

State of New York Executive Department
Office Of General Services
Procurement Services Group
Corning Tower Building - 38th Floor
Empire State Plaza
Albany, New York 12242
<http://www.ogs.state.ny.us>

CONTRACT AWARD NOTIFICATION

Title	:	Group 76086 – Microcomputer Software – Citrix Software
		Classification Code(s):43
Award Number	:	NEG-18158
Contract Period	:	August 9, 2004 – August 8, 2009
Bid Opening Date	:	N/A
Date of Issue	:	August 16, 2004
Specification Reference	:	As Incorporated Herein
Contractor Information	:	Appears on Page 2 of this Award

Address Inquiries To:

State Agencies & Vendors	Political Subdivisions & Others
Name : Stephanie Laffin Title : Purchasing Officer I Phone : 518-473-9440 Fax : 518-486-6867 E-mail : Stephanie.laffin@ogs.state.ny.us	Customer Services Phone : 518-474-6717 Fax : 518-474-2437 E-mail : customer.services@ogs.state.ny.us

The Procurement Services Group values your input.
Complete and return "Contract Performance Report" at end of document.

Description

This is a contract to acquire Citrix Software, Support, Maintenance and Consulting Services.

PR # 18158

(continued)

NOTE: See individual contract items to determine actual awardees.

<u>CONTRACT #</u>	<u>CONTRACTOR & ADDRESS</u>	<u>TELEPHONE #</u>	<u>FED.IDENT.#</u>
PT61263	Citrix Systems, Inc. 11 Penn Plaza, 20 th floor New York City, NY 10001	917-286-4940 917-279-0461 (cell) 917-286-4901 FAX	752275152
	Michael Barry Enterprise Relationship Manager Michael.barry@citrix.com		

AGENCIES SHOULD NOTIFY THE PROCUREMENT SERVICES GROUP PROMPTLY IF THE CONTRACTOR FAILS TO MEET DELIVERY OR OTHER TERMS OF THIS CONTRACT. PRODUCTS OR SERVICES WHICH DO NOT COMPLY WITH THE SPECIFICATIONS OR ARE OTHERWISE UNSATISFACTORY TO THE AGENCY SHOULD ALSO BE REPORTED TO THE PROCUREMENT SERVICES GROUP.

SMALL, MINORITY AND WOMEN-OWNED BUSINESSES:

The letters SB listed under the Contract Number indicate the contractor is a NYS small business. Additionally, the letters MBE and WBE indicate the contractor is a Minority-owned Business Enterprise and/or Woman-owned Business Enterprise.

PRICE:

For Citrix software license purchases only, NYS will receive a 45% discount off suggested list price for the first 1-20,000 purchased under this Contract. After exceeding 20,000 points, the discount will increase to 48% for subsequent License purchases through the remaining term of the contract.

CONSULTING SERVICES:

Acquisition of Consulting Services from this contract is limited to 20% as defined under contract clause number 3. c.

**State of New York
Office of General Services
PROCUREMENT SERVICES GROUP
Contract Performance Report**

Please take a moment to let us know how this contract award has measured up to your expectations. If reporting on more than one contractor or product, please make copies as needed. This office will use the information to improve our contract award, where appropriate. **Comments should include those of the product’s end user.**

Contract No.: _____ **Contractor:** _____

Describe Product* Provided (Include Item No., if available): _____

***Note:** “**Product**” is defined as a deliverable under any Bid or Contract, which may include commodities (including printing), services and/or technology. The term “Product” includes Licensed Software.

	Excellent	Good	Acceptable	Unacceptable
• Product meets your needs				
• Product meets contract specifications				
• Pricing				

CONTRACTOR

	Excellent	Good	Acceptable	Unacceptable
• Timeliness of delivery				
• Completeness of order (fill rate)				
• Responsiveness to inquiries				
• Employee courtesy				
• Problem resolution				

Comments: _____

(over)

Agency: _____ Prepared by: _____

Address: _____ Title: _____

_____ Date: _____

_____ Phone: _____

_____ E-mail: _____

Please detach or photocopy this form & return by FAX to 518/474-2437 or mail to:

OGS PROCUREMENT SERVICES GROUP
Customer Services, 37th Floor
Corning 2nd Tower - Empire State Plaza
Albany, New York 12242
* * * * *

(continued)

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES

CENTRALIZED CONTRACT FOR THE ACQUISITION OF PROPRIETARY SOFTWARE & RELATED SERVICES

New York State Contract #

Contractor Reference #

CITRIX SYSTEMS, INC.

THIS CONTRACT for the acquisition of proprietary software and related incidental services is made between the People of the State of New York, acting by and through the Commissioner of the Office of General Services (hereinafter "State" or "OGS") whose principal place of business is the 41st Floor, Corning Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242, pursuant to authority granted under New York State Finance Law, § 163, and **Citrix Systems, Inc.**, (hereinafter "Contractor"), with its principal place of business at 851 W. Cypress Creek Road, Ft. Lauderdale, Florida 33309.

1. CONTRACT SCOPE / TERM

This document (hereinafter "Contract") sets forth the terms and conditions governing the acquisition of software, maintenance and other incidental services (including, but not limited to, consulting and training). Terms used in this document shall have the meanings set forth in Appendix B-2. Amendments or modifications to the terms and conditions set forth herein may only be made with mutual written agreement of the parties and with the approval of the New York State Attorney General and Comptroller.

The term of this Contract shall be five (5) years commencing on the date of approval by the New York State Comptroller effective upon mailing by OGS (see Appendix B-2, Clause 38). The parties may renew the contract, upon approval of the NYS Comptroller, upon expiration of the original term for an additional five (5) year term. 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-2, *Definitions*, and *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 entities"). In the event that this Contract is so extended, such other authorized entities shall be solely responsible for liability and performance under the Contract, and Contractor agrees to hold them solely responsible for such liability and performance.

2. 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-2:

Appendix A	<i>Standard Clauses for NYS Contracts</i>
Contract	(This Document)
Appendix B-2	OGS General Specifications for Proprietary Software

Appendix C	<u>Mandatory</u> : 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 Software, Maintenance, Consulting and Training Services) # 4 Maintenance & Support (Description of Services) # 5 Consulting and Training (Description of Services & Course Offerings)

3. **PRODUCT OFFERINGS**

Products available under this Contract are set forth in Appendix E (Submission #3, 4 and 5). These offerings may be updated during the Contract term to incorporate new Product offerings, and price revisions and to delete items. Offering updates must be submitted under the Contract as soon as possible after they are announced by Contractor.

A. Developer's Software Product Line: Proprietary Product(s) developed by Contractor and offered either under Contractor's U.S. Commercial Price List or under a GSA Supply Schedule, may be included under this Contract.

