# Contract

THIS CONTRACT (hereinafter "Contract" or "Centralized Contract") for the acquisition of Information Technology Commodities and/or Services is made between the People of the State of New York, acting by and through the Commissioner of the Office of General Services (hereinafter "State" or "OGS") whose principal place of business is the 41st Floor, Corning Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242, pursuant to authority granted under New York State Finance Law §163, **IMPULSE POINT** (hereinafter "Contractor"), with its principal place of business at **6810 New Tampa Highway, Suite 400, Lakeland, FL 33815**. The foregoing are collectively referred to as the "Parties."

Whereas, OGS provided notification of availability of a non-competitive periodic recruitment solicitation ("Solicitation") for manufacturers that provide Information Technology Commodities and Services by placing a notice in the **January 6, 2015** edition of the New York State Contract Reporter; and

Whereas, the Solicitation set forth the minimum administrative and technical requirements that a vendor must meet to be eligible for consideration to receive an award; and

Whereas the Solicitation was structured with four separate lots: Lot 1–Software, Lot 2–Hardware, Lot 3–Cloud and Lot 4–Implementation Services; and

Whereas, this Centralized Contract requires, for each transaction, that the Authorized User issue a competitive Request for Quote (RFQ) to be issued to eligible Contractors pursuant to a How to Use Process. Each Authorized User Agreement resulting from the competitive RFQ process will be governed first by the terms and conditions specified herein and second by terms and conditions added to the Authorized User Agreement by the Authorized User; and

Whereas, the State evaluated Contractor's submission and determined that the Contractor met the minimum administrative and technical requirements for those Lot(s) set forth in Appendix D; and

Whereas, in accordance with State Finance Law Article 11, the State has made a determination that the Contractor's not to exceed pricing is reasonable; and

Whereas, Contractor agrees to the terms and conditions set forth in this Centralized Contract and the Contractor is willing to provide such services as set forth herein to Authorized Users; and

Whereas, the State issued a tentative award notice to Contractor for Lot(s) set forth in Appendix D.

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

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# Section 1. Introduction

## 1.1 OVERVIEW AND PURPOSE OF THIS CONTRACT

The New York State Office of General Services (OGS), New York State Procurement is responsible for developing and managing centralized Contracts for all New York State Authorized Users. NYS Procurement has developed this new contracting model for Information Technology (IT) procurement which will enable an Authorized User to procure from specific Lots for Software, Hardware, Cloud, and Implementation services. The procurements shall be competitive at the transactional level via Request for Quotations (RFQ) and will allow an Authorized User the ability to procure within any of the Lots, or across Lots.

# Section 2. Contract Scope

## 2.1 LOT OVERVIEW

This Contract encompasses the Lots listed in Appendix D – Contractor and Reseller Information. The following descriptions, as applicable, delineate the scope of the award Lots.

### 2.1.1 Lot 1 – Software

This Lot provides Authorized Users with a mechanism to purchase Products including software licenses (perpetual and term), Maintenance/Support for Contractor's Proprietary product line, training, and fleet management as set forth below. Competition is required at the Authorized User transactional level from Contractors and Resellers.

Products that are provided under other Lots shall not be purchased under this Lot.

| Lot 1 – Software |
|---|
| **Inclusions** |
| • Software Licenses for Contractor's proprietary product line, including<br>  ○ Perpetual licenses<br>  ○ Term licenses<br>• Pre-packaged Software Maintenance/Support for Contractor's proprietary product line<br>• Pre-packaged Software Installation<br>• Configuration Services (Limited in amount to 10% of the net NYS Contract Price for the total Products being procured not to exceed $25,000 total.)<br>• Software Training Packages, Remote and On-Site that are standardized and prepackaged<br>• Fleet management (management of software license inventory)<br>• Software Bundles, including:<br>  ○ Software Third Party Products<br>  ○ Maintenance<br>• Enterprise Software Purchases |
| **Restrictions** |
| • On Premise Software Only<br>• Manufacturers Only, as defined in the Glossary as Manufacturer – Software<br>• Hardware Third Party Products are allowed as part of a Software Bundle only if they are required to facilitate the provision of the Software solution. |
| **Exclusions** |
| In addition to the items excluded under this section, Contractors cannot sell a Product that does not qualify as Software under the Contract. The following are examples of excluded Products:<br>• Consulting Services<br>• Cloud Products<br>• Implementation<br>• Customized Training<br>• Stand-alone Professional Services<br>• SKUs that equate to "blocks of hours" |

| Lot 1 – Software |
|---|
| • Stand-alone Third Party Products<br>• Products that are provided under other Lots cannot be purchased under this Lot<br>• Configuration Services other than as set forth in Inclusions. |

### 2.1.2 Lot 2 – Hardware

This Lot provides Authorized Users with a mechanism to purchase Products including Hardware, pre-packaged installation, configuration, training, extended warranties, maintenance/support, and, ancillary equipment and accessories offered by the Contractor in its Published Price List may be included under this Lot. Related Software which is bundled with the Hardware and is required for installation, configuration and is integral to the operation of the Hardware is acceptable for purchase under this Lot. This Related Software must be acquired and delivered at the time of the Hardware purchase.

The Products must be commercially released Products and available for purchase through the Contractor's normal marketing channels. Alpha, beta, experimental or unannounced equipment is outside the scope of this Contract. Contractor shall not offer stand-alone third party Products through this Contract. No Products deemed end of Manufacturer production or within six months prior to end of life are to be sold, except with prior written approval by the Authorized User.

Products that are provided under other Lots shall not be purchased under this Lot.

| Lot 2 – Hardware |
|---|
| **Inclusions** |
| • Appliances<br>• Server & Mainframe Hardware<br>• Storage<br>• Microcomputer Systems, System Peripherals & Accessories<br>• Telecommunications Hardware, System Peripherals & Accessories<br>• Key Systems<br>• Private Branch Exchange<br>• Desktop / Notebooks / Laptop / Tablets / Workstations<br>• Audio / Video Conferencing Hardware<br>• Pre-packaged Hardware Maintenance/Support for Contractor's proprietary product line<br>• Pre-packaged Hardware installation and configuration services<br>• Configuration Services (Limited in amount to 10% of the net NYS Contract Price for the total Products being procured, not to exceed $25,000 total.)<br>• Hardware Training Packages (Remote and On-Site) that are standardized and prepackaged<br>• Fleet management (management of Hardware asset inventory)<br>• Hardware Bundles, including Related Software<br>• Imaging and/or Loading Services<br>• Remote Hardware Administration/Maintenance/Support<br>• Enterprise Hardware Purchases |
| **Restrictions** |
| • Manufacturers Only, as defined in the Glossary as Manufacturer – Hardware<br>• Software/Hardware Third Party Products are allowed as part of a Hardware Bundle only if they are required to facilitate the provision of the Hardware solution |
| **Exclusions** |
| In addition to the items excluded under this section, Contractors cannot sell a Product that does not qualify as Hardware under the Contract. The following are examples of excluded Products:<br>• Consulting Services<br>• Cloud paired appliances<br>• Cloud Products<br>• Customized Training<br>• Implementation Services<br>• Configuration Services other than as set forth in Inclusions |

| Lot 2 – Hardware |
|---|
| • Printers, Peripherals, Accessories and Related Services within the scope of OGS Group 75525 until such time as those awards are no longer valid<br>• Alpha, beta, experimental or unannounced equipment<br>• Software not in compliance with Related Software, of this Lot<br>• Stand-alone Third Party Products<br>• Products that are provided under other Lots cannot be purchased under this Lot |

### 2.1.3 Lot 3 – Cloud

This Lot provides Authorized Users with a mechanism to purchase Cloud Products.

| Lot 3 - Cloud |
|---|
| **Inclusions** |
| • Software as a Service (SaaS)<br>• Platform as a Service (PaaS)<br>• Infrastructure as a Service (IaaS)<br>• Anything as a Service (XaaS)<br>• Cloud Bundled Products – including Lot 1 or Lot 2 Product with Cloud features<br>• Integrated Bundle of Cloud Services<br>• Pre-packaged Cloud Maintenance/Support for Contractor's proprietary product line<br>• Pre-packaged Cloud Connectivity Bundle (For example, an existing Cloud Product bundled with a connectivity service to enable the use of the Cloud Product.)<br>• Pre-packaged Cloud installation and configuration services<br>• Cloud Training Packages (Remote and On-Site) that are standardized and prepackaged for Contractor's proprietary product line<br>• Free-standing Cloud-Based training services that are standardized and prepackaged for Contractor's proprietary product line (e.g. on-line professional training services)<br>• Apps for Mobile Devices<br>• Managed Security Services, Including Internet Traffic Monitoring Services.<br>• Fleet Management (management of Cloud asset inventory)<br>• Enterprise Cloud Purchases |
| **Restrictions** |
| • Manufacturers Only, as defined in the Glossary as Manufacturer – Cloud<br>• Third Party Products are allowed as part of a Cloud Bundle only if they are required to facilitate the provision of the Cloud solution |
| **Exclusions** |
| • Consulting Services<br>• Customization Services<br>• Customized Implementation Services<br>• Customized Configuration Services<br>• Customized Training<br>• Stand-alone Professional Services<br>• Stand-alone Third Party Products<br>• Products that are provided under other Lots cannot be purchased under this Lot |

### 2.1.4 Lot 4 – Implementation Services

Implementation Services are for the efficient deployment of Products and Services procured under Lots 1, 2 and/or 3 and any applicable future Lots awarded through Periodic Recruitment. Implementation Services are limited to services required to install or implement products from other Lots.

Implementation services are open to Manufacturers who are awarded a Contract(s) under Lots 1, 2 and/or 3 and any applicable future Lots.

| Lot 4 – Implementation Services |
|---|
| **Inclusions** |
| Implementation services and initial configuration of Lots 1 through 3. Examples include, but are not limited to:<br>• Business Process Analysis for new Products<br>• Project Management Services<br>• Data Conversion<br>• Customized Training on Products included within Lots 1, 2 and 3<br>• Programming Services capped at no more than 20% of the total implementation cost of the Authorized User Agreement<br>• Enterprise Implementation Services |
| **Restrictions** |
| • Restricted to Contractors with contracts for Lots 1, 2 or 3 (or any combination thereof)<br>• Implementation services may be procured to implement a Product purchased from Lots 1, 2 or 3 above<br>• Implementation services may be procured to implement a Product purchased prior to this Umbrella Contract if the Product is included within Lots 1, 2 or 3<br>• An Authorized User Agreement for Implementation shall be no longer than 36 months in duration including any time extensions |
| **Exclusions** |
| • Ongoing Services such as:<br>– Staff Augmentation<br>– Web Hosting<br>– Automated Network Monitoring (or any other service provided principally through an automated process)<br>– Equipment Maintenance/Support<br>– Application Service Provisioning<br>• Consulting Services not related to implementation of Products in all other Lots of the Contract<br>• Programming Services requiring more than 20% of the total implementation costs of the Authorized User Agreement |

## 2.2 PRODUCTS AND SERVICES EXCLUDED FROM THE SCOPE OF THIS CONTRACT

This Contract expressly excludes the following from its scope:

- Consulting services not related to implementation of Products in Lots 1, 2 and 3 of the Contract;
- Stand-alone Connectivity Services (e.g. connectivity services not bundled with any Product within the scope of this Contract)
- Staff Augmentation (standalone hourly based IT Services)
- Time and material billings;
- Large scale IT support infrastructure such as switch gear, generators, smoke detection, fire suppression and cooling systems; and
- Stand-alone Third Party Products.

## 2.3 SUBSEQUENT PERIODIC RECRUITMENT

During the term of the Contract, the State reserves the right to conduct subsequent future Periodic Recruitments. The purpose of future Periodic Recruitments will be for:

- Add new Lots for additional and/or emerging technologies
- Add new Contractors to existing and new Lots
- Add additional Lots to existing Contracts

OGS will formally announce when a periodic recruitment Solicitation is issued. Periodic recruitments will be issued at the discretion of the OGS. A Contractor shall be required to submit such Submission documentation as required by OGS, which may include additional applicable statutory requirements currently in effect at the time of the Periodic Recruitment. Should a Contractor Submission for a Lot be deemed non-responsive under any Periodic Recruitment, a Contractor cannot reapply for that Contract Lot until the next Periodic Recruitment is opened.

## 2.4 ESTIMATED SPEND AND QUANTITIES

This Contract is an Indefinite Delivery, Indefinite Quantity (IDIQ) Contract. Numerous factors could cause the actual volume of Product purchased under this Contract to vary substantially from any estimates previously provided. Such factors include, but are not limited to, the following:

- The Contract is a nonexclusive Contract;
- There is no guarantee of volume to be purchased; and
- There is no guarantee that demand will continue in any manner consistent with previous purchases.

## 2.5 DEFINITIONS

In addition to the terms defined in Appendix B, Section 2, Definitions, the following definitions shall apply in this Contract.

| Term | Definition |
|---|---|
| Analytic Derivatives | The outcome from data mining or other aggregated Data analysis techniques. |
| Anything as a Service (XaaS) | XaaS is a collective term said to stand for a number of things including "X as a service," "anything as a service" or "everything as a service." The acronym refers to an increasing number of services that are delivered over the Internet rather than provided locally or on-site. |
| Appliance | An Appliance is a device with integrated Software (firmware), specifically designed to provide a specific computing resource. The Hardware and Software are pre-integrated and pre-configured before delivery to customer, to provide a "turn-key" solution to a particular problem. Unlike general purpose computers, Appliances are generally not designed to allow the customers to change the Software (including the underlying operating system), or to flexibly reconfigure the Hardware. To be considered an Appliance, the (Hardware) device needs to be integrated with Software, and both are supplied as a package. |
| Authentication | The process of establishing confidence in the identity of users or information systems. |
| Authorized User Agreement | Authorized User Agreement shall mean the Purchase Order and/or such other documents memorializing the Contractor's obligations with respect to a given transaction resulting from an RFQ issued by an Authorized User. |
| Best Value | The basis for awarding all service and technology Contracts to the Bidder that optimizes quality, cost and efficiency, among responsive and responsible Bidders. (State Finance Law §163 (1) (j)). |
| Business Continuity and Disaster Recovery (BC/DR) | Business Continuity and Disaster Recovery (BCDR or BC/DR) are closely related practices that describe an organization's preparation for unforeseen risks to continued operations. |
| Business Day | Monday through Friday from 8:00 AM – 5:00 PM ET, excluding New York State or Federal holidays. |
| Business Entity | Any individual, business, partnership, joint venture, corporation, S-corporation, limited liability company, sole proprietorship, joint stock company, consortium, or other private legal entity recognized by statute. |
| Cloud | Cloud shall mean any Product or Service sold as an "as a service" offering or in which Authorized User Data is transmitted, acted upon, or stored on non-Authorized User equipment. This may include, but is not limited to, hosted applications, managed security services, and off-site Data storage. Cloud includes IaaS, PaaS, SaaS, and XaaS. |
| Cloud Provider | Person, organization or entity responsible for making a Cloud Service available to Authorized Users. |
| Commercial Off–The-Shelf (COTS) | A term for Products available in the commercial marketplace that can be purchased and used under government Contract. |
| Compliance | Conformity in fulfilling requirements. |
| Configuration | An arrangement of elements in a particular form, figure, or combination which includes minor physical or software setting changes that can be implemented without custom physical modifications or changes to the base code. Configuration may include Installation. |

| Term | Definition |
|---|---|
| Consensus Assessments Initiative Questionnaire (CAIQ) | As established by the Cloud Security Alliance (CSA). The Cloud Security Alliance Consensus Assessments Initiative (CAI) was launched to perform research, create tools and create industry partnerships to enable Cloud computing assessments. |
| Consulting | The providing of expert knowledge by a third party for a fee. |
| Continental United States (CONUS) | The 48 contiguous States, and the District of Columbia. |
| Contract Term | The initial term of the Contract and any renewals and/or extensions. |
| Copyright | Copyright is a legal concept, enacted by most governments, that grants the creator of an original work exclusive rights to its use and distribution, usually for a limited time, with the intention of enabling the creator of intellectual wealth (e.g. the photographer of a photograph or the author of a book) to receive compensation for their work and be able to financially support themselves. |
| Custom Software | Software that does not meet the definition of COTS Software. |
| Customization | Customization of Product is the modification of packaged Product to meet the individual requirements of an Authorized User. |
| Customized Training | Training that is designed to meet the special requirements of an Authorized User. |
| Data | Any information, Analytic Derivatives, formula, algorithms, or other content that the Authorized User may provide to the Contractor pursuant to this Contract. Data includes, but is not limited to, any of the foregoing that the Authorized User and/or Contractor (i) uploads to the Cloud Service, and/or (ii) creates and/or modifies using the Cloud Service. See also Analytic Derivatives. |
| Data Breach | Data Breach refers to unauthorized access by any person, including employees, officers, partners or subcontractors of Contractor, who have not been authorized to access such Data. |
| Data Center | The term "Data center" applies to all facilities which Authorized User Data is processed or stored. |
| Data Categorization | Data categorization is the process of risk assessment of Data. See also “High Risk Data”, “Moderate Risk Data” and “Low Risk Data”. |
| Data Conversion | The conversion of computer data from one format to another. |
| Data Mining | Data Mining is the computational process of discovering patterns in large data sets involving methods at the intersection of artificial intelligence, machine learning, statistics, and database systems. The overall goal of the data mining process is to extract information from a data set and transform it into an understandable structure for further use. Aside from the raw analysis step, it involves database and data management aspects, data pre-processing, model and inference considerations, interestingness metrics, complexity considerations, post-processing of discovered structures, visualization, and online updating. |
| Database | A single collection of Data stored in one place that can be used by personnel to make decisions and assist in analysis. |
| Deliverable | Products, Software, Information Technology, telecommunications technology, Hardware, and other items (e.g. reports) to be delivered pursuant to this Contract, including any such items furnished within the provision of services. |
| Device | A piece of electronic equipment (such as a laptop, server, hard drive, USB drive) adapted for a particular purpose. |
| Discount | An allowance, reduction or deduction from a selling price or list price extended by a seller to a buyer in order for the net price to become more competitive. More common forms of discounts include trade discounts, quantity discounts, seasonal discounts and cash discounts. |
| Discount from List | Mathematical calculation to determine the buyer’s price from a manufacturer’s price list. |
| Encryption | A technique used to protect the confidentiality of information. The process transforms ("encrypts") readable information into unintelligible text through an algorithm and associated cryptographic key(s). |
| Equal Employment Opportunity (EEO) | Policies and procedures of the jurisdiction to ensure non-discrimination and equal opportunity to all employees, especially women, minorities, and persons with disabilities. |
| Equipment | An all-inclusive term which refers either to individual Machines or to a complete Data Processing System or Subsystem, including its Hardware and Operating Software (if any). See also “device, “appliance,” and “hardware,” “machine.” |

