

Contract Amendment #1 to PT63039
Centralized Contract for the Acquisition of
International Business Machines (IBM) Systems & Peripherals (Storage)

Date: April 11, 2011

THIS AMENDMENT is made to Contract PT63039, by and between the People of the State of New York, acting by and through Carla Chiaro, Acting Commissioner of General Services, whose office is on the 41st Floor, Corning Tower Building, the Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242 (hereinafter "OGS" or "State"), and IBM, Inc (hereinafter "Contractor"), with its principal place of business at 80 State Street, Albany, NY 12207. The foregoing are collectively referred to as the "Parties."

Whereas, the Parties entered into the above-referenced Contract effective May 30, 2007 (the ("Agreement")) under which the Parties agreed to terms governing the acquisition of Contractor's Systems & Peripherals hardware, software and related services by state agencies and local governments (hereinafter "Authorized Users");

Whereas, maintenance and related services were previously acquired from a centralized contract, referred to as PS61988, which has expired;

Whereas, a decision was made to transfer the maintenance services for such hardware equipment to the existing hardware contracts; and

Whereas, the Parties now wish to amend the Contract to allow for the provision of maintenance services and other specified services under this Contract.

Therefore, in consideration of the promises, and the terms and conditions set forth in this amendment, the Parties agree to the following amendments to the Contract:

1. The Parties agree that clause 2 of the Contract is repealed and replaced in its entirety with the following language:

2. MERGER OF APPENDICES/CONFLICT OF CLAUSES

This Contract shall incorporate the following appendices as if set forth herein at length. Only documents expressly enumerated below shall be deemed a part of this Contract, and references contained in those documents to additional Contractor documents not enumerated below shall be of no force and effect. Conflicts between these documents shall be resolved in the following descending order of precedence, which supersedes the order of precedence stated in Appendix B-3.

Appendix A	Standard Clauses for NYS Contracts
Base Contract	Base Agreement of NYS Contract PT63039
Appendix B-3	OGS General Specifications
Appendix C	Contractor's Executive Law, Article 15-A (M/WBE) Requirements
Appendix D	Contract Update Form (For Product and Pricing Updates)
Appendix E	Required Contractor Submissions:
# 1	Mandatory Contractor Questionnaire
# 2	Contractor, Reseller & Distributor Information
# 3	NYS Net Prices (Prices for all Product)
# 4	Installation, Configuration, Extended Warranties, and Maintenance and Support, (Description of Services)
# 5	Consulting and Training (Purchased at same time as Products and related directly to the purchase under this agreement)
# 6	Contractor Order Forms or other order information (IBM Master Services Attachment for ServiceElite, MAG8DDH; (MSA))
# 7	IBM Statement of Work (SOW) for ServiceElite in effect for Contract PT63039

2. The Parties agree that the two affixed documents referenced as the IBM Master Services Attachment for ServiceElite and the IBM Statement of Work (SOW) for ServiceElite are incorporated into this Amendment in their entirety.

3. The Parties agree that clause 15 of the Contract, *AMENDMENT OF BASE CONTRACT*, is repealed and replaced in its entirety with the following language:

15. RESERVED

4. The Contractor and OGS agree that the Base Contract reverts to the standard terms and conditions, and maintenance services for hardware and software are available in accordance with the terms of the Contract.

5. This Agreement and Amendment #1 constitutes the entire agreement of the Parties with respect to the subject matter hereof, and any further amendment or addendum must also be in writing executed by authorized representatives of the Parties. Except as set forth in this Amendment #1, all terms and conditions of the Contract shall continue in full force and effect.

IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed on the date set for the below, effective on the date set forth above, and the persons signing represent and warrant that they are duly authorized to sign on behalf of the respective parties.

CONTRACTOR

Signature: [Signature]

Printed Name: Jack Milvaney

Title: Client Executive

Contractor Firm Name: IBM Corporation

Federal Tax Identification #: 13-0871985

THE PEOPLE OF THE STATE OF NEW YORK

Signature: [Signature]

Printed Name: Rory McAuley

Title: Acty Assistant Dirct

Office of General Services

INDIVIDUAL, CORPORATION, PARTNERSHIP, OR LLC ACKNOWLEDGMENT

STATE OF New York }
: Sworn Statement:
COUNTY OF Albany }

On the 12th day of April in the year 2011, before me personally appeared JACK MILVANEY, known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that he reside(s) in 80 State Street and further that:

[Check One]

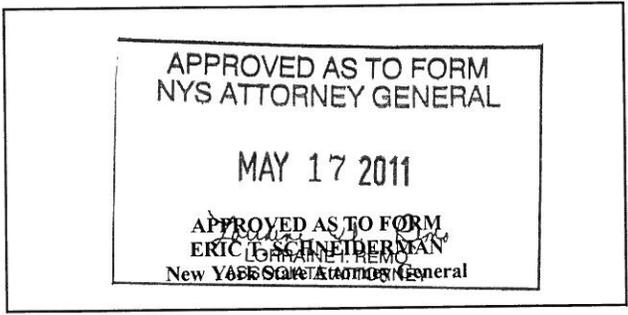
- If an individual): he executed the foregoing instrument in his/her name and on his/her own behalf.
- If a corporation, (a partnership, a limited liability company): he is the Client Executive of IBM Corporation, the corporation/ partnership/ Limited Liability Company described in the above instrument; that, he is authorized to execute the foregoing instrument on behalf of the corporation/ partnership/ 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 corporation/ partnership/ Limited Liability Company as the act and deed of said corporation/ partnership/ Limited Liability Company.

[Signature]
Signature of Notary Public

Sharon M. Gallo
Notary Public, State of New York
No. 01GA5046599
Qualified in Schenectady County
Commission Expires October 30, 2013

Notary Public
Registration No. 01GA5046599

State of: NY



Submission # 4

Maintenance & Support

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

The Maintenance and support price list submitted must contain at least the following items in this format:

Part #	Description	Unit List Price	NYS Discount %	NYS Net Price	Other columns chosen by Contractor
--------	-------------	-----------------	----------------	---------------	------------------------------------

(to be attached by Contractor)

To view the current maintenance pricelist at the IBM NYS Contract website, follow the link below, and then click on “Pricing Information”:
<http://www.ogs.state.ny.us/purchase/snt/awardnotes/7505020754can.HTM>

Submission # 6

Contractor Order Forms and Order Information

(Description of Forms and Use)

IBM Master Services Attachment for ServiceElite, MAG8DDH (MSA)



1. Scope of Services

IBM will provide you Hardware Maintenance and Technical Support Services as described in the following documents to support your storage products (called "Eligible Machines", "Eligible Programs" and together "Eligible Products"): (1) New York State Office of General Services (NYS OGS) Contract PT63039; (2) this IBM Master Services Attachment for ServiceElite, MAG8DDH; (3) the IBM Statement of Work for ServiceElite in effect for Contract PT63039; and (4) if applicable, the Authorized User's Service Level Agreement (SLA) (as provided in the Contract). Services are available for Eligible Products normally used for business, professional, or trade purposes, rather than personal, family, or household purposes. Only those services approved by OGS for inclusion in the Contract, and listed on the NYS Contract pricelist posted at the IBM NYS Contract web site, are authorized for sale under Contract PT63039. The Parties acknowledge that conflicts among referenced documents shall be resolved in the descending order of precedence set forth in Section 2 of NYS OGS Contract PT63039 (listed below).

Appendix A	Standard Clauses for NYS Contracts
Base Contract	Base Agreement of NYS Contract PT63039
Appendix B-3	OGS General Specifications
Appendix C	Contractor's Executive Law, Article 15-A (M/WBE) Requirements
Appendix D	Contract Update Form (For Product and Pricing Updates)
Appendix E	Required Contractor Submissions:
	# 1 Mandatory Contractor Questionnaire
	# 2 Contractor, Reseller & Distributor Information
	# 3 NYS Net Prices (Prices for all Product)
	# 4 Installation, Configuration, Extended Warranties, and Maintenance and Support, (Description of Services)
	# 5 Consulting and Training (Purchased at same time as Products and related directly to the purchase under this agreement)
	# 6 Contractor Order Forms or other order information (this IBM Master Services Attachment for ServiceElite (MSA))
	# 7 IBM Statement of Work (SOW) for ServiceElite in effect for Contract PT63039

IBM will identify the Eligible Products, the Services that apply to them, and the Services transaction contract period in a quote, (also referred to as a "Schedule" or "Schedule for ServiceElite"), provided to the Authorized User that references this MSA and any associated SOW or SLA. Each quote will also identify the Specified Locations at which the Services will be provided. A Specified Location may be your entire information processing environment, or a portion thereof, which may be resident at multiple sites or a single building.

The specific terms regarding Eligible Machine Services and Eligible Program Services contained in this MSA and its SOW or SLA apply only when you have contracted for an associated Eligible Machine maintenance Service or Eligible Program support Service as specified in a Purchase Order.

You understand and acknowledge that IBM, unless otherwise specified in your SOW or SLA, may utilize global resources (non-permanent residents used locally and personnel in locations worldwide) for the delivery of Services.

2. Authorized User Responsibilities

When an Authorized User (as defined in Contract PT63039) contracts for an applicable Service, the Authorized User (herein referred to as "you and your") agrees:

1. to provide IBM with an inventory in which you identify all Eligible Products to be covered at each Specified Location and to notify IBM whenever you move, add, or delete Eligible Products at an existing Specified Location or set up new Specified Locations;
2. that when an applicable Service includes IBM providing you with access codes to electronic diagnostic tools, information databases, or other Service delivery facilities, you will limit the use of these to only those who are authorized to use them under your control and only in support of Eligible Products and Services identified in the agreed upon Schedule;
3. to provide IBM with necessary information it requests to perform Services which are related to its provision of the Services to you and to notify IBM of any changes;

4. to provide internet, phone or fax connections to enable IBM to provide Remote Services, unless IBM specifies otherwise in writing;
5. to use the information obtained under these Services only for the support of the information processing requirements within your Enterprise;
6. to securely erase from any Machine/Parts that you return to IBM for any reason all programs not provided by IBM with the Machine and data, including without limitation, the following: 1) information about identified or identifiable individuals or legal entities ("Personal Data") and 2) your confidential or proprietary information and other data. If removing or deleting Personal Data is not possible, you agree to transform such information (e.g. by making it anonymous or encrypting it) so that it no longer qualifies as Personal Data under applicable law. You also agree to remove all monetary funds from Machines returned to IBM. IBM is not responsible for any funds, programs not provided by IBM with the Machine, or data contained in a Machine that you return to IBM. You acknowledge that, to perform its responsibilities, IBM may ship all or part of the Machine or its software to other IBM or third party locations around the world, and you authorize IBM to do so;
7. to acknowledge that Licensed programs for which software related services are available under this MSA are listed on the NYS Contract pricelist. A listing of all IBM Licensed programs, including those not authorized under Contract PT63039, is available at <http://www-03.ibm.com/services/sl/products/> or may be obtained from your IBM representative. The listing of Eligible Programs contains the last date of service for each respective release of licensed programs. IBM will support only current releases. End of Service information can be found at <http://www.01.ibm.com/software/support/lifecycle>. It is your responsibility to ensure that, when calling in for service, your software is current. You can, at your discretion, register to obtain IBM US Announcement Letters for Eligible Programs going to End of Service at the following url: https://www-931.ibm.com/bin/subscriptions/walk_small_steps.cgi?cl=USEN&nid=10577;
8. to notify the assigned IBM Contract Administrator of any contract, process or policy changes that would impact this contract;
9. if you are making available to IBM any facilities, software, hardware or other resources in connection with IBM's performance of Services, to obtain any licenses or approvals related to these resources that may be necessary for IBM to perform the Services and develop materials. IBM will be relieved of its obligations that are adversely affected by your failure to promptly obtain such licenses or approvals.
10. unless otherwise agreed upon in your SOW, to be responsible for (i) any data and the content of any database you make available to IBM in connection with a Service under Contract PT63039, (ii) the selection and implementation of procedures and controls regarding access, security, encryption, use and transmission of data, and (iii) backup and recovery of the database and any stored data.
11. in some instances, IBM may request that you allow it to remotely access your Eligible Machines and Programs to assist you in isolating the problem cause. You will remain responsible for adequately protecting your Eligible Machines and Programs, by defining and setting security parameters for IBM's access on your Eligible Machines and Programs, and for all data contained therein whenever we remotely access it with your permission. If you decline providing remote access to your Eligible Machines and Programs by IBM, IBM may be limited in its ability to fully provide the Services necessary to resolve the problem.

3. **Automatic Inventory Increase for Machine and Software Maintenance Services**

This selectable option will not be utilized by the State of New York in the NYS OGS Contract PT63039

4. **Charges and Payment**

For sales through IBM, your charges are calculated taking into account your Service selections, payment option, the Maintenance and Support Price List (Appendix E – Submission #4 to the NYS OGS Contract PT63039), and for prepayments, length of the prepay period. If Prepaid Annual Maintenance is offered as a payment option, IBM will provide an additional 5% discount from the NYS Net price.

For the entire transaction contract period, charges for included Eligible Product configurations and Services will not increase. All newly added Eligible Products and Services, as well as changes to existing Eligible Product configurations and Services, will assume the charge rate that applied for these at transaction contract period start, in accordance with the terms of Contract PT63039. Eligible Products and Services that become generally available during the transaction contract period will be added at the charge rate that applied on their initial availability date. You will receive the benefit of a decrease in applicable charges for amounts which become due on or after the effective date of the decrease.

FOR EACH TRANSACTION PACKAGE, THE FOLLOWING CHARGE ADJUSTMENT TERMS APPLY.

Total Services charges may be adjusted whenever:

1. a review of the inventory count indicates a change from the last accounting; or
2. a Specified Location is affected by a change that results in additional costs (e.g. a change in tax rates), Eligible Machine type, or Service is added, deleted, or changed.

For all Service charges based on usage, upon IBM's request you will promptly provide IBM with the actual meter reading recording the actual usage.

Travel Costs: Where travel costs are not included in the NYS Contract price, any reimbursement to IBM for such costs for employees who do not reside in the local commuting area for the work site, shall be made in accordance with New York State's Travel Reimbursement Manual published by the New York State Office of the State Comptroller. It will be the responsibility of the Authorized User to provide Contractor the most recently published reimbursement guidelines and rates.

5. Renewal and Termination

IBM will renew the Services, with Authorized User approval, for the same length period as identified in the previously agreed upon Schedule. Either Party may provide written notification (at least one (1) month prior to the end of the current period) to the other of its decision not to renew a service

You have committed to continue Services for the entire transaction contract period. However, you may terminate Services for an Eligible Product, on notice to IBM, if you permanently remove it from productive use within your Enterprise.