B. Third Party Products: To the extent that the Contractor's U.S. Commercial Price List includes third party Products other than Developer's proprietary line, which third party products overlap with offerings under other State Contracts, the State reserves the right, in its sole judgment, to exclude or delete overlapping items from this Contract, or to include such items under this Contract only if the Contractor offers it at or below the alternative Contract price. Only third party Products which are included in the Contractor's U.S. Commercial Price List may be sold under this Contract.

C. Services: Authorized Users may acquire services, including maintenance, consulting, and training, under this Contract. Consulting and training services as set forth in Appendix E (Submission #5) may be acquired from Contractor on a limited basis. Consulting and training services may not exceed twenty (20%) percent of the total order price for software licenses and maintenance. "Total order price" shall be defined as the aggregate purchase order amount for software licenses and maintenance placed by the Authorized User under this Contract in a twelve month period. Consulting and training which exceed twenty (20%) may be procured competitively using the OGS IT Services mini-bid process or another procurement process selected by the Authorized User.

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 (Submission #3).

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. 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-2, 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 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-2, Clause 80 (“Changes in 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.

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 rebundled 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. Price increases or new product offerings may not be electronically posted by Contractor until after receipt of OGS approval of the “Regular Add”.

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. New offerings may not be electronically posted by Contractor until after receipt of OGS approval of the “Special Add”.

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 the NYS Net Price appendix 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 RE-SELLERS/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.

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 procedures set forth below and require the advance approval of OGS.

(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.

(3) Price Decreases: Shall be calculated in accordance with Appendix B-2, 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 which 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.

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 1%. Therefore, the "NYS Net Price" shall be calculated by multiplying 0.99 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.

D. Pricing for Machine or Platform Migrations Calculations of software pricing shall be based on the size of the logical partition or, in the absence of partitions, machine size, on which the Software is installed and running, rather than the size of the entire machine on which the partition is resident.

In the event of a machine migration, Licensee will not incur an increase in maintenance or additional license fees provided that the total aggregate machine utilization by Licensee (i.e., MIPS, CPUs, or CPU partition(s), if the CPUs are partitioned) on which the Licensed Product is newly installed and running does not exceed the previously licensed capacity, in the aggregate.

In the event of software migration involving aggregate utilization of a larger logical partition or, in the absence of partition, larger machine capacity, or a different operating platform, a fee shall be paid to Licensor for the difference between the then-current NYS Net Price for the original partition, machine capacity or operating system, and the then-current NYS Net Price for the software on the new larger partition, machine group or operating system.

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, including educational institutions of the State of New York, 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.

8. INTERNET ACCESS TO CONTRACT & PRICING INFORMATION

Access by Authorized Users to Contract terms and pricing information may be made available and posted on the Internet. To that end, the Contractor may be required to host the complete Contract 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) during the Contract term, in accordance with the following requirements:

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.

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. Contractor agrees to comply with **Office for Technology Policy 99-3** <<http://www.oft/policy/99-3.htm>>, **Universal Accessibility for NYS Web Sites (Supplement to 96-13** <<http://www.oft/policy/96-13.htm>>), dated, September 30, 1999, which requires that all New York State agencies' web sites provide universal accessibility 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 99-3 <<http://www.oft/policy/99-3.htm>>.

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.

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 1%. 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. 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.

11. ENTIRE AGREEMENT

This Contract and the referenced appendices constitute the entire agreement between the parties thereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and the Contract shall not be changed, modified or altered in any manner except by an instrument in writing executed by both parties hereto, with the approval of the Attorney General and the Comptroller for the State of New York. Licensees shall not have the authority to modify the terms of the Contract, except as to better terms and pricing for a particular procurement than those set forth herein.

12. 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:

Stephanie Laffin
Procurement Services Group
37th Floor, Corning Tower
Empire State Plaza
Albany, New York 12242
Phone: (518) 473-9440
Fax: (518) 486-6867
Email: Stephanie.Laffin@ogs.state.ny.us

13. 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.

14. 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.

15. 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 above under "Notices" or through the OGS website (www.ogs.state.ny.us). Click on "For Government - Contracts and Purchasing," then "Seller Information," then " Dispute Resolution Procedures for Vendors."

APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

PLEASE RETAIN THIS DOCUMENT
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STANDARD CLAUSES FOR NYS CONTRACTS

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

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

2. NON-ASSIGNMENT CLAUSE. In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the 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 \$15,000 (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 \$30,000 (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 warrants, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further warrants 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

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
<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.

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APPENDIX B-2

GENERAL SPECIFICATIONS
(Negotiated Software Contracts)

*(Applicable to Procurements of
Proprietary Software & Related Services)*

PLEASE RETAIN THIS DOCUMENT FOR FUTURE REFERENCE

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NEW YORK STATE OFFICE OF GENERAL SERVICES

PROCUREMENT SERVICES GROUP

GENERAL

1. **APPLICABILITY** The terms and conditions set forth in this Appendix B-2 are expressly incorporated in and applicable to all proprietary software and related service 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 NYS *Public Officers Law*, (§ 73 & 74) 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 TERMS** Conflicts between Contract documents shall be resolved in the following order of precedence:

- **Appendix A** (*Standard Clauses for NYS Contracts*)
- **Negotiated Contract/Clarification Documents** Writing(s) setting forth the final agreement of the parties, excluding incorporated appendices.
- **Appendix B-2** (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, and other entities 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.

COMPROLLER 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 by the Office of General Services to Authorized Users that a Contract has been established.

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

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

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

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

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 licensed upon the terms and conditions set forth in the Contract. "Licensed Software" includes error corrections, upgrades, enhancements or new releases, and any deliverables due under a maintenance or service Contract (e.g., patches, fixes, PTFs, programs, code or data conversion, or custom programming).

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

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 any Contract which may include commodities, services and/or technology. The term "Product" includes Licensed Software.

PRODUCT RELEASES -NEW (Product Revisions) Any commercially released revisions to the version of a Product as may be generally offered and available to Authorized Users. New releases involve a substantial revision of functionality from a previously released version of the Product.

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 - 14. (RESERVED)

15. **CONFIDENTIAL / TRADE SECRET MATERIALS** Confidential, trade secret or proprietary materials as defined by the laws of the State of New York must be clearly marked and identified as such upon submission. Contractors intending to seek an exemption from disclosure of these materials under the *Freedom of Information*

Law must request the exemption in writing, setting forth the reasons for the claimed exemption, at the time of submission. 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. (RESERVED)

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. (RESERVED)

19. **ADVERTISING BID RESULTS** A Bidder in submitting a bid agrees not to use the results therefrom as a part of any commercial advertising without the prior written approval of the Commissioner.

