to Online Services.

## **10. Education Server Platform Licensing Option.**

If Institution licenses one or more of the CAL Products and the corresponding Server Platform Product(s) listed in the table below, Institution may run unlimited instances of any available edition of the corresponding server Products that constitute the Server Platform Products.

Institution must license each selected CAL Product and corresponding Server Platform Product for the aggregate of Institution's Organization-wide Count (at least 1000) and Student Count (at least 1000) as listed in the section entitled "Licensing options; license grant" above.

Unless Institution chooses to step up to a higher Product edition, Institution must include the Products selected from the table below with each anniversary order. If there is an increase in Product quantity used, Institution must submit an order for all CAL and Server Platform Products used but not ordered during the previous Enrollment year. Institution may aggregate CAL Product quantities acquired under a Qualifying Enrollment to meet quantity requirements of this Enrollment, provided that such Qualifying Enrollment or its successor is valid and in effect during the term of this Enrollment.

Server Platform Products licensed under this licensing option may only be used by Faculty, Staff and Student Users in Institution's Organization and by licensed external users using the Server Platform Products for the benefit of Institution's Organization.

Products Licenses acquired under this section may not be transferred to Graduates. Institution may buy out CAL Products but not Server Platform Products Licenses acquired under these terms. Institution is prohibited from transferring Licenses acquired under this section.

Institution agrees that Institution's use of the server Products that constitute the Server Platform Products is subject to the Product Use Rights.

Product Selection			
	CAL Product Selected	Server Platform Product Selected	Server Product included for Unlimited Deployment
<input type="checkbox"/>	SQL Server CALs	SQL Server Platform Academic	Unlimited Licenses for all editions of the corresponding server Products, plus all editions of BizTalk Server and associated external connectors.
<input type="checkbox"/>	Core CALs (acquired standalone or as part of a platform)	Core Server Platform Academic	Unlimited Licenses for all editions of the corresponding server Products, and associated external connectors.
<input type="checkbox"/>	Enterprise CALs (acquired standalone, as a step-up, or as part of a platform)	Enterprise Server Platform Academic	Unlimited Licenses for all editions of the corresponding server Products and external connectors, plus FAST search for Share Point, Forefront TMG Servers, and associated server management software.

## 11. Qualifying systems Licenses.

The desktop operating system Licenses granted under this program are upgrade Licenses only. Full desktop operating system Licenses are not available under this program. If Institution selects the Windows Desktop Operating System Upgrade, all Qualified Desktops on which Institution runs the Windows Desktop Operating System Upgrade must be licensed to run one of the qualifying operating systems identified in the Product List at <http://www.microsoft.com/licensing/contracts>. Note that the list of operating systems that qualify for the Windows Desktop Operating System Upgrade varies with the circumstances of the order. That list is more extensive at the time of the initial order than it is for some system refreshes during the term of this Enrollment. Exclusions are subject to change when new versions of Windows are released.

*For example: The following are not considered qualifying operating systems: (1) embedded operating systems; (2) Linux; and (3) OS/2. These are examples of exclusions only. Please see Product List for all current qualifying operating systems.*

## 12. Options upon completion of a Licensed Period.

Microsoft will provide prior written notice of expiration of the Enrollment. The notice will advise Institution of the option to: (1) extend the Enrollment, (2) submit a new Enrollment, (3) exercise the buy-out option, or (4) allow the Enrollment to expire. Microsoft will not unreasonably reject any extension order or new Enrollment. Each Licensed Period will start the day following the expiration of the prior Licensed Period:

- a. **One-year Licensed Period.** Institution may elect to extend an initial one-year Licensed Period for either (1) up to five consecutive terms of 12 full calendar months by submitting an extension order for each such extension term or (2) one term of 36 full calendar months.
- b. **Three-year Licensed Period.** Institution may elect to extend an initial three-year Licensed Period for either (1) up to three terms of 12 full calendar months or (2) one term of 36 full calendar months.

- c. **Buy-out option.** Institution may elect to obtain perpetual Licenses for Products licensed under this Enrollment provided it has licensed such Products under one or more Enrollments (including any extensions) under the Agreement (or a predecessor agreement) for at least 36 full calendar months immediately preceding expiration of this Enrollment. Institution must submit a buy-out order at least 30 days prior to expiration of this Enrollment. The buy-out option is not available for Products licensed under the Student option.

Except as specifically provided otherwise in the Product use rights, perpetual Licenses acquired through this buy-out option are device Licenses. The license grant in the section entitled "License options; license grant" above does not apply to such perpetual Licenses. For example, a License is required for each Qualified Desktop on which Institution desires to run Office.



## Appendix J

*The Qualified Education User Definition, identifies the Qualified Education Users who are eligible to participate under the Academic Select Plus and Campus and School Program Agreement (Enrollment for Education Solutions). All other Eligible Programs listed within the Qualified Educational User Definition are not covered under this Microsoft Business Agreement.*

### **Microsoft Qualified Educational User Definition (US Only)**

All Microsoft eligible education customers must be located or reside in the United States. Qualified Educational Users are those entities that both have an educational purpose or mission and meet the criteria specified below. If a controversy exists as to an organization's eligibility, Microsoft retains the right to determine in its sole discretion the eligibility of the organization for the specific transaction in question. The following are eligible to acquire Microsoft Academic Edition (AE) products in the programs indicated and are defined as qualified educational users:

<b>QUALIFIED EDUCATIONAL USERS:</b>	<b>ELIGIBLE PROGRAMS:</b>
<p><b>A) Educational Institutions</b>                      Defined as an accredited institution organized and operated exclusively for the purpose of teaching its enrolled students ("Educational Institutions"). An accredited institution must be:</p> <p>1. A public or private K-12, vocational school, correspondence school, junior college, college, university, or scientific or technical school that is either institutionally accredited by an accrediting agency nationally recognized by the U.S. Secretary of Education or, in the case of public K-12 institutions only, recognized or approved by the Department of Education of the State in which it is located. <b>OR</b></p> <p>2. A preschool meeting all of the following criteria: (i) is an early childhood program incorporated for the purpose of providing educational services to children between two and five years of age, and which serves minimum of ten such children; and (ii) has been in operation for at least one year.</p>	<p>AE Full Packaged Product                      Academic Open                      Academic Select Plus</p> <p>Campus Agreement                      (includes new enrollment under Campus Agreement : Enrollment For Education Solutions)                      (Both K12 Ed or Preschool &amp; Higher Ed)                      School Agreement                      (K12 Ed or Preschool Only)                      Open Value Subscription – Education Solutions                      (Both K12 Ed or Preschool &amp; Higher Ed)                      Get Genuine Windows Agreement - Academic</p>
<p><b>B) Administrative Offices or Boards of Education</b>                      Defined as (a) district, regional and state administrative offices of public Educational Institutions. (b) administrative entities organized and operated exclusively for the administration of private Educational Institutions, or (c) other state or local government entities nearly all of whose activities consist of administrative support, of a nature that advances academic learning, for public Educational Institutions.</p>	<p>AE Full Packaged Product                      Academic Open                      Academic Select Plus                      Campus Agreement                      (includes new enrollment under Campus Agreement : Enrollment For Education Solutions)                      (Both K12 Ed or Preschool &amp; Higher Ed)                      School Agreement                      (K12 Ed or Preschool Only)                      Open Value Subscription – Education Solutions                      (Both K12 Ed or Preschool &amp; Higher Ed)                      Get Genuine Windows Agreement - Academic</p>
<p><b>C) Full and Part Time Faculty and Staff</b>                      Defined as all full and part time faculty and staff of Educational Institutions.</p>	<p>AE Full Packaged Product Only</p>
<p><b>D) Full and Part Time Enrolled Students</b>                      Defined as full and part time enrolled students of Educational Institutions.</p>	<p>AE Full Packaged Product Only</p>
<p><b>E) Public Libraries</b>                      Must meet all of the following criteria: (i) primarily provide general library services without</p>	<p>AE Full Packaged Product                      Academic Open</p>

	charge to all residents of a given community, district or region; (ii) supported by public or private funds; (iii) make its basic collections and basic services available to the population of its legal service area without charges to individual users, but may impose charges on users outside its legal service area; and (iv) may or may not provide products and services, beyond its basic services, to the public at large with or without individual charges.	Academic Select Plus School Agreement Get Genuine Windows Agreement - Academic
F)	<b>Public Museums</b> Must meet all the following criteria: (i) are a public or private agency or institution organized on a permanent basis for essentially education or aesthetic purposes; (ii) utilize a professional staff; and (iii) own or utilize tangible objects, care for them and exhibit them to the public on a regular basis.	AE Full Packaged Product Academic Open Academic Select Plus School Agreement Get Genuine Windows Agreement - Academic
G)	<b>Home-School Program</b> Defined as a home-schooling program which provides K-12 education to a student or students and which is able to provide written proof that it either (i) belongs to a nationally-recognized home-schooling organization, or (ii) is expressly recognized by a local school district as an acceptable alternative to an accredited or state-recognized/approved educational institution.	AE Full Packaged Product

All United States territories such as Puerto Rico, Guam, Virgin Islands are not eligible under this definition.

**Special note regarding Hospitals, Healthcare Systems and Research Laboratories:**

Hospitals, Healthcare Systems and Research Laboratories (including independent Research Laboratories or Research Laboratories affiliated with the Department of Defense or the Department of Energy) are NOT eligible to acquire AE products unless they are wholly owned and operated by a qualified Educational Institution as defined above in Sections A and B "Wholly owned and operated" means that the Educational Institution is the sole owner of said hospital, healthcare system or research laboratory and the only entity exercising control over the said institution's day-to-day operations. Additional information on determining if an entity is wholly owned and operated by an Educational Institution can be found at: [www.microsoft.com/education/?ID=Eligible](http://www.microsoft.com/education/?ID=Eligible). Note that hospitals, healthcare systems, and research laboratories are NOT eligible to purchase School Agreement and are not eligible to be included as part of an Educational Institution's School Agreement even if they are wholly owned and operated by the Educational Institution.

Proposal ID	001-jendunn-S-901 F
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## Custom Supplemental Contact Information Form

This form can be used in combination with the Agreement and Enrollment/Registration. However, a separate form must be submitted for each Enrollment/Registration, when more than one is submitted on a signature form. For the purposes of this form, "Entity" can mean the signing Entity, Customer, Enrolled Affiliate, Government Partner, Institution, or other party entering into a Volume Licensing program agreement. Primary and Notices contacts in this form will not apply to Enrollments or Registrations.

- This form applies to:
- Business Agreement and Program Agreements
  - Enrollment/Affiliate Registration Form

Insert primary entity name if more than one Enrollment/Registration Form is submitted.

### Contact information.

Each party will notify the other in writing if any of the information in the following contact information page(s) changes. The asterisks (\*) indicate required fields; if the Entity chooses to designate other contact types, the same required fields must be completed for each section. By providing contact information, entity consents to its use for purposes of administering the Enrollment by Microsoft and other parties that help Microsoft administer this Enrollment. The personal information provided in connection with this agreement will be used and protected according to the privacy statement available at <https://licensing.microsoft.com>.

#### 1. Additional notices contact.

This contact receives all notices that are sent from Microsoft. No online access is granted to this individual.

- Name of Entity\*
- Contact name\*: First Last
- Contact email\*
- Street address\*
- City\* State\* Postal code\*
- Country\*
- Phone\* Fax

This contact is a third party (not the Entity). Warning: This contact receives personally identifiable information of the Entity.