Otherwise, you may terminate Services at the end of any current maintenance term upon 30 days written notice to IBM prior to the end of the term. Termination adjustment fees will not apply and you will receive a credit for any remaining prepaid period associated with Services you terminate in accordance with this provision.

6. Services

Warranty Service Upgrade

For certain Eligible Machines, you may select a Service upgrade from the standard type of warranty Service for the Machine. IBM provides Warranty Service for Machines, per the terms of Contract PT63039. Options for upgrade in type of Warranty Service are available for an additional charge, as listed in Appendix E, Submission #4. You may not terminate the Warranty Service upgrade or transfer it to another Machine during the warranty period. When the warranty period ends, the Machine will, with Authorized User approval, become part of your standard inventory count and will convert to maintenance Service at the same type of Service you selected for warranty Service upgrade.

Maintenance of IBM Machines

IBM will provide Service for Machines, as described in our Agreement, for those Eligible IBM Machines specified in the Schedule.

Certain Machine types may require the installation and use of remote connectivity tools and equipment for direct problem reporting, remote problem determination and resolution.

IBM provides certain types of maintenance service to keep machines in, or restore them to, conformance with their specifications. IBM will inform you of the available types of service for a machine. At its discretion, IBM will either repair or exchange the failing Machine. IBM manages and installs selected engineering changes that apply to IBM machines and may also perform preventive maintenance at your site pursuant to Section 9G of the Contract. Any feature, conversion, or upgrade IBM services must be installed on a Machine which is (i) the designated, serial-numbered Machine, if applicable, and (ii) at an engineering-change level compatible with the feature, conversion, or upgrade.

IBM's Repair and Exchange services do not cover:

- a. Accessories, supply items, consumables (such as batteries and printer cartridges), and structural parts (such as frames and covers);
- b. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by you or a third party;

- c. Machines with removed or altered machine or parts identification labels;
- d. Failures caused by a product for which IBM is not responsible. Note: IBM will participate in the diagnosis of the malfunction until the responsibility for the problem has been unequivocally established;
- e. Service of machine alterations; or
- f. Service of a machine on which you are using capacity or capability, other than that authorized by IBM in writing.

You agree:

- a. to obtain authorization from the owner to have IBM service a Machine that you do not own;
- b. where applicable, before IBM provides service, to:
 - (1) follow the problem determination and service request procedures that IBM provides;
 - (2) secure all programs, data, and funds contained in a Machine; and
 - (3) inform IBM of changes in a machine's location; and
- c. to follow the service instructions that IBM provides (which may include installed Machine Code and other software updates either downloaded from an IBM Internet Web site or copied from other electronic media)

A machine is only considered "Eligible" if it is operational and in conformance with its official published specifications on the Schedule start date. All Eligible Machines must be in good working order. When you order maintenance service for machines, IBM will inform you of the date on which maintenance Service will begin. IBM may inspect the machine within one month following that date. If the machine is not in an acceptable condition for service, you may have IBM restore it for a charge or you may withdraw your request for maintenance Service. However, you will be charged for any maintenance service that IBM has performed at your request.

Software Maintenance for Storage ("SWMA")

IBM will provide software maintenance support, as described below, for those Eligible Programs for which you are licensed and for which you order this Service.

General:

1. IBM makes available to you, as long as you keep this SWMA service active, the most current commercially available version, release or update to all of the Eligible Programs for which you acquire support under this Service, should any be made available. Information on ordering versions, releases or updates can be found at <http://www-05.ibm.com/servers/eserver/ess/OpenServlet.wss>, and selecting the Entitled Software Update ("ESU") screen tab
2. IBM provides you with assistance for your a) routine, short duration installation and usage (how-to) questions and b) code defect related questions.
3. IBM provides assistance via telephone and, if available, electronic access, only to your information systems (IS) technical support personnel during normal business hours (normal business hours are 8:00 a.m. to 5:00 p.m. in the local time zone where you receive this Service, Monday through Friday, excluding national holidays). This assistance is not available to your end users. IBM provides Severity 1 assistance 24 hours a day, every day of the year. Consult the IBM Software Support Guide, which may be found at <http://www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html> for details. A 24x7 (every day of the year) all severity option may also be available for an extra charge. During normal business hours, IBM's response time objective is two hours for voice and electronic problem submissions. For voice problem submissions during other than normal business hours, IBM's response time objective for critical problems (Severity 1) is two hours. For electronic problem submissions during other than normal business hours, IBM's response time objective is within two hours of the start of normal business hours on the next business day. IBM's initial response (either voice or electronic) may result in resolution of your problem or it will form the basis for determining what additional actions may be required to achieve technical resolution of your problem. IBM is not responsible for delays in electronic response delivery caused by systems and network problems.
4. This Service does not include assistance for a) the design and development of applications, b) your use of Eligible Programs in other than their specified operating environment, or c) failures caused by products for which IBM is not responsible under this Service.
5. This Service is provided for storage devices that are located within the United States. For calls that originate from outside of the United States: 1) toll free telephone access is not available, 2) "8:00 a.m. to 5:00 p.m. in the local time zone" is defined as the time zone where your designated Point of Contact resides, Monday through Friday (excluding national holidays), 3) replies or other return communication to the caller will be via electronic means only, 4) software "traps" or other tools that may be necessary to diagnose problems will be sent only to the United States storage device location, and 5) the diagnosis and repair of data encryption will be discussed only with personnel at the United States storage device location.

Eligible Programs:

Licensed programs for which this Service is available are listed at <http://www-03.ibm.com/services/sl/products/> or may be obtained from your IBM representative. The listing of Eligible Programs contains the last date of service for

each respective release of licensed programs. IBM will support only current releases. It is your responsibility to ensure that, when calling in for service, your software is current.

Optional Feature Support:

In addition to IBM Software Maintenance for Storage, IBM's Secure Support via USA Citizens feature may be available for an additional charge. This feature provides standard IBM software support managed exclusively by USA Citizens who are located in the continental U.S. Secure Support via USA Citizens is available via voice support only. Each time you call IBM, this feature's process will be engaged only after you identify yourself as a Secure Support via USA Citizens customer and IBM verifies your entitlement for this feature. When required by you, your data analysis and call data will be contained in an isolated network and supported by USA Citizens only.

Software Maintenance After License Fee: The Software Maintenance After License fee will be equal to the total of all support Charges that the Authorized User would have paid during the lapsed interval (i) had the Authorized User not declined Software Support Services (SWS) at the time it acquired the license for a Program and the Authorized User now wishes to acquire SWS or (ii) if the Authorized User wishes to resume SWS that the Authorized User had previously terminated. The new support period in such an instance begins on the date that IBM accepts your order.

The Services that can be delivered by IBM as part of NYS OGS Contract PT63039 are listed on the IBM Statement of Work for ServiceElite in effect for Contract PT63039, which is posted at the IBM NYS Contract website The IBM NYS Contract website for PT63039 can be accessed from the OGS Contract website at <http://www.ogs.state.ny.us/purchase/snt/awardnotes/7620021159can.HTM>. The IBM SOW for ServiceElite for Contract PT63039 is a revision of IBM's standard SOW, and includes only those Services that support Eligible Products which can be ordered off of the referenced OGS Contract, The SOW for ServiceElite for PT63039 is included in the order of precedence for Contract PT63039 and thus, is binding on transactions under Contract PT63039.

7. Entire Agreement

As provided in section 16 of Contract PT63039, this agreement and the referenced appendices constitute the entire agreement between IBM and the Authorized User regarding the Services described in this MSA and its applicable documents and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid

Submission # 7

IBM Statement of Work (SOW) for ServiceElite
in effect for Contract PT63039



Statement of Work for ServiceElite for PT63039

The Services that can be delivered by IBM as part of NYS OGS Contract PT63039 are listed on the IBM Statement of Work for ServiceElite in effect for Contract PT63039, which is posted at the IBM NYS Contract website. Further, the Statement of Work for ServiceElite for Contract PT63039 is a revision of IBM's standard document, amended to include only those Services that support Eligible Products which can be ordered from Contract PT63039. Authorized Users of Contract PT63039 are reminded that these services may only be purchased from this Contract for either Eligible Products originally purchased from Contract PT63039, or for end-of-life equipment that falls under the scope of Contract PT63039. Services are only available for the support of Eligible Products which can be ordered from Contract PT63039. Further, an Authorized User is advised to review Appendix E, Submission #6 for details regarding its responsibilities when Service is obtained.

While the IBM SOW for ServiceElite for Contract PT63039 is a revision of IBM's standard document, amended to include only those Services that support Eligible Products which can be ordered from PT63039, the Parties acknowledge clauses remain in the SOW that may conflict with the Appendix A, Base Agreement or Appendix B-3. In accordance with the order of precedence for Contract PT63039, the SOW has the lowest order of priority. Thus, conflicts are resolved in accordance with the order of precedence. Clauses that conflict include, but are not limited to, termination provisions, product offerings, license rights, scope of maintenance requirements, distribution of prepared reports, remote access and indemnification. An Authorized User should contact OGS in the event of any questions.

* (SELECT THE SERVICE DESCRIPTIONS THAT APPLY)

Initial Inventory Validation

You have agreed to provide a complete inventory of all Eligible Machines that are to be covered under maintenance Services. In certain situations, we may mutually agree to postpone start of maintenance Services pending the validation of the inventory of certain Eligible Machines at a Specified Location or Specified Locations.

In this event, you agree to provide IBM with an initial inventory of these Eligible Machines. Eligible Machines that are included in this initial inventory will be marked with a "K" on the applicable Schedule. All Eligible Machines provided in that initial inventory must be identified by machine type, model number, and quantity. For non-IBM Machines provided in that initial inventory, the manufacturer, product description, and manufacturer's model must also be included.

Within 90 days from the 'Schedule' or 'Schedule for ServiceElite' transaction contract period start date, you agree to provide complete identification information for each Eligible Machine on the initial inventory as well as any newly identified Eligible Machines to be covered under maintenance Services. You will provide the same identification information for the validated inventory as that which is normally provided for other Eligible Machines on the Schedule (including applicable serial numbers and Specified Locations). If you are unable to provide this information, you may request that IBM provide Services (separate from this Statement of Work) to validate your initial inventory. IBM will begin maintenance Services for all validated inventory within 30 days of receiving a revised inventory list with complete Eligible machine identification information.

Those Eligible Machines for which you do not provide complete identification information within 90 days will be removed from the Schedule and maintenance Services will not be made available for them. Eligible Machines may be added to the Schedule at a later date in accordance with our then current terms related to such additions.

Any fee based Inventory Validation Services are excluded from this Contract.

Support Line

IBM will provide you remote assistance ("Service") with the operation of supported products and system environments. In addition, you may order certain optional features which are enhancements to this Service. These terms also apply for each of these optional features unless IBM specifies otherwise.

Definitions

Eligible Machines and Programs – are those software and hardware machines and programs eligible for this Service as identified at IBM's Internet address: <http://www-03.ibm.com/services/sl/products>
Refer to the Support Line offering for Eligible Machines and Programs. Eligible Machines and Programs for storage devices are grouped by IBM storage classification.

Full Shift - is 24 hours a day, seven days a week, including national holidays.

Non-United States based customer representatives – are all customer personnel who do not reside in the United States (“U.S.”) placing calls to the IBM support structure.

Off Shift - is all hours outside of Prime Shift.

Primary Technical Contact (“PTC”) – is your U.S. based representative to whom IBM may direct general technical information pertaining to the Service. The PTC must have sufficient technical knowledge of the Eligible Machines and Programs within your environment in order to enable effective communication with the IBM support center.

Prime Shift - is 8:00 a.m. to 5:00 p.m. in the local time zone where you receive the Service, Monday through Friday (excluding national holidays).

Response Time – is the elapsed time between receipt by IBM technical support of your submission, and the acknowledgement of the submission. Please refer to the IBM Software Support Handbook for call handling process by severity at: <http://www14.software.ibm.com/webapp/set2/sas/f/handbook/home.html>

Storage device location – is the physical location of the Eligible Machines supported under this Service. All Eligible Machines must be physically located within the U.S.

IBM Responsibilities

This assistance is not available to your end users. IBM will provide you remote assistance (via telephone from IBM's support center or via an electronic search and questioning capability), in response to your requests pertaining to the following:

For all Eligible Machines and Programs in your covered support groups —

1. basic, short duration installation, usage, and configuration questions; and
2. questions regarding IBM Supported Product publications.

For all IBM software Eligible Programs in your covered support groups —

1. code-related problem questions;
2. diagnostic information review to assist in isolation of a problem cause (for example, assistance interpreting traces and dumps for installation and code related problems); and
3. for known defects, available corrective service information and program fixes which you are entitled to receive under the terms of the IBM license.

When you report a problem with covered Eligible Machine or Programs, IBM will provide a primary point of contact for all support requests. IBM will assist you by providing level 1 and level 2 support, which includes assistance for installation usage and configuration questions and provide general guidance on product documentation.

This Service is for storage devices located within the U.S. For calls that originate from outside of the U.S.: 1) toll free telephone access is not available, 2) “8:00 a.m. to 5:00 p.m. in the local time zone” is defined as the time zone where your designated U.S. based PTC resides, Monday through Friday (excluding national holidays), 3) replies or other return communication to the caller will be via electronic means only, 4) software “traps” or other tools that may be necessary to diagnose problems will be sent only to the U.S storage device location, and 5) the diagnosis and repair of data encryption will be discussed only with personnel at the U.S. storage device location, and 6) all support will be provided in the English language.

Optional Feature Support:

In addition to IBM Support Line for storage only, IBM's Secure Support via USA Citizens feature may be available for an additional charge. This feature provides standard IBM software support managed exclusively by USA Citizens who are located in the continental U.S. Secure Support via USA Citizens is available via voice support only. Each time you call IBM, this feature's process will be engaged only after you identify yourself as a Secure Support via USA Citizens customer and IBM verifies your entitlement for this feature. When required by you, your data analysis and call data will be contained in an isolated network and supported by USA Citizens only.