20.- 22. (RESERVED)

23. **PRICING**

a. (Reserved)

b. **Net Pricing** Unless otherwise specified in the Contract, prices shall be net, including transportation, customs, tariff, delivery, and other charges fully prepaid by the Contractor to the destination(s) indicated on the Purchase Order, subject to the cash 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 any 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 update drawings and

plans during the Contract term to reflect additions, alterations, and deletions as a condition of payment. 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. (RESERVED)

26. **PROCUREMENT CARD** The State of New York has entered into agreements for purchasing and travel 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 unsatisfactory, defective or faulty Product in accordance with other contract requirements, the Contractor shall immediately credit a cardholder's account for Products deemed unsatisfactory, defective or faulty.

27. - 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 developer 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 terminate the Contract. 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** Contractor may be disqualified from receiving awards if Contractor, or anyone in Contractor's employment, has previously failed to perform satisfactorily in connection with public bidding or contracts.

35. - 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 service contracts to those additional entities authorized to utilize commodity contracts 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 guarantee 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.

40. **MODIFICATION OF CONTRACT 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 / SPECIFIC QUANTITY CONTRACTS Estimated quantity contracts are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Contract term. No guarantee of any quantity(s) is implied or given. Contracts for services and technology are completely voluntary as to use, and therefore no quantities are guaranteed.

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

43. BEST PRICING OFFER

Price Decreases shall take effect automatically during the Contract term and apply to Purchase 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 a similar quantity, and the maximum price or discount associated with such offer or promotion is better than the discount or net price otherwise available under this Contract, such better price or discount shall apply for similar quantity transactions 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 (c).

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. 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 specified by the Authorized User, 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.

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.

b. **Shipping Charges** Unless otherwise stated in the Bid Specifications, all deliveries shall be deemed to be FOB destination to the delivery address specified on the Purchase Order. Even where the specifications permit Product to be purchased at a price FOB shipping point plus transportation charges, it is understood not to relieve the Contractor from responsibility for safe and proper

delivery. Contractor shall be responsible for insuring that the Bill of Lading states "charges prepaid" for all shipments.

c. Receipt of Product The Contractor shall be solely responsible for assuring that deliveries are made to personnel authorized to accept delivery on behalf of the Authorized User. Any losses resulting from the Contractor's failure to deliver Product to authorized personnel shall be borne exclusively by the Contractor.

48. 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 and inspected by the receiving entity. Acceptance shall occur within the acceptance period specified in this Appendix B-2, 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. 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, due to warranty non-conformance or declined after evaluation, 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. Removal may be accomplished by Contractor 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 to rejected or non-conforming Product shall remain with Contractor. Rejected items not removed by the Contractor within ten calendar days of notification shall be regarded as abandoned by the Contractor, and the Authorized User shall have the right to dispose of the items 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- 54. (RESERVED)

55. EMPLOYEES / SUBCONTRACTORS / AGENTS All employees, subcontractors or agents 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 or agent 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, subcontractor, or agents 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 Issuing Entity. Prior to an assignment of the right to receive moneys

becoming effective, Contractor shall file 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. Contractor's request to assign shall not be unreasonably withheld.

57. PERFORMANCE / BID BOND The Issuing Entity reserves the right to require the Bidder/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 Issuing Entity. 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. SAVINGS / 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 officers, employees or agents 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 (a) within ten (10) calendar days after the cause which creates or will create the delay first arose if the Contractor could reasonably foresee that a delay could occur by reason thereof, or (b) if delay is not reasonably foreseeable, 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, with Contractor's consent, which consent shall not unreasonably be withheld, 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 distributors/resellers 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 for Agency purchases, and such payment shall be made in accordance with ordinary State procedures and practices.

Payment of Contract purchases made by Authorized Users other than Agencies shall be billed directly by Contractor on invoices/vouchers, together with complete and accurate supporting documentation as required by the Authorized User.

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

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 Authorized Users. Neither is the Office of General Services nor the Office of the State Comptroller 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. In the event of Contractor's material breach, which remains uncured for more than thirty (30) days after written notice to the Contractor, the Commissioner may pursue any of the actions in a through e below:

- a. **Cover / Substitute Performance** In the event of Contractor's material breach, the Commissioner may, with or without formally bidding same:
 - i. Purchase from other sources; 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 of lesser or greater quality.

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

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

c. 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.

d. Deduction / Credit 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 cancelled 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. (RESERVED)

67. INDEPENDENT CONTRACTOR It is understood and agreed that the legal status of the Contractor, its agents, distributors, resellers, officers and employees 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 agents, subcontractors, officers, distributors, resellers or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the State or any Authorized User hereunder or received from another third party, will not be divulged to any third parties. Contractor shall not be required to keep confidential any such 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.

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 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 that:

a. Product Performance Products delivered pursuant to this Contract conform to the 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, 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 said 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 pay, at its sole expense, all applicable permits, licenses, tariffs, 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 its obligations under the Contract. Prior to award and during the Contract term and any renewals thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the bid/Contract and any applicable laws, including but not limited to, permits, insurance coverage, licensing, proof of coverage for workman's compensation, and shall provide such proof as required by the Commissioner. Failure to do so may constitute grounds for the Commissioner to cancel or suspend this Contract, in whole or in part, or to take any other action deemed necessary by the Commissioner.

d. Product Warranty Every Product must be unconditionally guaranteed against faulty material and workmanship for a period of ninety (90) days from and after the date the Product is accepted unless otherwise specified by the Commissioner. Furthermore, the Contractor agrees to extend its warranty period by the cumulative periods of time, after notification, during which the Product requires servicing or replacement (down time) or is in the possession of the Contractor, its agents, officers, distributors, resellers or employees. 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. Substituted or replacement Product must be unconditionally guaranteed for a period of ninety (90) days from the date such substituted or replacement Product was installed or replaced. 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. This warranty shall survive any termination of the Contract in accordance with the warranty term.

e. (Reserved)

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 therefrom, including but not limited to the failure or untimely performance of such services.

This Date/Time Warranty shall survive beyond termination or expiration of this contract through: a) ninety (90) days or b) the Contractor 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. Except as otherwise specified above, the warranties set forth above and herein shall survive any termination of this contract for individual projects in accordance with the stated warranty term(s).

THE WARRANTIES SET FORTH IN THIS CONTRACT ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE

IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Misuse, accident, unsuitable physical or operating environment, modification or operation inconsistent with standard industry practice, or failure caused by a product for which Contractor is not responsible may void the warranties.