#### 2. Software Assurance manager.

This contact will receive online permissions to manage the Software Assurance benefits under the Enrollment or Registration.

- Name of Entity\*
- Contact name\*: First Last
- Contact email\*
- Street address\*
- City\* State\* Postal code\*

**Country\***

**Phone\***            **Fax**

This contact is a third party (not the Entity). Warning: This contact receives personally identifiable information of the Entity.

### **3.     **Subscriptions manager.****

This contact will assign MSDN, Expression, and TechNet Plus subscription licenses to the individual subscribers under this Enrollment or Registration. Assignment of the subscription licenses is necessary for access to any of the online benefits, such as subscription downloads. This contact will also manage any complimentary or additional media purchases related to these subscriptions.

**Name of Entity\***

**Contact name\*:**    **First**            **Last**

**Contact email\***

**Street address\***

**City\***            **State\***            **Postal code\***

**Country\***

**Phone\***            **Fax**

This contact is a third party (not the Entity). Warning: This contact receives personally identifiable information of the Entity.

### **4.     **Online Services manager.****

This contact will be provided online permissions to manage the Online Services ordered under the Enrollment or Registration.

**Name of Entity\***

**Contact name\*:**    **First**            **Last**

**Contact email\***

**Street address\***

**City\***            **State\***            **Postal code\***

**Country\***

**Phone\***            **Fax**

This contact is a third party (not the Entity). Warning: This contact receives personally identifiable information of the Entity.

### **5.     **Customer Support Manager (CSM):****

This person is designated as the Customer Support Manager (CSM) for support-related activities.

**Name of Entity\***

**Contact name\*:**    **First**            **Last**

**Contact email\***

**Street address\***

**City\***            **State\***            **Postal code\***

**Country\***

**Phone\***            **Fax**

This contact is a third party (not the Entity). Warning: This contact receives personally identifiable information of the Entity.

### **6.     **Primary contact information:****

An individual from inside the organization must serve as the primary contact. This contact receives online administrator permissions and may grant online access to others. This contact also receives all notices unless Microsoft is provided written notice of a change.

**Name of Entity\*** State of New York Office of General Services  
**Contact name\*:** First Vivian Last Basile  
**Contact email\*** Vivian.basile@ogs.ny.gov  
**Street address\*** 38th Floor, Corning Tower (Empire State Plaza)  
**City\*** Albany **State\*** NY **Postal code\*** 12242  
**Country\*:** United States  
**Phone\*** (518) 402-9400 **Fax** (518) 486-6867

**7. Notices contact and online administrator information:**

This individual receives online administrator permissions and may grant online access to others. This contact also receives all notices.

Same as primary contact

**Name of Entity\***

**Contact name\*:** First Last

**Contact email\***

**Street address\***

**City\*** **State\*** **Postal code\***

**Country\*:**

**Phone\*** **Fax**

This contact is a third party (not the Entity). Warning: This contact receives personally identifiable information of the Entity.

# Appendix D

## 1. CONTRACT ADMINISTRATION

Contractor must provide a dedicated Contract administrator to support the updating and management of the Centralized Contract on a timely basis. Information regarding the Contract administrator is set forth below.

Microsoft has identified the following contacts for questions related to this Centralized Contract.

Questions pertaining to Microsoft's overall Master Contract with the State of NY, or NYS Government Customers interested in learning more about Microsoft Volume Licensing Offerings should contact:

Ken Damato  
Account Executive – Microsoft Corporation  
Telephone: 518-441-0604  
E-mail: [kdamato@microsoft.com](mailto:kdamato@microsoft.com)

NYS Government customers should contact:

Ken Damato  
Account Executive – Microsoft Corporation  
Telephone: 518-441-0604  
E-mail: [kdamato@microsoft.com](mailto:kdamato@microsoft.com)

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Lisa McNamera  
Licensing Specialist – Microsoft Corporation  
Telephone: 908-770-5493  
E-mail: [lisalev@microsoft.com](mailto:lisalev@microsoft.com)

NYS County and Local Government customers should contact:

Mike Barry  
Account Manager – Microsoft Corporation  
Telephone: 917-279-0471  
E-mail: [mibarry@microsoft.com](mailto:mibarry@microsoft.com)

Lisa McNamera  
Licensing Specialist – Microsoft Corporation  
Telephone: 908-770-5493  
E-mail: [lisalev@microsoft.com](mailto:lisalev@microsoft.com)

NY City Customers should contact:

Bill Branch  
Account Manager – Microsoft Corporation

Telephone: 518-331-5388  
E-mail: [bbranch@microsoft.com](mailto:bbranch@microsoft.com)

Lisa McNamera  
Licensing Specialist – Microsoft Corporation  
Telephone: 908-770-5493  
E-mail: [lisalev@microsoft.com](mailto:lisalev@microsoft.com)

NYS Education customers should contact:

David Pearlman – Microsoft Corporation  
Account Manager  
Telephone: 585-383-8173  
E-mail: [david.pearlman@microsoft.com](mailto:david.pearlman@microsoft.com)

Jessika Graham  
Licensing Specialist – Microsoft Corporation  
Telephone: 610-240-7129  
[jegraham@microsoft.com](mailto:jegraham@microsoft.com)

## **CONTRACT MODIFICATION PROCEDURE**

The following guidelines are subject to change at the discretion of OGS. A Contract Amendment requires a formally executed document by mutual agreement of the Parties, to be provided by OGS Contract Administrator, after submission and approval of the Contract Modification Form.

**(1) TYPES OF CONTRACT MODIFICATIONS:** In order to expedite processing of a contract modification, where proposed changes involve more than one category below, each change should be submitted to OGS as a separate request.