| Term | Definition |
|---|---|
| Federal Information Security Management Act (FISMA) | The Federal Information Security Management Act of 2002 ("FISMA", 44 U.S.C. § 3541, et seq.) is a United States federal law enacted in 2002 as Title III of the E-Government Act of 2002 (Pub.L. 107–347, 116 Stat. 2899). The act recognized the importance of information security to the economic and national security interests of the United States. The act requires each federal agency to develop, document, and implement an agency-wide program to provide information security for the information and information systems that support the operations and assets of the agency, including those provided or managed by another agency, contractor, or other source. |
| Fleet Management | The development and management of inventory (e.g. Software inventory, Hardware inventory, Cloud inventory). |
| Follow the Sun | Follow-the-sun is a type of global workflow in which tasks are passed around daily between work sites that are many time zones apart. |
| General Services Administration (GSA) | The department within the U.S. government that is responsible for procurement of goods and services. |
| Government Entity | A federal, state or municipal entity located in the United States. |
| Hardware | Refers to IT Equipment and is contrasted with Software. See also Equipment. |
| High Risk Data | Is as defined in FIPS PUB 199, Standards for Security Categorization of Federal Information and Information Systems (“High Impact Data”). |
| Implementation | Implementation refers to post sales process of guiding a client from purchase to use of the Product that was purchased. This may include but is not limited to post sales requirements analysis, scope analysis, limited customizations, systems integrations, data conversion/migration, business process analysis/improvement, user policy, customized user training, knowledge transfer, project management and system documentation. |
| Information Technology (IT) | Includes, but is not limited to, all electronic technology systems and services, automated information handling, System design and analysis, conversion of data, computer programming, information storage and retrieval, telecommunications which include voice, video, and data communications, requisite System controls, simulation, electronic commerce, and all related interactions between people and Machines. |
| Information Technology Services (ITS) | New York State Office of Information Technology Services (http://www.its.ny.gov/). It is the responsibility of ITS to provide centralized IT services to the State and its governmental entities with the awareness that our citizens are reliant on those services. |
| Infrastructure as a Service (IaaS) | The capability provided to the Authorized User is to provision processing, storage, networks, and other fundamental computing resources where the Authorized User is able to deploy and run arbitrary Software, which can include operating systems and applications. The Authorized User does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, deployed applications; and possibly limited control of select networking components (e.g., host firewalls). |
| Installation | The act or process of making Products ready to be used. Installation does not include Configuration. |
| Installation Date | The date specified in the Authorized User Agreement by which the Contractor must have the ordered Equipment ready for use by the Authorized User. |
| Installation of Hardware | Involves physically installing various types of computer systems and/or adding new components to an already existing system. Installation set up of computer systems includes the initial installation of Hardware and other components that are or may be part of a larger system. |
| Intellectual Property (IP) | Includes inventions, patents, copyrights, trade secrets, trademarks, technical Data, industrial designs that are generally protected and proprietary. |
| Internet Access | Connection to the internet through an Internet Service Provider (ISP). |
| Internet Service Provider (ISP) | An ISP is an organization that provides services for accessing, using, or participating in the Internet. |
| Interoperability | The capability to communicate, to execute programs, or to transfer Data among various functional units under specified conditions |

| Term | Definition |
|---|---|
| Legacy Systems | Any outdated Hardware/Software system that remains in use despite the availability of more current technology. It usually is an archaic Data management platform that may contain proprietary custom designed Software (e.g. An old database management system running on mainframes). |
| Logical Partition (LPAR) | A logical partition is a subset of computer's Hardware resources, virtualized as a separate computer. |
| Low Risk Data | Is as defined in FIPS PUB 199, Standards for Security Categorization of Federal Information and Information Systems (“Low Impact Data”). |
| Machine | An individual unit of a Data processing system or subsystem, separately identified by a type and/or model number, comprised of but not limited to mechanical, electro-mechanical, and electronic parts, microcode, and special features installed thereon and including any necessary Software, e.g., central processing unit, memory module, tape unit, card reader, etc. |
| Maintenance | The upkeep of Product that keeps the Product operating in accordance with the Manufacturer’s specification. |
| Mandatory | Refers to items or information that the State has deemed that a Vendor must submit as compulsory, required and obligatory. These items or information are noted as such, or the requirements may be phrased in terms of “must” or “shall”. Mandatory requirements must be met by the Vendor for Vendor’s Submission to be considered responsive. |
| Manufacturer | A person or business entity that creates, makes, processes, or fabricates a Product or something of value, which changes a raw material or commodity from one form to another or creates a new Product or commodity. |
| Manufacturer - Software | An organization that creates, programs, or develops proprietary Software that are branded, warranted, supported, and maintained by the entity that creates it and holds all intellectual property rights of the assembled solution. |
| Manufacturer - Cloud | An organization that creates, programs, or develops a proprietary system that is delivered as a subscription service that is branded, warranted, supported, and maintained by the entity that creates it. It may or may not be hosted by the Manufacturer, but the Manufacturer will be held responsible for the performance of the service provided regardless of the owner of the support infrastructure. |
| Manufacturer - Hardware | An organization that creates or assembles Hardware components into an integrated proprietary system that is branded, warranted, supported, and maintained by the entity that creates it and holds all intellectual property rights of the assembled solution. |
| Manufacturer Part Number (SKU) | An identification number assigned to an individual part by the Manufacturer or distributor of that part; usually includes a combination of alpha and/or numeric characters. |
| Manufacturer’s Price List | A price list published in some form by the Manufacturer and available to and recognized by the trade. |
| May | Denotes the permissive in a contract clause or specification. Refers to items or information that the State has deemed are worthy of obtaining, but not required or obligatory. |
| Mean | The arithmetic average. The average value of a set of numbers. |
| Minority and/or Woman-Owned Business (MWBE) | A business certified with Empire State Development (ESD) as a Minority and/or Woman-Owned Business. |
| Model Number | An identification number assigned to describe a style or class of item, such as a particular design, composition or function, by the Manufacturer or distributor of that item. |
| Moderate Risk Data | Is as defined in FIPS PUB 199, Standards for Security Categorization of Federal Information and Information Systems (“Moderate Impact Data”). |
| Must | Denotes the imperative in a Contract clause or specification. Means required - being determinative/mandatory, as well as imperative. |
| National Institute of Standards and Technology (NIST) | NIST is the federal technology agency that works with industry to develop and apply technology, measurements, and standards. http://www.nist.gov |

| Term | Definition |
|---|---|
| New York State Small Business Enterprise (NYS SBE) | A "New York State Small Business" is defined as a company that is a resident to New York State, independently owned and operated, with 100 or fewer employees, and not dominant in its field. See State Finance Law §160(8). |
| Non-State Agencies | Political subdivisions and other entities authorized by law to make purchases from OGS Centralized Contracts other than those entities that qualify as State Agencies. This includes all entities permitted to participate in centralized contracts per Appendix B, §39(b), Non-State Agency Authorized Users and §39(c), Voluntary Extension and State Finance Law Section 163(1)(k). |
| NYS Procurement | The New York State Office of General Services that is authorized by law to issue centralized, statewide contracts for use by New York State agencies, political subdivisions, schools, libraries and others authorized by law to participate in such contracts. http://nyspro.ogs.ny.gov |
| Office of the State Comptroller (OSC) | The New York State Office of the State Comptroller. http://www.osc.state.ny.us/ |
| Operating System (OS) | Those routines, whether or not identified as program Products, that reside in the Equipment and are required for the Equipment to perform its intended function(s), and which interface the operator, other Contractor-supplied programs, and user programs to the Equipment. |
| Personally Identifiable Information (PII) | As defined in NIST Special Publication 800-122 "Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)", |
| Platform as a Service (PaaS) | The capability provided to the Authorized User to deploy onto the Cloud, infrastructure Authorized User-created or acquired applications created using programming languages and tools supported by the Vendor. The Authorized User does not manage or control the underlying cloud infrastructure including network, servers, operating systems, or storage, but has control over the deployed applications and possibly application hosting environment configurations. |
| Preventive Maintenance | Maintenance, performed on a scheduled basis by the Contractor, which is designed to keep the Equipment in proper operating condition. |
| Processor | A microprocessor or other form of central processing unit that accesses shared resources. A dual-core or multicore processor (an integrated circuit with two or more microprocessors or central processing units plugged into the same socket) shall be considered a single Processor. |
| Procurement Card (P-Card) | A method of procuring and settling the purchase of goods and services. |
| Procurement Plan | The Product of the procurement planning process. A Procurement Plan may include, but is not limited to: the project requirements, the procurement team, the justification for the procurement, the procurement method, financial/technical weighting options and a procurement timeframe. |
| Product Bundle | Multiple Products combined for sale as a single Product offering. In the instance where a Product Bundle is comprised of Products by multiple Manufacturers, the Product Bundle can only be offered for sale under the Contract by the Manufacturer having the largest portion of the cost of the Product Bundle based on the Manufacturer's list price for the Product Bundle components. |
| Programming Services | Programming Services are modifications or additions to Source Code. |
| Project Manager (PM) | A project manager is a professional in the field of project management. Project managers can have the responsibility of the planning, execution and closing of any project, typically relating to construction industry, architecture, aerospace and defense, computer networking, telecommunications or Software development. |
| Project Plan | A formal, approved document used to guide both project execution and project control. The primary uses of the project plan are to document planning assumptions and decisions, facilitate communication among stakeholders, and document approved scope, cost, and schedule baselines. |
| Related Software | Software which is bundled with Hardware and is required for installation, configuration and is integral to the operation of the Hardware. |
| Reseller | A Reseller is a company or individual (merchant) that purchases goods or services with the intention of selling them rather than consuming or using them. Also known as Value Added Reseller (VAR) or channel partner. Resellers must be eligible to quote statewide, independently and lower than Manufacturer (Contract) pricing for procurements under resulting Contracts. Reseller must also be able to accept orders, invoice and receive payment for Products. |

| Term | Definition |
|---|---|
| Sales Agent | A Sales Agent may assist the Manufacturer with sales, but Sales Agents are not authorized to accept orders, invoice or receive payment. |
| Security Incident | A Security Incident is a violation or imminent threat of violation of computer security policies, acceptable use policies, or standard security practices. A Security Incident is also defined as any event that adversely affects the confidentiality, integrity, or availability of system and its Data. See NYS ITS Policy NYS-S13-005 or its successor for additional information. |
| Service | The performance of a task or tasks and may include a material good or a quantity of material goods, and which is the subject of any purchase or other exchange. For the purposes of this article, technology shall be deemed a service. |
| Shall | Denotes the imperative in a Contract clause or specification. Means required - being determinative/mandatory, as well as imperative. |
| Should | Denotes the permissive in a Contract clause or specification. Refers to items or information that the State has deemed are worthy of obtaining, but not required or obligatory. |
| Small Business | Please refer to State Finance Law section 160(8) for the definition of “small business concern” or “small business.” |
| Software | An all-inclusive term which refers to any computer programs, routines, or subroutines supplied by the Contractor, including operating Software, programming aids, application programs, and program Products. |
| Software as a Service (SaaS) | The capability provided to the Authorized User is to use the provider’s applications running on a Cloud infrastructure. The applications are accessible from various client devices through a thin client interface such as a Web browser (e.g., Web-based email), or a program interface. The Authorized User does not manage or control the underlying Cloud infrastructure including network, servers, operating systems, storage, or even individual application capabilities, with the possible exception of limited user-specific application configuration settings. |
| Statement of Work (SOW) | A SOW is a document that captures and defines the work activities, deliverables, and timeline an Authorized User seeks from a vendor. The SOW usually includes detailed requirements, with standard regulatory and governance terms and conditions. |
| Statewide Financial System (SFS) | The New York State Enterprise Resource Planning (ERP) system. |
| Storage | Specific to technology, a computer memory that retains data for some period of time. Storage can be categorized in many ways such as: primary or secondary; read-only, random access and magnetic storage. |
| System | The complete collection of Hardware, Software and services as described in the resulting Authorized User Agreements, integrated and functioning together, and performing in accordance with the Authorized User Agreement. |
| Third Party Products | Third Party Intellectual Property or Third Party Products means any intellectual property owned by parties other than Authorized User or Contractor and provided to Authorized Users for use in connection with the Services. |
| Trademark | A trademark, trade mark, or trade-mark is a recognizable sign, design or expression which identifies Products or services of a particular source from those of others. |
| Transaction | An agreement between an Authorized User and a Contractor to exchange a Product(s) or Service(s) for payment. |
| Usage | The quantity of an inventory item consumed over a period of time expressed in units of quantity or of value in dollars. |
| Vendor | An enterprise that sells goods or services. |
| Volume Software License Agreement | A Volume Software License Agreement can occur when there is a large quantity of Software purchased from a particular Software Manufacturer, for a specified time period, which results in additional discounting beyond the Contract discounts. |
| Will | Denotes the permissive in a contract clause or specification. |
| Written / Written Communication | Written Communication makes use of the written word. Examples of written communications include e-mail, Internet websites, letters, proposals, and contracts. |

## 2.6 CONTRACT DOCUMENTS AND CONFLICT OF TERMS

This Centralized Contract is composed of the documents set forth below. In the case of any conflict among these documents, conflicts shall be resolved in the order of precedence indicated below.

1. Appendix A – Standard Clauses for New York State Contracts;
2. This Document, Appendix J – Contractor's Insurance Requirements, and Appendix J.1 – Contractor-Specific Insurance Requirements (as applicable)
3. Appendix B – General Specifications
4. Appendix C – Contract Modification Procedure
5. Appendix D – Contractor and Reseller Information
6. Appendix E – Pricing Pages
7. Appendix F – Primary Security and Privacy Mandates
8. Appendix G – Processes and Forms Templates
    a. Attachment 1 – How to Use the Manufacturer Umbrella Contract
    b. Attachment 2 – Statement of Work – Request for Quote
    c. Attachment 3 – Statement of Work – Request for Quote - Financial
9. Appendix H – Maintenance and Warranty Service Report
10. Appendix I – Report of Contract Sales

## 2.7 CONTRACT TERM

The term of this Contract shall commence upon execution of the Contract by OGS as evidenced by the date accompanying the OGS signature line, and shall end on November 29, 2020. The State reserves the right, at its sole discretion, to extend the term of this Contract by an additional five (5) years upon Contractor's agreement thereto.

Notwithstanding the commencement of the term of the Contract, Contractor shall not bid on an RFQ for a specific Lot until the OGS website identifies Contractor as eligible to participate in an RFQ for that specific Lot.

## 2.8 DOWNSTREAM PROHIBITION

Any and all work from this Contract that involves developing specifications, establishing a base for other applications or otherwise gaining information that would give Contractor an unfair competitive advantage in a future procurement may result in the Contractor being precluded from further work (downstream prohibition) due to conflicts of interest. Authorized User shall provide notification of any downstream prohibitions known at the time the RFQ is released. See State Finance Law section 163-a and section 163 (2) for additional information on the statutory prohibitions. Non-State agency Authorized Users may have additional statutory prohibitions.

## 2.9 CONTRACTOR'S INSURANCE REQUIREMENTS

The insurance requirements of this Contract are set forth in Appendix J and, if applicable, Appendix J.1.

## 2.10 NEW YORK STATE VENDOR RESPONSIBILITY

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

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

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

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

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

## 2.11 TAX LAW §5-A

Section 5-a of the Tax Law requires certain Contractors awarded State Contracts for commodities, services and technology valued at more than $100,000 to certify to the NYS Department of Taxation and Finance (DTF) that they are registered to collect New York State and local sales and compensating use taxes. The law applies to Contracts where the total amount of such Contractors' sales delivered into New York State 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 DTF. Note: 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 Proposal 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 Proposal 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. Unless the information upon which the ST-220-TD is based changes, this form only needs to be filed once with DTF. If the information changes for the Contractor, its affiliate(s), or its subcontractor(s), a new Form No. ST-220-TD must be filed with DTF.

Form ST-220-CA must be 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.

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 the DTF. For additional information and frequently asked questions, please refer to the DTF website: http://www.tax.ny.gov.

## 2.12 TOLL FREE NUMBER

If Contractor provides a toll-free telephone number for Authorized User usage, Contractor should staff this toll-free number at a minimum from 9:00 AM to 5:00 PM Monday through Friday Eastern Time, excluding New York State or federal holidays. The toll-free number is set forth in Appendix D – Contractor and Reseller Information. This number is to be provided at no cost to the State.