72. (RESERVED)

73. SOFTWARE LICENSE GRANT Where Product is acquired on a licensed basis the following shall constitute the license grant:

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

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

c. Licensed Documentation If commercially available, Licensee shall have the option to require the Contractor to deliver, at Contractor's expense: 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 and will 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 notice to Contractor. In the event that Authorized User does not initially acquire or discontinue maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product without any additional penalties or other charges, by paying Contractor the amount which would have been due under the Contract for the period of time that such maintenance had lapsed, at then-current NYS net maintenance rates.

e. Permitted License Transfers As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated site not originally specified in the license, including transfers between Agencies ("permitted license transfers"). Licensee(s) do not have to obtain the approval of Contractor for permitted license transfers, but must give thirty (30) days prior written notice to Contractor of such move(s) and certify in writing that the Product is not in use at the prior site. There shall be no additional license or other transfer fees due Contractor, provided that: i) the maximum capacity of the consolidated machine is equal to the combined individual license capacity of all licenses running at the consolidated or transferred site (e.g., named users, seats, or MIPS); or ii) if the maximum capacity of the consolidated machine is greater than the individual license capacity being transferred, a logical or physical partition or other means of restricting access will be maintained within the computer system so as to restrict use and access to the Product to that unit of licensed capacity solely dedicated to beneficial use for Licensee. In the event that the maximum capacity of the consolidated machine is greater than the combined individual license capacity of all licenses running at the consolidated or transferred site, and a logical or physical partition or other means of restricting use is not available, the fees due Contractor shall not exceed the fees otherwise payable for a single license for the upgrade capacity.

f. Restricted Use By Outsourcers / Facilities Management, Service Bureaus / or Other Third Parties Outsourcers, facilities management or service bureaus retained by Licensee shall have the right to use the Product to maintain Licensee's business operations, including data processing, for the time period that they are engaged in such activities, provided that: 1) Licensee gives notice to Contractor of such party, site of intended use of the Product, and means of access; and 2) such party has executed, or agrees to execute, the Product manufacturer's standard nondisclosure or restricted use agreement which executed agreement shall be accepted by the Contractor ("Non-Disclosure Agreement"); and 3) if such party is engaged in the business of facility management, outsourcing, service bureau or other services, such third party will maintain a logical or physical partition within its computer system so as to restrict use and access to the program to that portion solely dedicated to beneficial use for Licensee. In no event shall Licensee assume any liability for third party's compliance with the terms of the Non-Disclosure Agreement, nor shall the Non-Disclosure Agreement create or impose any liabilities on the State or Licensee.

Any third party with whom a Licensee has a relationship for a state function or business operation, shall have the temporary right to use Product (e.g., JAVA Applets), provided that such use shall be limited to the time period during which the third party is using the Product for the function or business activity.

g. Archival Back-Up and Disaster Recovery Licensee may use and copy the Product and related Documentation in connection with: 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 delivery to accept Product unless the Contractor is responsible for installation, in which case the thirty day period shall run from completion of installation. Where applicable, contractor's standard acceptance checklist(s), as mutually agreed between the contractor and OGS, shall be utilized for acceptance documentation purposes. 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. In the event that the Contractor provides a free trial period for its Product, the length of the trial shall count toward the thirty (30) day acceptance period.

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. Such cancellation 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 the amount set forth in section 83 below.

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 PRODUCTS

a. Definitions

i. "Products" - A deliverable furnished 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 intellectual 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. Existing Products must be identified prior to commencement of work or else will be presumed to be custom product.

iii. "Custom Products" - Products, preliminary, final or otherwise, which are created or developed by Contractor, its subcontractors, partners, employees, resellers 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 work order. The Authorized User shall have

ownership and/or perpetual rights to use, copy, modify, distribute or adapt Products as follows:

i. Existing Products: Title to all Existing Licensed Product(s), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall: (1) remain with Contractor or third party proprietary owner, who retains all rights, title and interest (including patent, trademark or copyrights). Effective upon payment, Authorized User is granted an irrevocable, non-exclusive, worldwide, paid-up 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 Product to Authorized Users up to the license capacity stated in the purchase order with all license rights necessary to fully effect the general business purpose(s) of the project or work plan or Contract, including the financing assignment rights set forth in paragraph (c) below; and (2) be licensed in the name of the State of New York where the Issuing Entity is a state agency, department, board, commission, office or institution. The Authorized User agrees to reproduce the copyright notice and any other legend of ownership on any copies authorized under this paragraph.

ii. Custom Products: Effective upon Product creation, and unless the Contractor negotiates a joint ownership arrangement with the Authorized User at the time the Authorized User issues Contract documents for procurement, 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 patent, 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.

c. Transfers or Assignments of Existing or Custom Products by an

Authorized User: An Authorized User may transfer or assign existing or custom products and the licenses thereunder to another Authorized User pursuant to a governmental reorganization or assignment of functions under which the pertinent functions of such Authorized User are transferred to a successor. 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 or work plan in the course of Contractor's business.

d. Transfers or Assignments of Existing or Custom products by an

Authorized User 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 Project Definition 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. 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 the rights in licensed products that the Authorized User would have had prior to the transfer or assignment a third party financing entity or trustee; provided, further, however, in the event of any termination or expiration of such sublicense by reason of payment in full, all of the third party financing entity or Trustee's rights in such Licensed Product shall terminate immediately and Authorized User's prior rights to such Existing Licensed Product shall be revived.

e. Sale or License of Custom Products:**i) Projects Involving Third Party Tax-Exempt Financing, e.g., 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 financing, tax-exempt financing may not occur until such Products are, or become, useable. In the event that the Contractor wishes to obtain ownership rights to such 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.

ii) Non-Financed Projects: For projects which are not funded by third party financing, the Authorized User may agree to a sale or other transfer of rights to Custom Products at any time by giving notice of such intent in the project or work plan. The absence of such language shall be deemed a reservation of title and ownership unto the Authorized User. In the event that such an option is included in the project or work plan, Contractor must include in its proposal a quoted purchase price for Custom Products. Effective upon successful delivery and acceptance by the Authorized User of all Project deliverables, Contractor is granted an irrevocable, non-exclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, prepare derivative works, and distribute Existing Product and the quoted price may be taken as an offset from final payment(s) due Contractor.

77. PROOF OF LICENSE The Contractor must provide to each Licensee who places a Purchase 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, 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 Contractor'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.

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 a Project Award.

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 Users from suits, actions, damages and costs of every name and description relating to personal injury and damage to real or personal tangible property caused by an intentional act or negligence of Contractor, its agents, employees, partners or subcontractors, without limitation; provided, however, that the Contractor shall not indemnify for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the State or Authorized Users.