- a) **UPDATES:** "Updates" are changes that do not require a change to the established Centralized Contract terms and conditions. Updates may include: Centralized Contract changes and updates made in accordance with the previously approved pricing formula (e.g. discount from list price); adding new products or services within the established, previously approved pricing structure; lowering pricing of products or services already on Contract, deleting products or services available through the Centralized Contract, adding product or service that do not fall under the previously established price structure or discounts under the Contract, re-bundled products, and other updates not listed above that are deemed to be in the best interest of the State and do not result in a change to the established Centralized Contract terms and conditions. Updates must be submitted to OGS for review, and must be accompanied by a justification of reasonableness of price if the change results in a change in pricing methodology. OGS will notify Contractor in writing if approved.
- b) **AMENDMENTS:** "Amendments" are changes that are not specifically covered by the terms and conditions of the Centralized Contract but inclusion is found to be in the best interest of the State. Requests for product changes and other requests that would require changes to the terms and conditions of the Centralized Contract would fall into the Amendments category. Contractor must provide a written justification of reasonableness of the price levels offered in the applicable Program Agreement and a statement explaining why it is in the best interest of the State to approve the requested amendment. Amendments typically require negotiation between OGS and the Contractor. OGS will work directly with the Contractor to obtain the required documentation for each requested amendment and notify Contractor in writing if approved.

**(2) CONTRACTOR'S SUBMISSION OF CONTRACT MODIFICATIONS:** In connection with any Contract modification, OGS reserves the right to:

- request additional information
- reject Contract modifications
- remove Products from Contract modification requests
- request additional discounts for new or existing Products

**(3) PRICE LEVEL JUSTIFICATION – FORMAT:** Contractor is required to submit the Product and price level information for the update in an Excel spreadsheet format electronically via e-mail (and in hard copy if requested by OGS) to the OGS Contract Administrator. The list must be dated. The Product and price level information should include and identify (e.g., by use of separate worksheets or by using italics, bold and/or color fonts):

- Price level increases
- Price level decreases
- Products being added

**(4) SUPPORTING DOCUMENTATION:** Each modification request must include the current Microsoft Price Level relevant to the Products included in the update.

**(5) SUBMITTAL OF MODIFICATION REQUESTS:** A Contract modification request must be accompanied by a completed Contract Modification Form. Contractor should briefly describe the nature and purpose of the update (e.g., update requested in order to reflect a recently approved GSA schedule, to restructure the price level to its customers generally, and/or for new Products which fall into a new group or

category that did not exist at the time of approval of the Contract by the Office of General Services). The Contract Modification Form must contain original signatures by an individual authorized to sign on behalf of Contractor and must be notarized.

STATE OF NEW YORK  
EXECUTIVE DEPARTMENT - OFFICE OF GENERAL SERVICES  
Corning Tower – 38<sup>th</sup> Floor  
Empire State Plaza  
Albany, New York 12242

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

**INSTRUCTIONS:**

1. This form is to be used for all Contract modifications. The form is to be completed in full, signed and submitted to OGS for final approval. Any submission that is not complete and signed will be rejected.
2. Contractor is required to submit the Product and price level information for the update electronically via e-mail in either an Excel spreadsheet (and in hardcopy if requested by OGS) to the OGS Contract Administrator for this Contract.
3. Price level increase requests must be submitted in accordance with the Centralized Contract.
4. If more than one type of modification is being requested, each type should be submitted as a separate request.

The Contract modification request must be accompanied by the relevant Microsoft Price Level information.

**COMPLETE STATEMENTS 1 THROUGH 5 BELOW:**

<p>1. This request is for an:  <input type="checkbox"/> Update  <input type="checkbox"/> Amendment</p> <p>See Contract Modification Procedure for an explanation of these terms.</p>	<p>2. The intent of this submittal is to request:  <input type="checkbox"/> Addition of new products or services  <input type="checkbox"/> Deletion of products or services  <input type="checkbox"/> Change in pricing level  <input type="checkbox"/> Other Update  <input type="checkbox"/> Other Amendment</p>
<p>3. All discounts are:  <input type="checkbox"/> GSA  <input type="checkbox"/> Most Favored Nation*  <input type="checkbox"/> Other (provide explanation)</p> <hr/> <p>*Prices offered are the lowest offered to any similarly situated entity.</p>	<p>4. Attached documentation includes:  <input type="checkbox"/> Current approved GSA (labeled "For information only")  <input type="checkbox"/> Current relevant Microsoft Price List (labeled "For information only")  <input type="checkbox"/> Revised NYS Net Price List in same format as found in the Pricing Appendix for this Contract  <input type="checkbox"/> Current copy of the "National Consumer Price Index for All Urban Consumers (CPI-U) Northeast region" (for price increases only)</p>
<p>5. Describe the Nature and Purpose of the modification. If applicable, please explain how pricing has been structured to customers, and/or identify and describe new Products which fall into a new group or category that did not exist at the time of approval of the Contract by the Office of General Services.</p>	

**The following CORPORATE ACKNOWLEDGEMENT statement must be signed by an individual authorized to sign on behalf of Contractor for the modification being requested in this Contract Modification document. The authorizing authority's signature must be notarized.**

\_\_\_\_\_  
 Signature of Authorized Vendor Representative

**CORPORATE ACKNOWLEDGMENT**

STATE OF }:

ss.:

COUNTY OF }

On the \_\_\_\_ day of \_\_\_\_\_ in the year 20\_\_, before me personally came: \_\_\_\_\_, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in \_\_\_\_\_; that he/she/they is (are) \_\_\_\_\_ (the President or other officer or director or attorney in fact duly appointed) of \_\_\_\_\_, the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by authority of the board of directors of said corporation.