## 2.13 DESIGNATED PERSONNEL

The Contractor will provide the Designated Personnel listed below for the duration of the Contract at no charge to the State.

Contractor must notify OGS within five (5) business days if any of the Designated Personnel changes, and provide an interim contact person until the position is filled. Contractor may submit a Designated Personnel change by submission electronically via e-mail of a revised Appendix D – Contractor and Reseller Information to the OGS Contract Administrator.

### 2.13.1 Account Manager

A designated Account Manager for the Centralized Contract shall be provided. The Account Manager is responsible for the overall relationship with the State during the course of the Contract and shall act as the central point of contact.

2.13.2 Billing Contact

A designated Billing Contact for the Centralized Contract shall be provided. The Billing Contact will become the single point of contact between the Contractor and the Authorized User for matters related to invoicing, billing and payment.

2.13.3 Emergency Contact
Not a complete sentence.
A designated Emergency Contact for the Centralized Contract shall be provided. The Emergency Contact will be available 24 hours a day, 365 days per year for emergency procurements.

2.13.4 Contractor Administrator

Contractor must provide a designated Contract Administrator to support the updating and management of the Contract on a timely basis. Information regarding the Administrator is set forth in Appendix D – Contractor and Reseller Information. During the term of the Contract, Contractor must notify OGS within five (5) business days if its Contract Administrator changes, and provide an interim contact person until the position is filled. Contractor may submit a Contract Administrator change by submission electronically via e-mail of a revised Appendix D – Contractor and Reseller Information to the OGS Contract Administrator.

## 2.14 E-RATE

Authorized users who receive E-rate funding are encouraged to review Universal Service Fund rules and regulations to verify the applicability of this Contract to the E-rate program.

## 2.15 NEW YORK STATE RIGHTS

2.15.1 New York State reserves the right to:

A. Unilaterally make revisions, changes and/or updates to any templates, Appendices (excluding Appendices A and B) and/or Attachments to this Contract without processing a formal amendment and/or modification.
B. The State reserves the right to exclude any price lists or individual Products and services that do not fall within the scope of this Contract.
C. OGS reserves the right to use on-line processes, such as reverse auction, to make acquisitions under the resulting Contracts. Bidder agrees that if awarded a Contract, it will participate in these on-line processes established by OGS.
D. OGS reserves the right to incorporate an electronic workflow system that may include elements of the Authorized User RFQ process.
E. OGS reserves the right to post Authorized User Contract usage of Centralized Contracts.

2.15.2 Authorized User Reserved Rights

In addition to the above reserved rights, the Authorized User shall have the following additional reserved rights:

A. The Authorized User reserves the right to add requirements to the RFQ and resulting Authorized User Agreement that are more advantageous than the terms and conditions established with the Contract.
B. The Authorized User reserves the right to require the Contractor to identify any sub-contractors, and to approve such sub-contractors.
C. The Authorized User reserves the right to request the Contractor’s insurance policy language for purposes of substantiating Vendor's compliance with Contract Section 2.9 Contractor’s Insurance Requirements, or such other Insurance Requirements as required by the Authorized User as part of a RFQ.

## 2.16 LIVING WAGE

An Authorized User subject to a local law establishing a “living wage”, such as Section 6-109 of the New York City Administrative Code, is required to ensure the Contractor sought to be hired complies with such local law. If the pay rate(s) for a job title(s) as set forth in Appendix E – Pricing Pages, are less than the local law “living wage” than Authorized User subject to such local law cannot use this Contract for such job title(s). Local laws, however, are not a term and condition of the OGS Contract.

## 2.17 PREVAILING WAGE RATES - PUBLIC WORKS AND BUILDING SERVICES CONTRACTS

Work being done under a resulting Authorized User Agreement may be subject to the prevailing wage rate provisions of the New York State Labor Law. Such work will be identified by the Authorized User within the RFQ. See "Prevailing Wage Rates – Public Works and Building Services Contracts' in Appendix B, Clause 10, OGS General Specifications. Any federal or State determination of a violation of any public works law or regulation, or labor law or regulation, or any OSHA violation deemed "serious or willful" may be grounds for a determination of vendor non-responsibility and rejection of proposal.

The Prevailing Wage Case Number for this Contract is PRC# 2014011745.

The Prevailing Wage Rates for various occupations and General Provisions of Laws Covering Workers on Article 8 Public Work Contract can be accessed at the following NYS Department of Labor website:

http://wpp.labor.state.ny.us/wpp/showFindProject.do?method=showIt

- Insert PRC# 2014011745 in the box provided and click Submit.
- Click Wage Schedule located underneath the main header of this page. The PDF file may be searched to obtain the Prevailing Wage Rate for a specific occupation.

## 2.18 SHORT TERM EXTENSION

In the event a replacement Contract has not been issued, any Contract let and awarded hereunder by the State, may be extended unilaterally by the State for an additional period of up to three (3) months upon notice to the Contractor with the same terms and conditions as the original Contract including, but not limited to, prices and delivery requirements. With the concurrence of the Contractor, the extension may be for a period of up to six (6) months in lieu of three (3) months. However, this extension terminates should the replacement Contract be issued in the interim.

## 2.19 PROCUREMENT INSTRUCTIONS

Authorized Users should refer to Attachment 1 – How to Use the Manufacturer Umbrella Contract for specific instructions on the usage of this Contract. OGS reserves the right to unilaterally make revisions, changes and/or updates to Attachment 1 – How to Use the Manufacturer Umbrella Contract without processing a formal amendment and/or modification.

## 2.20 SPECIFICATIONS

During the term of the Contract, the Authorized User may request Product specifications for particular items that have been included by the Contractor in Appendix E – Pricing Pages. These specifications will be provided by the Contractor at no cost.

## 2.21 INSTRUCTION MANUALS AND ASSOCIATED DOCUMENTATION

Product shall be furnished, at no extra charge, with one complete set of standard operator instruction manuals and documentation (hard copy, CD/DVD or web link) as would normally accompany such Product(s). Contractor shall also ensure that the part numbers and net prices associated with the documentation are available to the Authorized User and included in Appendix E – Pricing Pages should an Authorized User purchase additional sets of technical manuals. Where documentation is provided in electronic format, an Authorized User shall be entitled to make copies to the extent necessary to fully enjoy the rights granted under this Contract provided that the Authorized User reproduces the copyright notice and any other legend of ownership on any copies made.

## 2.22 NYS OFFICE OF INFORMATION TECHNOLOGY SERVICES NOTIFICATION

All New York State Agencies must notify the Office of Information Technology Services of any purchases of technology that meet the stated thresholds and technology-related materials, services or otherwise, as stated in Technology Policy NYS–P08-001: http://www.its.ny.gov/policy/NYS-P08-001.pdf, as may be amended, modified or superseded.

## 2.23 SALES REPORTING REQUIREMENTS

Contractor shall furnish OGS quarterly sales reports utilizing Appendix I - Report of Contract Sales. Purchases by Non-State Agencies, political subdivisions and others authorized by law shall be reported in the same report and indicated as required. All fields of information shall be accurate and complete. OGS reserves the right to unilaterally make revisions, changes and/or updates Appendix I - Report of Contract Sales or to require sales to be reported in a different format without processing a formal amendment and/or modification. Further, additional related sales information and/or detailed Authorized User purchases may be required by OGS and must be supplied upon request.

#### 2.23.1 Reseller Sales

Product purchased through Reseller(s) must be reported by Contractor in the required Appendix I – Report of Contract Sales.

#### 2.23.2 Due Date

The Appendix I - Report of Contract Sales will be quarterly (January - March, April - June, July - September and October - December). Reports will be due 1 month after the closing quarter.

## 2.24 SERVICE REPORTS FOR MAINTENANCE/SUPPORT AND WARRANTY WORK

#### 2.24.1 Service Reports for Authorized User

An Authorized User in an RFQ may require compliance with any or all of this section.

If requested by the Authorized User, the Contractor shall furnish the Authorized User with service reports for all maintenance/support and warranty work upon completion of the services. The service reports may include the following information in either electronic or hard copy form as designated by the Authorized User:

- Date and time Contractor was notified
- Date and time of Contractor's arrival
- Make and model of the Product
- Description of malfunction reported by Authorized User
- Diagnosis of failure and/or work performed by Contractor
- Date and time failure was corrected by Contractor
- Type of service – Maintenance/Support or warranty
- Charges, if any, for the service

#### 2.24.2 Service Reports for OGS

For all Lots OGS reserves the right to request the Contractor provide OGS an annual report on the 1st day of March of each year of the Contract detailing all maintenance/support and warranty work conducted under the Contract for both State Agencies and Non-State Agencies during the immediate prior calendar year. The Contractor will use Appendix H – Maintenance and Warranty Service Report. The report shall include the name of the State or Non-State Agency and all of the information in Section 2.24.1 and be submitted electronically in Microsoft Excel 2010 or lower version unprotected, via e-mail to the attention of the OGS Contract Administrator.

## 2.25 DISTRIBUTION OF CONTRACTOR PRICE LIST AND CONTRACT APPENDICES

Contractor shall provide Authorized Users with electronic copies of the Contract, including Price Lists and Appendices, upon request.

## 2.26 CONTRACT MODIFICATIONS

Contractor may propose modifications to the Contract utilizing Appendix C - Contract Modification Procedures. Contract Modifications are changes that do not require a change to the established Contract terms and conditions.

## 2.27 PROMPT PAYMENT DISCOUNTS

If a Contractor offers a discount for prompt payment, the Contractor shall include the terms of the discount on all invoices, the amounts which are due if the Authorized User meets the terms, and the date for which the prompt payment discount(s) expire.

## 2.28 CONTRACTOR'S OBLIGATION FOR RESELLER PARTICIPATION

Contractor shall not, directly or indirectly, by agreement, communication or any other means, restrict any Reseller's participation or ability to participate or compete in an Authorized User SOW/RFQ.

### 2.28.1 Conditions of Reseller(s) Participation

Reseller(s) must be approved in advance by the State as a condition of eligibility under the Contract. The State also reserves the right to rescind any such participation or request that Contractor name additional Resellers, in the best interests of the State, at the State's sole discretion, at any time. Contractor shall have the right to qualify Reseller(s) and their participation under this Contract by Lot:

1. such qualifying criteria are uniformly applied to all potential Resellers based upon Contractor's established, neutrally applied commercial/governmental program criteria, and not to a particular procurement;
2. all general categories of qualifying criteria must be disclosed by the Contractor to the State, in advance, at the beginning of the Contract term;
3. those qualifying criteria met by the Reseller must be identified in Reseller designations at the time that Reseller approval is requested; and,
4. Immediate notice is provided to OGS in the event that a change in Reseller's status occurs during the Contract term.

### 2.28.2 Designation of Reseller(s)

When Reseller(s) are submitted for approval, Contractor must provide the State, in advance, with all necessary ordering information, billing addresses and Federal Identification numbers in the format requested in Appendix D – Contractor and Reseller Information.

### 2.28.3 Responsibility for Reporting/Performance

Contractor shall be fully liable for Reseller(s) performance and compliance with all Contract terms and conditions. Product purchased through Reseller(s) must be reported by Contractor in the required quarterly sales reports to the State as a condition of payment. In addition to inclusion of Reseller(s) volume in the Contractor's sales reporting obligation to the State, at the request of Authorized User, Reseller(s) shall provide Authorized User with reports of the individual Authorized User's Contract activity with Reseller.

### 2.28.4 Applicability of Contract Terms

Product or services ordered directly through Reseller(s) shall be limited to Products or services currently approved for inclusion under this Contract and shall be subject to all terms and conditions of this Contract as a condition of Reseller participation.

### 2.28.5 Condition for Responding to Authorized User Request for Quote

The Authorized User transaction is required to be competitive (see Attachment 1 – How to Use the Manufacturer Umbrella Contract for examples of Procurement Scenarios). Contractors are encouraged to identify multiple Resellers to participate in competitive transactions.

In order for an Authorized User to solicit a single Contractor on an RFQ, that Contractor must have at least five (5) Resellers named on the Manufacturer's Contract, and those Resellers must be eligible to quote statewide, independently and lower than Contract pricing for procurements under this Contract which meet their qualifying criteria.

## 2.29 PURCHASE ORDERS AND INVOICING

All invoices shall at a minimum, include the items listed below and any additional information identified in the Authorized User RFQ and resulting Authorized User Agreement:

- Contract Number

- Contractor/Reseller Name
- NYS Vendor ID
- Manufacturer Part Number (SKU)
- Product Name
- Product Description
- Quantity
- NYS Net Price for each Product
- Specific designation of special price(s) which may be better than the NYS Net Contract Price
- Invoice Total

## 2.30 PAYMENTS

Payments cannot be processed by Authorized Users until Product(s) have been delivered and accepted in accordance with Appendix B §33 Product Delivery and Appendix B §66 Product Acceptance. Payment will be based on any invoice used in the Contractor's normal course of business. Invoices must contain all requirements in Invoicing.

Authorized Users are instructed not to process invoices that do not include the required information set forth above. Invoices must be detailed and include in the body of the invoice or an attachment to the invoice all of the required items. Failure to comply may result in lengthy payment delays.

## 2.31 MAINTENANCE AND SUPPORT PROVISIONS

### 2.31.1 Maintenance/Support Agreement Provisions

Maintenance agreements may include the following:

- Scope of Services
- Delivery and Acceptance Timeframes and Procedures
- Time Commitments & Prioritization of Services
- Preventive and Corrective Maintenance/Support Activities
- Service Level Agreements
- Service Level Agreement Penalties/Rewards
- Reporting Requirements/Problem Escalation and Follow-up Procedures

### 2.31.2 Maintenance/Support of Product

Where Authorized User elects Maintenance/support services, Contractor shall perform Maintenance/support of Product so as to provide Authorized User with the ability to utilize the Product without interruption, delay, or significant functional downtime to the Authorized User’s ongoing business operations during the Maintenance/support term in accordance with the terms and conditions of the applicable service descriptions.

### 2.31.3 Obligations

The Contractor shall not be obligated to repair damage caused by fire or other casualty (except that caused by the Contractor or those under Contractor’s control), or willful or grossly negligent operation or handling of the Product by the Authorized User.

### 2.31.4 Right to Refuse/Discontinue Maintenance/Support

An Authorized User shall not be required to purchase Maintenance/support for use of Product. There shall be no automatic renewal of Maintenance/support.

### 2.31.5 Maintenance/Support Agreement Contract Price Survival

An Authorized User’s Maintenance/support agreement, entered into during the term of this Contract, may continue beyond the end of the Contract based on the following limitations:

- Maintenance/support period must start prior to the expiration of the Contract;
- Authorized User has pre-paid for the entire Maintenance/support term;

- Maintenance period cannot last longer than a 36 month period past the expiration of the Contract.

#### 2.31.6 Legacy Maintenance/Support

Contractor may offer Legacy Maintenance/support services on End of Life, or obsoleted Product, that is not being offered under this Contract, provided that the equipment fits within the scope of this Contract as set forth in Section 2, Contract Scope. Legacy Maintenance/support options shall be included in Appendix E - Pricing Pages. A description of each type of Legacy Maintenance/support option shall be provided in Appendix E - Pricing Pages.

#### 2.31.7 Maintenance/Support Responsibility

As a part of Maintenance/support responsibilities, the Contractor shall represent the Authorized User in regards to other involved equipment and service providers to identify and correct the malfunction. Malfunctions that cannot be immediately diagnosed and pinpointed to a certain piece of Product will require the participation of the Contractor until the responsibility for the problem has been established. See Appendix B. 57, Cooperation with Third Parties.

#### 2.31.8 Maintenance/Support Service Sheets

Upon Authorized User's request, the Contractor shall furnish the Authorized User with a Maintenance/support Service Sheet for all Maintenance/support requests. At a minimum, the Maintenance/support Service Sheet should include the following data for each request for service:

- Date and time notified by Authorized User
- Date and time of arrival of Contractor
- Description of malfunction reported by Authorized User
- Diagnosis of failure and work performed by Contractor
- Date and time failure was corrected
- Charges for the service, if applicable
- Name of person performing the service

#### 2.31.9 Remote Administration, Maintenance and Support

Appendix E – Pricing Pages must include a Product description of any remote administration and/or Maintenance/support service arrangements if offered/provided with the Product. The cost for any equipment required to perform this function and the cost of the service, must be borne by the Contractor, as part of the cost of Maintenance/support. Connections to the Authorized User's networks must be performed in a manner prescribed by an Authorized User to preserve the integrity of the Authorized User's network, confidentiality and integrity of information transmitted over that Authorized User's network, and the availability of the network.

Monitoring of network performance metrics, such as throughput, firmware levels and updates, or uptime, can be provided through Lot 1 – Software and Lot 2 - Hardware. All Contractors should review NYS ITS Technology Standard NYS-S14-010, Remote Access.

Any remote administration, maintenance/support service that transmits, stores, acts upon or could remotely access Authorized User's Data is considered a Cloud service and must be included in Lot 3 – Cloud.

## 2.32 PRE-INSTALLATION SITE VISITS

In accordance with Appendix B, Section 19, Site Inspection, Authorized User can require a site visit as part of the Authorized User's RFQ.