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 under any individual Project Award or subsequent scope change(s) ("Project Award") 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 shall be fully liable for the actions of its agents, employees, partners or subcontractors and such liability for direct damages under any Project Award shall not exceed two (2) times the charges rendered by the Contractor. Unless otherwise specifically enumerated herein or in the Project Definition, Contractor shall not be liable for consequential, indirect, special or economic consequential damages, even if Contractor has been advised of the possibility of such damages. *Contractor shall not be responsible for loss of records or data unless the Contractor is required to back-up the records or data as a Deliverable.*

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 for minority business enterprises (MBE) participation and 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

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**

APPENDIX D

CONTRACT UPDATE FORM



STATE OF NEW YORK
 EXECUTIVE DEPARTMENT - OFFICE OF GENERAL SERVICES
 PROCUREMENT SERVICES GROUP
 Corning Tower – 37th Floor
 Empire State Plaza
 Albany, New York 12242

CONTRACT UPDATE FORM	
OGS CONTRACT NO.: _____	DATE OF SUBMISSION: _____
CONTRACT PERIOD: From: _____ To: _____	VENDOR CONTACT: NAME: _____ PHONE NO: _____ FAX NO.: _____ E-MAIL: _____
GROUP NO. & DESCRIPTION: _____ _____	
NOTE: Submission of this FORM does not constitute acceptance by the State of New York until approved by the appropriate New York State representative(s).	

INSTRUCTIONS:

1. This form is to be used for all contract updates. The form is to be completed **in triplicate** and submitted to the OGS Procurement Services Group for final approval. Vendors shall complete, sign, and notarize where indicated, and attach this form to a cover letter written on standard company letterhead. Any submission that is not complete or signed **in triplicate** will be rejected.
2. *Contractor may be required to submit the Product and price information for the update in an Excel spreadsheet format in hard copy and on a floppy disk and/or electronically via e-mail to the OGS Purchasing Officer.*
3. *To expedite the processing of updates that qualify as Auto Adds, do not combine Auto Adds with Regular or Special Adds. **If more than one type of update is being submitted, they should be submitted as totally separate requests.***
4. *The list must be dated and the format should be consistent with the format of the price list(s) included in the Pricing Appendix of the Contract.*
5. *The contract update must be accompanied by either the GSA Price List and revised NYS Net Price List incorporating all changes or the US Commercial Price List and revised NYS Net Price List incorporating all changes, whichever is applicable.*

COMPLETE STATEMENTS 1 THROUGH 8 BELOW:

1. This request is an: _____ Auto Add _____ Regular Add _____ Special Add See contract for an explanation of these terms.	2. The intent of this submittal is to: _____ Add new products _____ Delete products _____ Increase pricing _____ Reduce pricing _____ Amend VAR list
---	---

3. All terms and conditions of the contract shall apply to this request. <input type="checkbox"/> Agree <input type="checkbox"/> Disagree	4. All discounts as agreed to in the contract shall apply. <input type="checkbox"/> Agree <input type="checkbox"/> Disagree
5. All discounts are: <input type="checkbox"/> GSA <input type="checkbox"/> Most Favored Nation* *Prices offered are the lowest offered to any similarly situated entity.	6. Attached documentation includes: <input type="checkbox"/> Current approved GSA (labeled "For information only") <input type="checkbox"/> Current commercial price list (labeled "For information only") <input type="checkbox"/> Revised NYS Net Price List
7. If other than an auto-ad, describe the Nature and Purpose of the update: <hr/> <hr/>	
8. For a regular add, please explain how pricing has been restructured to customers, and/or identify and describe 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. If not applicable, state NA: <hr/> <hr/>	

The following CORPORATE ACKNOWLEDGEMENT statement is to be included in each of the three original forms. The request must be signed by an individual given the authority to perform this action by the corporation's board of directors and the signature must be notarized. The contractor further certifies that all information provided to the Entity with respect to Executive Order Number 127 is complete, true and accurate. For information regarding Executive Order 127 requirements can be found at: <http://www.ogs.state.ny.us/legal/ExeOrder127/overview.asp>

 Signature of Authorized Vendor Representative:

<u>CORPORATE ACKNOWLEDGMENT</u>	
STATE OF	}
	:
	ss.:
COUNTY OF	}
On the ____ day of _____ in the year 20__, before me personally came: _____, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in _____; that he/she/they is (are) _____ (the President or other officer or director or attorney in fact duly appointed) of _____, the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by authority of the board of directors of said corporation.	
<hr/> Signature and Office of Person Taking Acknowledgment	

FOR STATE USE ONLY

OGS APPROVAL:

Approved _____ *Approved as amended* _____
Disapproved _____

Name: _____

Title: _____

Date _____

OSC APPROVAL:

Approved _____ *Disapproved* _____

Name: _____

Title: _____

Date _____

APPENDIX E

CONTRACTOR'S REQUIRED SUBMISSIONS

SUBMISSION #1
MANDATORY CONTRACTOR QUESTIONNAIRE
 [CONTRACTOR MUST ANSWER ALL QUESTIONS]
 Page 1 of 3

1. Are you a New York State resident business?	Yes _____	No _____
2. Total number of people employed by your firm:	_____	
3. Total number of people employed by your firm in New York State:	_____	
4. Is your company independently owned and operated?	Yes _____	No _____
5. Place of manufacture or development of Product(s) offered (Please indicate "Yes" or "No" for A, B or C):		
A. All NYS manufacture/development?	Yes _____	No _____
OR		
B. All manufactured/developed outside NYS?	Yes _____	No _____
OR		
C. Manufactured/developed in NYS and outside NYS?	Yes _____	No _____
6. Is your firm at least 51% owned and controlled by women, or 51% owned and controlled by minority group members, i.e., Black Hispanic, Asian, Pacific Islander, American Indian, Alaskan Native?	Yes _____	No _____
If yes, _____ Minority Owned _____ Women Owned		
If yes, have you been certified or registered? _____ Yes _____ No		
If yes, List certification or registration authority: _____ _____		
7. Do any of the Products offered herein incorporate recycled materials?	Yes _____	No _____ N/A _____
8. Do any of the Products offered herein contain remanufactured components?	Yes _____	No _____ N/A _____
9. Are any of the Products offered herein Energy Star Compliant?	Yes _____	No _____ N/A _____
If yes, which Products? _____ _____		
10. Within the past five years has your firm, any affiliate, any predecessor company or entity, owner, director, officer, partner or proprietor been the subject of:	(Check any that apply. If "Yes,, describe using additional pages.)	
a. an indictment, judgment, conviction, or a grant of immunity, including pending actions, for any business-related conduct constituting a crime under local, state or federal law?	Yes _____	No _____
b. a federal, state, or local government suspension or debarment, rejection of any bid or disapproval of any proposed subcontract, including pending actions, for lack of responsibility, denial or revocation of pre-qualification or a voluntary exclusion agreement?	Yes _____	No _____
c. any federal or state determination of a violation of any public works law or regulation, or labor law or regulation, or any OSHA violation deemed "serious or willful"?	Yes _____	No _____