Response Criteria

IBM provides Severity 1 assistance 24 hours a day, every day of the year. A 24x7 (every day of the year) all severity option may also be available at an extra charge. During Prime Shift, IBM's response time objective is two hours for voice and electronic problem submissions. For voice problem submissions during other than Prime Shift hours, IBM's response time objective for (Severity 1) is two hours and if you select the 24x7 all severity option, four hours for non-critical problems. For electronic problem submissions during other than Prime Shift, IBM's response time objective is within two hours of the start of Prime Shift on the next business day. IBM's initial response (either voice or electronic) may result in resolution of your problem or it will form the basis for determining what additional actions may be required to achieve technical resolution of your problem. IBM is not responsible for delays in electronic response delivery caused by systems and network problems.

Your Responsibilities

You agree to:

1. ensure you are properly licensed to all software and have a current subscription (where required) for the Eligible Programs for which you request assistance;
2. retrieve and review the latest Eligible Machines and Programs on a regular basis to verify whether there have been any additions or deletions within your covered support groups;
3. ensure that any access codes IBM provides to you are used only by your authorized personnel;
4. designate a technically qualified representative ("Primary Technical Contact") who will be your focal point to whom IBM may direct general technical information pertaining to your Eligible Machines and Programs.
5. provide IBM with all relevant and available diagnostic information (including product or system information) pertaining to software problems you request assistance with;
6. if necessary, provide IBM with appropriate remote access to your Eligible Machines and Programs to assist you in isolating the software problem cause. You will remain responsible for adequately protecting your Eligible Machines and Programs, by defining and setting security parameters for IBM's access on your Eligible Machines and Programs, and all data contained therein whenever IBM remotely accesses it with your permission; and
7. provide IBM with written notice of changes to your machine inventory within one month after the change occurs. Such changes may cause a revision to your charges for this Service. (Note: This responsibility does not apply for Enterprise Support.)

Enterprise Support (This section applies only for sales through IBM.)

If you select Enterprise Support you will receive Support Line Service coverage, as described above, for all Eligible Machines and Programs that are part of your business systems environment. If total Enterprise Support is not desired, specific serial number coverage is available and this section will not apply. You agree to provide IBM an initial inventory of your Eligible Machines and Programs including the machines on which they are installed, and inform IBM of inventory changes (additions/removals) prior to each yearly anniversary of the start of the transaction contract period. Your Eligible Machines and Programs install base at the start of each contract year will be used to determine charges for that year.

Termination

You may terminate Support Line for any support group or any optional feature as per the terms of PT63039. However, you may not terminate Support Line if you have elected to continue feature support.

This SOW is governed by only those documents expressly enumerated as a part of this Contract in clause 2 of the Base Agreement. References contained in those documents to additional Contractor documents not enumerated in clause 2 shall be of no force and effect. Conflicts between these documents shall be resolved in the descending order of precedence, which supersedes the order of precedence stated in Appendix B-3, set forth in clause 2 of the Base Agreement.

As used in this Statement of Work, "you" and "your" refer to the Enterprise identified below.

Agreed to: (Enterprise Name)

By _____

Authorized signature

Name (type or print): [Redacted]

Date: [Redacted]

Enterprise number: [Redacted]

Enterprise address:

[Redacted]

Agreed to:

International Business Machines Corporation

By _____

Authorized signature

Name (type or print): [Redacted]

Date: [Redacted]

Reference Attachment number: MAG8DDH

Statement of Work number: [Redacted]

IBM address:

[Redacted]

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP



STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES

CENTRALIZED CONTRACT FOR THE ACQUISITION OF SYSTEMS & PERIPHERALS
HARDWARE AND SOFTWARE - STORAGE

IBM Corporation

New York State Contract # **PT63039**

DESIGNATED CONTACTS: Team # 8

James Patrick, Purchasing Officer I
Telephone No. (518) 486-6036
E-mail: james.patrick@ogs.state.ny.us

Barbara Henderson, Team Leader
Telephone No. (518) 473-9057
E-mail: barbara.henderson@ogs.state.ny.us

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

Information may be accessed at:

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

THIS CONTRACT for the acquisition of Systems & Peripherals hardware, software and related services (hereinafter "Product") is made between the People of the State of New York, acting by and through the Commissioner of the Office of General Services (hereinafter "State" or "OGS") whose principal place of business is the 41st Floor, Corning Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242, pursuant to authority granted under New York State Finance Law, § 163, and **International Business Machines Corporation** (hereinafter "Contractor"), with its principal place of business at: **80 State Street, Albany NY 12207**

PROCUREMENT LOBBYING TERMINATION:

OGS reserves the right to terminate this contract in the event it is found that the certification filed by the Offerer/Bidder in accordance with New York State Finance Law §139-k was intentionally false or intentionally incomplete. Upon such finding, OGS may exercise its termination right by providing written notification to the Offerer/Bidder in accordance with the written notification terms of this contract.

SUMMARY OF POLICY AND PROHIBITIONS ON PROCUREMENT LOBBYING:

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

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

1. CONTRACT SCOPE/TERM

This document (hereinafter “Contract”) sets forth the terms and conditions governing the acquisition of Systems & Peripherals (Storage) hardware and software, including installation, configuration, extended warranties, maintenance, support and other incidental services (including, but not limited to, consulting [analysis and design] and training). Terms used in this document shall have the meanings set forth in Appendix B-3. Amendments or modifications to the terms and conditions set forth herein may only be made with mutual written agreement of the parties with the approval of the New York State Attorney General and the New York State Comptroller.

The term of this Master Contract shall be five (5) years commencing on the date of approval by the New York State Comptroller, effective upon mailing by OGS. Starting with the third anniversary of the contract term, either party shall have the option to terminate this contract upon thirty (30) days notice prior to the Contract anniversary date. CANCELLATION (Item 10 Cancellation Clause) remains in full force and application. Upon expiration of the original term, the parties may renew the Contract, with the approval of the Office of the State Comptroller, for an additional five (5) year term or until a new contract is approved by the Office of the State Comptroller, whichever is first. Upon termination of the Contract, all rights and obligations set forth herein shall survive in accordance with their terms as to procurements made or individual licenses granted to Authorized Users prior to such termination.

This Contract is available for use by all Authorized Users (See: Appendix B-3, Clause 6 (Definitions), and Clause 39 (Participation in Centralized Contracts) and may be extended with the joint approval of the Contractor and the Commissioner for joint purchasing by any department, agency or instrumentality of the United States government and/or any state including political subdivisions thereof (“other Authorized Users ”). In the event that this Contract is so extended, such other Authorized Users shall be solely responsible for liability and performance under the Contract, and Contractor agrees to hold them solely responsible for such liability and performance.

2. MERGER OF APPENDICES/CONFLICT OF CLAUSES

This Contract shall incorporate the following appendices as if set forth herein at length. Only documents expressly enumerated below shall be deemed a part of this Contract, and references contained in those documents to additional Contractor documents not enumerated below shall be of no force and effect. Conflicts between these documents shall be resolved in the following descending order of precedence, which supercedes the order of precedence stated in Appendix B-3.

Appendix A	Standard Clauses for NYS Contracts
Base Contract	This Document
Appendix B-3	OGS General Specifications
Appendix C	Contractor's Executive Law, Article 15-A (M/WBE) Requirements
Appendix D	Contract Update Form (For Product and Pricing Updates)
Appendix E	Required Contractor Submissions:
# 1	Mandatory Contractor Questionnaire
# 2	Contractor, Reseller & Distributor Information
# 3	NYS Net Prices (Prices for all Product)
# 4	Installation, Configuration, Extended Warranties, and Maintenance and Support, (Description of Services)
# 5	Consulting and Training (Description of Services)
# 6	Contractor Order Forms or other order information

3. PRODUCT OFFERINGS

Products available under this Contract are set forth herein and specified in Appendix E (Submission #'s 3, 4 and 5). These offerings may be updated during the Contract term to incorporate new Product offerings, price revisions and to delete items. Offering updates must be submitted under the Contract as soon as possible after Contractor announces them. This Contract is currently limited to sale, installation and maintenance of Product (see also 3.2 Service Offerings). Leasing is not permitted at this time. The Commissioner reserves the right to amend the Contract at any time to incorporate lease offerings.

3.1 SYSTEMS & PERIPHERALS

A. Manufacturer's Product Line: All Systems & Peripherals hardware and software Products, peripherals and accessories offered by the Contractor in its US Commercial Price List or GSA Supply Schedule may be included under this contract. Appendix E, which lists Manufacturer's Product and NYS Net pricing, includes the Product, standard warranty, instruction manuals/documentation, shipping costs and delivery FOB destination inside storeroom door. These products include but are not limited to: Large CPU's (Proprietary & open systems and their corresponding operating and application software items), Storage and applicable software for storage (all types including microcomputer storage), Imaging Products (scanners, storage, and software required for such items) (Note: This Contract does not include Microcomputers, PC, printers or the accessories for these items. The State reserves the right at a later date to consolidate other contracts then held by the manufacturer into this Contract or into another or new contract. The State further reserves the right to expand the scope to include other types of peripherals not currently covered herein.)

B. Third Party Products: Only third party Products, which are available under Contractor's standard commercial price list, may be offered for sale under this Contract. Appendix E, which lists such third party products and NYS Net pricing, includes the Product, standard warranty, instruction manuals/documentation, shipping costs and delivery FOB destination inside storeroom door.

To the extent that the Contractor's price list includes components and/or services which overlap other State contracts, the Office of General Services reserves the right, in its sole judgment: 1) to exclude or delete overlapping items from this Contract, or 2) to include such items under this Contract if the Contractor offers such items at or below the alternative contract price.

C. Instruction Manuals/Software & Documentation: Product shall be furnished, at no extra charge, with one complete set of standard operator instruction manuals and documentation (hard copy or CD Rom) as would normally accompany such Product(s). If these documents are subject to a separate cost and are not normally supplied free with the Product, the Contractor must so advise the Authorized User. 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. Authorized Users may purchase additional sets of technical manuals, if needed. Where software documentation is provided in electronic or CD-ROM format, Authorized User shall be entitled to make copies to the extent necessary to fully enjoy the rights granted under this Contract.

3.1.1 SPECIFICATIONS

During the term of the contract, the OGS may request Product specifications for particular items that have been included by the Contractor in the State Net price list. These specifications will be for the sole use of OGS and will be provided by the Contractor at no cost.

A. All equipment delivered for installation will: 1) conform to the manufacturer's testing standards at the time of purchase under this contract, and 2) incorporate the most recent design changes from the manufacturer as of the scheduled delivery dates for that technology.

B. The Products must be commercially released products and available for customer purchase through the contractor's normal marketing channels. Experimental or unannounced equipment shall not be offered.

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

C. Where accessories, adjuncts or peripheral equipment are to be supplied, the Authorized User has the responsibility of providing the Contractor with sufficient specifications regarding installed, existing equipment or software to ensure that the Contractor can determine that the additions are compatible with the User's existing equipment.

D. As an option, in addition to new Product (reference Appendix B-3, sections 21 and 71d.) OGS will accept and encourage Contractor to offer refurbished or remanufactured Products included in the manufacturer's price list

Use of Recycled Material: New York State as a member of the council of Great Lakes Governors, supports and encourages vendors to use recycled 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 unless such use is precluded due to health and welfare or safety requirements or product specifications contained herein.

3.2 SERVICE OFFERINGS:

Services, including installation, configuration, extended warranties, maintenance, support, and other incidental services (including, but not limited to, consulting {analysis and design} and training) may be acquired directly from Contractor under this contract at the prices specified in Appendix E except as noted below. Unless otherwise noted in Appendix E, fees for these services are not included in the Product price. (See exception, below, under 3.2.5 Configuration Services.)

Consulting and training services may not exceed twenty (20%) percent of the total order price for hardware and software (and software maintenance). "Total order price" shall be defined as the aggregate purchase order amount for hardware and software licenses (and software maintenance) placed by the Authorized User under this Contract in a twelve month period. Consulting and training which exceeds twenty (20%) may be procured competitively using the OGS IT Services backdrop contracts or another procurement process selected by the Authorized User. On occasion, an Authorized User may have a single or sole source purchase need for consulting or training. Upon OSC prior approval, such purchase may be done under this contact above 20% in accordance with Procurement Council Guidelines, Section 4 Procurement Techniques, F. Single /Sole Source)].

It is expected that, where services can be furnished by multiple sources (e.g. Contractor and/or Resellers), each source may offer different rates for the same service. Rates offered by each multiple source cannot exceed Contractor's ceiling rate for that type/category. The parties may, upon mutual agreement expressed in the Purchase Order, agree to more advantageous payment or financing schedules.

3.2.1 SERVICE LEVEL AGREEMENTS (SLAs)

Authorized Users will be encouraged to enter into formal written Service Level Agreements (SLAs) with the Contractor prior to placing orders for Product under this Contract, particularly for mission critical, high availability systems. It will be further recommended that the purchase order specifically reference the SLA. The SLA will serve, at a minimum, the following important functions:

- a) Defines the services that the Contractor will provide, assigns priorities to these services, and establishes baseline standards, responsibilities, and commitments.
- b) Becomes the basis for performance measurement reporting and provides the opportunity to identify potential service level improvements.

The SLA may be viewed as a "living" document and should be periodically reviewed and changed based upon mutual agreement to better-fit then current business requirements.

At a minimum SLA's may include the following sections:

1. Scope Of Services
2. Delivery and Acceptance Timeframes and Procedures
3. Time Commitments & Prioritization of Services

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

4. Preventive and Corrective Maintenance Activities
5. Service Level Agreement Penalties/Rewards
6. Reporting Requirements/Problem Escalation and Follow-up Procedures

3.2.2 EQUIPMENT AND/OR SOFTWARE - DROPSHIP ONLY

In the event that an Authorized User specifically requests the purchase as a dropship of Product and does not require installation by the Contractor, Appendix B-3, clause 74 does not apply. The Contractor delivers the Product under manufacturer's warranty on an FOB destination basis and issues an invoice. Upon receipt, the Authorized User can authorize payment.

3.2.3 CONSULTING SERVICES

Consulting Services may include qualified, professional analysis, recommendations, or design expertise to the Authorized User relating to Systems & Peripherals hardware and software. Said expertise must include a current knowledge of the technology marketplace, related Systems & Peripherals issues and trends, and may include the ability to:

- A. Analyze existing technological environment, including hardware, software, and live operations and transaction volumes.
- B. Design and develop new systems, add-ons or modifications to existing Systems & Peripherals systems, including single platform computer systems and distributed systems.
- C. Develop functional and/or design specifications, technical writing and documentation.
Note: Any Contractor who assists an Authorized User with the preparation of specifications that will become a part of any solicitation document used by the Authorized User to solicit "best and final" offers among contractors, may not be eligible to bid on that project pursuant to NY State Finance Law § 163-a. This generally prohibits any vendor who prepares and furnishes a specification to an Authorized User (by means of consulting services under any contract or under the OGS IT Services backdrop contracts) from subsequently bidding on the acquisition as a prime or subcontractor.