\_\_\_\_\_  
Notary Public

**OGS APPROVAL:**

Approved \_\_\_\_\_ Approved as amended \_\_\_\_\_ Disapproved \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_ Date \_\_\_\_\_

**APPENDIX A**

**STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS**

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**PLEASE RETAIN THIS DOCUMENT  
FOR FUTURE REFERENCE.**

December, 2012

**TABLE OF CONTENTS**

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

**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, licensor, 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, national origin, sexual orientation, age, disability, genetic predisposition or carrier status, or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of

any State approved sums due and owing for work done upon the project.

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

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

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

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

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

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.** (a) 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: [mwbecertification@esd.ny.gov](mailto:mwbecertification@esd.ny.gov)  
<http://esd.ny.gov/MWBE/directorySearch.html>

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

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

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

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

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

**21. RECIPROCITY AND SANCTIONS PROVISIONS.**

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

**22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

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

the contract, the Department of Civil Service and the State Comptroller.

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

**25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.**

To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

**APPENDIX B**  
**GENERAL SPECIFICATIONS**

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**PLEASE RETAIN THIS DOCUMENT FOR FUTURE REFERENCE**

TABLE OF CONTENTS

<u>GENERAL</u>	<u>PAGE</u>	<u>TERMS &amp; CONDITIONS</u>	<u>PAGE</u>
1. Applicability	1	43. Emergency Contracts	9
2. Governing Law	1	44. Purchase Orders	9
3. Ethics Compliance	1	45. Product Delivery	10
4. Conflict of Terms	1	46. Weekend and Holiday Deliveries	10
5. Definitions	1-3	47. Shipping/Receipt of Product	10
		48. Title and Risk of Loss	10
		49. Re-Weighing Product	10
<b><u>BID SUBMISSION</u></b>		50. Product Substitution	10
6. International Bidding	3	51. Rejected Product	10
7. Bid Opening	3	52. Installation	10
8. Bid Submission	3	53. Repaired or Replaced Product/ Components	11
9. Facsimile Submissions	3	54. On-Site Storage	11
10. Authentication of Facsimile Bids	4	55. Employees/Subcontractors/Agents	11
11. Late Bids	4	56. Assignment	11
12. Bid Contents	4	57. Subcontractors and Suppliers	11
13. Extraneous Terms	4	58. Performance/Bid Bond	11
14. Confidential/Trade Secret Materials	4	59. Suspension of Work	11
15. Release of Bid Evaluation Materials	4	60. Termination	11
16. Freedom of Information Law	5	61. Savings/Force Majeure	12
17. Prevailing Wage Rates - Public Works and Building Services Contracts	5	62. Contract Billings	12
18. Taxes	6	63. Default - Authorized User	12
19. Expenses Prior to Contract Execution	6	64. Interest on Late Payments	12
20. Advertising Results	6	65. Remedies for Breach	13
21. Product References	6	66. Assignment of Claim	13
22. Remanufactured, Recycled, Recyclable Or Recovered Materials	6	67. Toxic Substances	13
23. Products Manufactured in Public Institutions	6	68. Independent Contractor	13
24. Pricing	6	69. Security	13
25. Drawings	7	70. Cooperation with Third Parties	13
26. Site Inspection	7	71. Contract Term - Renewal	13
27. Procurement Card	7	72. Additional Warranties	13
28. Samples	7	73. Legal Compliance	15
		74. Indemnification	15
		75. Indemnification Relating to Third Party Rights	15
<b><u>BID EVALUATION</u></b>		76. Limitation of Liability	15
29. Bid Evaluation	8	77. Insurance	15
30. Conditional Bid	8		
31. Clarification/Revisions	8	<b><u>THE FOLLOWING CLAUSES PERTAIN TO TECHNOLOGY &amp; NEGOTIATED CONTRACTS</u></b>	
32. Prompt Payment Discounts	8	78. Software License Grant	15
33. Equivalent or Identical Bids	8	79. Product Acceptance	17
34. Performance and Responsibility Qualifications	8	80. Audit of Licensed Product Usage	17
35. Disqualification for Past Performance	8	81. Ownership/Title to Project Deliverables	17
36. Quantity Changes Prior To Award	8	82. Proof of License	18
37. Timeframe for Offers	8	83. Product Version	18
<b><u>TERMS &amp; CONDITIONS</u></b>		84. Changes to Product or Service Offerings	18
38. Contract Creation/Execution	8	85. No Hardstop/Passive License Monitoring	19
39. Participation in Centralized Contracts	8	86. Source Code Escrow for Licensed Product	19
40. Modification of Contract Terms	9		
41. Scope Changes	9		
42. Estimated/Specific Quantity Contracts	9		

**GENERAL**

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

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

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

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

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

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

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

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

**ATTORNEY GENERAL** Attorney General of the State of New York.

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

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

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

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

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

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

**COMPTROLLER** Comptroller of the State of New York.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**STATE** State of New York.

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

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

**VIRUS** Any computer code, whether or not written or conceived by Contractor, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product, or any other associated software,

firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Product manufacturer.

### **BID SUBMISSION**

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

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

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

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

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

**"BID ENCLOSED" (bold print, all capitals)**

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

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

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

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

**9. FACSIMILE SUBMISSIONS** Unless specifically prohibited by the terms of the Bid Specifications, facsimile Bids may be SUBMITTED AT THE SOLE OPTION AND RISK OF THE BIDDER. Only the FAX number(s) indicated in the Bid Specifications may be used. Access to the facsimile machine(s) is on a "first come, first serve" basis, and the Commissioner bears no liability or responsibility and makes no guarantee whatsoever with respect to

the Bidder's access to such equipment at any specific time. Bidders are solely responsible for submission and receipt of the entire facsimile Bid by the Authorized User prior to Bid opening and must include on the first page of the transmission the total number of pages transmitted in the facsimile, including the cover page. Incomplete, ambiguous or unreadable transmissions in whole or in part may be rejected at the sole discretion of the Commissioner. Facsimile Bids are fully governed by all conditions outlined in the Bid Documents and must be submitted on forms or in the format required in the Bid Specifications, including the executed signature page and acknowledgment.