<p>12. Are prices quoted the same as or lower than those quoted other corporations, institutions and government agencies (including GSA/VA contracts) on similar products, quantities, terms and conditions? See "Best Pricing Offer" in Appendix B-2 D, OGS General Specifications. If "NO", please explain on a separate sheet.</p>	<p>Yes _____</p>	<p>No _____</p>
<p>A. Do you have a contract with the General Services Administration (GSA) or Veterans Affairs (VA) for products offered? (Check all that apply.)</p>	<p>Yes _____ GSA _____ VA _____</p>	<p>No _____</p>
<p>B. If yes, will you offer New York State your GSA or VA pricing or better?</p>	<p>Yes _____ GSA _____ VA _____</p>	<p>No _____</p>
<p>C. If yes, a copy of the GSA or VA schedule is required. Have you included a copy?</p>	<p>Yes _____ GSA _____ VA _____</p>	<p>No _____</p>
<p>13. If awarded a contract, will bidder accept the New York State Procurement Card?</p>	<p>Yes _____</p>	<p>No _____</p>
<p>A. If yes, state any dollar limit on orders for which you will accept the NYS Procurement Card.</p>	<p>Up to \$ _____</p>	
<p>B. Additional discount for purchases made with the NYS Procurement Card:</p>	<p>Yes _____ _____ %</p>	<p>No _____</p>
<p>14. Will you offer a Cash Discount for payment within 15 days of delivery and/or receipt of voucher?</p>	<p>Yes _____ _____ %</p>	<p>No _____</p>
<p>15. Will you offer a Cash Discount for payment within 30 days of delivery and/or receipt of voucher?</p>	<p>Yes _____ _____ %</p>	<p>No _____</p>

***** ALL VENDORS PLEASE TAKE NOTICE OF NUMBER 16 BELOW *****

16. NON-COLLUSION CERTIFICATION

By submission of this contract, each contractor and each person signing on behalf of any contractor certifies, and in the case of a joint contract each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief:

- (1) The prices in this contract have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other contractor or with any competitor;
- (2) Unless otherwise required by law, the prices which have been quoted in this contract have not been knowingly disclosed by the contractor and will not knowingly be disclosed by the contractor prior to contract award, directly or indirectly, to any other contractor or to any competitor; and
- (3) No attempt has been made or will be made by the contractor to induce any other person, partnership or corporation to submit or not to submit a contract for the purpose of restricting competition.

(Contractor's Signature)

(Name of Business)

<p>Submission # 2 Contractor & Reseller/Distributor Information</p>
--

<p>Contractor Information (for Ordering and Contract Administration Purposes)</p>
--

1. CONTRACTOR/COMPANY INFORMATION	
Company Name:	
Address: (From first page of Contract)	
FEDERAL ID #:	
Source Code Escrow Agent: Name: Address: Phone Number:	

2. CENTRALIZED CONTRACT	
Contract Administrator Name:	
Title:	
Mailing Address:	
Telephone Number:	
E-mail:	
FAX:	

3. SALES/BILLING	
Contact Name:	
Title:	
Address:	
Telephone Number:	
E-mail:	
FAX:	

4. MAINTENANCE/ SERVICE	
Contact Name:	
Title:	
Address:	
E-mail:	
WWW Address:	
Telephone Number:	FAX:
Contract "Toll" Free Support Phone Number:	Hours of Availability:

Reseller/Distributor Information	
Contractor's General Commercial Qualifying Criteria for Resellers/Distributors:	1. Attach a description of all reseller criteria following this page; or 2. If Contractor does not market or distribute product through resellers/distributors in the normal course of business, Contractor must attach a statement to that effect following this page. 3. Attach Additional Sheets, If Necessary.
Reseller/Distributor	
(#1) Company Name:	
Address:	
FEDERAL ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller is Authorized to:	<input type="checkbox"/> Take Orders <input type="checkbox"/> Ship Direct <input type="checkbox"/> Receive Payment
Qualifying Criteria Applicable to this Reseller:	

Reseller/Distributor	
(#2) Company Name:	
Address:	
FEDERAL ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller is Authorized to:	<input type="checkbox"/> Take Orders <input type="checkbox"/> Ship Direct <input type="checkbox"/> Receive Payment
Qualifying Criteria Applicable to this Reseller:	

Reseller/Distributor	
(#3) Company Name:	
Address:	
FEDERAL ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller is Authorized to:	<input type="checkbox"/> Take Orders <input type="checkbox"/> Ship Direct <input type="checkbox"/> Receive Payment
Qualifying Criteria Applicable to this Reseller:	

Submission # 2A
Bidder Disclosure of Contacts

Bidder Disclosure of Contacts Form

This form shall be completed and submitted with your bid/proposal or offer in accordance with Executive Order Number 127 (EO 127). Failure to complete and submit this form shall result in a determination of non-responsiveness and disqualification of the bid, proposal or offer. If at the time of submission of this form, the specific name of a person authorized to attempt to influence a decision on your behalf is unknown, you agree to provide the specific person’s information when it is available. You also agree to update this information during the negotiation or evaluation process of this procurement, and throughout the term of any contract awarded to your company pursuant to this bid/proposal or offer.

Is this an initial filing in accordance with Section II, paragraph 1 of EO 127 or an updated filing in accordance with Section II, paragraph 2 of EO 127?:

Initial Filing

Updated Filing

The following person or organization was retained, employed or designated by or on behalf of the Bidder to attempt to influence the procurement process:

Name: _____

Title: _____

Occupation: _____

Company: _____

Address1 _____

Address2 _____

City _____

State _____ Zip _____ Country _____

Telephone Number _____

Does the above named person or organization have a financial interest in the procurement?:

Yes No

Provide the foregoing information for each person or organization retained, employed or designated by or on behalf of the Bidder to attempt to influence the procurement process:

* * * * *

Submission # 3

NYS Contract Net Price List

(NYS Net Prices For: Software, Maintenance,
Consulting & Training Services)

(to be attached by Contractor)

Pricing is Based On:

- US Commercial List, Dated _____
- GSA Supply Schedule Number _____
Dated _____
- Other: _____

Submission # 4

Maintenance & Support

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

(to be attached by Contractor)

Submission # 5

Consulting & Training Services
(Description of Services & Course Offerings)

(to be attached by Contractor)