3.2.4 TRAINING SERVICES

Training Services may include pre-packaged training Products, and/or customized training programs as requested, including Live Training, Computer Based/Multi-Media Training that encompasses Internet-Delivered Training, and/or Video Based Training.

3.2.5 CONFIGURATION SERVICES

Configuration Services are an option and may include, but are not limited to, the following:

- A. System Set-Up - Set time and date
- B. Board-Level Enhancements - Memory upgrades; I/O Boards; etc.
- C. System Integration (configure install and integrate products acquired from the Contract)
- D. Customized Configurations
- E. Hardware And Software Management (including hardware and software asset tracking and tagging if requested)

Contractor may provide configuration services, including installation of third party software or ancillary options, in order that Authorized Users shall be able to take delivery of completed systems. Unless Contractor separately enumerates a fee for basic configuration services, it shall be presumed that the pricing set forth in Appendix E includes basic software configuration for software that is acquired from Contractor under this Contract. Where third party Product is not acquired under the Contract but from alternative contract vehicles, Contractor may

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

charge Authorized Users, in addition to the hardware price, the additional configuration fee(s) as set forth in Appendix E for configuration of non-contract third party software. Contractor shall be required to coordinate with other contract holders for delivery of such Products and shall comply with all proprietary or copyright restrictions while such Products are in their possession.

3.2.6 MAINTENANCE, GENERAL PROVISIONS

- A. The Contractor shall advise Authorized Users of the maintenance options that may be ordered with the Product and the costs associated with each option. Maintenance may be ordered separately at any time during the contract period and/or license term. Authorized Users will have the option of selecting a monthly/annual maintenance contract or maintenance on a time and materials basis. The Purchase Order, or equivalent, shall identify which option has been selected. The initial maintenance term and any renewal(s) thereof may survive expiration of the contract term as outlined in the second paragraph of Section 1. Contract Scope/Term.
- B. Warranty will become effective subsequent to Acceptance of the Product.
- C. Where Authorized User elects support and maintenance services, Contractor shall maintain the 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 term in accordance with the terms and conditions of the applicable service descriptions.
- D. Maintenance shall be provided upon expiration of the warranty or under circumstances not covered by said warranty. All maintenance options shall be included in Appendix E. Complete details of each type of maintenance option shall be provided in Appendix E, Submission 4.
- E. Unless the agreement (SLA) between the Authorized User and the Contractor specifies otherwise and so long as the malfunction is attributable to Contractor's Product, Contractor guarantees that within forty-eight (48) continuous hours of its response for any maintenance as provided above that repairs will be successfully completed and that system service will be fully restored.
- F. If at any time during the warranty period or any subsequent maintenance period, service is performed on the Product by anyone other than the Contractor, without the Contractor's consent, or if the Product is removed from the premises without the Contractor's supervision and consent, then at the option of the Contractor, the warranty agreement or maintenance contract may become null and void for those items of Product affected by the prohibitions. The Contractor shall notify the OGS Procurement Services Group of any such cancellation. OGS reserves the right to review the validity of such cancellation with the Contractor and Authorized User and take appropriate action.
- G. The Contractor shall not be obligated to repair damage caused by fire or other casualty (except that caused by the Contractor), or willful or grossly negligent operation or handling of the Product by the Authorized User's employees. Properly trained Authorized Users' personnel may make software changes to Authorized Users' configuration without the Contractor's prior written consent. Should the Contractor's consent be required, it shall not be unreasonably withheld. The Authorized User shall be responsible for updating of all records associated with the modifications.
- H. If preventive maintenance (PM) is recommended by the manufacturer, PM shall be performed during the Authorized User's working hours at a time acceptable to the Authorized User.
- I. Authorized Users will pay monthly in arrears for any services utilized for maintenance, service, and parts in accordance with the Contractor's established rates. Prepaid Annual Maintenance will be available only with an additional 5% or greater discount. Rates are to be adjusted monthly in arrears by Contractor for increases and decreases in the quantity of the Product.

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

- J. Authorized Users shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon 30 days written notice to Contractor prior to the end of the term.
- K. Nothing in this Contract shall be construed to prevent Authorized User from acquiring peripheral equipment from a Third Party.
- L. To assist authorized users in complying with the HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) requirements, contractors are required to work with users who wish to either destroy the information on hard drives or retain possession of the drive when trading equipment or receiving maintenance/warranty replacement. The State is seeking alternatives to insure a purchaser has the right to maintain ownership of the hard drive at time of warranty replacement and/or when trading in equipment. Contract Users are encouraged to address this requirement prior to placing orders with contractors.

Contractors are asked to include such options as part of their warranty service and trade-in programs or as an extra, chargeable item. While all users may not wish to exercise this/these option(s), they should be available as contract options.

3.2.7 REMOTE ADMINISTRATION/MAINTENANCE

Appendix E Submission #4 must include a description of any Remote Administration and/or Maintenance Service arrangements if provided with the Product. The description must include the frequency of the interrogations and the resulting data. 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. To ensure switch security, modems installed for remote maintenance must be one or two number dial-back modems.

3.2.8 MAINTENANCE RESPONSIBILITY

Malfunctions that cannot be immediately diagnosed and pinpointed to a certain piece of equipment or service will require the participation of the Contractor until the responsibility for the problem has been unequivocally established.

In no instance shall the failure to resolve the issue of responsibility relieve any Contractor of their obligation to restore Product operation. The Authorized User shall have the right to adjust such matters after the fact and validate charges and/or maintenance credits applicable to the provisions of the maintenance agreement. As a part of maintenance responsibilities, the Contractor shall represent the Authorized User with other involved equipment and service providers in order to identify and correct the malfunction. The specific maintenance responsibilities are described in the maintenance agreement and must include the delineation of responsibility for any charges received from other involved equipment and service providers as a result of the use of Contractor supplied Products.

3.2.9 MAINTENANCE/SERVICE SHEETS

The Contractor shall furnish the Authorized User with a maintenance service sheet for all maintenance requests. The maintenance service sheet shall include, as a minimum, the following data for each request for service:

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

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

The maintenance service report must be supplied upon completion of maintenance whenever it is performed on the system.

4. CONTRACT ADMINISTRATION

- A. **Contract Administrator:** Contractor must provide a dedicated Contract Administrator to support the updating and management of the Contract on a timely basis. Information regarding the Administrator shall be set forth in Appendix E.
- B. **“Toll Free” Number:** Contractor must provide a toll-free telephone number for order tracking/delivery schedule information, Contract administration issues, as well as other questions by Authorized Users related to the day-to-day operation and use of the Contract other than Product support. The toll-free number must be available Monday through Friday on State business days between the hours of 8 a.m. to 5 p.m., Eastern Time. The number shall be set forth in Appendix E, (Submission #3).

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

- C. **Sales & Support Staff:** Contractor must provide service, sales and support staff to service Authorized Users geographically located at multiple purchasing locations throughout New York State. Contractor shall insure that sufficient resources are available directly, or through use of Resellers/distributors in accordance with Section 5, to insure maximum service capability throughout the State. OGS reserves the right to require Contractor to add additional Resellers to this Contract to insure that Authorized Users receive adequate coverage and service.
- D. **Procedures for Updating Contract Price & Product Listings:**
NOTE: THE FOLLOWING PROCEDURES ARE NOT APPLICABLE TO CONTRACTOR PROPOSED CHANGES TO CONTRACT TERMS AND CONDITIONS. Any implied or express request for changes in or additions to existing Contract terms and conditions, including new terms and conditions associated with a specific Product line being added to the Contract for the first time, requires a formal Contract amendment and requires the approval of OGS, the NYS Attorney General and the NYS Comptroller. New or revised Contract terms and conditions are subject to the restrictions set forth in Appendix B-3, Section 40.

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

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

a) **AUTO ADDS / DELETIONS** – “Auto Adds/Deletions” are Contract changes and updates made in accordance with the previously approved Contract pricing formula; e.g., a “discount from list” or pricing based on an approved GSA-based price Schedule. “Auto Adds” do not include any price increases. “Auto Adds/Deletions” include: i) adding new products within the established, previously approved pricing structure, ii) lowering pricing for Products previously incorporated under the Contract, and iii) deleting Products previously incorporated under the Contract. For categories (i) and (ii) Auto Adds: Contractor shall automatically update the Contract price list and may proceed with selling Products without prior approval of either OGS or the Office of the State Comptroller. Contractor should note, however, that all “Auto Adds” approved by OGS are subject to a post audit by the Office of the State Comptroller. For category (iii) Auto Deletions, at the end of and subject to the period specified in Appendix B-3, Clause 80 (“Changes to Product or Service Offerings”), Contractor may automatically update the Contract price list by deleting the Product(s), without prior approval of either OGS or the Comptroller.

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

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

b) **REGULAR ADD** - “Regular Adds” are requests for i) price increases for Products which are already incorporated under the Contract, and ii) addition of new products to the Contract which do not fall under the previously established price structure or discounts for Product types previously approved under the Contract. Regular Adds include re-bundled Products or Services. Regular Adds must be submitted to OGS for prior approval, and must be accompanied by a justification of reasonableness of price. Regular Adds are subject to pre-audit by the Comptroller. If approved, OGS staff will notify Contractor in writing. Contractor until after receipt of OGS approval of the “Regular Add”, may not electronically post new product offerings. When the Contract pricing is based on GSA prices, the revised prices or prices of new Products must reflect current GSA prices adjusted as necessary for any additional discounts.

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

d) **CHANGES IN RESELLER LIST** - If the Contractor allows resellers to participate in the contract in accordance with the Use of Resellers/Distributors clause of this Contract, requests to add or delete resellers or to modify reseller information must be submitted for prior approval of the State. Contractor may request changes to the designated Reseller List by submission of a completed, revised Appendix E, Submission # 2.

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

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

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

- Price increases
- Products being added

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

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

(5) **COVER LETTERS:** A Contract update must be accompanied by three (3) copies of the Contract Update Form set forth in Appendix E. Contractor should briefly describe the nature and purpose of the update (e.g., update requested in order to reflect a recently approved GSA schedule, to restructure the pricing to its Licensees generally, and/or for new Products or services which fall into a new group or category that did not exist at the time of approval of the Contract by the New York State Comptroller, etc.). Each of the three copies of the Contract Update Form must

contain original signatures by an individual authorized to sign on behalf of Contractor, and an original corporate acknowledgment (see below).

5. USE OF RESELLERS/DISTRIBUTORS

Contractor must provide service, sales and support staff to service Authorized Users geographically located at multiple purchasing locations throughout New York State. Contractor shall insure that sufficient resources are available directly, or through Resellers/Distributors to insure maximum service capability throughout the State. The State agrees to permit Contractor to utilize approved, designated value added resellers (VARs), distributors and dealers (“Resellers”) to participate as alternate distribution sources for Contractor. Such participation is subject to the following conditions:

- A. Designation of Reseller(s):** Contractor shall specify whether orders must be placed directly with Contractor, or may be placed directly with designated Reseller(s). When Reseller(s) are submitted for approval, Contractor must provide the State, in advance, with all necessary ordering, billing addresses and Federal Identification numbers in the format provided in Appendix E (Submission #2).
- B. Conditions of Participation:** Reseller(s) must be approved in advance by the State as a condition of eligibility under this section. 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 as fulfillment agents under this Contract by product line, contracting program (i.e., government/educational sales), geographic region, size/sales volume, technical training or other criteria (“qualifying criteria”), provided that: i) 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; ii) all general categories of qualifying criteria must be disclosed by the Contractor to the State, in advance, at the beginning of the Contract term, and iii) those qualifying criteria met by the Reseller must be identified on the form provided in Appendix E (Submission #2) at the time that Reseller approval is requested under this paragraph; and iv) immediate advance notice is provided to OGS in the event that a change in Reseller’s status occurs during the Contract term.

All Resellers who have been approved in accordance with the foregoing paragraph shall be eligible to quote lower pricing for procurements under this Contract which meet their qualifying criteria. Except as otherwise set forth in Appendix E (Submission #2), Contractor warrants and represents that it shall not, directly or indirectly, by agreement, communication or any other means, restrict any Reseller’s participation or ability to quote a particular order.

- C. 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 Semi-Annual Reports to the State as a condition of payment, and where applicable, to Third Party Developer(s) in accordance with the reporting requirements of this Contract. In addition to inclusion of Reseller(s) volume in the Contractor’s semi-annual reporting obligation to the State, at the request of Authorized User, Reseller(s) shall provide Authorized User with semi-annual reports of the individual Authorized User’s Contract activity with Reseller.
- D. Applicability of Contract Terms:** Product ordered directly through Reseller(s) shall be limited to Products previously approved for inclusion under this Contract and shall be subject to all terms and conditions of this Contract as a condition of Reseller participation.

6. PAYMENTS/PRICING

Prices shall be calculated and paid in accordance with this section and Appendix E (Submission # 3) in effect at the time of order placement. Pricing set forth in Appendix E (Submission # 3) includes all applicable documentation, media, shipping, delivery and handling charges. (Hereinafter “NYS Net Price”) Contractor may, however, upon mutual agreement of the Authorized User, negotiate more advantageous pricing for particular orders. Orders placed under this Contract will additionally be governed by purchasing procedures included in the “Contract Award Notification”.

A. Travel, Meals & Lodging Unless expressly set forth to the contrary in Appendix E (Submission # 3), NYS net prices set forth in the Contract shall be deemed inclusive of travel, meals and lodging, wherever applicable. Where travel, meals and lodging are allowed over and above the NYS Net Prices, reimbursement to Contractor for such costs for employees who do not reside in the local commuting area for the work site, shall be made in accordance with the State’s Travel Reimbursement Manual published by the New York State Office of the State Comptroller. It will be the responsibility of the Authorized User to provide Contractor the most recently published reimbursement guidelines and rates.

B. Subsequent Changes to Product Offerings All changes must be in accordance with the conditions set forth below and in accordance with the Procedures outlined in Section 5. C.

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

(2) **Deletion of Products:** OGS reserves the right to delete any Product from the Contract at its discretion at any time. (See also Section 4, D, (1), a.)

(3) **Price Decreases:** Shall be calculated in accordance with Appendix B-3, Clause 43.