## 2.33 NEW YORK STATE STATEWIDE FINANCIAL SYSTEM

New York State is currently operating on an Enterprise Resource Planning (ERP) system, Oracle PeopleSoft software, referred to as the Statewide Financial System (SFS). SFS is currently on PeopleSoft Financials version 9.0 Bundle 18, operating on PeopleTools version 8.49.33. The State is planning to upgrade to PeopleSoft Financials version 9.2 sometime in 2015. SFS supports requisition-to-payment processing and financial management functions.
The State is also implementing an eProcurement application that supports the requisitioning process for State Agencies to procure goods and services in SFS. This application provides catalog capabilities. Vendors with centralized contracts

have the ability to provide a “hosted” or “punch-out” catalog that integrates with SFS and is available to Authorized Users via a centralized eMarketplace website. There are no fees required for a Vendor’s participation in the catalog site development or management. Upon completion and activation of an on-line catalog, State agencies will process their orders through the SFS functionality and other Authorized Users can access the catalog site to fulfill orders directly. The State is also implementing the PeopleSoft Inventory module in the near future to track inventory items within the item master table. Further information regarding business processes, interfaces, and file layouts may be found at: www.sfs.ny.gov and http://www.osc.state.ny.us/agencies/guide/MyWebHelp/.

## 2.34 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 this Contract. 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 Appendix B, Section 2 Definitions Authorized User and Section 27 Participation in Centralized Contracts. For purchase orders issued by the Port Authority of New York and New Jersey (or any other authorized entity that may have delivery locations adjacent to New York State), services to be provided may include locations adjacent to New York State.

Upon request, all eligible Non-State Agencies must furnish a Contractor with the proper tax exemption certificates and documentation certifying eligibility to use State Contracts. Questions regarding an organization's eligibility to purchase from New York State Contracts may be directed to OGS New York State Procurement's Customer Services at 518-474-6717.

This Contract may be extended to additional States or Governmental jurisdictions upon mutual written agreement between New York State (the lead contracting State) and the Contractor. Political subdivisions and other authorized entities within each participating State or governmental jurisdiction may also participate in any resultant Contract if such State normally allows participation by such entities. New York State reserves the right to negotiate additional discounts based on any increased volume generated by such extensions. In the event that this Contract is so extended, such other authorized entities shall be solely responsible for liability and performance under the Contract and Contractor agrees to hold them solely responsible for such liability and performance.

## 2.35 EXPIRATION OF CONTRACT; SURVIVAL OF AUTHORIZED USER AGREEMENTS

Except as permitted below, Authorized User Agreements cannot extend 12 months past the Contract expiration.

### 2.35.1 Lot 4 - Implementation

Authorized User Agreements fully executed prior to the expiration of the Centralized Contract shall survive the expiration date of the Centralized Contract, if applicable, based on the term of the Authorized User Agreement. An Authorized User Agreement for Lot 4 – Implementation shall be no longer than 36 months in duration including any time extensions.

### 2.35.2 Maintenance/Support Agreement Contract Price Survival

An Authorized User’s Maintenance/support agreement, entered into during the term of this Contract, may continue beyond the end of the Contract based on the following limitations:

- Maintenance/support period must start prior to the expiration of the Contract;
- Authorized User has pre-paid for the entire Maintenance/support term;
- Maintenance/support period cannot last longer than a 36 month period past the expiration of the Contract.

## 2.36 PREFERRED SOURCE PRODUCTS

State Finance Law §162 requires that governmental entities afford first priority to the products/services of Preferred Source suppliers such as Correctional Industries (Corcraft), New York State Preferred Source Program for People who are Blind, and NYS Industries for the Disabled (NYSID), when such products/services meet the form, function and utility of the Authorized User. An Authorized User must determine if a particular commodity or service is approved for a Preferred Source and follow the requirements of State Finance Law §162(3) or (4)(b), respectively, before engaging the Contractor. Some products/services in the resultant Contract(s) may be available from one or more Preferred Sources.

Contractor will be required to prominently display the following language on all pricelists:

Authorized Users Note: Some products/services in this Contract may be available from one or more Preferred Sources. Authorized Users are reminded to comply with the statutory requirements under §162 of the State Finance Law and the guidelines issued by the State Procurement Council to afford first priority to products/services available from Preferred Sources which meet your form, function and utility.

The complete, updated list of Preferred Source Offerings is available on the OGS website, at http://www.ogs.state.ny.us/procurecounc/pdfdoc/pslist.pdf.

## 2.37 TRADE-INS

An Authorized User may trade-in Products when making purchases from this Contract. Trade-ins must be negotiated between the Authorized User and the Contractor as there is no mandatory trade-in policy established in this Contract. Contractor is prohibited from imposing any mandatory requirements or restrictions on Product disposal (e.g., prohibiting cross-brand trade-ins), other than generic environmental safety concerns.

An Authorized User is obligated to actively seek current fair market value when trading Products and must keep accurate records in the file verifying the process. For State Agencies, such trade-ins must comply with State Finance Law section 167 and it may be necessary to provide supporting documentation to the Office of the State Comptroller.

## 2.38 NEW YORK STATE OFFICE OF INFORMATION TECHNOLOGY SERVICES POLICIES

Authorized Users may require, as part of an RFQ/SOW, Contractor compliance with applicable ITS policies found at: http://www.its.ny.gov/tables/technologypolicyindex.htm.

## 2.39 RECALLS

Contractor shall immediately notify OGS of any recalls pertaining to any items awarded to the Contractor.

## 2.40 AMERICANS WITH DISABILITIES ACT (ADA)

The Federal ADA Act, signed into law July 26, 1990, bars employment discrimination and requires all levels of Government to provide necessary and reasonable accommodations to qualified workers with disabilities. Contractors are required to identify and offer any software or hardware products they manufacture or adapt which may be used or adapted for use by visually, hearing, or any other physically impaired individuals. Although it is not mandatory for Contractors to have this equipment in order to receive an award, it is necessary to identify any such equipment they have which falls into the above category.

## 2.41 PUBLIC INFORMATION

Disclosure of items related to this Agreement shall be permitted consistent with the laws of the State of New York and specifically the Freedom of Information Law (FOIL) contained in Section 87 of the Public Officers Law. The State shall take reasonable steps to protect from public disclosure any of the records relating to this procurement that are otherwise exempt from disclosure under that statute. Information constituting trade secrets, for purposes of FOIL, must be clearly marked and identified as such upon submission. If the Contractor intends to seek an exemption from disclosure of these materials under FOIL, the Contractor shall, at the time of submission, request the exemption in writing and provide an explanation of why the disclosure of the identified information would cause substantial injury to the competitive position of the Contractor. Acceptance of the identified information by the State does not constitute a determination that the information is exempt from disclosure under FOIL Determinations as to the availability of the identified information will be made in accordance with FOIL at the time a request for such information is received by the State.

## 2.42 DIESEL EMISSION REDUCTION ACT

Pursuant to N.Y. Environmental Conservation Law §19 0323 of the (“the Law”) it is a requirement that heavy duty diesel vehicles in excess of 8,500 pounds use the best available retrofit technology (“BART”) and ultra-low sulfur diesel fuel (“ULSD”). The requirement of the Law applies to all vehicles owned, operated by or on behalf of, or leased by State agencies and State or regional public authorities. It also requires that such vehicles owned, operated by or on behalf of, or

leased by State agencies and State or regional public authorities with more than half of its governing body appointed by the Governor utilize BART.

The Law may be applicable to vehicles used by Contractors "on behalf of" State agencies and public authorities and require certain reports from Contractors. All heavy duty diesel vehicles must have BART by December 31, 2015 (unless further extended by Law). The Law also provides a list of exempted vehicles. Regulations set forth in 6 NYCRR Parts 248 and 249 provide further guidance. The Bidder hereby certifies and warrants that all heavy duty vehicles, as defined in NYECL §19 0323, to be used under this contract, will comply with the specifications and provisions of NYECL §19 0323, and 6 NYCRR Parts 248 and 249.

## 2.43 POOR PERFORMANCE

An Authorized User should notify OGS Customer Services promptly if the Contractor fails to meet the requirements of this Contract. Performance which does not comply with requirements or is otherwise unsatisfactory to the Authorized User should also be reported to Customer Services:

Office of General Services
New York State Procurement
38th Floor Corning Tower
Empire State Plaza
Albany, NY 12242
Customer Services Coordination E-mail: customer.services@ogs.ny.gov
Telephone: (518) 474-6717 / Fax: (518) 474-2437

## 2.44 MERCURY ADDED CONSUMER PRODUCTS

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

## 2.45 SURPLUS/TAKE-BACK/RECYCLING

A. A State agency is reminded of its obligation to comply with the NY State Finance Law §§ 167, Transfer and Disposal of Personal Property, and 168, The Management of Surplus Computer Equipment, regarding transfer and disposal of surplus personal property before utilizing take-back, recycling, or other options for disposition of equipment that is still in operable condition.

B. If Contractor offers a take-back/recycling program, then Contractor shall provide a record of disposition to each Authorized User who participates in the take-back/recycling program for units transferred for disposition. Contractor shall provide documentation that the units were disposed of in an environmentally sound manner in compliance with applicable local, state and federal laws. See Section C below for specific requirements governing electronic equipment recycling.

C. The NYS Department of Environmental Conservation (DEC) Electronic Equipment Recycling and Reuse Act ("Act") (Environmental Conservation Law, Article 27, Title 26, Electronic Equipment Recycling and Reuse), requires manufacturers to establish a convenient system for the collection, handling, and recycling or reuse of electronic waste. If Contractor is a manufacturer of electronic equipment covered by the Act, Contractor agrees to comply with the requirements of the Act. More information regarding the Act can be found on the DEC website at: http://www.dec.ny.gov/chemical/65583.html.

D. If a Contractor offers a take-back/recycling program or offers an electronic equipment recycling program pursuant to the Act, and an Authorized User participates in same, then the Authorized User shall ensure the destruction of all data from any hard drives surrendered with the machines/covered electronic equipment. Contractor shall not require an Authorized User to surrender the hard drive, as an Authorized User may wish to retain the hard drive for security purposes. Contractor shall advise the Authorized User in advance if the retention of the hard drive results in additional fees or reduction in trade-in value. It is recommended that an Authorized User use a procedure for ensuring the destruction of confidential data stored on hard drives or other storage media that meets or exceeds the National Institute of Standards and Technology (NIST) Guidelines for Media Sanitation as found in NIST Special Publication 800-88.

## 2.46 USE OF RECYCLED OR REMANUFACTURED MATERIALS

New York State supports and encourages Contractors to use recycled, remanufactured or recovered materials in the manufacture of products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the product or packaging unless such use is precluded due to health or safety requirements or product specifications contained herein. Refurbished or remanufactured components or products are required to be restored to original performance and regulatory standards and functions and are required to meet all other requirements of this Contract. Warranties on refurbished or remanufactured components or products must be identical to the manufacturer's new equipment warranty or industry's normal warranty when remanufacturer does not offer new equipment. See "Remanufactured, Recycled, Recyclable or Recovered Materials" in Appendix B, OGS General Specifications.

## 2.47 ENVIRONMENTAL ATTRIBUTES AND NYS EXECUTIVE ORDER 4

New York State is committed to environmental sustainability and endeavors to procure products with reduced environmental impact. One example of this commitment may be found in Executive Order No. 4 (Establishing a State Green Procurement and Agency Sustainability Program), which imposes certain requirements on State Agencies, authorities, and public benefit corporations when procuring commodities, services, and Hardware. More information on Executive Order No. 4, including specifications for offerings covered by this Contract, may be found at http://www.ogs.ny.gov/EO/4/Default.asp.

## 2.48 BULK DELIVERY AND ALTERNATIVE PACKAGING MATERIALS

New York State encourages the use of innovative packaging that reduces the weight of packaging and the generation of packaging waste. A Contractor is encouraged to use reusable materials and containers and to utilize packaging configurations that take advantage of storage containers designed to be part of the product for the shipment of multi-unit purchases. New York State recognizes that these packaging methods are in the development stage and may not be currently available. Authorized Users are urged to inquire about these programs at the time of purchase and determine the best solution for their needs.

## 2.49 EPA ENERGY STAR PROGRAM

The Federal EPA, in cooperation with the Manufacturers, continues a program to foster the manufacture of energy efficient equipment. New York State fully supports this effort and requires all applicable Products offered to comply with EPA Energy Star guidelines for energy efficiency. The State may discontinue use of and/or delete from the Contract selected Products as mandated by any Federal, State or local energy legislation that is enacted during the term of this Contract. The Contractor shall have no recourse with the State for such discontinuance/deletion.

## 2.50 NO DRUGS OR ALCOHOL

For reasons of safety and public policy, in any Contract resulting from this procurement, the use of illegal drugs and/or alcoholic beverages by the Contractor or its personnel shall not be permitted while performing any phase of the work herein specified.

## 2.51 TRAFFIC INFRACTIONS

The State will not be liable for any expense incurred by the Contractor for any parking fees or as a consequence of any traffic infraction or parking violations attributable to employees of the Contractor.

## 2.52 NOTICES

All notices, demands, designations, certificates, requests, offers, consents, approvals and other instruments (including updates to Appendix D – Contractor and Reseller Information) given pursuant to this Contract shall be in writing and shall be validly given when mailed by registered or certified mail, or hand delivered, (i) if to the State, addressed to the State at its address:

22802 Contract Administrator
Office of General Services
New York State Procurement

38th Floor Corning Tower
Empire State Plaza
Albany, NY 12242

and (ii) if to Contractor, addressed to Contract Administrator at the address included in Appendix D – Contractor and Reseller Information. The Parties may from time to time, specify any address in the United States as its address for purpose of notices under this Agreement by giving fifteen (15) days written notice to the other party. The Parties agree to mutually designate individuals as their respective representatives for purposes of this Agreement.

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

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

## 2.53 ACCESSIBILITY OF WEB-BASED INFORMATION AND APPLICATIONS POLICY LANGUAGE

For State Agency Authorized User Acquisitions: Any web-based information and applications development, or programming delivered pursuant to the contract or procurement, will comply with New York State Enterprise IT Policy NYS-P08-005, Accessibility of Web-Based Information and Applications as follows:

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

## 2.54 CAPTIONS

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

## 2.55 SEVERABILITY

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

## 2.56 PERFORMANCE OF SERVICES

The Contractor is responsible for fully meeting all Contract obligations set forth in the Contract and for providing Product in accordance with the Contract or any Authorized User Agreement.

## 2.57 REMOVAL OF RECORDS FROM PREMISES

Where performance of the Contract involves use by the Contractor (or the Contractor's subsidiaries, affiliates, partners, agents or subcontractors) of Authorized User owned or licensed papers, files, computer disks or other electronic storage devices, data or records at Authorized User facilities or offices, or via remote access, the Contractor (or the Contractor's subsidiaries, affiliates, partners, agents or subcontractors) shall not remotely access, modify, delete, copy or remove such Records without the prior written approval of the Authorized User.

## 2.58 CONTRACTOR RESPONSIBILITY FOR SUBCONTRACTORS

The following requirements shall supplement the requirements of Appendix B, § 42 and 44:

- The Contractor shall not in any way be relieved of any responsibility under the Contract by any subcontract.
- The Contractor shall be solely responsible to the State and Authorized User for the acts or defaults of its Subcontractor(s) and of such Subcontractors' officers, agents, and employees, each of whom shall for this purpose, be deemed to be the agent or employee of the Contractor to the extent of its subcontract.
- Any Deliverable provided or furnished by a Subcontractor shall be deemed for purposes of the Contract to be provided or furnished by the Contractor.
- The Contractor shall inform each Subcontractor fully and completely of all provisions and requirements of the Contract, including:
  a. those relating either directly or indirectly to the Deliverables to be provided and the materials to be furnished or Services provided pursuant to its respective subcontract,
  b. to maintain and protect against any unauthorized disclosure of records with respect to work performed under the subcontract in the same manner as required of the Contractor,
  c. those relating to the State's rights to audit records and
  d. to cooperate with any investigation, audit, or other inquiry related to the Contract or any litigation relating thereto. Contractor agrees that every such subcontract shall expressly stipulate that all labor performed and materials furnished pursuant thereto shall strictly comply with the requirements of the Contract and that no subcontract shall impair the rights of the State or Authorized User or create any contractual relationship between the Subcontractor and the State or Authorized User.
- Failure to disclose the identity of any and all Subcontractor(s) used by the Contractor as required hereunder may, at the sole discretion of the Authorized User, result in a disqualification of the Subcontractor, if not immediately cured, or may result in termination of the Authorized User Agreement for cause.
- The Contractor shall pay all Subcontractors for and on account of Services and/or Deliverables provided by such Subcontractors in accordance with the terms of their respective subcontracts. If and when required by the State or Authorized User, the Contractor shall submit satisfactory evidence that it has made such payment.
- The Contractor shall, within five (5) business days of the State or Authorized User written request, file promptly with the requestor a copy of any subcontract providing services for an Authorized User Agreement.
- The Contractor shall require that the Subcontractor must pass through all terms and conditions of the Contract, including but not limited to Appendix A, to any lower tier subcontractors.

## 2.59 CONTRACTOR STAFF WITHIN AUTHORIZED USER AGREEMENT

An Authorized User in an RFQ may require compliance with any or all of this section.

All employees of the Contractor, or of its subcontractors, who shall perform under an Authorized User Agreement, shall possess the necessary qualifications, training, licenses, and permits as may be required within the jurisdiction where the services specified are to be provided or performed, and shall be legally entitled to work in such jurisdiction. All persons, corporations, or other legal entities that perform Services under the Contract on behalf of Contractor shall, in performing the Services, comply with all applicable Federal, State, and local laws concerning employment in the United States.