**Preferred Support Services Agreement
For Use with New York State Contract PT61263**

Customer Information

Between _____ (“Customer”) and Citrix Systems, Inc. (“Citrix”).
 Terms: This agreement is for a period of one (1) year commencing on _____ (“Effective Date”) and ending on _____
 unless renewed as provided herein.
 Street Address: _____
 City: _____ State: _____ Zip: _____
 Telephone: _____ Ext: _____ Fax: _____

Authorized Citrix Reseller Information (if applicable)

Reseller Name: _____ Reseller Level: _____ Reseller Tax ID: _____
 Salesperson’s Name: _____ Telephone: _____ Ext: _____
 Street Address: _____
 City: _____ State: _____ Zip: _____

Select Preferred Option	Description of Services	NYS Price (5% discount)	Price (US \$)
0 Preferred 25	<ul style="list-style-type: none"> ▪ Up to 25 Incidents, in one Region, during each 1 year term ▪ Basic Coverage Hours (8:00 a.m. – 6:00 p.m. Continental U.S.) ▪ 2 Named Contacts ▪ Quarterly Webcasts 	\$7,125	\$7,500
0 Preferred Extend	<ul style="list-style-type: none"> ▪ Up to 50 Incidents, in one Region, during each 1 year term ▪ 24x7 Round-the-Clock Coverage Hours ▪ 4 Named Contacts ▪ Quarterly Webcasts 	\$23,750	\$25,000
0 Preferred PLUS	<ul style="list-style-type: none"> ▪ Up to 75 Incidents, in one Region, during each 1 year term ▪ 24x7 Round-the-Clock Coverage Hours ▪ 6 Named Contacts ▪ Quarterly Webcasts ▪ 1 Assigned TRM for Relations Management Services 	\$57,000	\$60,000

Breakout of Regions: Americas – North America, Central America and South America; (b) EMEA – Europe, Middle East and Africa; (c) AsiaPac – Asia and Australia, but not including Japan. (For support in Japan, please contact Citrix Japan to learn about available support options)

Add-on Type	Description	Availability	Price (US \$)
Contacts	▪ 1 Named Contact	▪ All Preferred Support Agreements	\$1,500
Incidents	▪ 10 Additional Incidents	▪ Preferred 25	\$3,000
	▪ 10 Additional Incidents	▪ Preferred Extend	\$5,000
	▪ 10 Additional Incidents	▪ Preferred PLUS	\$7,500
Region	▪ 1 Additional Region	▪ Preferred 25	\$1,500
	▪ 1 Additional Region	▪ Preferred Extend	\$5,000
	▪ 1 Additional Region	▪ Preferred PLUS (includes additional TRM)	\$40,000

Selected Preferred Support Option \$ _____
 Add-on Options.....\$ _____
 Total Annual Support Price..... \$ _____

Agreed: _____ Accepted: _____
 Customer Citrix

 Authorized Signature Date Authorized Signature Date

Preferred Support Services Agreement Terms and Conditions

1. OVERVIEW. This Agreement describes the specific areas of service, responsibilities, fees and terms associated with Preferred Support Services for the Supported Products, and incorporates specified clauses from the New York State Contract # PT61263 (the "Contract"). Preferred Support focuses on the following key areas of service:

- **Technical Support** covers assistance via phone, Internet and fax to help resolve problems based on selected coverage hours.
- **Relations Management** from an assigned Technical Relations Manager ("TRM") to build and maintain technical relationships with Customer's key management and support staff and ensure each element of Preferred Support meets Customer's business requirements. This Service is **only** available in the Preferred PLUS Option.

2. CITRIX RESPONSIBILITIES. Citrix will provide the following where applicable:

2.1 Service Delivery: All services will be provided remotely from Citrix to Customer locations. Where on-site visits are mutually agreed, the Parties agree that reimbursement for travel, meals or lodging expenses shall not exceed the rates authorized by the NYS Office of the State Comptroller for State Employee travel at <http://www.ogs.state.ny.us/travel/travelReqs.html>. In addition, all services will be provided in the English language unless otherwise agreed to by Customer and Citrix in writing. In certain instances, as mutually agreed to provide resolution to problems, Customer may be required to send CPU and peripherals to Citrix designated locations for diagnosis and test. All shipments and return charges shall be at user's expense.

2.2 Technical Support: Preferred Support includes problem resolution services for technical issues involving Citrix products.

- a) Incident Submission and Resolution. An "incident" is defined as a single support issue and reasonable effort(s) needed to resolve it. A single support issue is a problem that cannot be broken down into subordinate problems. If a problem consists of subordinate problems, each subordinate problem shall be considered a separate incident. Before Citrix provides support for an incident, Customer and Citrix's support engineer(s) must agree on what the problem is and parameters for an acceptable solution. An incident may require multiple telephone calls and off-line research to achieve final resolution. The incident severity will determine the response levels within Citrix and the estimated engineer response times are defined in the table on Exhibit A.
- b) Remote Access. As part of the resolution process, Citrix may access Customer's system via remote access to analyze problems. Remote access is a requirement for resolving issues remotely and Customer will be informed prior to conducting this service. Citrix may provide Customer with software to assist with problem diagnosis and/or resolution. Any information reviewed by Citrix shall be deemed confidential in accordance with Appendix B-2, Section 68. SECURITY/CONFIDENTIALITY, of the Contract. In the event Citrix requires remote access and Customer does not provide Citrix with remote access, Citrix shall not be held liable to resolve such support issues, but will use best efforts to resolve issues remotely.
- c) Supported Products – Supported Products are currently supported Citrix server based Products.
- d) Engineering Support. In situations where Citrix cannot provide a satisfactory resolution to Customer's critical problem through normal support methods, Citrix may engage its product development team to create a Private (hotfix) to the Citrix product of the then current licensed software version or, the immediately prior licensed software version, as applicable. Citrix retains all right, title and interest in and to all Privates. Privates are designed to

address a specific Customer situation and may not be distributed by Customer outside the Customer organization without written consent from Citrix. Limited regression testing is performed on Privates. Privates are released as hotfixes once the Customer has verified the Private has resolved the issue and extensive regression testing is complete.

- e) Multivendor Coordination. Citrix will work with Customer's other key partners to resolve problems in a heterogeneous environment. When problems reported on Citrix products involve interactions with other vendors' products, and Customer has a support agreement with that vendor, Citrix will share diagnostic information and collaborate to provide a solution.
- f) Onsite Support. In critical situations, Customer may request onsite support as a separate and distinct billable service. Onsite support is subject to Citrix resource availability, and the tasks performed will vary based on the situation, environment, and business impact of the problem.