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

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

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

c) **Escalation Cap:** Contractor has the sole responsibility to submit to OGS a rate adjustment request that must include a copy of the index or other supporting documentation necessary to support the request. Such adjustment shall in no event exceed the lesser of five (5%) percent or the percent increase in the latest copy of the “National Consumer Price Index for All Urban Consumers (CPI-U)”, as published by the U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. 20212. In no event can prices exceed the Contractor’s published U.S. Commercial List price.

d) **Effective Date of Increase:** Price increases shall be effective upon final approval by the State, and may not be posted on the Internet prior to receipt of final approval. (See Section 4, D, b) Regular Add)

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

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

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

(3) **Pricing Increases:** Price increases shall be effective upon final approval by the State, and may not be electronically posted by Contractor prior to receipt of final approval. (See Section 4, D, b) Regular Add)

- D. Trade-Ins** - Authorized Users may trade-in equipment when making purchases from this Contract. Trade-in's must be negotiated between the Authorized User and the Contractor as there is no mandatory trade-in policy established for 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. Users are obligated to actively seek current fair market value when trading equipment and must keep accurate records in the file verifying the process. For State Agencies, it may be necessary to provide this documentation to the Office of the State Comptroller. (See Section 3.2.6 L)

7. DISTRIBUTION OF CONTRACTOR PRICE LIST AND CONTRACT APPENDICES

Contractor shall bear the cost of and shall effect distribution of copies of the Contract, including price lists and appendices, upon request. Contractor shall not, however, distribute Contract information unless OGS has approved it in advance. Contractor shall also be required to furnish OGS with additional copies of the approved price lists (paper copy or diskette, at the State's discretion) upon request as may be necessary in the normal course of business.

7.1 CURRENT AGREEMENTS BETWEEN CONTRACTOR AND ELIGIBLE AUTHORIZED USERS

Eligible Authorized Users with independent contracts for Contractor products and services may, at any time, convert any existing contract(s) with Contractor to participate under this Contract and upon doing so shall have all rights of an "Authorized User", provided that notice of such migration shall be forwarded to the Contractor.

Contractor has an affirmative responsibility to inform eligible Authorized Users, via e-mail or other formal communications, of the terms, conditions and pricing of this Contract at the earliest opportunity after approval of this Contract by all parties. (See also, Appendix B-3, Clause 33,e.)

8. INTERNET ACCESS TO CONTRACT & PRICING INFORMATION

It is the intention of the parties to facilitate access by Authorized Users to contract offering and pricing information primarily electronically via the Internet. To that end, OGS shall host and update the Contract terms and conditions throughout the Contract term. The Contractor is required to host the complete Contract, NET pricing and Product offerings at Contractor's Internet site, at Contractor's sole expense, including all subsequent changes in the Contract offerings (adds, deletes, price revisions) throughout the Contract term. Contractor may not password protect or otherwise restrict access to the site. This Contract, and Contractor's NYS Contract page, or pages required by this agreement, constitute public documents under the laws of the State of New York and Contractor cannot restrict access (e.g., through use of restrictive technology or passwords) to the contract terms and conditions, or data, or records, and or information required to be maintained by the Contractor for the State.

- A. Warranty:** Contractor warrants and represents that Contract and related information will be accurately and completely posted, maintained and displayed in an objective and timely manner which renders it clearly distinguishable from other, non-Contract offerings at Contractor's web site. Contractor shall indemnify the State and Contract users for damages resulting from errors or inaccuracies in such information, or from any failure to maintain or timely post Contract information in accordance with this paragraph.
- B. Price Data Retention & Audit:** Information at web site should reflect the pricing information for the preceding twelve-month period. At the end of each twelve-month period, the Contractor shall either electronically archive the information at the web site in a manner which allows the State to access the information or electronically transmit the information to the State. This does not relieve the Contractor from any audit requirements imposed by Appendix A, Clause 10, nor does it shorten the retention periods for information stated therein. In addition, annual audits of the information posted at Contractor's web site may be conducted by OSC, or by an independent auditor at Contractor's expense.

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

- C. **Site Changes:** Contractor hereby consents to a link from the OGS web site to the Contractor's web site in order to facilitate access to Contract information. The establishment of the link is provided solely for convenience in carrying out the business operations of the State, and OGS reserves the right to terminate or remove a link at any time, in its sole discretion, without advance notice, or to deny a future request for a link. OGS will provide Contractor with subsequent notice of link termination or removal. Contractor shall provide OGS with timely written notice of any change in URL or other information needed to access the site and/or maintain the link.
- D. **Use of Access Data Prohibited:** If Contractor stores, collects or maintains data electronically as a condition of accessing State Contract information, such data shall only be used internally by Contractor for the purpose of implementing or marketing the State Contract, and shall not be disseminated to third parties or used for other marketing purposes. This Contract constitutes a public document under the laws of the State of New York and Contractor cannot restrict access to the Contract terms and conditions including pricing, i.e., through use of restrictive technology or passwords.
- E. **Responsibility for Content:** Contractor is solely responsible for administration, content, intellectual property rights and all materials at Contractor's web site. Contractor is solely responsible for its actions and those of its agents, employees, resellers, subcontractors or assigns, and agrees that neither Contractor nor any of the foregoing has any authority to act or speak on behalf of the State. When building their page delivered pursuant to this Contract, Contractor agrees to comply with **Office for Technology Policy # P04-002**, (<http://www.oft.state.ny.us/policy/p04-002/index.htm>), **Accessibility of State Agency Web-based Intranet and Internet Information and Applications** dated June 21, 2004, (as such policy may be amended, modified or superseded) which requires that state government web sites be accessible to persons with disabilities. The State of New York has adopted the W3C Web Content Accessibility Guidelines <<http://www.w3.org/TR/WAI-WEBCONTENT/>> as a means to provide optimal access to State agency web sites and the content therein. The Contractor agrees to apply the most current version of these guidelines in the design, creation and maintenance of its linked website. Contractor agrees that its Web content shall conform with level "A", satisfying all priority one checkpoints. In addition, Contractor agrees that its site will have a contact mechanism so individuals who might have trouble accessing any portion of the site can report the problem. The Contractor agrees that the Web Accessibility Guidelines and the checkpoints and guidelines referenced therein will be used in the development of all new pages and will be the basis for bringing existing pages into compliance as required by the **Office for Technology Policy # P04-002**.
- F. **On-line Price Configurator:** Contractor may be required to make available an on-line configurator at its Contract web site. Directions and assistance in using the configurator and web site in general must be available at entry. This configurator must enable Authorized Users to:
- (1) view the options available for the type Product requested;
 - (2) search and find Products under the approved Contract list;
 - (3) calculate complete acquisition costs
- Information about payment, shipping, delivery terms and special pricing should be available. Authorized Users should have the option of printing their "shopping cart" choices; and for those users, who are positioned to use it, an option for on-line secure ordering should also be available.
- G. **Access By Non-Electronic Means:** Notwithstanding the foregoing, where an Authorized User does not have the capability to access contract information electronically, it shall be the Contractor's responsibility to configure the transaction in accordance with the above, and to configure and print out the configured transaction screen and furnish by means of FAX or hardcopy the configured transaction summary to the Authorized User upon request.

9. REPORTING/MONITORING CONTRACT PERFORMANCE

Contractor shall electronically provide the State with verified semi-annual reports in the format required by the State showing the dollar volume of any and all sales under this Contract for the prior six-month period. Said report shall include a break out of participation by individual Authorized Users, including State and non-State governmental entities and others authorized by law. The Industrial Funding Fee payable to the New York State Office of General Services Finance Office will also be due on the same schedule. Reports and Industrial Funding Fee payments shall be delivered within thirty (30) days of the close of the semi-annual period. Semi-annual periods will end on December 31st and June 30th. If the contract period begins or ends in a fractional portion of a reporting period only the actual contract sales for this fractional period should be reported in that semi-annual report. Similarly the Industrial Funding Fee payable to the New York State Office of General Services Finance Office will only be due for the actual contract sales reported in that reporting period. The amount of the Industrial Funding Fee Payment shall match the contract sales contained in the semi-annual report based on the percentage established by the GSA. This percentage is currently set at .75%. In the event that a Contractor utilizes resellers, it is the responsibility of Contractor to include all Contract revenues from these participants in the semi-annual report. Where third party Product is offered and delivered under this Contract, Contractor shall be required to separately report such sales volume on a semi-annual basis to the State.

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

10. CANCELLATION

In addition to the cancellation rights stated in Appendix B-3, any order placed under this Contract may be canceled for convenience at any time by the Authorized User upon thirty (30) days written notice without penalty or other early termination charges due.

In the event that an order is canceled either for cause or for convenience, Contractor shall be entitled to payment for services rendered and materials provided prior to the termination, and subject to offsets, if any, for claims by Authorized User against the Contractor. In no event shall any Authorized User be liable for lost profits, incidental, consequential or special damages based upon the exercise of OGS or Authorized User's cancellation rights.

11. TRAINING AND IMPLEMENTATION

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

12. NYS STANDARD RESPONSIBILITY QUESTIONNAIRE (Appendix 1)

Contractor agrees to fully and accurately complete the NYS Standard Vendor Responsibility Questionnaire, which is attached as Appendix 1 (hereinafter the "Questionnaire"). The Contractor acknowledges that the State's execution of the Contract will be contingent upon the State's determination that the Contractor is responsible, and that the State will be relying upon the Contractor's responses to the Questionnaire in making that determination. The Contractor agrees that if it is found by the State that the Contractor's responses to the Questionnaire were intentionally false or intentionally incomplete, on such finding, OGS may terminate the Contract by providing ten (10) days written notification to the Contractor. In no case shall such termination of the Contract by the State be deemed a breach thereof, nor shall the State be liable for any damages for lost profits or otherwise, which may be sustained by the Contractor as a result of such termination.

NEW YORK STATE OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP

13. TAX LAW 5-A (Appendix 2)

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

This law imposes upon certain contractors the obligation to certify whether or not the contractor, its affiliates, and its subcontractors are required to register to collect state sales and compensating use tax and contractors must certify to DTF that each affiliate and subcontractor exceeding such sales threshold is registered with DTF to collect New York State and local sales and compensating use taxes. The law prohibits the State Comptroller, or other approving agency, from approving a contract awarded to a contractor meeting the registration requirements but who is not so registered in accordance with the law.

Contractor certification forms and instructions for completing the forms are attached to this contract template. Form No. ST-220-TD must be filed with and returned directly to DTF. Unless the information upon which the ST-220-TD is based changes, this form only needs to be filed once with DTF. If the information changes for the contractor, its affiliate(s), or its subcontractor(s), a new Form No. ST-220-TD must be filed with DTF.

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

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

14. AMENDMENT TO APPENDIX B-3

Clause 59 c –since Executive Order 127 has been rescinded, this clause is replaced with the following;

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

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

15. AMENDMENT OF BASE CONTRACT

Maintenance Services for Hardware and Software are removed from this contract and are available from the IBM Comprehensive Services Agreement PS61988.

Section 3 – amended to remove “maintenance support” from this clause.

Section 3.2 – amended to reflect removal of storage hardware and software maintenance which are to be performed under the existing Comprehensive Services Agreement PS61988, except for extended warranties and installation services. The standard 20% rule for consulting & training (also included in sections 3.2.3 & 3.2.4) will also still apply.

Section 3.2.6 A-K – amended, with the exception of any references to Warranty provisions, so that maintenance will be performed under the existing Comprehensive Services Agreement PS61988.

Section 3.2.6 L – will remain unchanged.

Sections 3.2.7 3.2.8 and 3.2.9 – are amended to be removed since maintenance services will be performed under the existing Comprehensive Services Agreement PS61988.

16. ENTIRE AGREEMENT

This Contract and the referenced appendices constitute the entire agreement between the parties thereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and these contracts shall not be changed, modified or altered in any manner except by an instrument in writing executed by authorized representatives of both parties hereto. Such parties include Contractor, the Commissioner of OGS, the Attorney General, and the Comptroller on behalf of the State of New York. Authorized Users shall not have the authority to modify the terms of the Contract, except as to acceptance of better terms and pricing for a particular procurement than that set forth under the Contract.

17. NOTICES

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

James Patrick Procurement Officer 1
OGS / PSG 38th Floor, Corning Tower
Empire State Plaza
Albany, New York 12242
Phone: (518) 486-6036
Fax: (518) 486-6867
Email: james.patrick@ogs.state.ny.us

18. 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.

19. SEVERABILITY

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

20. DISPUTE RESOLUTION POLICY

It is the policy of the Office of General Services Procurement Services Group (PSG) to provide vendors with an opportunity to administratively resolve disputes, complaints or inquiries related to PSG bid solicitations or contract awards. PSG encourages vendors to seek resolution of disputes through consultation with PSG staff. All such matters will be accorded impartial and timely consideration. Interested parties may also file formal written disputes. A copy of PSG's Dispute Resolution Procedures for Vendors may be obtained by contacting the person shown on the front of this Invitation for Bids or through the OGS website (www.ogs.state.ny.us).

APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

TABLE OF CONTENTS

1. **Executory Clause**
2. **Non-Assignment Clause**
3. **Comptroller's Approval**
4. **Workers' Compensation Benefits**
5. **Non-Discrimination Requirements**
6. **Wage and Hours Provisions**
7. **Non-Collusive Bidding Certification**
8. **International Boycott Prohibition**
9. **Set-Off Rights**
10. **Records**
11. **Identifying Information and Privacy Notification**
12. **Equal Employment Opportunities For Minorities and Women**
13. **Conflicting Terms**
14. **Governing Law**
15. **Late Payment**
16. **No Arbitration**
17. **Service of Process**
18. **Prohibition on Purchase of Tropical Hardwoods**
19. **MacBride Fair Employment Principles**
20. **Omnibus Procurement Act of 1992**
21. **Reciprocity and Sanctions Provisions**
22. **Purchases of Apparel**

STANDARD CLAUSES FOR NYS CONTRACTS

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

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

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

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

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

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

thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

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

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

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

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

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

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.

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

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

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

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.