### 2.59.1 Staffing Changes within Authorized User Agreement

1. Any staffing represented as key personnel are anticipated to fulfill the entire life of the project. If staffing changes are required for any of the key personnel on the project prior to the completion of his or her assignment period, the Contractor shall first, before proceeding with such removal, consult with and seek the approval of the Authorized User. If, after said consultation, it is mutually agreed that such removal shall take place, the Contractor shall provide the resumes of up to three (3) potential replacements with similar or better qualifications for the Authorized User review and approval within three (3) business days, or as otherwise agreed to by the Authorized User.

2. The newly-assigned Contractor staff must have qualifications as good as or better than those of the replaced staff. At the commencement of the transition period, the departing staff and the new staff will work together to develop a written transition plan to transition the responsibilities. The Authorized User reserves the right to approve this transition plan.
3. The Authorized User shall also have the right in its reasonable discretion to request removal of a Contractor Staff member at any time, and the Contractor must provide the resumes of up to three (3) potential replacements with similar or better qualifications for the Authorized User's review and approval within three (3) business days, or as otherwise agreed to by the Authorized User.
4. Where Contractor Staff ceases work for reasons beyond the control of the Contractor, the Contractor must immediately notify the Authorized User and provide the resumes of up to three (3) potential replacements with similar or better qualifications for the Authorized User's review and approval within three (3) business days, or as otherwise agreed to by the Authorized User.

a. Reasons beyond the control of the Contractor shall be defined as: (i) death of the Contractor Staff member; (ii) disability or illness; (iii) Contractor Staff member resigns his or her position; (iv) termination for cause by the Contractor; (v) military service or (vi) any other reason deemed acceptable by the Authorized User.
b. The provisions of this section do not preclude any Contractor Staff member from reasonable sick leave or annual leave.

5. Upon the Authorized User's approval, replacement staff will become project staff and will be subject to the terms and conditions of the Contract and Authorized User Agreement.

If the Authorized User does not approve one of the proposed replacement candidates, the Contractor must provide additional candidates for the Authorized User's review within three (3) business days. If the Authorized User still does not find a proposed replacement acceptable, the Authorized User reserves the right to either suspend activities under the Authorized User Agreement or terminate the Authorized User Agreement for cause pursuant to Appendix B paragraph 47, Termination.

## 2.60 ADDITIONAL CONTRACTOR TERMS AND CONDITIONS WITHIN AN AUTHORIZED USER AGREEMENT

As part of Contractor's response to an Authorized User RFQ/SOW, a Contractor may propose additional terms and conditions which do not contradict or violate any of the terms and conditions of this Contract, are more advantageous to the Authorized User, and place no additional liability or responsibility on the Authorized User. Such additional terms and conditions may be allowed and incorporated into the Authorized User Agreement, provided the Contractor identifies such terms and conditions in Contractor's response to the Authorized User's RFQ/SOW and the Authorized User accepts such additional terms and conditions.

## 2.61 EMPLOYEE INFORMATION REQUIRED TO BE REPORTED BY CERTAIN CONSULTANT CONTRACTORS AND SERVICE CONTRACTORS

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

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

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

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

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

Contractor agrees to simultaneously report such information to The Department of Civil Service (CS) and OSC as designated below:

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

**Office of the State Comptroller**
Bureau of Contracts
110 State St., 11th Floor
Albany, New York
Attn: Consultant Reporting
Fax: (518) 474-8030 or (518) 473-8808

Contractor is advised herein and understands that this information is available for public inspection and copying pursuant to §87 of the New York State Public Officers Law (Freedom of Information Law). In the event individual Employee names or social security numbers are set forth on a document, the State Agency making such disclosure is obligated to redact both the name and social security number prior to disclosure. Further information is available in Section XI.18.C of the Office of the State Comptroller's Guide to Financial Operations (http://www.osc.state.ny.us/agencies/guide/MyWebHelp/), "Consultant Disclosure Legislation."

2.61.1.1 INSTRUCTIONS FOR COMPLETING FORM A AND B

Form A and Form B should be completed for Contracts for consulting services in accordance with Section XI.18.C of the Office of the State Comptroller's Guide to Financial Operations (http://www.osc.state.ny.us/agencies/guide/MyWebHelp/), "Consultant Disclosure Legislation," and the following:

A. **Form A** - **Contractor's Planned Employment Form (**available from and submitted to the using Agency, if necessary.) (Form AC-3271-S: http://www.osc.state.ny.us/agencies/forms/index.htm)
B. **Form B** - **Contractor's Annual Employment Report** (to be completed by May 15th of each year for each consultant Contract in effect at any time between the preceding April 1st through March 31st fiscal year and submitted to the CS, OSC and procuring Agency.) (Form AC-3272-S: http://www.osc.state.ny.us/agencies/forms/index.htm)

**Scope of Contract**: choose a general classification of the single category that best fits the predominate nature of the services provided under the Contract.
**Employment Category**: enter the specific occupation(s), as listed in the O*NET occupational classification system, which best describes the Employees providing services under the Contract.
*(Note: Access the O*NET database, which is available through the US Department of Labor's Employment and Training Administration, on-line at online.onetcenter.org to find a list of occupations.)*
**Number of Employees**: enter the total number of Employees in the employment category employed to provide services under the Contract during the report period, including part time Employees and Employees of subcontractors.
**Number of Hours**: enter the total number of hours worked during the report period by the Employees in the employment category.
**Amount Payable under the Contract**: enter the total amount paid by the State to the State Contractor under the Contract, for work by the Employees in the employment category, for services provided during the report period.

## 2.62 CONFIDENTIALITY AND PRIVACY POLICIES AND LAWS

The Contractor shall comply with all State and Authorized User policies regarding compliance with various confidentiality and privacy laws, rules and regulations, including but not limited to the Family Educational Rights and Privacy Act (FERPA), the Health Insurance and Portability Act of 1996 (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH). As part of such compliance, Contractor shall execute written confidentiality/non-disclosure agreements as requested by the State or an Authorized User.

## 2.63 FEDERAL FUNDING

For an Authorized User using Federal funds, Contractor shall cooperate in adding to the Authorized User's Agreement any Federal funding contract clauses necessary for the Authorized User's Project. An Authorized User shall identify to Contractor, as a condition of using this Contract and during the RFQ process, whether Federal funds will be utilized for the Project.

## 2.64 ELECTRONIC WORKFLOW SYSTEM

OGS reserves the right to incorporate an electronic workflow system that may include elements of the Authorized User RFQ/SOW process.

OGS reserves the right to post Authorized User Contract usage of Centralized Contracts.

## 2.65 TRAVEL, MEALS AND LODGING - LOT 4 – IMPLEMENTATION ONLY

For Lot 4 only, when provided for in the RFQ and resultant Authorized User Agreement, the Authorized Users may reimburse travel expenses. All rules and regulations associated with this travel can be found at http://osc.state.ny.us/agencies/travel/travel.htm. In no case will any travel reimbursement be paid that exceeds these rates. All travel will be paid only as specified within the Authorized User Agreement and must be billed with that associated Invoice with receipts attached.

The Contractor shall receive prior approval from the Authorized User for any travel that occurs during the term of an Authorized User Agreement. Parking fees and/or parking tickets shall not be paid by an Authorized User.

Unless otherwise specified in writing by the Authorized User, a vehicle will not be provided by Authorized User to the Contractor for travel. Therefore, the Contractor will be responsible for ensuring that the Contractor has access to an appropriate vehicle (e.g., personal vehicle or rental vehicle) or common carrier with which to carry out any necessary travel.

For the Contractor to obtain reimbursement for the use of a rental vehicle, such use must be justified as the most cost-effective mode of transportation under the circumstances (including consideration of the most effective use of time).

The Contractor is responsible for keeping adequate records to substantiate any claims for reimbursement, by personnel for travel in performance of the services.

All services provided under the resultant Authorized User Agreement must be performed within CONUS.

## 2.66 PERFORMANCE AND BID BONDS

There are no BONDS for this Contract. In accordance with Appendix B (General Specifications), Clause 45 “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 this Contract. An Authorized User may require in an RFQ a performance, payment or Bid bond, or negotiable irrevocable letter of credit or other form of security for the faithful performance for the resultant Authorized User Agreement

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

### 2.67.1 General Provisions

A. OGS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 (“MWBE Regulations”) for all State contracts as defined therein, with a value (1) in excess of $25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of $100,000 for real property renovations and construction.

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

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

D. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of contract, leading to the withholding of funds or such other actions, liquidated damages pursuant to clause VII (Breach of Contract and Liquidated Damages) of this section or enforcement proceedings as allowed by the Contract.

2.67.2 Equal Employment Opportunity (EEO)

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

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

B. Form EEO 100 - Staffing Plan

To ensure compliance with this section, the Contractor submitted a staffing plan to OGS to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories.

C. Form EEO 101 - Workforce Employment Utilization Report ("Workforce Report")

If Contractor's Form EEO 100- Staffing Plan provided that Contractor is able to report the actual workforce utilized in the performance of this Contract, the following clause shall apply: Contractor agrees it will, upon request, submit to OGS a Workforce Utilization report on Form EE101 identifying the workforce actually utilized on the contract if known.

If Contractor's EEO Form 100 - Staffing Plan provided that Contractor is unable to separate out the actual workforce utilized in the performance of the Contract from its total workforce, the following clause shall apply: Contractor and OGS agree that Contractor is unable to separate out the workforce utilized in the performance of the Contract from Contractor's and/or subcontractor's total workforce and that the information provided on the previously submitted Staffing Plan is Contractor's total workforce during the subject time frame, not limited to work specifically under the Contract.

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

2.67.3 Contract Goals

A. OGS hereby establishes the following goals for Minority-owned Business Enterprises (MBE) participation, Women-owned Business Enterprises (WBE) participation, and total Minority- and Women-Owned Business Enterprises (collectively referred to as MWBE) participation, based on the current availability of qualified MBEs and WBEs:

| Lot No. | Lot Description | MBE Goal | WBE Goal | Total MWBE Goal |
|---|---|---|---|---|
| 1 | Software | 10 % | 10 % | 20 % |
| 2 | Hardware | 10 % | 10 % | 20 % |
| 3 | Cloud | 0 % | 0 % | 0 % |

| Lot No. | Lot Description | MBE Goal | WBE Goal | Total MWBE Goal |
|---|---|---|---|---|
| | | | | (see subsection D) |
| 4 | Implementation Services | 15 % | 15 % | 30 % |

The total Contract goal can be obtained by utilizing any combination of MBE and/or WBE participation for subcontracting and supplies acquired under this Contract.

B. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the Contract Goals established in clause III-A hereof, Contractor should reference the directory of New York State Certified MWBEs found at the following internet address: https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528. Questions regarding compliance with MWBE participation goals should be directed to the OGS Office for Minority and Women Owned Businesses and Community Relations. . Additionally, Contractor is encouraged to contact the Division of Minority and Women's Business Development (518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

C. Contractor must document good faith efforts to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of the Contract (see "Required Good Faith Efforts" below),

(1)

D. Note that with respect to Lot 3 Cloud only, 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 for Lot 3 Cloud, who perform commercially useful functions on this Contract for the provision of services and materials.

### 2.67.4 MWBE Utilization Plan

A. Contractor certifies that it has submitted, in accordance with 5 NYCRR § 142.4, a completed MWBE Utilization Plan on Form MWBE 100 and will follow such Plan for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in clause III-A of this Section.

B. Contractor further understands that making false representations or including information evidencing a lack of good faith as part of, or in conjunction with, the submission of a Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of a contract for cause, loss of eligibility to submit future bids, and/or withholding of payments.

C. Contractor further agrees that a failure to submit and/or use such completed MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, OGS shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsiveness.

### 2.67.5 Request for Waiver

A. If the Contractor, after making good faith efforts, as set forth in "Required Good Faith Efforts" below, is unable to comply with MWBE goals, the Contractor may submit in accordance with 5 NYCRR § 142.7, a Request for Waiver form (BDC 333) documenting good faith efforts by the Contractor to meet such goals. If the documentation included with the waiver request is complete, OGS shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.

B. If OGS, upon review of the MWBE Utilization Plan and Monthly MWBE Compliance Reports determines that Contractor is failing or refusing to comply with the Contract goals and no waiver has been issued in regards to such non-compliance, OGS may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.

C. **Prior to submission of a request for a partial or total waiver, Contractor shall contact the OGS Office for Minority and Women Owned Businesses and Community Relations for guidance**

### 2.67.6 Required Good Faith Efforts

Pursuant to 5 NYCRR § 142.8, Contractors must document their good faith efforts toward utilizing MWBEs on the Contract. Evidence of required good faith efforts shall include, but not be limited to, the following:

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

### 2.67.7 Monthly MWBE Contractor Compliance Report

A. In accordance with 5 NYCRR § 142.10, Contractor is required to report Monthly MWBE Contractor Compliance to OGS during the term of the Contract for the preceding month's activity, documenting progress made towards achievement of the Contract MWBE goals. OGS requests that all Contractors use the New York State Contract System ("NYSCS") to report subcontractor and supplier payments made by Contractor to MWBEs performing work under the Contract. The NYSCS may be accessed at https://ny.newnycontracts.com/. This is a New York State-based system that all State agencies and authorities will be implementing to ensure uniform contract compliance reporting throughout New York State.
B. When a Contractor receives a payment from a State Agency Authorized User following a purchase from an OGS Procurement Services contract, it is the Contractor's responsibility to pay its subcontractors and suppliers in a timely manner. On or after the first day of each month, the Contractor will receive an e-mail or fax notification ("audit notice") indicating that a representative of its company needs to log-in to the NYSCS to report the company's MWBE subcontractor and supplier payments for the preceding month. The Contractor must also report when no payments have been made to a subcontractor or supplier in a particular month with entry of a zero dollar value in the NYSCS. Once subcontractor and supplier payments have been entered into the NYSCS, the subcontractor(s) and supplier(s) will receive an email or fax notification advising them to log into the NYSCS to confirm that they actually received the reported payments from the Contractor. It is the Contractor's responsibility to educate its MWBE subcontractors and suppliers about the NYSCS and the need to confirm payments made to them in the NYSCS.
C. To assist in the use of the NYSCS, OGS recommends that all Contractors and MWBE subcontractors and suppliers sign up for the following two webinar trainings offered through the NYSCS: "Introduction to the System for Vendors" and "Contract Compliance Reporting - Vendor Training" to become familiar with the NYSCS. To view the training schedule and to register visit: https://ny.newnycontracts.com/events.asp
D. As soon as possible after the Contract is approved, Contractor should visit https://ny.newnycontracts.com and click on "Account Lookup" to identify the Contractor's account by company name. Contact information should be reviewed and updated if necessary by choosing "Change Info." It is important that the staff member who is responsible for reporting payment information for the Contractor be listed as a user in the NYSCS. Users who are not already listed may be added through "Request New User." When identifying the person responsible, please add "- MWBE Contact" after his or her last name (e.g. John Doe – MWBE Contact) to ensure that the correct person receives audit notices from the NYSCS. NYSCS Technical Support should be contacted for any technical support questions by clicking on the links for "Contact Us & Support" then "Technical Support" on the NYSCS website.
E. If Contractor is unable to report MWBE Contractor Compliance via the NYSCS, Contractor must submit a Monthly MWBE Contractor Compliance Report on Form MWBE 102 to OGS, by the 10th day of each month during the term of the Contract, for the preceding month's activity to: OGS MWBE Office, 29th floor Corning Tower, Empire State Plaza, Albany, NY 12242. Phone: 518-486-9284; Fax: 518-486-9285.
F. It is the Contractor's responsibility to report subcontractor and supplier payments. Failure to respond to payment audits in a timely fashion through the NYSCS, or by paper to OGS, may jeopardize future payments pursuant to the Breach of Contract and Liquidated Damages clause below.

#### 2.67.8 Breach of Contract and Liquidated Damages

A. In accordance with Executive Law Section 316-a and 5 NYCRR §142.13, the Contractor acknowledges that if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such a finding constitutes a breach of contract and the Contractor shall be liable to OGS for liquidated or other appropriate damages, as set forth herein.
B. Such liquidated damages shall be calculated as an amount equaling the difference between:
   1. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and
   2. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.
C. If, after Contractor has been afforded due process to respond to the allegation that it willfully or intentionally failed to comply with the MWBE participation goals, OGS determines that Contractor is liable for liquidated damages and such identified sums have not been withheld by OGS, Contractor shall pay such liquidated damages to OGS within sixty (60) days after such determination unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the Division of Minority and Women's Business Development pursuant to Subdivision 8 of Section 313 of the Executive Law, in which event the liquidated damages shall be payable if the Director renders a decision in favor of OGS.

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

### 2.68 EMERGING TECHNOLOGIES

The State reserves the right to modify the terms of this Contract or any future periodic recruitments, to allow for emerging technologies. OGS reserves the right to include such technology(ies) hereunder or to issue a formal modification or amendment to this Contract.

## Section 3. LOT 3 – CLOUD SPECIFIC TERMS AND CONDITIONS

To the extent that Contractor has received an award for Lot 3, Cloud, the following terms and conditions apply to Lot 3, Cloud.

### 3.1 BUNDLED OFFERINGS

This Lot may contain Bundles which include Hardware and/or Software in combination with Cloud Services. All components of the Bundle must be within the overall scope of this Contract. The Hardware or Software Products included in the Bundle cannot be listed as stand-alone items for this Lot. Third Party Products are allowed as part of a Bundle only if they are required to facilitate the provision of the Cloud solution.

### 3.2 PROTECTION OF DATA, INFRASTRUCTURE AND SOFTWARE

Contractor is responsible for providing physical and logical security for all Data, infrastructure (e.g. hardware, networking components, physical devices), and software related to the services the Contractor is providing under the Authorized User Agreement.