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

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

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

**12. BID CONTENTS** Bids must be complete and legible. All Bids must be signed. All information required by the Bid Specifications must be supplied by the Bidder on the forms or in the format specified. No alteration, erasure or addition is to be made to the Bid Documents. Changes may be ignored by the Commissioner or may be grounds for rejection of the Bid. Changes, corrections and/or use of white-out in the Bid or Bidder's response portion of the Bid Document must be initialed by an authorized representative of the Bidder. Bidders are cautioned to verify their Bids before submission, as amendments to Bids or requests for withdrawal of Bids received by the Commissioner after the time specified for the Bid opening, may not be considered.

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

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

resulting Contract, but shall be deemed included for informational or promotional purposes only.

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

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

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

**14. CONFIDENTIAL/TRADE SECRET MATERIALS**

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

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

**15. RELEASE OF BID EVALUATION MATERIALS** Requests concerning the evaluation of Bids may be submitted under the Freedom of Information Law. Information, other than statistical or

factual tabulations or data such as the Bid Tabulation, shall only be released as required by law after Contract award. Bid Tabulations are not maintained for all procurements. Names of Bidders may be disclosed after Bid opening upon request. Written requests should be directed to the Commissioner.

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

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

**a. "Public Works" and "Building Services" - Definitions**

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

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

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

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

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

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

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

**iii. Submission of Certified Payroll Transcripts for Public Works Contracts Only** Contractors and Subcontractors on public works projects must submit monthly payroll transcripts to the Authorized User that has prepared or directs the preparation of the plans and specifications for a public works project, as set forth in the Bid Specifications. For Mini-Bid solicitations, the payroll records must be submitted to the entity preparing the agency Mini-Bid project specification. For "agency specific" Bids, the payroll records should be submitted to the entity issuing the purchase order. For all other OGS Centralized Contracts, such records should be submitted to the individual agency issuing the purchase order(s) for the work. Upon mutual agreement of the Contractor and the Authorized User, the form of submission may be submitted in a specified disk format acceptable to the Department of Labor provided: 1) the Contractor/Subcontractor retains the original records; and, (2) an original signed letter by a duly authorized individual of the Contractor or Subcontractor attesting to the truth and accuracy of the records accompanies the disk. This provision does not apply to Article 9 of the Labor Law building services contracts.

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

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

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

Commissioner of Labor for the preservation of the Contract site or for the protection of the life and limb of the persons using the Contract site.

#### 18. TAXES

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

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

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

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

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

20. ADVERTISING RESULTS The prior written approval of the Commissioner is required in order for results of the Bid to be used by the Contractor as part of any commercial advertising. The Contractor shall also obtain the prior written approval of the Commissioner relative to the Bid or Contract for press or other media releases.

#### 21. PRODUCT REFERENCES

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

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

22. REMANUFACTURED, RECYCLED, RECYCLABLE OR RECOVERED MATERIALS Upon the conditions specified in the Bid Specifications and in accordance with the laws of the State of New York, Contractors are encouraged to use recycled, recyclable or

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

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

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

#### 24. PRICING

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

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

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

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

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

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

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

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

(ii) Commercial Price List Reductions: Where NYS Net Prices are based on a discount from Contractor's list prices, the date Contractor

lowers its pricing to its customers generally or to similarly situated government customers during the Contract term; or

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

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

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

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

## 25. DRAWINGS

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

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

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

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

additional work is required under this clause in order to properly complete the delivery and installation of the required Product or provide the requested service.

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

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

## 28. SAMPLES

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

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

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

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

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

Specifications, the Commissioner may reject the Bid. If an award has been made, the Commissioner may cancel the Contract at the expense of the Contractor.

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

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

### **BID EVALUATION**

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

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

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

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

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

34. **PERFORMANCE AND RESPONSIBILITY QUALIFICATIONS** The Commissioner reserves the right to investigate or inspect at any time whether or not the Product, services,

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

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

36. **QUANTITY CHANGES PRIOR TO AWARD** The Commissioner reserves the right, at any time prior to the award of a specific quantity Contract, to alter in good faith the quantities listed in the Bid Specifications. In the event such right is exercised, the lowest responsible Bidder meeting Bid Specifications will be advised of the revised quantities and afforded an opportunity to extend or reduce its Bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its Bid price may result in the rejection of its Bid and the award of such Contract to the lowest responsible Bidder who accepts the revised qualifications.

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

### **TERMS & CONDITIONS**

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

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

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

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

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

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

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

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

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

Other than where such terms are more advantageous for the Authorized User(s) than those set forth in the Contract, no alteration or modification of the terms of the Contract, including substitution of Product, shall be valid or binding against Authorized User(s) unless authorized by the Commissioner or specified in the Contract Award Notification. No such alteration or modification shall be made by unilaterally affixing such terms to Product upon delivery (including, but not limited to, attachment or inclusion of standard pre-printed

order forms, product literature, "shrink wrap" terms accompanying software upon delivery, or other documents) or by incorporating such terms onto order forms, purchase orders or other documents forwarded by the Contractor for payment, notwithstanding Authorized User's subsequent acceptance of Product, or that Authorized User has subsequently processed such document for approval or payment.

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

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

With respect to any specific quantity stated in the contract, the Commissioner reserves the right after award to order up to 20% more or less (rounded to the next highest whole number) than the specific quantities called for in the Contract. Notwithstanding the foregoing, the Commissioner may purchase greater or lesser percentages of Contract quantities should the Commissioner and Contractor so agree. Such agreement may include an equitable price adjustment.