In accordance with Section 312 of the Executive Law, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for

the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then:

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

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

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

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

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

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

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

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

17. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

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

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

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

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

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

NYS Department of Economic Development
Division for Small Business
30 South Pearl St -- 7th Floor
Albany, New York 12245
Telephone: 518-292-5220
Fax: 518-292-5884

<http://www.empire.state.ny.us>

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

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

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

- (a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;
- (b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;
- (c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and
- (d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

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

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

THIS PAGE IS INTENTIONALLY LEFT BLANK

APPENDIX B-3

General Specifications for Hardware Contracts

(Applicable to Negotiated Hardware & Related Software and Services Contracts)

TABLE OF CONTENTSTERMS AND CONDITIONS

<ul style="list-style-type: none"> 1. Applicability 2. Governing Law 3. Appendix A 4. Ethics Compliance 5. Conflict of Terms 6. Definitions – Part I 7. International Bidding 8-14. (Reserved) 15. Record Disclosure/ Confidentiality of Proprietary Records 16. Prevailing Wage Rates 17. Taxes 18. Expenses Prior to Contract Execution 19. Advertising 20. Product References 21. Recycled, Remanufactured or Recovered Materials 22-23. (Reserved) 24. Drawings 25. Site Inspection 26. Procurement Card 27. Samples 28 - 29. (Reserved) 30. Clarifications/Revisions 31-32. (Reserved) 33. Performance Qualifications 34. Disqualification for Past Performance 35. (Reserved) 36. Release of Materials 37. (Reserved) 38. Contract Creation/ Execution 39. Participation in Centralized Contract 40. Modification of Terms 41. Scope Changes 42. Estimated Quantity Contracts 	<ul style="list-style-type: none"> 43. Best Pricing Offer 44. Purchase Orders 45. Product Delivery 46. Weekend & Holiday Deliveries 47. Shipping/Receipt of Product 48. Risk of Loss 49-50. (Reserved) 51. Rejected Product 52. Installation 53. Repaired or Replace Parts/Components 54. On-Site Storage 55. Employees/Subcontractors/ Agents 56. Assignment/ Subcontractors 57. Performance/Bid Bond 58. Suspension of Work 59. Termination 60. Force Majeure 61. Contract Billings 62. Default - Authorized User 63. Interest on Late Payments 64. Remedies for Breach 65. Assignment of Claim 66. Toxic Substances 67. Independent Contractor 68. Security/Confidentiality 69. Cooperation With Third Parties 70. Contract Term -Renewal 71. Warranties/Guarantees 72. (Reserved) 73. Software License Grant 74. Product Acceptance 75. Audit of Licensed Product Usage 76. Ownership/Title To Project Deliverables 77. Proof of License 	<ul style="list-style-type: none"> 78. Migration to Centralized Contract 79. Product Version 80. Changes to Product or Service Offering 81. No Hardstop/Passive License Monitoring 82. Source Code Escrow For Licensed Product 83. Indemnification & Limitation of Liability
--	--	--

APPENDIX B-3 GENERAL SPECIFICATIONS FOR HARDWARE & RELATED SOFTWARE AND SERVICES CONTRACTS

GENERAL

1. APPLICABILITY The terms and conditions set forth in this Appendix B-3 are expressly incorporated in and applicable to all negotiated hardware and related Software and services contracts let by the Office of General Services Procurement Services Group, or by any other Issuing Entity where incorporated by reference. Captions are intended as descriptive and are not intended to limit or otherwise restrict the terms and conditions set forth herein.

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

3. APPENDIX A Appendix A (*Standard Clauses for New York State Contracts*) is expressly incorporated and made a part of this Contract.

4. ETHICS COMPLIANCE All Contractors and their employees must comply with the requirements of Sections 73 and 74 of the NYS *Public Officers Law*, and other State codes, rules and regulations establishing ethical standards for the conduct of business with New York State. In signing the Contract, Contractor certifies full and continuing 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 Contract termination, and/or other civil or criminal proceedings as required by law.

5. CONFLICT OF CLAUSES Conflicts between Contract documents shall be resolved in the following descending order of precedence:

- Appendix A (*Standard Clauses for NYS Contracts*)
- **Negotiated Contract Document** Writing(s) setting forth the final agreement of the parties, excluding incorporated appendices.
- Appendix B-3 (This document)
- **Incorporated Contract Appendices, if any, following order of precedence stated in the negotiated Contract**

6. DEFINITIONS Terms used in this Contract shall have the following meanings:

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

ATTORNEY GENERAL Attorney General of the State of New York.

AUTHORIZED USER(S) Agencies, or any other entity authorized by the laws of the State of New York to participate in NYS Centralized Contracts (including but not limited to political subdivisions, public authorities, public benefit corporations and certain other entities set forth in law), or the State of New York acting on behalf of one or more such

Agencies or other entities, provided that each such Agency or other entity shall be held solely responsible for liabilities or payments due as a result of its participation.

CERTIFICATES OF PARTICIPATION (COPS) Certificates issued pursuant to Article 5-A of the State Finance Law which represent the right to receive a proportionate share in lease, installment or other periodic payments to be made by any state department, agency or the City University of New York.

COMMISSIONER Commissioner of OGS, or in the case of a Contract or specifications issued by an Issuing Entity, the head of such Issuing Entity or their authorized representative.

COMPTROLLER Comptroller of the State of New York

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

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

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

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

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

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

ENTERPRISE PARTICIPANTS A designated group of one or more Licensees acquiring Product under this Contract on an aggregated basis.

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.

ISSUING ENTITY The Office of General Services or the Authorized User who issues the Contract documents for a procurement.

LICENSED SOFTWARE Software transferred upon the terms and conditions set forth in the Contract. Licensed Software includes Error Corrections, upgrades, enhancements or New Product Releases, and any deliverables due under a maintenance or service Contract (e.g., patches, fixes, Program

Temporary Fixes, programs, code or data conversion, or custom programming).

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

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

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

LOGICAL PARTITION A subset of the processing power within a machine which has been divided through hardware and/or software means (i.e., *Processor Resources/System Manager* [PR/SM]) so as to limit the total processing power which is accessible by an operating system image by individual Authorized Users or individual software products.

NEW PRODUCT RELEASES (Product Revisions) Any commercially released revisions to the version of a Product version 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.

OBJECT CODE The machine executable code that can be directly executed by a computer's central processing unit(s).

OGS The New York State Office of General Services

PHYSICAL PARTITION A subset of the processing power within a central electronic complex which has been derived through hardware means so as to limit the total processing power accessible by an operating system image by individual users or individual Products.

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

PRODUCT 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.

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

PURCHASE ORDER The Authorized User's fiscal form or format which is used when making a purchase (e.g., formal

written Purchase Order, Procurement Card, electronic Purchase Order, or other authorized instrument).

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

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

STATE State of New York

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

VIRUS Any computer code, whether or not written or conceived by Contractor, which 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.

7. INTERNATIONAL BIDDING All offers (tenders), and all information and Product required by the Contract 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.

8 - 14. (RESERVED)

15. RECORD DISCLOSURE/CONFIDENTIALITY OF PROPRIETARY RECORDS Contractor may preserve proprietary rights as to confidential or business process information in accordance with procedures established under NYS Public Officers Law, § 89, provided that: (i) Contractor shall inform the Commissioner or Authorized User, as applicable, upon submission of its records, in writing, that such records furnished, are proprietary and are not to be disclosed; and (ii) said records shall be sufficiently identified; and (iii) Contractor shall state the reasons why the information should be exempted from disclosure; and (iv) designation of said records as exempt from disclosure is reasonable and approved by the Commissioner or Authorized User, as applicable. Acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures.

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

a. "Public Works" and "Building Services" - Definitions
i. Public Works *Labor Law* Article 8 applies to Contracts for public improvement in which laborers, workers or mechanics are employed on a "public works" project (distinguished from public "procurement" or "service" Contracts). The State, a public benefit corporation, a municipal corporation (including a school district), or a commission appointed by law must be a party to the Contract. The wage and hours provision

applies to any work performed by Contractor or subcontractors.

ii. Building Services *Labor Law* Article 9 applies to Contracts for building service work over \$1,500 with a public agency, which 1) involve the care or maintenance of an existing building, or 2) involve the transportation of office furniture or equipment to or from such building, or 3) involve the transportation and delivery of fossil fuel to such building, and 4) the principal purpose of which is to furnish services through use of building service employees.

b. Prevailing Wage Rate Applicable to Proposals A copy of the applicable prevailing wage rates to be paid or provided are attached to the solicitation. Contractors must submit proposals 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. Where the solicitations require the Contractor to enumerate hourly wage rates in the proposal, Contractor may not submit proposals based upon hourly wage rates and supplements below the applicable prevailing wage rates as established by the New York State Department of Labor. **Proposals which fail to comply with this requirement will be disqualified.**

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

d. Public Posting & Certified Payroll Records In compliance with Article 8, Section 220 and Article 9, Sections 231 and 233 of the *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 sub-contractors 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 sub-contractors on public works projects must submit monthly payroll transcripts to the Issuing Entity which has prepared or directs the preparation of the plans and specifications for a public works project, as set forth in the Bid Specifications or Contract, as applicable. For mini-

bid solicitations, the payroll records must be submitted to the entity preparing the agency mini-bid project specification. For "agency specific" proposals, 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 issuing entity, 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 building services contracts.**

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

e. Day's Labor - Defined for Article 8, Public Works (For Purposes of Article 8 of the Labor Law) No laborer, worker or mechanic 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 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.

17. TAXES

a. The NYS net 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 items 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 Contractor.

c. Purchases by Authorized Users other than the State of New York may be subject to such taxes, and in those instances the tax should be computed based on the NYS net price and added to the invoice submitted to such entity for payment.

18. EXPENSES PRIOR TO CONTRACT EXECUTION

The State is not liable for any costs incurred by a Contractor during the course of negotiations of a Contract or for any work performed prior to Contract execution.

19. ADVERTISING Contractor agrees not to use the contract as a part of any commercial advertising or press release without the prior written approval of the Commissioner.

20. PRODUCT REFERENCES

a. (RESERVED)

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

21. RECYCLED, REMANUFACTURED OR RECOVERED MATERIALS

Upon the conditions specified in the Contract and in accordance with the laws of the State of New York, Contractors are encouraged 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 and use of the product or packaging unless such use is precluded due to health, welfare or safety requirements. Where such use is not practical, suitable, or permitted by the Contract, Contractor should deliver new materials in accordance with the warranties set forth in the Contract.

Refurbished or remanufactured components or Products may be accepted at the discretion of the Commissioner, or upon the conditions set forth in the Contract.

Products with recycled, recovered, refurbished, or remanufactured content must be identified in the Contract or will be deemed new Product.

22. (RESERVED)

23. PRICING

a. (RESERVED)

b. **Net Pricing** Unless other specified in the Contract, prices are net, including transportation, customs, tariff, delivery, taxes (if any) delivery and other charges fully prepaid by the Contractor to the destination(s) indicated on the Purchase Order, subject to the prompt payment discount.

c. (RESERVED)

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

e. **COPS or Third Party Financing** If Product acquisitions are financed through Certificates of Participation (COPS) or other 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.

24. DRAWINGS

a. (RESERVED)

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.

25. SITE INSPECTION

Where a site inspection is required by the Authorized User, Contractor shall be required to inspect the site, including environmental or other conditions or pre-existing deficiencies in the installed Product, equipment or environment, which may affect Contractor's ability to properly deliver, install or otherwise provide the required Product. All inquiries regarding such conditions shall be made in writing. Contractor shall be deemed to have knowledge of any deficiencies or conditions which such inspection or inquiry might have disclosed. Contractor must provide a detailed explanation if additional work is required under this clause in order to properly complete the delivery and installation of the required Product.

26. PROCUREMENT CARD

The State of New York has entered into agreements for purchasing card services. The Purchasing Card enables Authorized Users to make authorized purchases directly from a Contractor without processing the Purchase Orders or Purchase Authorizations currently required. 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 unsatisfactorily, defective or faulty Product in accordance with other contract requirements, the Contractor shall immediately credit a cardholder's account for Products returned as unsatisfactory, defective or faulty.

27. SAMPLES

a. - e. (RESERVED)

f. Requests For Samples By Authorized Users

Requests for samples by Authorized Users require the consent of the Contractor. Where Contractor refuses to furnish a sample, Authorized User may, in its sole discretion, make a determination on the performance capability of the Product or on the issue in question. Any samples (evaluation units) furnished to an Authorized User are furnished with the understanding that Authorized User will either return the evaluation units to Contractor after a minimum thirty (30) day evaluation period (or other mutually agreed to period of time), or the Authorized User will pay the Contractor for the

evaluation units in accordance with the payment clause set forth in the Contract.

28. - 29. (RESERVED)

30. CLARIFICATIONS / REVISIONS Prior to award, the Commissioner reserves the right to seek clarifications, request revisions, or to request any information deemed necessary from the Vendor. Failure to provide requested information may result in Contract not being processed.

31. - 32. (RESERVED)

33. PERFORMANCE QUALIFICATIONS The Commissioner reserves the right to investigate or inspect at any time whether or not the Product, qualifications or facilities offered by the Contractor meet the requirements set forth in the Contract or Purchase Order. Contractor shall at all times during the Contract term remain responsible and responsive. A Contractor must be prepared, if requested by the Commissioner, to present evidence of experience, ability and financial standing, as well as a statement as to capacity of the manufacturer for the production, distribution and servicing of the Products offered. If the Commissioner determines that the conditions and terms of the Contract are not complied with, or that items or Product proposed to be furnished do not meet the specified requirements, or that the qualifications, financial standing or facilities are not satisfactory, or that performance is untimely, the Commissioner may avail him or herself of the remedies outlined herein (see particularly Sections 58, 59 and 64) Nothing in the foregoing shall mean or imply that it is obligatory upon the Commissioner to make an investigation either before or after award of a Contract, but should such investigation be made, it in no way relieves the Contractor from fulfilling all requirements and conditions of the Contract.

34. DISQUALIFICATION FOR PAST PERFORMANCE Vendor may be disqualified from being awarded a Contract, if Vendor, or anyone in Vendor's employment, has previously failed to perform satisfactorily in connection with public bidding or Contracts.

35. (RESERVED)

36. RELEASE OF MATERIALS Requests for information concerning the Contract may be submitted under the *Freedom of Information Law*. Information shall be released as required by law after Contract award. Written requests should be directed to the Commissioner.

37. (RESERVED)

38. CONTRACT CREATION / EXECUTION Except for contracts governed by Article 11-B of the *State Finance Law*, upon receipt of all required approvals a Contract shall be deemed executed and created upon the Commissioner's mailing or electronic communication to the address set forth in the Contract of: i) a Letter of Acceptance; ii) a fully executed Contract; or iii) a Purchase Order authorized by the Commissioner.

39. PARTICIPATION IN CENTRALIZED CONTRACT The following shall not limit or inhibit the OGS

Commissioner's authority under *State Finance Law*, Section 163 (10) (e) (Piggybacking):

a. Agencies All State Agencies may utilize and purchase under any State Centralized Contract let by the Office of General Services Procurement Services Group, unless the Contract limits purchases to specific State Agencies.