All Data security provisions agreed to by the Authorized User and Contractor within the Authorized User Agreement may not be diminished for the duration of the Authorized User Agreement. No reduction in these conditions in any fashion may occur at any time without prior written agreement by the parties amending the Authorized User Agreement.

### 3.3 SECURITY POLICIES AND NOTIFICATIONS

#### 3.3.1 State Security Policies and Procedures

The Contractor and its personnel shall review and be familiar with all State security policies, procedures and directives currently existing or implemented during the term of the Contract, including ITS Policy NYS-P03-002 Information Security Policy (or successor policy(ies)).

#### 3.3.2 Security Incidents

Contractor shall address any Security Incidents in the manner prescribed in ITS Policy NYS-P03-002 Information Security Policy (or successor policy(ies)), including the New York State Cyber Incident Reporting Procedures incorporated therein or in such successor policy(ies).

## 3.4 DATA BREACH - REQUIRED CONTRACTOR ACTIONS

Unless otherwise provided by law, in the event of a Data Breach, the Contractor shall:

1. notify the ITS EISO and any potentially affected Authorized User(s), or their designated contact person(s), by telephone as soon as possible, but in no event more than four (4) hours from the time the Contractor either has knowledge of a Data Breach;

2. consult with and receive authorization from the Authorized User(s) as to the content of any notice to affected parties prior to notifying any affected parties to whom notice of the Data Breach is required, either by statute or by the Authorized User;

3. coordinate all communication regarding the Data Breach with the ITS EISO and Authorized User(s);

4. cooperate with the Authorized User and ITS EISO in attempting (a) to determine the scope and cause of the breach; and (b) to prevent the future recurrence of such security breaches; and

5. take corrective action in the timeframe required by the Authorized User. If Contractor is unable complete the corrective action within the required timeframe, in addition to the remedies provided in Appendix B, Section 52, Remedies for Breach, the Authorized User may contract with a third party to provide the required services until corrective actions and services resume in a manner acceptable to the Authorized User, or until the Authorized User has completed a new procurement for a replacement service system. The Contractor will be responsible for the cost of these services during this period.

Nothing herein shall in any way (a) impair the authority of the OAG to bring an action against Contractor to enforce the provisions of the New York State Information Security Breach Notification Act (ISBNA) or (b) limit Contractor's liability for any violations of the ISBNA or any other applicable statutes, rules or regulations.

## 3.5 DATA OWNERSHIP, ACCESS AND LOCATION

### 3.5.1 Data Ownership

The Authorized User shall own all right, title and interest in Data.

### 3.5.2 Authorized User Access to Data

The Authorized User shall have access to its Data at all times, through the term of the Authorized User Agreement, plus the applicable period as specified in Section 3.12 Expiration, Termination or Suspension of Services.

The Authorized User shall have the ability to import or export Data in piecemeal or in its entirety at the Authorized User's discretion, without interference from the Contractor. This includes the ability for the Authorized User to import or export Data to/from other Contractors.

### 3.5.3 Contractor Access to Data

The Contractor shall not copy or transfer Data unless authorized by the Authorized User. In such an event the Data shall be copied and/or transferred in accordance with the provisions of this Section. Contractor shall not access any Data for any purpose other than fulfilling the service. Contractor is prohibited from Data Mining, cross tabulating, monitoring Authorized User's Data usage and/or access, or performing any other Data Analytics other than those required within the Authorized User Agreement. At no time shall any Data or processes (e.g. workflow, applications, etc.), which either are owned or used by the Authorized User be copied, disclosed, or retained by the Contractor or any party related to the Contractor. Contractors are allowed to perform industry standard back-ups of Data. Documentation of back-up must be provided to the Authorized User upon request. Contractor must comply with any and all security requirements within the Authorized User Agreement.

#### 3.5.4 Data Location and Related Restrictions

All Data shall remain in CONUS. Any Data stored, or acted upon, must be located solely in Data Centers in CONUS. Services which directly or indirectly access Data may only be performed from locations within the Continental United States (CONUS). All Data in transit must be handled in accordance with FIPS-140-2 or TLS1, or TLS2 (or successor).

#### 3.5.5 Support Services

All helpdesk, online, and support services which access any Data must be performed from within CONUS. At no time will any Follow the Sun support be allowed to access Data directly, or indirectly, from outside CONUS.

#### 3.5.6 Infrastructure Support Services

Infrastructure support services that do not directly or indirectly access Data may be provided in a Follow the Sun format, if expressly outlined within the Authorized User Agreement.

## 3.6 CONTRACTOR PORTABLE DEVICES

Contractor shall not place Data on any portable Device unless Device is located and remains within Contractor's CONUS Data Center.

The Data, and/or the storage medium containing the Data, shall be destroyed in accordance with applicable ITS destruction policies (ITS Policy S13-003 Sanitization/Secure Disposal and S14-003 Information Security Controls or successor) when the Contractor is no longer contractually required to store the Data.

## 3.7 TRANSFERRING OF DATA

#### 3.7.1 General

The Contractor will not transfer Data unless directed to do so in writing by the Authorized User.

At the request of the Authorized User, the Contractor will provide the services required to transfer Data from existing Databases to physical storage devices, to facilitate movement of large volumes of Data.

The Authorized User may require several Cloud providers to share or transfer Data for a period of time. This will be provided for in the Authorized User Agreement or shall be assumed to be limited to a six month duration.

#### 3.7.2 Transfer of Data at end of Contract and/or Authorized User Agreement Term

At the end of the Contract and/or Authorized User Agreement term, Contractor may be required to transfer Data to a new Contractor. This transfer must be carried out as specified by the Authorized User in the Authorized User Agreement. This transfer may include, but is not limited to, conversion of all Data into or from an industry standard format(s) including comma/delimited files, txt files, or Microsoft standard file formats.

#### 3.7.3 Transfer of Data; Charges

Charges for the transfer of Data are to be defined in the Authorized User Agreement or in the Price List if not included in the Authorized User Agreement. In the absence of a definition of such expenses in the Authorized User Agreement or Price List, this shall be done at no charge to the Authorized User.

#### 3.7.4 Transfer of Data; Contract Breach or Termination

In the case of Contract breach or termination for cause of the Contract, all expenses for the transfer of Data shall be the responsibility of the Contractor.

## 3.8 ENCRYPTION

All Data must be encrypted at all times unless specifically outlined otherwise in the Authorized User Agreement. At a minimum, encryption must be carried out at the most current NYS Encryption Standard (NYS-S14-007), (or successor policy(ies) with key access restricted to the Authorized User only, unless with the express written permission of the

Authorized User. The Authorized User Agreement shall specify the respective responsibilities of the Authorized User and the Contractor for the encryption of Data.

## 3.9 REQUESTS FOR DATA BY THIRD PARTIES

Unless prohibited by law, Contractor shall notify the Authorized User in Writing within 24 hours of any request for Data (including requestor, nature of Data requested and timeframe of response) by a person or entity other than the Authorized User, and the Contractor shall secure Written acknowledgement of such notification from the Authorized User before responding to the request for Data.

Unless compelled by law, the Contractor shall not release Data without the Authorized User's prior Written approval.

## 3.10 SECURITY PROCESSES

If requested by an Authorized User as part the Request for Quote process, Contractor shall complete a Consensus Assessment Initiative Questionnaire (CAIQ) including on an annual basis thereafter. The form is available at Cloud Security Alliance (https://cloudsecurityalliance.org/). The CAIQ may be used to assist the Authorized User in building the necessary assessment processes when engaging with Cloud providers.

In addition to a request for a CAIQ, Contractor shall cooperate with all reasonable Authorized User requests for a Written description of Contractor's physical/virtual security and/or internal control processes. The Authorized User shall have the right to reject any Contractor's RFQ response or terminate an Authorized User Agreement when such a request has been denied.

## 3.11 UPGRADES, SYSTEM CHANGES AND MAINTENANCE/SUPPORT

The Contractor shall give a minimum of five (5) business days advance Written notice to the designated Authorized User(s) contact of any upgrades or system changes that will impact services as provided in the Authorized User Agreement.

## 3.12 EXPIRATION, TERMINATION OR SUSPENSION OF SERVICES

### 3.12.1 Return of Data

The Contractor shall return Data in a format agreed upon within the Authorized User Agreement or as agreed to with the Authorized User. The Contractor must certify all Data has been removed from its system and removed from backups within timeframes established in the Authorized User Agreement or as agreed to with the Authorized User.

### 3.12.2 Suspension of Services

During any period of suspension of service, the Authorized User shall have full access to all Data at no charge. The Contractor shall not take any action to erase and/or withhold any Authorized User Data, except as directed by the Authorized User.

### 3.12.3 Expiration or Termination of Services

Upon expiration or termination of an Authorized User Agreement, the Authorized User shall have full access to all Data for a period of 60 calendar days at no charge. During this period, the Contractor shall not take any action to erase and/or withhold any Data, except as directed by the Authorized User. An Authorized User shall have the right to specify a period in excess of 60 calendar days in its RFQ.

## 3.13 SECURE DATA DISPOSAL

When requested by the Authorized User, the Contractor shall destroy Data in all of its forms, including all back-ups. Data shall be permanently deleted and shall not be recoverable, according ITS Policy S13-003 Sanitization/Secure Disposal or successor and S14-003 Information Security Controls or successor. Certificates of destruction, in a form acceptable to the Authorized User, shall be provided by the Contractor to the Authorized User.

## 3.14 ACCESS TO SECURITY LOGS AND REPORTS

Upon request, the Contractor shall provide reports to the State or Authorized User in a format as specified in the Authorized User Agreement.

## 3.15 CONTRACTOR PERFORMANCE AUDIT

The Contractor shall allow the Authorized User to assess Contractor's performance by providing any materials requested in the Authorized User Agreement (e.g., page load times, response times, uptime, and fail over time). The Authorized User may perform this Contractor performance audit with a third party at its discretion, at the Authorized User's expense.

The Contractor shall perform an independent audit of their Data Centers, at least annually, at Contractor expense. The Contractor will provide a full version of the audit report upon request by the Authorized User. The Contractor shall identify any confidential, trade secret, or proprietary information in accordance with Appendix B, Section 9(a), Confidential/Trade Secret Materials.

## 3.16 PERSONNEL

### 3.16.1 Background Checks

The Authorized User Agreement may require the Contractor to conduct background checks on certain Contractor staff at no charge to the Authorized User.

### 3.16.2 Separation of Duties

The Authorized User Agreement may require the separation of job duties, and limit staff knowledge of Data to that which is absolutely needed to perform job duties.

## 3.17 BUSINESS CONTINUITY/DISASTER RECOVERY (BC/DR) OPERATIONS

The Contractor shall provide a business continuity and disaster recovery plan if required in the Authorized User Agreement. The Contractor shall specify how the BC/DR plan will impact the uptime associated with the Authorized User Agreement.

## 3.18 COMPLIANCE WITH FEDERAL, STATE AND LOCAL REGULATIONS

If required within the Authorized User Agreement, Contractor will provide verification of compliance with specific Federal, State and local regulations, laws and IT standards that the Authorized User is required to comply with. See Appendix F – Primary Security and Privacy Mandates.

## 3.19 AUTHENTICATION TOKENS

The Authorized User Agreement may require authentication tokens for all systems. For more details, please see NYS ITS Policy S14-006 Authentication Tokens Standard or successor.

## 3.20 MODIFICATION TO CLOUD SERVICE DELIVERY TYPE AND DESCRIPTION WITHIN AN AUTHORIZED USER AGREEMENT

As Cloud services can be flexible and dynamic, delivery mechanisms may be subject to change. This may result in changes to the service type, description, or SKU. The State and Authorized Users require notification of any such changes to ensure security and business needs are met.

Any changes to the description, type of service(s), or SKU (e.g., PaaS to IaaS) must be provided to OGS via Appendix C - Contract Modification Procedure.

In addition, notification must be provided to the Authorized User for review and acceptance, prior to implementation. Any changes to the Authorized User Agreement will require the Authorized User to re-assess the risk mitigation methodologies and strategies and revise the Authorized User Agreement as needed.

# Section 4. LOT 4 – IMPLEMENTATION SPECIFIC TERMS AND CONDITIONS

To the extent that Contractor has received an award for Lot 4, Implementation Services, the following terms and conditions apply to Lot 4, Implementation Services.

## 4.1 REQUEST FOR QUOTATION (RFQ) TRANSACTION PROCESS

All RFQs must be submitted on the RFQ template. The RFQ for this Lot will also contain a deliverable-based Statement of Work (SOW). The RFQ will include, but is not limited to: Authorized User timeframes; system integration requirements; and other risks that may affect the cost to the Authorized User.

All responses to RFQs must include detailed price information, including but not limited to: hours required per title, cost per hour etc. Travel, lodging and per diem costs must be itemized in the total quote and may not exceed the rates in the NYS OSC Travel Policy. More information can be found at http://www.osc.state.ny.us/agencies/travel/travel.htm.

All costs must be itemized and included in the Contractor's quote.

## 4.2 BACKGROUND CHECKS

The Authorized User Agreement may require the Contractor to conduct background checks on certain Contractor staff at no charge to the Authorized User.

## 4.3 FOREIGN EMPLOYEES

H-1B VISA costs shall not be passed through to the Authorized User under this Contract. Although Authorized Users will not affirm employment for immigration purposes, an Authorized User may be asked to confirm Contractor's statement of the individual's employment for immigration purposes. Based on RFQ security requirements the Authorized User may require that all staff must be citizens of the United States, and if so, Authorized User will indicate in the RFQ.

## 4.4 PROJECT PLAN

### 4.4.1 Development of Project Plan

Upon the Authorized User request, the Contractor must develop a Project Plan. This Project Plan may include implementation personnel, installation timeframes, escalation procedures and acceptance plan as appropriate for the services requested. Specific requirements of the plan will be defined in the RFQ document. In response to the RFQ, the Contractor must agree to furnish all labor and supervision necessary to successfully implement services procured from this Lot.

### 4.4.2 Project Plan Document

The Contractor will provide to the Authorized User, a Project Plan that contains, at a minimum, the following items:

- Name of the Project Manager, Contact Numbers and E-Mail Address
- Names of the Project Team Members, Contact Numbers and E-Mail Address
- A list of implementation milestones based on the Authorized User's desired installation date
- A list of responsibilities of the Authorized User during system implementation
- A list of designated Contractor Authorized Personnel
- Escalation procedures including management personnel contact numbers
- Full and complete documentation of all implementation work
- Samples of knowledge transfer documentation
- When applicable, a list of all materials and supplies required to complete the implementation described in the RFQ

### 4.4.3 Materials and Supplies Required to Complete Implementation

In the event that there are items required to complete an Implementation, the Contractor must provide a full-itemized list including Manufacturer name and part number. These items will be priced and purchased separately by the Authorized User. The cost of these items will be added to the Contractor's final quote to determine best value and/or lowest cost.

#### 4.4.4 Negotiation of Final Project Plan

If the Authorized User chooses to require a full Project Plan, the State further reserves the right for Authorized Users to negotiate the final Project Plan with the apparent RFQ awardee. Such negotiation must not substantively change the scope of the RFQ plan, but can alter timeframes or other incidental factors of the final Project Plan. Authorized User will provide the Contractor a minimum five business days' notice of the final negotiation date. The Authorized User reserves the right to move to the next responsible and responsive bidder if Contractor negotiations are unsuccessful.

## 4.5 SINGLE POINT OF CONTACT

The Contractor must provide, at the request of the Authorized User, a Single Point of Contact (SPOC) regardless of the breadth of the services being provided. The Contractor is required to provide the name and contact telephone numbers (desk, cell phone etc.) of the SPOC.

## 4.6 RETAINAGE

The Authorized User may retain a percentage of each deliverable payment of no more than twenty-five (25) percent until the acceptance of the complete Implementation. This retainage may be reduced up to five (5) percent as described in the SOW, when the Contractor substantially reduces the time required from the timeframes negotiated between the Authorized User and the Contractor.

## 4.7 ENHANCEMENTS TO SERVICES

When agreed to by the Authorized User, unanticipated enhancements to the services procured must not exceed a cumulative twenty (20) percent of the total negotiated quoted project cost. Any changes that will result in exceeding this twenty (20) percent will require that a new RFQ be issued. As project management is included within this Lot, it is incumbent upon the Contractor to notify the Authorized User in writing when a requested scope change will exceed the cumulative twenty (20) percent total value of the project. Contractor's failure to do so may be deemed a failure to manage the project and may result in administrative action against the Contractor.

## 4.8 REMOVAL OR REPLACEMENT OF STAFF

With documented justification, the Authorized User may request the removal or replacement of any staff. The Contractor must do so in the most expeditious manner possible. Any associated cost will be borne by the Contractor. As documentation to facilitate knowledge transfer is the sole responsibility of the Contractor, the replacement staff will be provided at no cost during the knowledge transfer period.