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

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

All Purchase Orders issued pursuant to Contracts let by the Commissioner must bear the appropriate Contract number and, if necessary, required State approvals. As deemed necessary, the Authorized User may confirm pricing and other Product information with the Contractor prior to placement of the Purchase Order. The State reserves the right to require any other information from the Contractor which the State deems necessary in order to complete any Purchase Order placed under the Contract. Unless otherwise specified, all Purchase Orders against Centralized Contracts will be placed by Authorized Users directly with the Contractor and any discrepancy between the terms stated on the vendor's order form, confirmation or acknowledgment, and the Contract terms shall be resolved in favor of

the terms most favorable to the Authorized User. Should an Authorized User add written terms and conditions to the Purchase Order that conflict with the terms and conditions of the Contract, the Contractor has the option of rejecting the Purchase Order within five business days of its receipt but shall first attempt to negotiate the additional written terms and conditions in good faith with the Authorized User, or fulfill the Purchase Order. Notwithstanding the above, the Authorized User reserves the right to dispute any discrepancies arising from the presentation of additional terms and conditions with the Contractor.

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

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

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

**47. SHIPPING/RECEIPT OF PRODUCT**

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

**b. Shipping Charges** Unless otherwise stated in the Bid Specifications, all deliveries shall be deemed to be freight on board (F.O.B.) destination tailgate delivery at the dock of the Authorized User. Unless otherwise agreed, items purchased at a price F.O.B. Shipping point plus transportation charges shall not relieve the

Contractor from responsibility for safe and proper delivery notwithstanding the Authorized User's payment of transportation charges. Contractor shall be responsible for ensuring that the Bill of Lading states "charges prepaid" for all shipments.

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

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

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

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

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

**52. INSTALLATION** Where installation is required, Contractor shall be responsible for placing and installing the Product in the required locations. All materials used in the installation shall be of good quality and shall be free from any and all defects that would mar the appearance of the Product or render it structurally unsound. Installation includes the furnishing of any equipment, rigging and materials required to install or place the Product in the proper location. The Contractor shall protect the site from damage for all its work and shall repair damages or injury of any kind caused by the Contractor, its employees, officers or agents. If any alteration, dismantling or excavation, etc. is required to effect installation, the Contractor shall thereafter promptly restore the structure or site. Work shall be

performed to cause the least inconvenience to the Authorized User(s) and with proper consideration for the rights of other Contractors or workers. The Contractor shall promptly perform its work and shall coordinate its activities with those of other Contractors. The Contractor shall clean up and remove all debris and rubbish from its work as required or directed. Upon completion of the work, the building and surrounding area of work shall be left clean and in a neat, unobstructed condition, and everything in satisfactory repair and order.

**53. REPAIRED OR REPLACED PARTS / COMPONENTS**

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

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

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

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

Upon notice to the Contractor, the Contract may be assigned without the consent of the Contractor to another State Agency or subdivision of the State pursuant to a governmental reorganization or assignment

of functions under which the functions are transferred to a successor Agency or to another Agency that assumes OGS responsibilities for the Contract.

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

**58. PERFORMANCE / BID BOND** The Commissioner reserves the right to require a Bidder or Contractor to furnish without additional cost, a performance, payment or Bid bond or negotiable irrevocable letter of credit or other form of security for the faithful performance of the Contract. Where required, such bond or other security shall be in the form prescribed by the Commissioner.

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

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

**60. TERMINATION**

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

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

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

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

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

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

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

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

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

that continued performance of the Contract would result in a substantial loss.

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

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

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

**63. DEFAULT – AUTHORIZED USER**

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

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

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

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

**64. INTEREST ON LATE PAYMENTS**

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

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

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

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

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

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

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

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

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

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

e. **Deduction/Credit** Sums due as a result of these remedies may be deducted or offset by the Authorized User from payments due, or to become due, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the Authorized User the amount of such claim

or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, liquidated damages, etc., which arise from the administration of the Contract.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Where Contractor, ISV or other third party manufacturer markets any Project Deliverable with a standard commercial warranty which goes

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

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

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

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

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

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

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

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

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

**73. LEGAL COMPLIANCE** Contractor represents and warrants that it shall secure all notices and comply with all laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any renewals thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Bid and Contract and any applicable laws, including but not limited to, permits, licensing, and shall provide such proof as required by the Commissioner. Failure to comply or failure to provide proof may constitute grounds for the Commissioner to cancel or suspend the Contract, in whole or in part, or to take any other action deemed necessary by the Commissioner. Contractor also agrees to disclose information and provide affirmations and certifications to comply with Sections 139-j and 139-k of the State Finance Law.

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

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

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

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

In the event that an action at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the service or Product under the Contract infringes any patent, copyright or proprietary right, and Contractor is of the opinion that the allegations in such action in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the

Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract. Contractor shall in such event protect the interests of the Authorized User and secure a continuance to permit the Authorized User to appear and defend its interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the Authorized User may have. This constitutes the Authorized User's sole and exclusive remedy for patent infringement, or for infringement of any other third party proprietary right.

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

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

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

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

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

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

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

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

interest in any trademark, trade name, or service mark is granted hereunder.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- i. **Restricted Use by Licensee** Except as expressly authorized by the terms of license, Licensee shall not:
- (i) Copy the Product;
  - (ii) Cause or permit reverse compilation or reverse assembly of all or any portion of the Product;
  - (iii) Export the Licensed Software in violation of any U.S. Department of Commerce export administration regulations.