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

c. Voluntary Extension Purchase Orders issued against a State Centralized Contract by any Authorized User not provided for by law 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 Contracts for services to those additional entities authorized to utilize Contracts for commodities under Section 163 (3) (a) (iv) of the *State Finance Law*, which would comprise all entities authorized under prior laws.

d. Responsibility for Performance Participation in New York State Centralized Contracts by Authorized Users is permitted upon the following conditions: a) 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; b) 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; c) 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 d) each non-state agency Authorized User and Contractor guarantees to save the State, its officers, agents and employees harmless from any liability that may be or is imposed by their failure to perform in accordance with its obligations under the Contract.

e. Contract Migration State Agencies or any other Authorized User holding individual Contracts with Contractors under a Centralized Contract shall be able to migrate to the Centralized Contract with the same Contractor, effective on the Contract begin date (retroactively, if applicable). Such migration shall not operate to diminish, alter or eliminate any right that the agency or other Authorized User otherwise had under the terms and conditions of their individual Contract.

40. MODIFICATION OF TERMS The terms and conditions set forth in the Contract govern all transactions by Authorized User(s) under this Contract. The Contract may only be modified or amended upon mutual written agreement of the Commissioner and Contractor. For individual orders, however, the Contractor may offer Authorized User(s) more advantageous pricing, payment, or other terms and conditions than those set forth in the Contract. In such event, Contractor shall furnish a copy of such better offer to the Commissioner upon request.

Other than where terms are more advantageous for the Authorized User(s) than those set forth in the Contract, no

alteration or modification of the terms of the Contract, including substitution of Product, shall be valid or binding against Authorized User(s) unless authorized by the Commissioner or specified in the *Contract Award Notification*. Contractor may not unilaterally modify the terms of the contract by affixing additional terms to Product upon delivery (e.g., attachment or inclusion of standard pre-printed order forms, product literature, "shrink wrap" terms accompanying or affixed to Product) or by incorporating such terms onto Contractor's order or fiscal forms, or other documents forwarded by the Contractor for payment. Acceptance of Product or processing of such documentation on forms furnished by the Contractor for approval or payment does not constitute acceptance of the proposed modification to terms and conditions.

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

42. ESTIMATED QUANTITY CONTRACTS Estimated quantity Contracts are expressly agreed and understood to be made only for the quantities, if any, actually ordered during the Contract term. No guarantee of any quantity(ies) is implied or given. Contracts for services and technology are completely voluntary as to use, and therefore no quantities are guaranteed.

43. BEST PRICING OFFER

Price Decreases shall take effect automatically during the Contract term and apply to Product orders submitted on or after:

a. **GSA Changes:** Where NYS Net Prices are based on an approved GSA Schedule, the date the approved GSA Schedule pricing decreases during the Contract term; or

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

c. **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 the same or a smaller 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 for the life of such general offer or promotion.

d. **Special Offers/Promotions to Authorized Users:** Contractor may offer Authorized Users, under either the 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 I.

44. PURCHASE ORDERS Unless otherwise authorized in writing by the Commissioner, no Products are to be delivered or furnished by Contractor until transmittal of an official Purchase Order from the Authorized User. Unless terminated or canceled 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 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. Unless otherwise specified, all Purchase Orders against Centralized Contracts will be placed by Authorized Users directly with the Contractor and shall be deemed to incorporate the terms and conditions set forth in this Contract by reference. Should an Authorized User add pre-printed terms and conditions to the purchase order that conflict with the terms and conditions of this contract, the Contractor has the option of rejecting the order after first attempting to negotiate the additional pre-printed terms and conditions in good faith with the Authorized User, or of filling the order. However, in no way does this requirement diminish an Authorized User's right to negotiate a Service Level Agreement (SLA) as outlined in the Contract. 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.

The Purchase Order shall indicate the address for delivery of the Product. Authorized User shall confirm pricing, supported hardware platforms and model availability with Contractor prior to placement of orders. Contractor's order form shall, at a minimum, contain the NYS Product reference number, license type, price, and must separately itemize quantities for software, documentation, and services. The State reserves the right to require any other information from the Contractor, which the State deems necessary in order to verify any Purchase Order placed under the Contract.

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

The state reserves the right for Authorized Users to purchase Product including services, that extend beyond the end date of the Contract term so long as the order is placed during the Contract period. Where an Authorized User purchases maintenance from a Centralized Contract, the terms and conditions of the Contract shall survive expiration of the

Contract term and apply through completion of maintenance term.

46. WEEKEND & HOLIDAY DELIVERIES Unless otherwise specified by the Authorized User, deliveries will not be scheduled for Saturdays, Sundays or legal holidays observed by the State of New York except where an emergency exists or the delivery is a replacement or is late, in which event the convenience of the Authorized User shall govern.

47. SHIPPING / RECEIPT OF PRODUCT

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

b. Shipping Charges Unless otherwise stated in the Contract, all deliveries shall be deemed to be FOB destination tailgate delivery at the dock of the Authorized User. Unless otherwise agreed, Product purchased at a price FOB shipping point plus transportation charges, are understood not to relieve the Contractor from responsibility for safe and proper delivery notwithstanding the Authorized User's payment of transportation charges. Contractor shall prepay shipping charges and be responsible for insuring that the Bill of Lading states "shipping 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. A signed receipt of delivery to the address specified on the purchase order shall be deemed to be made to authorized personnel. Any losses resulting from the Contractor's failure to deliver Product as specified on the Purchase Order shall be borne exclusively by the Contractor.

48. RISK OF LOSS Notwithstanding the form of shipment, 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 the acceptance period specified in this Appendix B-3, or such other period of time mutually agreed to by Authorized User and Contractor. 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 which is substandard or does not comply with the Contract terms, may be rejected or accepted on an adjusted price basis, as determined by the Commissioner.

49. -50. (RESERVED)

51. REJECTED PRODUCT When Product is rejected, it must be removed by the Contractor from the premises of the receiving entity within ten calendar days of notification of rejection by Authorized User. Carrier pick up arranged by Contractor or prepaid shipping by Contractor are acceptable for hardware. Removal for software may be accomplished by providing a pre-paid self-addressed mailer for the return of software to the Contractor. Upon request from Contractor,

Authorized User shall certify in writing that the Product has been removed from all computer systems and all related documentation has been returned to the Contractor. Upon rejection notification, risk of loss of rejected or non-conforming Product shall remain with Contractor. Rejected Product 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 the 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.

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

53. REPAIRED OR REPLACED PARTS / COMPONENTS Where the Contractor is required to repair, replace or substitute parts or components under the Contract, the repaired, replaced or substituted Products shall be subject to all terms and conditions for new Products set forth in the Contract, including Product warranties. Replaced or repaired components, or parts 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. The Authorized User before installation must approve substitutes for the original manufacturer's installed parts or components. The part or component shall be equal to or of better quality than the original part or component being replaced.

54. ON-SITE STORAGE Materials, equipment or supplies may be stored at the Authorized User's site at the Contractor's sole risk and only with the approval of the Authorized User.

55. EMPLOYEES/ SUBCONTRACTORS / AGENTS All employees, officers, agents, subcontractors, resellers or distributors performing work under the Contract must be trained technicians who meet or exceed the technical and training qualifications set forth in the Contract, 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, officer, agent, subcontractor, reseller or distributor furnished by Contractor and to refuse access to or require replacement of any

personnel for cause, including but not limited to, technical or training qualifications, quality of work or change in security status or non-compliance with Authorized User's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract terms. The Commissioner reserves the right to reject and/or bar from the facility for cause any employee, officer, agent, subcontractor, reseller or distributor of the Contractor.

56. ASSIGNMENT / SUBCONTRACTORS 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, other than the assignment of the right to receive money due, without the prior written consent of the Commissioner. See Appendix A, clause 2. Prior to an assignment of the right to receive money becoming effective, Contractor shall file a written notice of such assignment simultaneously with the NYS Comptroller, the Commissioner, and participating Authorized User(s).

The Commissioner reserves the right to reject any proposed subcontractor, assignee or supplier for bona fide business reasons, which may include, but are not limited to: that the proposed transferee is on the Department of Labor's list of companies with which New York State cannot do business; the Commissioner determines that the company is not qualified; unsatisfactory contract performance or service has been previously provided; or attempts were not made to solicit minority and women's business enterprises (M/WBE) bidders for the subcontract.

57. PERFORMANCE / BID BOND The Issuing Entity reserves the right to require the Contractor to furnish without additional cost, a performance, payment or bid bond or negotiable irrevocable letter of credit or other form of security for the faithful performance of the Contract. Where required, such bond or other security shall be in the form prescribed by the Commissioner.

58. 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 State or 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 on State spending, declaration of Emergency, or other such circumstances. Upon issuance of such notice, the Contractor is not to accept any Purchase Orders, and shall comply with the Suspension Order. Activity may resume at such time as the Commissioner issues a formal written notice authorizing a resumption of work.

59. TERMINATION

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

If the annual volume of business done by the Contractor is less than the minimum annual volume criteria established for the Contract for two consecutive contract years, the Contract may be terminated for cause. For purposes of this paragraph, contract year is defined as the first full four quarters reported after award, in accordance with the Reporting/Monitoring Contract Performance clause included in the Contract, and each of the same four quarterly periods thereafter until contract termination.

b. For Convenience: This Contract may be terminated at any time by the State for convenience upon sixty (60) days written notice without penalty or other early termination charges due. Such termination shall not affect the validity of Purchase Orders placed prior to termination. Such termination of the Contract shall not affect any project or Purchase Order which has been issued under the Contract prior to the date of such termination.

c. For Violation of Executive Order Number 127: The State reserves the right to terminate this contract in the event it is found that the certification filed by the Contractor in accordance with New York State Executive Order Number 127, signed by Governor Pataki on June 16, 2003, was intentionally false or intentionally incomplete. Upon such finding, the State may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms in the contract.

60. FORCE MAJEURE The Contractor shall not be responsible for delay resulting from its failure to perform if neither the fault nor negligence of the Contractor, its employees, officers, agents, subcontractors, resellers or distributors contributed to such delay and the delay is due directly to acts of God, wars, acts of public enemies, strikes, fires or floods, or other similar cause beyond the control of the Contractor, or for any of the foregoing which affect subcontractors or suppliers and no alternate source of supply is available to the Contractor. In such event, Contractor shall notify the Commissioner, by certified or registered mail, of the delay or potential delay and the cause(s) thereof either (i) within ten (10) calendar days after the cause first arose, or (ii) within five (5) calendar days after the date the Contractor first had reason to believe a delay could result. The foregoing shall constitute the Contractor's sole remedy or excuse with respect to such delay. In the event performance is suspended or delayed, in whole or in part, by reason of any of the aforesaid causes or occurrences and proper notification is given the Commissioner, any performance so suspended or delayed shall be performed by the Contractor at no increased cost, promptly after such disabilities have ceased to exist unless it is determined in the sole discretion of the Commissioner that the delay will significantly impair the value of the Contract to the State or to Authorized Users, whereupon the Commissioner may:

a. Accept allocated performance or deliveries from the Contractor. The Contractor, however, hereby agrees to grant preferential treatment to State Agencies with respect to Product subjected to allocation; and/or

b. Purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the Contract quantity; or

c. Terminate the Contract or the portion thereof which is subject to delivery 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: (1) the volatility is due to causes outside the control of Contractor; (2) the volatility affects the marketplace or industry, not just the particular contract source of supply; (3) the effect on pricing or availability of supply is substantial; and (4) the volatility so affects Contractor's performance that continued performance of the Contract would result in a substantial loss.

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

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

Contractor shall make available, upon request of the Commissioner, any and all information to verify the accuracy of the billings and Contract performance. In addition, the Contractor shall provide all sales information as specifically required by the Contract. All such submittals shall be provided in the format required by the Commissioner and in the media commercially available from the Contractor. The Commissioner may direct the Contractor to provide the information to the State Comptroller or to any Authorized User that has placed order(s) under the Contract.

62. DEFAULT - AUTHORIZED USER An Authorized User's breach shall be individual and shall not be deemed a breach of the Centralized Contract. In the event a participating Authorized User fails to make payment to the Contractor for Products delivered, accepted and properly invoiced, within 60 days of such delivery and acceptance, the Contractor may, upon 10 days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional shipments of Product or provision of services to such entity until such time as reasonable arrangements have been made and assurances given by such entity for current and future Contract payments.

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

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

63. INTEREST ON LATE PAYMENTS

a. State Agencies The payment of interest on certain payments due and owed by a State agency may be made in accordance with Article 11-A of *State Finance Law* and Title 2 of the New York Code of Rules and Regulations, Part 18 (Implementation of Prompt Payment Legislation).

b. By Non-State Agencies The terms of Article 11-A apply only to procurements by and the consequent payment obligations of State Agencies. Neither expressly nor by any implication is the statute applicable to non-State Agency Authorized Users. Neither the Office of General Services nor the Office of 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*.

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

a. Cover / Substitute Performance In the event of Contractor's material breach, the Authorized User may, with or without formally bidding same:

i. Purchase from other sources to replace the Product rejected, revoked, not timely delivered or repudiated; or

ii. If, 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 is unsuccessful, the Commissioner may acquire replacement Product or service of lesser or greater quality.

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

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

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

State or Authorized User in connection therewith, including reasonable attorney's fees, shall be paid by the Contractor.

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

d. Deduction / Credit In any case of Contractor's breach, payment may be withheld in whole or in part at the discretion of the Commissioner pursuant to Appendix A, Clause 9. Should the amount withheld be finally paid, a cash discount originally offered may be taken as if no delay in payment had occurred.

Sums due as a result of these remedies may be deducted or offset by the State or 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 State or Authorized User the amount of such claim or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, liquidated damages, etc., which arise from the administration of the Contract.

e. Fee Refund In the event that a Purchase Order is canceled for breach, Authorized User shall be entitled to a refund of any fees paid by Authorized User for usage or services prospectively from the date of breach.

65. ASSIGNMENT OF CLAIM Contractor hereby assigns to the State any and all its claims for overcharges associated with this Contract which may arise under the antitrust laws of the United States, 15 U.S.C. Section 1, et seq. and the antitrust laws of the State of New York, G.B.L. Section 340, et seq.

66. TOXIC SUBSTANCES Each Contractor furnishing a toxic substance as defined by Section 875 of the *Labor Law* to an Authorized User, 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 user agency representative.

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

applicable federal, state and local taxes, and all FICA contributions.

68. SECURITY / CONFIDENTIALITY Contractor warrants, covenants and represents that it will comply fully with all security procedures of the State and any Authorized User(s) in performance of the Contract.