# Signature Page

IN WITNESS WHEREOF, the Parties have executed this Contract as of the date last written below. The Parties further hereby certify that original copies of this executed and approved signature page will be affixed, upon final approval, to exact copies of this Contract being executed simultaneously herewith. The acknowledgment must be fully and properly executed by an authorized person. By signing you certify your express authority to sign on behalf of yourself, your company, or other entity and full knowledge and acceptance of this agreement, Appendix A (Standard Clauses For New York State Contracts), Appendix B, and State Finance Law §139-j and §139-k (Procurement Lobbying), and that all information provided is complete, true and accurate. By signing, Contractor affirms that it understands and agrees to comply with the OGS procedures relative to permissible contacts as required by State Finance Law §139-j (3) and §139-j (6) (b).

| **CONTRACTOR** | | **THE PEOPLE OF THE STATE OF NEW YORK** | |
|---|---|---|---|
| Signature: | | Signature: | |
| Printed Name: | | Printed Name: | |
| Title: | | Title: | |
| Company Name: | **Impulse Point** | Date: | |
| Federal ID: | **65-1214267** | | |
| NYS Vendor ID: | **1100138215** | | |

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

**STATE OF** }
} **SS.:**
**COUNTY OF** }

On the _____day of _____ in the year 20____, before me personally appeared _____, known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that _he maintains an office at _____, and further that:

**[Check One]**

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

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

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

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

_____
**Notary Public**
**Registration No.**

# APPENDIX A

# STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

**PLEASE RETAIN THIS DOCUMENT**
**FOR FUTURE REFERENCE.**

January 2014

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## STANDARD CLAUSES FOR NYS CONTRACTS

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

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

**2. NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

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

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

**5. NON-DISCRIMINATION REQUIREMENTS.** To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence victim status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of $50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of

any State approved sums due and owing for work done upon the project.

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

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

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

**10. RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION**. (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

**12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.** In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of $25,000.00,

whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of $100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of $100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

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

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

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

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

**13. <u>CONFLICTING TERMS</u>.** 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. <u>GOVERNING LAW</u>.** This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

**15. <u>LATE PAYMENT</u>**. 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. <u>NO ARBITRATION</u>.** 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. <u>SERVICE OF PROCESS</u>**. 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. <u>PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS</u>**. 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

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
https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp

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

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

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

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

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

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

**22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

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

the contract, the Department of Civil Service and the State Comptroller.

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

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

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

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

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

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

# APPENDIX B

# GENERAL SPECIFICATIONS

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## GENERAL

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

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

**a. 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.

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

**b1. SOLICITATION** Writings by the State setting forth the scope, terms, conditions and technical specifications for a procurement of Product. The procurement may be undertaken on a competitive or non-competitive basis. Such writings typically include, but are not limited to: Invitation for Bids (IFB), Request for Quotations (RFQ), Request for Proposals (RFP), addenda or amendments thereto, and terms and conditions that are incorporated by reference, including but not limited to, Appendix A (Standard Clauses for NYS Contracts), Appendix B, (General Specifications) and identified attachments. Where the procurement is undertaken on a non-competitive basis, the term "Solicitation" shall be deemed to refer to the all the terms and conditions identified by the State.

**b2. 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.

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

**d. 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 will include the following classification of public procurement:

> **Centralized Contracts** 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. Once established, procurements will be made from the selected Contractor(s) with required competition through a Request for Quote.

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

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

**g. 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.

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

**i. 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(s).

**j. 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.

**k. 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.

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

**m. RESERVED.**

**n. 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).

**o. LICENSEE(S)** 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(s)" 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.

**p. 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.

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

**r. 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.

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

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

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

**v. 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).

**w. RESERVED.**

**x. REQUEST FOR QUOTATION (RFQ)** A type of Bid Document used by an Authorized User to conduct a competitive procurement among Contractors.

**y. 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.

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

**aa. 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.

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

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

**dd. 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.

**ee. STATE** State of New York.

**ff. 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.

**gg. 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.

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

**ii. VIRUS** Any computer code, whether or not written or conceived by Contractor, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Product manufacturer. Virus shall also include any malware, adware, or other computer code, whether or not written or conceived by Contractor, which allows data or metrics to be copied, redirected or modified without the express consent of the Authorized User.

## BID SUBMISSION

**3. 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.

**4. RESERVED.**
**5. RESERVED.**
**6. RESERVED.**

**7. 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 Solicitation. 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.

**8. EXTRANEOUS TERMS** Bids must conform to the terms set forth in the Solicitation, 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 requirements of the Solicitation Section 4.6 and Attachment 6 may be considered as having been submitted for consideration by OGS.

No extraneous term(s), whether or not deemed "material," shall be incorporated into the Contract unless submitted in accordance with the above and the Commissioner or her designee 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).

**9. 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. The State's receipt/acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures. Properly identified information that has been designated confidential, trade secret, or proprietary by the Bidder will not be disclosed except as may be required by the Freedom of Information Law or other applicable State and federal laws.

**b. COMMISSIONER OR AUTHORIZED USER** Contractor warrants, covenants and represents that any confidential information obtained by Contractor, its agents, affiliates, Subcontractors, officers, distributors, resellers or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the State or any Authorized User hereunder or received from another third party, will not be divulged to any third parties without the written consent of the Commissioner or Authorized User unless disclosure is required by law or legal process. Contractor shall not be required to keep confidential any such material that is publicly available through no fault of Contractor, independently developed by Contractor without reliance on confidential information of the Authorized User, or otherwise obtained under the Freedom of Information Law or other applicable New York State laws and regulations. If disclosure is required by law or legal process, Contractor shall provide advance notification to the State or Authorized User, as applicable. This warranty shall survive termination of this Contract. Contractor further agrees to take commercially reasonable steps as to its agents, affiliates, Subcontractors, officers, distributors, resellers or employees regarding the obligations arising under this clause to insure such confidentiality.

**10. 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. PREVAILING WAGE RATE APPLICABLE TO BID SUBMISSIONS** The prevailing wage rate case number has been included in the Solicitation and may also be obtained by visiting www.labor.ny.gov. 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.

**b. WAGE RATE PAYMENTS/CHANGES DURING CONTRACT TERM** The wages to be paid under any resulting Contract shall not be less than the prevailing rate of wages and supplements as set forth by law. It is required that the Contractor keep informed of all changes in the prevailing wage rates during the Contract term that apply to the classes of individuals supplied by the Contractor on any projects resulting from this Contract, subject to the provisions of the Labor Law. Contractor is solely liable for and must pay such required prevailing wage adjustments during the Contract term for its employees as required by law and is responsible for ensuring any subcontractors utilized on the Contract also comply with the prevailing wage provisions of the New York State Labor Law.

**c. ARTICLE 8 CONSTRUCTION/PUBLIC WORKS CONTRACTS** In compliance with Article 8, Section 220 of the New York State Labor Law:

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

**ii. Payroll Records** Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. For public works contracts over $25,000 where the Contractor maintains no regular place of business in 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. Day's Labor** No laborers, workmen or mechanics in the employ of the Contractor, Subcontractor or other person doing or contracting to do all or part of the work contemplated by the Contract shall be permitted or required to work more than eight hours in any one calendar day or more than five calendar days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. "Extraordinary emergency" shall be deemed to include situations in which sufficient laborers, workers and mechanics cannot be employed to carry on public work expeditiously as a result of such restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the NYS Commissioner of Labor for the preservation of the Contract site or for the protection of the life and limb of the persons using the Contract site.

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

**i. Payroll Records** Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. Where the Contractor or Subcontractor maintains no regular place of business in New York State, such records must be kept at the work site while work is being performed.

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

**11. 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.** 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.

**12. 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, cost proposal revision, or for any work performed prior to Contract execution.

**13. 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.

**14. 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.

**15. 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.

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

**17. 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.

g. Specific price decreases:
**(i) GSA Changes**: Where NYS Net Prices are based on an approved GSA Schedule, price decreases shall take effect automatically during the Contract term and apply to Purchase

Orders submitted on or after the date the approved GSA Schedule pricing decreases during the Contract term; or

**(ii) Commercial Price List Reductions**: Where NYS Net Prices are based on a discount from Contractor's list prices, price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after the date Contractor lowers its pricing 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 having any obligation to comply on a global basis with, the terms of this clause.

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

**18. 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 Solicitation 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.

**19. 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.

**20. 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 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.

**21. RESERVED.**

## BID EVALUATION

**22. BID EVALUATION** The Commissioner reserves the right to accept or reject any and all Bids, or separable portions of Bids, and waive technicalities, irregularities, and omissions if the Commissioner determines the best interests of the State will be served. The Commissioner, in his/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 Bid.

**23. TIE BIDS** In the event two Bids are found to be substantially equivalent, price shall be the basis for determining the award recipient. While prompt payment discounts will not be considered in determining the low Bid, the Commissioner may consider any prompt payment discount in resolving Bids which are otherwise tied. If two or more Bidders submit substantially equivalent Bids as to pricing or other factors, the decision of the Commissioner to award a Contract to one or more of such Bidders shall be final.

**24. RESERVED.**
**25. RESERVED.**

## TERMS & CONDITIONS

**26. 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.

**27. PARTICIPATION IN CENTRALIZED CONTRACTS**

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

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

**c. Voluntary Extension** Purchase Orders issued against a Centralized Contract by any Authorized User not provided for in the 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)(a)(iv) of the State Finance Law.

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

**e. Contract Migration** Authorized Users holding individual Contracts with a Contractor at the time that Contractor is awarded a Centralized Contract for the same Products 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.

**28. 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 be modified or amended only upon mutual written agreement of the Commissioner and Contractor.

Notwithstanding the foregoing, the Contractor may, however, offer an Authorized User for a particular RFQ procurement: (1) better and more advantageous pricing; (2) better and more advantageous payment terms; or (3) better and more advantageous delivery terms, and the Authorized User may accept such terms without OGS approval. If the Authorized User accepts such terms, the Authorized User shall furnish a copy of such terms to OGS for informational purposes at the time of issuance of the Authorized User's tentative award notification.
Other than where such terms related to pricing, payment or delivery 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). 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.

Additional terms and conditions relating to areas other than pricing, payment or delivery may be allowed as part of Contractor's response to an Authorized User RFQ/SOW and incorporated into the Authorized User Agreement provided that all of the following conditions are met:

1) The Contractor identifies such terms and conditions in Contractor's response to the Authorized User's RFQ/SOW; and

2) Such terms and conditions do not contradict or violate any of the terms and conditions of the Contract, and/or are more advantageous to the Authorized User and the State than those set forth in the Contract; and

3) Such terms place no additional liability or responsibility on the Authorized User or State; and

4) The Authorized User accepts such additional terms and conditions.

**29. RESERVED.**

**30. ESTIMATED / SPECIFIC QUANTITY CONTRACTS**
Estimated quantity contracts, also referred to as indefinite delivery / indefinite quantity contracts, are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Contract term. No guarantee of any quantity is implied or given.

With respect to any specific quantity stated in the contract, the Commissioner reserves the right after award to order up to 20% more or less (rounded to the next highest whole number) than the specific quantities called for in the Contract. Notwithstanding the foregoing, the Commissioner may purchase greater or lesser percentages of Contract quantities should the Commissioner and Contractor so agree. Such agreement may include an equitable price adjustment.

**31. 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 clause. The reasons underlying the finding that an emergency exists shall be included in the procurement record.

**32. 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 Contractor's order form, confirmation or acknowledgment, and the Contract terms shall be resolved in favor of the terms most favorable to the Authorized User. Should an Authorized User add written terms and conditions to the Purchase Order that conflict with the terms and conditions of the Contract, the Contractor has the option of rejecting the Purchase Order within five business days of its receipt but shall first attempt to negotiate the additional written terms and conditions in good faith with the Authorized User, or fulfill the Purchase Order. Notwithstanding the above, the Authorized User reserves the right to dispute any discrepancies arising from the presentation of additional terms and conditions with the Contractor.

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

Contractor shall make available to the Authorized User either delivery of a physical copy(s) of the Software and Documentation or electronic download of the Software and Documentation from the Contractor's electronic delivery web site. Authorized User can access and electronically download the Licensed Software and related Documentation for each Product offered under the Contract. The Authorized User acknowledges that Contractor's delivery obligation for electronic delivery under this Contract is met by the provision of the electronic delivery web site URL. Unless otherwise specified in the Authorized User Agreement, the Authorized User shall be responsible for installation of the Licensed Software.

**34. 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.

**35. SHIPPING/RECEIPT OF PRODUCT**

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

**b. Shipping Charges** Unless otherwise stated in the 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.

**36. 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.

**37. RESERVED.**
**38. RESERVED.**
**39. 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.

**40. INSTALLATION** Where installation is required, Contractor shall be responsible for placing and installing the Product in the required locations. All materials used in the installation shall be of good quality and shall be free from any and all defects that would mar the Product or render it unsound. Installation includes the furnishing of any equipment, rigging and materials required to install or place the Product in the proper location. The Contractor shall protect the site from damage for all its work and shall repair damages or injury of any kind caused by the Contractor, its employees, officers or agents. If any alteration, dismantling or excavation, etc. is required to effect installation, the Contractor shall thereafter promptly restore the structure or site. Work shall be performed to cause the least inconvenience to the Authorized User(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.

**41. 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 Warranties Clause herein. Replaced or repaired Product or parts and components of such Product shall be new and shall, if available, be replaced by the original manufacturer's component or part. Remanufactured parts or components meeting new Product standards may be permitted by the Commissioner or Authorized User. Before installation, all proposed substitutes for the original manufacturers installed parts or components must be approved by the Authorized User. The part or component shall be equal to or of better quality than the original part or component being replaced.

**42. 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 Solicitation, 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 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 any facility for cause any employee, Subcontractor, or agents of the Contractor.

**43. ASSIGNMENT** In accordance with Section 138 of the State Finance Law, the Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the contract or its right, title or interest therein, or its power to execute such contract to any other person, company, firm or corporation in performance of the contract without the prior written consent of the Commissioner or Authorized User (as applicable); provided, however, any consent shall not be unreasonably withheld, conditioned, delayed or denied 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 for assignment to the Commissioner and seek written agreement from the Commissioner which will be filed with the Comptroller. Commissioner shall use reasonable efforts to promptly respond to any request by Contractor for an assignment, provided that Contractor supplies sufficient information about the party to whom the Contractor proposes to assign the contract.

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

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

**45. 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, 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.

**46. 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 in State spending, declaration of emergency, contract compliance issues or other circumstances. Upon issuance of such notice, the Contractor is not to accept any Purchase Orders, and shall comply with the suspension order. Activity may resume at such time as the Commissioner issues a formal written notice authorizing a resumption of performance under the Contract.

An Authorized User may issue a formal written notice for the suspension of work for which it has engaged the Contractor for reasons specified in the above paragraph. The written notice shall set forth the reason for such suspension and the estimated duration of the suspension. Acopy of the written notice shall be provided to the Commissioner. Activity may resume at such time as the Authorized User issues a formal written notice authorizing a resumption of performance under the Contract. Such written notice shall provide a minimum of ten (10) business days notification before resumption of performance.

**47. TERMINATION**

**a. For Cause**: For a material breach that remains uncured for more than thirty calendar 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 respectively, 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 Commissioner for convenience upon sixty calendar 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.

By written notice, an Authorized User may terminate an Authorized User Agreement at any time for convenience upon sixty (60) calendar days written notice or other specified time period of at least sixty

calendar days without penalty or other early termination charges due. Such termination of the Authorized User Agreement shall not affect the Contract or any other project or Purchase Order that has been issued under the Contract. If the Authorized User Agreement is terminated pursuant to this subdivision, the Authorized User shall remain liable for all completed and accepted deliverables accrued but unpaid charges incurred through the date of the termination. Contractor shall use due diligence and provide any outstanding deliverables for which payment is made.

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

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

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

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

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

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

**48. <u>SAVINGS/FORCE MAJEURE</u>** A Force Majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled and is not due to the negligence or willful misconduct of the affected party. Force Majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, terrorism, strikes, fires, explosions, actions of the elements, floods, or other similar causes beyond the control of the Contractor or the Commissioner in the performance of the Contract where non-performance, by exercise of reasonable diligence, cannot be prevented.

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

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

a. The Commissioner may purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the Contract quantities without penalty or liability to the State, or
b. The Contractor will provide Authorized Users with access to Products first in order to fulfill orders placed before the Force Majeure event occurred. The Commissioner agrees that Authorized Users shall accept allocated performance or deliveries during the occurrence of the Force Majeure event.

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

Notwithstanding the above, at the discretion of the Commissioner where the delay or failure will significantly impair the value of the Contract to the State or to Authorized Users, the Commissioner may terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.

In addition, the Commissioner reserves the right, in his/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. Failure of the Contractor to agree to any adjustment shall be a dispute under the Disputes clause; provided however, that nothing in this clause shall excuse the Contractor from performing in accordance with the Contract as changed.

**49. <u>CONTRACT INVOICING</u>**

a. **Invoicing.** Contractor and the dealers/distributors/resellers designated by the Contractor, if any, shall provide complete and

accurate billing invoices to each Authorized User in order to receive payment. Billing invoices submitted to an Authorized User must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer. Submission of an invoice and payment thereof shall not preclude the Commissioner from requesting reimbursement or demanding a price adjustment in any case where the Product delivered is found to deviate from the terms and conditions of the Contract or where the billing was inaccurate.

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

b. **Payment of Contract Purchases made by an Authorized User when the State Comptroller is responsible for issuing such payment** The Authorized User and Contractor agree that payments for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payments shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller website at **www.osc.state.ny.us**, by e-mail at **HelpDesk@sfs.ny.gov**, or by telephone at (518) 457-7737 or toll free (877) 737-4185. Contractor acknowledges that it will not receive payment on any invoices submitted under this Contract that are payable by the State Comptroller if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

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

**50. DEFAULT – AUTHORIZED USER**

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

**b. Failure to Make Payment.** In the event a participating Authorized User fails to make payment to the Contractor for Products delivered, accepted and properly invoiced, within thirty calendar days of such delivery and acceptance, the Contractor may, upon five business days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional 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 ten business days prior to declaring a breach of Contract by any Authorized User, by certified or registered mail, notify both the Commissioner and the purchasing official of the breaching Authorized User of the specific facts, circumstances and grounds upon which a breach will be declared.