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

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

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

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

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

## **81. OWNERSHIP/TITLE TO PROJECT DELIVERABLES**

### **a. Definitions**

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

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

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

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

#### **(i) Existing Products:**

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

**2. Software** - Title and ownership to Existing Software Product(s) delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other independent software vendor proprietary owner ("Existing Licensed

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

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

c. **Transfers or Assignments to a Third Party Financing Agent** It is understood and agreed by the parties that a condition precedent to the consummation of the purchase (s) under the Contract may be the obtaining of acceptable third party financing by the Authorized User. The Authorized User shall make the sole determination of the acceptability of any financing proposal. The Authorized User will make all reasonable efforts to obtain such financing, but makes no representation that such financing has been obtained as of the date of Bid receipt. Where financing is used, Authorized User may assign or transfer its rights in Licensed Products (existing or custom) to a third party financing entity or trustee (“Trustee”) as collateral where required by the terms of the financing agreement. Trustee’s sole rights with respect to transferability or use of Licensed Products shall be to exclusively sublicense to Authorized User all of its Licensee’s rights under the terms and conditions of the License Agreement; provided, further, however, in the event of any termination or expiration of such sublicense by reason of payment in full, all of Trustee’s rights in such Licensed Product shall terminate immediately and Authorized User’s prior rights to such Existing Licensed Product shall be revived.

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

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

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

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

#### 84. **CHANGES TO PRODUCT OR SERVICE OFFERINGS**

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

In the event that the Contractor is not the Product Manufacturer, Contractor shall be required to: (i) provide the notice required under the paragraph above, to the entities described within five (5) business days of Contractor receiving notice from the Product Manufacturer, and (ii) include in such notice the period of time from the date of notice that the Product Manufacturer will continue to provide Product or withdraw support.

The provisions of this subdivision (a) shall not apply or eliminate Contractor’s obligations where withdrawn support is being provided by an independent Subcontractor. In the event that such Subcontractor

ceases to provide service, Contractor shall be responsible for subcontracting such service, subject to state approval, to an alternate Subcontractor.

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

#### **85. NO HARDSTOP/PASSIVE LICENSE MONITORING**

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

#### **86. SOURCE CODE ESCROW FOR LICENSED PRODUCT**

If Source Code or Source Code escrow is offered by either Contractor or Product manufacturer or developer to any other commercial customers, Contractor shall either: (i) provide Licensee with the Source Code for the Product; or (ii) place the Source Code in a third party escrow arrangement with a designated escrow agent who shall be named and identified to the State, and who shall be directed to release the deposited Source Code in accordance with a standard escrow agreement acceptable to the State; or (iii) will certify to the State that the Product manufacturer/developer has named the State, acting by and through the Authorized User, and the Licensee, as a named beneficiary of an established escrow arrangement with its designated escrow agent who shall be named and identified to the State and Licensee, and who shall be directed to release the deposited Source Code in accordance with the terms of escrow. Source Code, as well as any corrections or enhancements to such source code, shall be updated for each new release of the Product in the same manner as provided above and such updating of escrow shall be certified to the State in writing. Contractor shall identify the escrow agent upon commencement of the Contract term and shall certify annually that the escrow remains in effect in compliance with the terms of this paragraph.

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

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

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

## INDEX

	<u>Paragraph</u>		<u>Paragraph</u>
	<u>No.</u>		<u>No.</u>
<u>A</u>			
Additional Warranties	72	Modification of Contract Terms	40
Advertising Results	20		
Applicability	1	<u>N</u>	
Assignment	56	No Hardstop/Passive License Monitoring	85
Assignment of Claim	66		
Audit of Licensed Product Usage	80	<u>O</u>	
Authentication of Facsimile Bids	10	On-Site Storage	54
		Ownership/Title to Project Deliverables	81
<u>B</u>			
Bid Contents	12	<u>P</u>	
Bid Evaluation	29	Participation in Centralized Contracts	39
Bid Opening	7	Performance and Responsibility Qualifications	34
Bid Submission	8	Performance/Bid Bond	58
		Prevailing Wage Rates Public Works & Building Services Contracts	17
<u>C</u>			
Changes to Product or Service Offerings	84	Pricing	24
Clarification/Revisions	31	Procurement Card	27
Confidential/Trade Secret Materials	14	Product Acceptance	79
Conflict of Terms	4	Product Delivery	45
Conditional Bid	30	Product References	21
Contract Billings	62	Product Substitution	50
Contract Creation/Execution	38	Product Version	83
Contract Term - Renewal	71	Products Manufactured in Public Institutions	23
Cooperation with Third Parties	70	Prompt Payment Discounts	32
		Proof of License	82
<u>D</u>			
Default - Authorized User	63	Purchase Orders	44
Definitions	5	<u>Q</u>	
Disqualification for Past Performance	35	Quantity Changes Prior to Award	36
Drawings	25		
<u>E</u>			
Emergency Contracts	43	<u>R</u>	
Employees/Subcontractors/Agents	55	Rejected Product	51
Equivalent or Identical Bids	33	Release of Bid Evaluation Materials	15
Estimated/Specific Quantity Contracts	42	Re-Weighing Product	49
Ethics Compliance	3	Remanufactured, Recycled, Recyclable or Recovered Materials	22
Expenses Prior to Contract Execution	19	Remedies for Breach	65
Extraneous Terms	13	Repaired or Replaced Product/Components	53
<u>F</u>			
Facsimile Submissions	9	<u>S</u>	
Freedom of Information Law	16	Samples	28
		Savings/Force Majeure	61
<u>G</u>			
Governing Law	2	Scope Changes	41
		Security	69
<u>I</u>			
Indemnification	74	Site Inspection	26
Indemnification Relating to Third Party Rights	75	Shipping/Receipt of Product	47
Independent Contractor	68	Software License Grant	78
Installation	52	Source Code Escrow for Licensed Product	86
Insurance	77	Subcontractors and Suppliers	57
Interest on Late Payments	64	Suspension of Work	59
International Bidding	6		
		<u>T</u>	
<u>L</u>			
Late Bids	11	Taxes	18
Legal Compliance	73	Termination	60
Limitation of Liability	76	Timeframe for Offers	37
		Title and Risk of Loss	48
		Toxic Substances	67
		<u>W</u>	
		Weekend and Holiday Deliveries	46