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

The State acknowledges and agrees that Contractor brings to this Contract, and pursuant to this Contract will acquire, a substantial amount of general ideas, concepts, know-how, techniques, data, modules, components, designs, utilities, interfaces, templates, subroutines, analyses, methods, algorithms, formulas, technical information, specifications and other materials used or developed by Contractor in the course of this Contract ("Residuals"). "General" is defined to mean that it does not identify confidential, secure or other non-public information about the specific business processes, records or data of the Authorized User. Nothing in this Contract is intended to, or shall be construed to, restrict Contractor from using such Residuals to prepare materials or provide solutions for other customers. Moreover, nothing contained in this Contract shall preclude, or in any way limit, Contractor from providing products or services to others who compete with the State.

69. COOPERATION WITH THIRD PARTIES The Contractor shall be responsible for fully cooperating with any third party, including but not limited to subcontractors of the Authorized User, relating to delivery of Product or coordination of services.

70. 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 (cumulatively) with the written concurrence of the Contractor.

71. WARRANTIES & GUARANTEES Where Contractor or Product manufacturer/developer generally offers additional or more advantageous warranties than set forth below, Contractor shall offer or pass through any such warranties to Authorized Users. Contractor hereby warrants and represents:

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

b. Title and Ownership Warranty Full ownership, clear title free of all liens, and/or that Contractor has obtained on behalf of Authorized User perpetual license rights to use the Product for the purposes of this Contract. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor fully indemnifies the State and Authorized User for any loss, damages or actions arising from a breach of this warranty without limitation. Authorized User may require Contractor to furnish appropriate written documentation establishing the above rights and interests as a condition of payment. Authorized User's request or failure to request such documentation shall not relieve Contractor of liability under this warranty.

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

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

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

Where Contractor, the Independent Software Vendor "ISV", or other third party manufacturer markets any Project Deliverable delivered by or through Contractor with a standard commercial

warranty, such standard warranty shall be in addition to, and not relieve the Contractor from, Contractor's warranty obligations during the Project warranty and extended warranty period(s). Where such standard commercial warranty covers all or some of the Project warranty or extended warranty period(s), Contractor shall be responsible for the coordination during the Project warranty or extended warranty period(s) with ISV or other third party manufacturer(s) for warranty repair or replacement of ISV or other third party manufacturer's Product.

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

e. Replacement Parts Warranty If during the regular or extended warranty periods faults develop, the Contractor shall promptly repair or, upon demand, replace the defective unit or component part affected. All costs for labor and material and transportation incurred to repair or replace defective Product during the warranty period shall be borne solely by the Contractor, and the State or Authorized User shall in no event be liable or responsible therefore. Replaced components, or parts shall be new and shall, if available, be replaced by the original manufacturer's component or part. The Commissioner or Authorized User may permit refurbished or remanufactured parts or components meeting new product standards. The Authorized User before installation must approve substitutes for the original manufacturer's installed parts or components. The part or component shall be equal to or of better quality than the original part or component being replaced.

Any part or component replaced by the Contractor under the Contract warranty shall be guaranteed for the greater of: a) the warranty period under paragraph (d) above; or b) if a separate warranty for that part or component is generally offered by the manufacturer, the standard commercial warranty period offered by the manufacturer for the individual part or component.

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

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

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

transitions, including leap year calculations. Contractor shall be responsible for damages resulting from any delays, errors or untimely performance resulting there from, including but not limited to the failure or untimely performance of such services.

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

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

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

THE WARRANTIES SET FORTH IN THE CONTRACT ARE IN ADDITION TO ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Misuse, accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by Authorized User, or failure caused by a product for which Contractor is not responsible may void the warranties. **Contractor does not warrant uninterrupted or error-free operation of a Product or service.**

72. (RESERVED)

73. SOFTWARE LICENSE GRANT Third party software provided by the Contractor under this contract shall be licensed in accordance with the developer's standard license and warranty terms which terms shall be furnished to Authorized User at time of purchase. Warranty coverage for software must start at the same time as the Product warranty period set forth in Clause 71. Any costs associated with this requirement shall be borne by the Contractor.

Contractor developed software provided under this Contract shall be acquired on a licensed basis, and the following shall constitute the license grant:

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

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

c. Licensed Documentation If commercially available, Licensee shall have the option to require the Contractor to deliver, at Contractor's expense: a) one (1) hard copy and one (1) master electronic copy of the Documentation in diskette or CD-ROM format; or b) hard copies of the Product Documentation by type of license in the following amounts, unless otherwise mutually agreed:

- Individual/Named User License - 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 (e.g., if unit has a 3½" disk drive, software must be provided on 3½" diskettes).

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. Maintenance term(s) shall not automatically renew.

Maintenance shall include, at a minimum, (1) the provision of error corrections, updates, revisions, fixes, upgrade and new releases to Licensee, and (2) 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 written notice to Contractor. In the event that Authorized User does not initially purchase 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, or for twelve months, whichever is less, at then-current NYS net maintenance rates.

e. Permitted License Transfers As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated site not originally specified in the license, including transfers between Agencies ("permitted license transfers"). Licensee(s) do not have to obtain the

approval of Contractor for permitted license transfers, but must give thirty (30) days prior written notice to Contractor of such move(s) and certify in writing that the Product is not in use at the prior site. There shall be no additional license or other transfer fees due Contractor, provided that: 1) 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: 1) 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; 2) 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; 3) 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 under this section #73. "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.

74. PRODUCT ACCEPTANCE Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User(s) shall have thirty (30) days from the date of delivery to accept Product unless the Contractor is responsible for installation, in which case the thirty day period shall run from completion of installation. Failure to provide notice of acceptance or rejection 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 testing and acceptance. During this acceptance period, Authorized User must take reasonable care to protect delivered product from undue damage or theft.

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 another thirty (30) day increment. Authorized User shall notify Contractor of acceptance upon successful completion of the documented installation test. In the event of cancellation, such action shall not give rise to any cause of action against the State or Authorized User for damages, loss of profits, expenses, or other remuneration of any kind.

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 fees paid to Contractor, if any, or any liability for costs incurred by the State or Authorized User at the direction or recommendation of Contractor.

75. 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) or Federation Against Software Theft (FAST) be used directly or indirectly to conduct audits, or 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.

76. OWNERSHIP / TITLE TO PROJECT DELIVERABLES**a. Definitions**

- i. "Products" - A deliverable furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), 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. "Existing Products" - Tangible Products and intangible licensed Products which exist prior to the commencement of work under the Contract. Contractor retains the burden of proving that a particular product was existing before commencement of the Project.
- iii. "Custom Products" - Products, preliminary, final or otherwise, which are created or developed by Contractor, its subcontractors, partners, employees or agents for Authorized User under the Contract.

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

i. Existing Products:

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

ii. Custom Products: Effective upon creation of Custom Products, Contractor hereby conveys, assigns and transfers to Authorized User the sole and exclusive rights, title and interest in Custom Product(s), whether preliminary, final or otherwise, including all trademark and copyrights. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction and marketing by or through Contractor, its agents, employees, or subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under a project definition/work order in the course of Contractor's business.

Where a scope of work does not involve COPS or other third party financing, the 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 proposal 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 Lessor's rights under the terms and conditions of the License Agreement; provided, further, however, in the event of any termination or expiration of such sublicense by reason of payment in full, all of Trustee's rights in such Licensed Product shall terminate immediately and Authorized User's prior rights to such Existing Licensed Product shall be revived.

d. Sale or License of Custom Products Involving Tax-Exempt Financing (i.e., Certificates of Participation (COPS))

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

e. Contractor's Obligation with Regard to ISV (Third Party) Product

Where Contractor furnishes Existing Licensed Product(s) as a Project Deliverable, and sufficient rights necessary to effect the purposes of this section 76.0 are not otherwise provided in the Contractor or ISV's standard license agreement, Contractor shall be responsible for obtaining from the ISV third party proprietary owner/developer the rights set forth herein to the benefit of the Authorized User at Contractor's sole cost and expense.

77. PROOF OF LICENSE The Contractor must provide to each Licensee who places a Product order either: a) the Product developer's certified License Confirmation Certificates in the name of such Licensee; or b) 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.

78. MIGRATION TO CENTRALIZED CONTRACT

Authorized User may obtain additional Product authorized under this Contract, (e.g., licensed capacity upgrades, new releases, documentation, maintenance, hardware, consulting or training) whether or not Product was initially obtained independently of this Contract. The Authorized User's election to obtain additional Product shall not operate to diminish, alter or extinguish rights previously granted.

79. 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.

80. 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: (1) notify the Commissioner, each Licensee and each Authorized User then under contract for maintenance or technical support in writing of the intended discontinuance; and (2) 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 (3) at Authorized User's option, provided that the Authorized User is under contract for maintenance on the date of notice, either: a) provide the Authorized User with either a Product replacement or migration path with at least equivalent functionality at no additional charge, or b) provide Authorized User with the source code for Licensed Product 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: (1) provide the notice required under (1), above, to the entities described within five (5) business days of Contractor receiving notice from the Product Manufacturer, and (2) include in such notice the period of time from the date of notice that the Product Manufacturer will continue to provide Product or withdrawn support.

The provisions of this paragraph (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: (1) notify the State and each Authorized User in writing of the intended change; (2) 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 (3) 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.

81. NO HARDSTOP / PASSIVE LICENSE MONITORING

Unless an Authorized User is otherwise specifically advised to the contrary in writing at the time 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.

82. SOURCE CODE ESCROW FOR LICENSED PRODUCT

If source code or source code escrow is offered by either Contractor or Product manufacturer/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 Office of General Services, and the Licensee, as a named beneficiary of an established escrow arrangement with its designated escrow agent who shall be named and identified to the State and Licensee, and who shall be directed to release the deposited Source Code in accordance with the terms of escrow. Source Code, as well as any corrections or enhancements to such source code, shall be updated for each new release of the Product in the same manner as provided above and such updating of escrow shall be certified to the State in writing. Contractor shall identify the escrow agent upon commencement of the Contract term and shall certify annually that the escrow remains in effect in compliance with the terms of this paragraph.

In the event that there is an established escrow arrangement with a designated escrow agent then, with respect to products sold by the Contractor to the State of New York, the Contractor shall make best efforts to negotiate or have negotiated an amendment of the established escrow agreement with the designated escrow agent to reflect that disputes regarding any right that the State of New York may have related to the source code: (a) shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise; and (b) may not be submitted to binding arbitration, but must, instead be heard in a court of competent jurisdiction of the State of New York. Except as to the amendments sought to the established escrow agreement in this section 82, nothing herein shall be construed as an agreement by the State of New York to otherwise be bound by the terms and conditions of the established escrow agreement.

Source Code, as well as any corrections or enhancements to such source code, shall be updated for each new release of the Product in the same manner as provided above and such updating of escrow shall be certified to the State in writing. Contractor shall identify the escrow agent upon commencement of the Contract term and shall certify annually that the escrow remains in effect in compliance with the terms of this paragraph.

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

83. INDEMNIFICATION & LIMITATION OF LIABILITY

Neither party shall be liable for any delay or failure in performance beyond its control resulting from acts of God or force majeure. The parties shall use reasonable efforts to eliminate or minimize the effect of such events upon performance of their respective duties under Contract.

Contractor shall be fully liable for the actions of its agents, employees, partners or subcontractors and shall fully indemnify and save harmless the State and Authorized User 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 Contractor, its agents, employees, partners or subcontractors, without limitation; provided, however, that the Contractor shall not indemnify for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the State.

Contractor will indemnify, defend and hold the State and its Authorized Users harmless, *without limitation*, from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs which may be finally assessed against the State in any action for infringement of a United States Letter Patent with respect to the Products furnished, or of any copyright, trademark, trade secret or intellectual property right, provided that the State shall give the Contractor: (i) prompt written notice of any action, claim or threat of infringement suit, or other suit, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action at the expense of Contractor. Where a dispute or claim arises relative to a real or anticipated infringement, the State or Authorized User may require Contractor, at its sole expense, to submit such information and documentation, including formal patent attorney opinions, as the Commissioner shall require.

The Contractor shall not be obligated to indemnify that portion of a claim or dispute based upon: I) Authorized User's unauthorized modification or alteration of a Product; ii) Authorized User's use of the Product in combination with other products not furnished by Contractor; iii) Authorized User's use in other than the specified operating conditions and environment.

In addition to the foregoing, if the use of any item(s) or part(s) thereof 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 as the Authorized User's exclusive remedy to take action in the following order of precedence: (i) to procure for the State the right to continue using such item(s) or part (s) thereof, as applicable; (ii) to modify the component so that it becomes non-infringing equipment of at least equal quality and performance; or (iii) to replace said item(s) or part(s) thereof, as applicable, with non-infringing components of at least equal quality and performance, or (iv) if none of the foregoing is commercially reasonable, then provide monetary compensation to the State up to the dollar amount of the Project Award.

For all other claims against the Contractor, where liability is not otherwise set forth in the Contract as being “without limitation”, and regardless of the basis on which the claim is made, Contractor's liability **for direct damages shall be**

\$100,000, or two (2) times the charges submitted by the Contractor to the Authorized User for payment under the Contract whichever is greater. Unless otherwise specifically enumerated herein, neither party shall be liable to the other for special, indirect or consequential damages, including lost data or records (unless the Contractor is otherwise required to back-up the data or records as part of the Contract), unless a party has been advised of the possibility of such damages and failed to take proper action to avoid such damages. Neither party shall be liable for lost profits, lost revenue or lost institutional operating savings.

The State and Authorized User may, in addition to other remedies available to them at law or equity and upon notice to the Contractor, retain such monies from amounts due Contractor, or may proceed against the performance and payment bond, if any, as may be necessary to satisfy any claim for damages, penalties, costs and the like asserted by or against them.

APPENDIX C

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

CONTRACTOR'S REQUIREMENT UNDER ARTICLE 15-A

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

The Office of General Services (OGS) is required to implement the provisions of Article 15-A for all of its Contracts (1) in excess of \$25,000 for labor, services, supplies, equipment, materials, or any combination of the foregoing and (2) for Contracts in excess of \$100,000 for real property renovation and construction. For purposes of this Contract, OGS hereby establishes a goal of 4% for minority business enterprises (MBE) participation and 4% for women-owned business enterprises (WBE) participation.

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

POLICY AND PROVISIONS

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

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

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

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

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

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

POST AWARD

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

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

APPENDIX C

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

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

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

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

Telephone: (212) 803-2414

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