**d. Insufficient basis.** If the Contractor's basis for declaring a breach is insufficient, the Contractor's declaration of breach and failure to service an Authorized User may constitute a breach of the Contract, and the Authorized User may thereafter seek any remedy available at law or equity.

**51. PROMPT PAYMENTS**

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

**b. By Non-State Agencies** Upon acceptance of Product or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be thirty calendar days, excluding legal holidays, or as mandated by the appropriate governing law from the receipt of a proper invoice. The terms of Article 11-A of the State Finance Law apply only to procurements by and the consequent payment obligations of 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.

**52. 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 that has not been cured within thirty calendar (30) days following Contractor's receipt of written notice of the 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 service or Product of lesser or greater quality.

Such purchases may be deducted from the Contract quantity without penalty or liability to the State. The Commissioner agrees that Authorized Users shall accept allocated performance or deliveries during a period where Contractor is making good faith efforts to cure a material breach.

**b. Withhold Payment** In any case where a reasonable question of material, uncured non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Commissioner. Should Contractor and the Commissioner fail to agree upon the question of "materiality" in an instance of non-performance, such failure to agree shall be a dispute under the Disputes clause.

**c. Bankruptcy** In the event that the Contractor files, or there is filed against Contractor, a petition under the U.S. Bankruptcy Code during the term of this Centralized Contract, Authorized Users may, at their discretion, make application to exercise its right to set-off against

monies due the Debtor or, under the Doctrine of Recoupment, be credited the amounts owed by the Contractor arising out of the same transactions.

**d. Reimbursement of Costs Incurred** The Contractor agrees to reimburse the Authorized User promptly for any and all additional costs and expenses incurred for acquiring acceptable 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, including reasonable attorney's fees, shall be paid by the Contractor.

Where the Contractor fails to timely deliver pursuant to the guaranteed delivery terms of the Contract, the ordering Authorized User may obtain substitute Product temporarily and the cost of the replacement Product shall be deducted from the Contract quantity without penalty or liability to the State.

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

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

**54. 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 representative.

**55. 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.

**56. 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, information security and cyber security rules, procedures and protocols ("Procedures"). Authorized User shall indicate if there are any applicable Procedures as part of the RFQ required under this Contract. The Authorized User shall make available the relevant Procedures and Contractor shall be responsible for distributing to its representatives and assessing and ensuring compliance. The Authorized User, Contractor and the State agree that the Procedures do not modify or amend the other terms and conditions of the Contract.

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

**58. 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.

**59. WARRANTIES**

**a. Product Performance**

Contractor hereby warrants and represents that the Products acquired by the Authorized User under the terms and conditions of this Contract conform to the specifications in the Authorized User Agreement, performance standards and documentation, and the documentation fully describes the proper procedure for using the Products.

Contractor further warrants and represents that
(a) if the Products acquired by the Authorized User pursuant to an Authorized User Agreement under this Contract include software application development, software application customization, software programming, software integration or similar items ("Software Deliverables") then such Software Deliverables shall be free from defects in material and workmanship and will conform with all requirements of the Contract and Authorized User Agreement for the warranty period, or for a minimum of sixty (60) calendar days from the date of acceptance of the completed project, whichever is longer ("Project warranty period"), and that

(b) Products, components or deliverables specified and furnished by or through Contractor shall individually, and where specified and furnished as a system, be free from defects in material and workmanship and will conform with all requirements of the Contract and Authorized User Agreement for the warranty period, or for a minimum of sixty (60) calendar days from the date of acceptance of the completed project, whichever is longer ("Project warranty period").

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

Contractor also warrants that the Products, in the form provided to the Authorized User, do not infringe any copyright, trademark, trade secret or other right of any third party.

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

**c. Product Warranty for Deliverables** 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").

The Commissioner agrees that Contractor is not responsible for any modification of the Products made by an Authorized User without Contractor's approval.

**d. Replacement Parts Warranty** If during the regular or extended warranty periods, parts or components break or fail to perform as intended, 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(s) shall be borne solely by the Contractor, and the State or Authorized User shall in no event be liable or responsible therefor.

Any Product or parts thereof 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 set forth under paragraph (a) above; or b) if a separate warranty for that Product or parts thereof is generally offered by the manufacturer, the standard commercial warranty period offered by the manufacturer for the individual part or component.

**e. Virus Warranty** The Contractor represents and warrants that any Product acquired by the Authorized User does not contain any known viruses. Contractor is not responsible for viruses introduced at the Authorized User's site.

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

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

This Date/Time Warranty shall survive beyond termination or expiration of this contract as long as the Product is used by the governmental entity, or its successor, for whom the Product was originally purchased." Nothing in this warranty statement shall be construed to limit any rights or remedies otherwise available under this Contract for breach of warranty.

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

**h.** All warranties contained in this Contract shall survive the termination of this Contract.

**i. Miscellaneous** The Authorized User shall promptly notify the Contactor and the Commissioner in writing of any claim of breach of any warranty provided herein.

The rights and remedies of the State and the Authorized Users provided in this clause are in addition to and do not limit any rights afforded to the State and the Authorized Users by any other clause of the Contract.

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

**k. No Implied Warranties** To the extent permitted by law, these warranties are exclusive and there are no other express or implied warranties or conditions, including warranties or conditions of merchantability and fitness for a particular purpose.

**60. LEGAL COMPLIANCE** Contractor represents and warrants that it shall secure all notices and comply with all applicable laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any 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 terminate or suspend the Contract, in whole or in part, or to take any other action deemed necessary by the Commissioner. Contractor also agrees to disclose information and provide affirmations and certifications to comply with Sections 139-j and 139-k of the State Finance Law.

**61. INDEMNIFICATION** Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully defend, indemnify and hold 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, which shall arise or result from this Contract, without limitation; provided, however, that the Contractor shall not indemnify to the extent any claim, loss or damage arising hereunder is solely due to the negligent act, failure to act, gross negligence or willful misconduct of the Authorized Users.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of 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, claim or suit at the expense of Contractor.

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

Indemnification of the Contractor by Authorized Users is prohibited under the Contract.

**62. INDEMNIFICATION RELATING TO INFRINGEMENT** The Contractor will also defend, indemnify and hold the Authorized Users harmless from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs in any action for infringement of a patent, copyright, trademark, trade secret or other proprietary right provided: a) such claim arises solely out of the Products as supplied by the Contractor, and not out of any modification to the Products made by Authorized User or by someone other than Contractor at the direction of the Authorized User without Contractor's approval; and b) Authorized User gives Contractor prompt written notice of any such action, claim suit or threat of suit alleging infringement.

The Authorized User shall give Contractor the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and to provide assistance in the defense of any such action, claim or suit at the expense of Contractor.

Such indemnity shall only be applicable in the event of claims, judgments, liabilities and/or costs that may be finally assessed against Authorized User in any action for infringement of a patent, or of any copyright, trademark, trade secret or other third party proprietary right except to the extent such claims, judgments, liabilities and/or costs arise solely from the Authorized Users negligent act, failure to act, gross negligence or willful misconduct.

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

In the event that an action at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the Product under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action 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 and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the Authorized User and seek to secure a continuance to permit the Authorized User to appear and defend their 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.

Indemnification of the Contractor by Authorized Users is prohibited under the Contract.

**63. LIMITATION OF LIABILITY FOR LOTS 1 and 2.** Except as otherwise set forth in the Indemnification clause and the Indemnification Relating to Third Party Rights clause, the limit of liability for claims arising from Purchase Orders involving Lots 1 and 2 shall be as follows:

**a.** Contractor's liability for any claim, loss or liability arising out of, or connected with the Products provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the Purchase Order for the Products and services, or parts thereof forming the basis of the Authorized User's claim 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.

**63A. LIMITATION OF LIABILITY FOR LOT 4.** Except as otherwise set forth in the Indemnification clause and the Indemnification Relating to Third Party Rights clause, the limit of liability for claims arising from Purchase Orders involving Lot 4 shall be as follows:

**a.** Contractor's liability for any claim, loss or liability arising out of, or connected with the Products provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the Purchase Order for the Products and services, or parts thereof forming the basis of the Authorized User's claim or (ii) two million dollars ($2,000,000), 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

**63B. LIMITATION OF LIABILITY FOR LOT 3.**

Except as otherwise set forth in the Indemnification clause and the Indemnification Relating to Third Party Rights clause, the limit of liability for claims arising from Purchase Orders involving Lot 3 shall be as follows:

**a.** Contractor's liability for any claim, loss or liability arising out of, or connected with the Products provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in:

**i.** an amount equal to "X" times (as specified in the chart in paragraph (ii) below) the charges specified in the Purchase Order for the Products and services, or parts thereof forming the basis of the Authorized User's claim or

**ii.** Minimum (as specified in the chart below), whichever is greater.

| | "X" Times the Charges | Minimum |
|---|---|---|
| Purchase Order involving Data Classified as Low Risk only | 2 | $2,000,000 |
| Purchase Order involving Data Classified as Moderate Risk but not High Risk | 3 | $5,000,000 |
| Purchase Order involving Data Classified as High Risk | 5 | $10,000,000 |

**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.

**64. DISPUTES**

**I. Policy**

It is the policy of OGS to provide Interested Parties, as that term is defined herein, with an opportunity to administratively resolve disputes related to OGS bid solicitations, contract awards or contract administration. Interested Parties are encouraged, but not required, to seek resolution of disputes through consultation with OGS staff through the Informal Dispute Resolution Process described herein, prior to filing a Formal Dispute. All Informal and Formal Disputes will be accorded full, impartial and timely consideration. OGS Dispute Resolution Procedures may be obtained by contacting the person identified in the Contract as a designated contact or through the OGS website (www.ogs.ny.gov).

**II. Dispute Resolution Procedures**

A. Informal Dispute Resolution Process

1. In the event there is a dispute 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 the terms of the Contract. 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, 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 through negotiation.
3. If negotiation between the Contractor and Authorized User fails to resolve any such dispute to the satisfaction of the parties within fourteen (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 executive officer representative. Such representatives shall meet in person and shall attempt in good faith to resolve the dispute within the next fourteen (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 informal 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.

B. Formal Dispute Process

1. Definitions

a. Filed means the complete receipt of any document by OGS before its close of business.
b. Interested Party for the purpose of filing a dispute relating to a solicitation, as used in this section, means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a Contract or by the failure to award a Contract.
c. Interested Party for the purpose of filing a dispute relating to a Contract award, as used in this section, means an actual bidder or offeror for the subject Contract.
d. Interested Party for the purpose of filing a dispute relating to the administration of the Contract, as used in this section, means the awarded Contractor for the subject Contract.
e. Issuance of award means the Date of Issue identified on the Contract Award Notification transmitted by OGS.
f. A Formal Dispute means a written objection by an Interested Party to any of the following:

i. A solicitation or other request by OGS for offers for a contract for the procurement of commodities, services or technology.
ii. The cancellation of the solicitation or other request by OGS.
iii. An award or proposed award of the Contract by OGS.

iv. A termination or cancellation of an award of the Contract by OGS.
v. Changes in the scope of the Centralized Contract by the Commissioner.
vi. Determination of "materiality" in an instance of nonperformance or contractual breach.
vii. An equitable adjustment in the Centralized Contract terms and/or pricing made by the Commissioner during a Force Majeure event.

2. Submission of Formal Disputes
a. A Formal Dispute must be filed in writing with the Director of NYSPro by mail using the following contact information:

Director, New York State Procurement
A Division of the Office of General Services
38th Floor, Corning Tower Empire State Plaza
Albany, NY 12242

b. The Formal Dispute must include:
i. Name, address, e-mail address and telephone numbers of the filer.
ii. Solicitation or Contract number.
iii. Detailed statement of the legal and factual grounds for the Formal Dispute, including a description of resulting prejudice to the filer.
iv. Copies of relevant documents.
v. Request for a ruling by the agency.
vi. Statement as to the form of relief requested.
vii. All information establishing that the filer is an Interested Party for the purpose of filing a Formal Dispute.
viii. All information establishing the timeliness of the Formal Dispute.

3. Formal Disputes concerning a solicitation shall be filed by an Interested Party (see II.B(1)(b)) with OGS no later than ten (10) business days before the date set in the solicitation for receipt of bids. If the date set in the solicitation for receipt of bids is less than ten (10) business days from the date of issue, Formal Disputes concerning the solicitation shall be filed with OGS at least twenty-four (24) hours before the time designated for receipt of bids.

4. Formal Disputes concerning a pending or awarded Contract must be filed within ten (10) business days by an Interested Party (see II.B(1)(c)) after the disputing party knew or should have known of the facts which form the basis of the Formal Dispute; however, a Formal Dispute may not be filed later than ten (10) business days after issuance of the Contract award.

5. Formal Disputes concerning the administration of the Contract after award (see II.B(1)(iv-vii)) must be filed within twenty (20) business days by an Interested Party (see II.B(1)(d)) after the disputing party knew or should have known of the facts which form the basis of the Dispute. However, if Contractor and Authorized User participate in the Informal Dispute Resolution Process, Formal Disputes concerning the administration of the Contract after award must be filed by Contractor within twenty (20) business days after the Contractor and Authorized User failed to reach resolution through the Informal Dispute Resolution Process set forth in Section II.A.

6. Agency Response
a. OGS will consider all information relevant to the Formal Dispute, and may, in its discretion, suspend, modify, or cancel the disputed procurement/Contract action prior to issuance of a Formal Dispute decision.
b. OGS reserves the right to require the filer to meet or participate in a conference call with OGS to discuss the Formal Dispute when, in its sole judgment, circumstances so warrant.
c. OGS reserves the right to waive or extend the time requirements for decisions and final determinations on appeals herein prescribed when, in its sole judgment, circumstances so warrant.
d. OGS reserves the right to consider or reject the merits of any Formal Dispute.
e. 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 Formal Dispute.

7. Appeals
a. Should the filer be dissatisfied with the Formal Dispute determination, a written appeal may be filed with the Chief Procurement Officer, by mail using the following contact information:

Chief Procurement Officer
New York State Procurement
A Division of the Office of General Services
38th Floor, Corning Tower
Empire State Plaza
Albany, NY 12242

b. 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.
c. 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.
d. 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.
e. The decision of the Chief Procurement Officer shall be a final and conclusive agency determination.

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

**65. <u>SOFTWARE LICENSE GRANT</u>** 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 (or, at the option of the Authorized User, term 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) 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. Contractor is required to submit written notification to Authorized Users of the upcoming maintenance end date no later than sixty (60) calendar days prior to such maintenance end date.

**e. Permitted License Transfers** As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated site not originally specified in the license, including but not limited to transfers within Agencies, between Agencies, and transfers pursuant to a governmental restructuring or reorganization ("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.

**66. PRODUCT ACCEPTANCE** Unless otherwise provided by mutual agreement of the Authorized User and the Contractor in the Authorized User Agreement, 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. Title or other property interest and risk of loss shall not pass from Contractor to the Authorized User until the Products have been accepted. Failure to provide notice of acceptance or rejection or a deficiency statement to the Contractor by the end of the period provided for under this clause constitutes acceptance by the Authorized User(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. When Product is not accepted, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of non-acceptance by the Authorized User. Rejected items not removed by the Contractor within the ten calendar day period shall be regarded as abandoned by the Contractor and the Authorized User shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse the Authorized User for any costs incurred in storage or effecting removal or disposition after the ten calendar day period.

**67. 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.

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

**a. Definitions**

**(i)** For purposes of this clause, "Products." Deliverables furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), whether printed in hard copy or maintained on 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 clause, "Existing Products." Tangible Products and intangible licensed Products that exist prior to the commencement of work under the Contract. Existing Products includes any discovery, invention, report, document, data, photograph, deliverable, or other material in connection with or provided pursuant to this Contract that existed prior to or was developed or discovered independently from the activities directly related to this Contract. Contractor bears the burden of proving that a particular product was in existence prior to the commencement of the Project.

**(iii)** For purposes of this clause, "Custom Products." Products, preliminary, final or otherwise, which are created or developed by Contractor, its Subcontractors, partners, employees or agents for an Authorized User pursuant to an Authorized User Agreement 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 Authorized User Agreement or Purchase Order. Unless otherwise specified in writing in the RFQ and the Authorized User Agreement 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 Third Party 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 Third Party Software Vendor(s). Effective upon acceptance, such Product shall be licensed to Authorized User in accordance with the Contractor or Third Party Software 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 Third Party Software'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 clause.

3. Other - Contractor grants to the Authorized User a worldwide, non-exclusive, royalty-free, perpetual license to use, reproduce, display, distribute copies of, and prepare derivative works of any Contractor "Existing Product"" embodied in the Deliverables which is not covered in 1 or 2 above.

(**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 clause.

**e. Contractor's Obligation with Regard to Third Party Software (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 Third Party Software's standard license agreement, Contractor shall be responsible for obtaining from the Third Party Software third party proprietary owner/developer the rights set forth herein to the benefit of the Authorized User at Contractor's sole cost and expense.

**69. 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.

**70. 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.

**71. 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.

**72. 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.

**73. 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 clause.

Nothing herein shall prevent an Authorized User from requesting Source Code or Source Code Escrow in any RFQ, when Source Code or Source Code Escrow is not offered by either Contractor or Product manufacturer or developer to any other commercial customers. Contractor shall follow the Contract Modification procedures of the Contract to add any pricing for Source Code or Source Code Escrow not offered by either Contractor or Product manufacturer or developer to any other commercial customers.

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.

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