2.3 Relations Management. The Preferred PLUS option gives the Customer proactive technical relations management. A Technical Relations Manager (TRM) is assigned to the account to build the relationship between Customer and Citrix by providing a high-level technical expertise and proactive services. The TRM also serves as the point of information delivery and Customer feedback to the product groups, research and development and other Citrix groups. These services include:

- a) Orientation Session. At the start of this service, an initial orientation session will be scheduled for the TRM to introduce the Customer to Citrix Technical Support contact information and processes. All support is remote unless indicated otherwise.
- b) Escalation Management. In cases where issues need engineering assistance, the TRM will act as the Customer's advocate and function as point-of-contact to assist in rapid resolution of the incident.
- c) Implementation and Informational Reviews. The TRM will be a resource for the Customer to assist with product information and recommendations for integration of Citrix products in the Customer environments.
- d) Incident Tracking and Status Reporting Sessions. TRM will provide the Customer on a regular basis, reports summarizing Customer account information such as incidents opened and status updates.

3. CUSTOMER RESPONSIBILITIES. This section describes the roles and responsibilities required by Customer. Citrix's performance is predicated upon the following responsibilities being fulfilled by Customer in accordance with this Service Agreement.

- a) Customer will designate a Customer Support Manager ("CSM") who will be the primary administrative contact associated with this Support Agreement.
- b) Customer will designate Named Contacts (including a CSM) and each Named Contact (excluding CSM) will be supplied with an individual service ID number for contacting technical support.
- c) Citrix recommends that Customer have the Named Contacts be Citrix certified to assist in the procurement of technical support.
- d) Customer may be asked to perform problem determination activities as suggested by Citrix. Problem determination activities may include performing network traces, capturing error messages, and collecting configuration information. Customer may also be requested to perform problem resolution activities including changing product configurations, installing new versions of software or new components, or modifying processes. Customer agrees to cooperate with such requests.

- e) Customer is responsible for implementing procedures necessary to safeguard the integrity and security of software and data from unauthorized access and to reconstruct lost or altered files resulting from catastrophic failures.
- f) Customer is responsible for procuring, installing and maintaining all equipment, telephone lines, communications interfaces, and other hardware at Customer site and providing Citrix with access to Customer's facilities as required to operate the Supported Products and permitting Citrix to perform the service called for by this Agreement.

4. EXCLUSIONS. Citrix is not required to provide any support services relating to problems arising out of (i) Customer's failure to implement all currently available Upgrades to the Supported Products; (ii) changes to the operating system or environment which adversely affect the Supported Products; (iii) any alterations of or additions to the Supported Products performed by parties other than Citrix; (iv) use of the Supported Products on a CPU and peripherals other than the CPU and peripherals for which such Supported Products were designed and licensed for use on; or (v) Products that have reached the End of Life Date in accordance with the Citrix End of Life Policy available at www.citrix.com. As used herein, "Upgrades" means any new versions or feature releases, which are supplied under Subscription Advantage. Technical Support does not include development work on software not licensed from Citrix or development work for enhancements or features that are outside the documented functionality of the Supported Products. Customer may request consulting and/or development work from Citrix as a separate, billable service.

5. CONTRACT RENEWALS. This Agreement shall renew for additional one (1) year terms upon mutual written consent of the parties. Citrix reserves the right to increase prices consistent with Section 6.B.(4) of the Contract. Unused incidents during a term do not roll over to any subsequent term.

6. WARRANTY DISCLAIMER. Appendix B-2, Section 71. WARRANTY, is hereby incorporated into this Agreement. Citrix will use all reasonable commercial efforts to provide the support requested by Customer under this Agreement in a professional and workmanlike manner, but Citrix cannot guarantee a certain resolution time or that every question or problem raised by Customer will be resolved.

7. LIMITATION OF LIABILITY. The Customer agrees that Citrix's liability under this Agreement is as described in Appendix B-2, Section 83. INDEMNIFICATION & LIMITATION OF LIABILITY, of the Contract.

8. CONFIDENTIALITY. The terms of confidentiality that apply to this Agreement are as stated in Appendix B-2, Section 68. SECURITY/CONFIDENTIALITY, of the Contract.

9. GENERAL PROVISIONS. This Agreement will be governed by and interpreted under the laws of the State of New York without reference to conflict of law principles. The waiver of any breach or default will not constitute a waiver of any other right hereunder or any subsequent breach or default. In accordance with the conditions of Appendix B-2, section 5, CONFLICT OF TERMS, the terms of this Agreement supersede any contrary or additional terms contained in any Customer-issued purchase order or writing.

Exhibit A

Incident Severity and Response Times:

Severity	Definition	Estimated Initial Response Time
1	System is down or effectively unusable as a result of the problem. Problem causes mission-critical impact on the Customer's operation with no acceptable workaround or functionality used to perform tasks considered to be essential to Customer operations, project completion or normal productivity of end-user.	Within 1 hour
2	System is up and running, but the problem causes significant impact and has no acceptable workaround. High impact problem where operation is proceeding, but in a significantly impaired fashion or functionality used to perform tasks considered to be important but not primary to immediate business operations.	Within 2 hours
3	System is up and running and the problem causes only limited or insignificant impact. Important to long-term productivity, but is not causing an immediate work stoppage.	Within 4 hours
4	Problem does not have significant impact to the Customer or functionality that is not important and infrequently used.	Within 4 hours

Customer Responsibilities:

Severity	Customer should be prepared to:
1	<ul style="list-style-type: none"> ▪ Commit appropriate resources to be available to provide additional information within one day of Citrix's request. ▪ Make reasonable efforts to apply suggested solutions within a half day of receipt. ▪ Enable Citrix to use remote access if necessary.
2	<ul style="list-style-type: none"> ▪ Begin the process required to provide additional information to resolve the problem within one day of Citrix's request. ▪ Make reasonable efforts to apply suggested solutions within a half day of receipt. ▪ Enable Citrix to use remote access if necessary.
3	<ul style="list-style-type: none"> ▪ Monitor and respond as necessary. ▪ Enable Citrix to use remote access if necessary.
4	<ul style="list-style-type: none"> ▪ Monitor as necessary.

Preferred Support Agreement Named Contact Information

Customer Support Manager (CSM):

A CSM is an individual designated by the Customer who will be the contact for any notifications regarding the Preferred Support Services (i.e. price increases, renewal notification, etc.)

Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone: _____ Email Address: _____

Technical Contact:

The following individuals are authorized to contact Citrix for technical support issues. Please refer to the corresponding Preferred Support option to determine the number of technical contacts. Use additional page, if necessary.

Technical Contact Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone: _____ Email Address: _____

Technical Contact Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone: _____ Email Address: _____

Technical Contact Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone: _____ Email Address: _____

Technical Contact Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone: _____ Email Address: _____

Technical Contact Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone: _____ Email Address: _____

Technical Contact Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone: _____ Email Address: _____