

AGREEMENT

by and between

NEW YORK STATE

OFFICE OF GENERAL SERVICES

and

WRIGHT EXPRESS FINANCIAL SERVICES CORPORATION

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STATE OF NEW YORK
OFFICE OF GENERAL SERVICES
AGREEMENT # PS65802

CENTRALIZED CONTRACT FOR THE ACQUISITION OF FUEL CARD SERVICES

THIS AGREEMENT is made this 22 day of June, 2012, by and between the People of the State of New York, acting by and through the Commissioner of the Office of General Services (OGS), whose office is on the 41st Floor, Tower Building, Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242 (hereinafter referred to as the "State" or "OGS"), and Wright Express Financial Services Corporation, (herein after "Contractor"), having its principal place of business at 7090 South Union Park Center, Suite 350, Salt Lake City, Utah 84047, The foregoing are collectively referred to as the "Parties."

WHEREAS, OGS is statutorily authorized to enter into centralized procurement contracts for services and technology acquisitions for use by New York State agencies and departments, public authorities, political subdivisions and others authorized by statute to utilize its contracts, and

WHEREAS, the Procurement Services Group (hereinafter "PSG") has been established within OGS to implement this statutory authorization, and

WHEREAS, PSG has identified a need for a Fuel Card Services program, to enable State Agencies, political subdivisions and others authorized by law to acquire Fuel Card Services, which program is described and which needs are in Request for Proposal No. 22445 and were specified and advertised, on December 13, 2011 in the New York State Contract Reporter, as required by New York State Economic Development Law, and

WHEREAS, OGS conducted a competitive process to identify the company which could provide the Fuel Card Services at the best value, and

WHEREAS, the State has determined that the Contractor is responsible and, has submitted a responsive Proposal; and the Contractor is willing to provide the Fuel Card Services as set forth herein (the "Contract," or the "Agreement").

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

SECTION I. OVERVIEW

I.1 CONTRACT SCOPE

This Contract sets forth the terms and conditions for the provision of Fuel Card Services as follows:

- A. The Contractor shall provide Fuel Card Services, as specified in Section III.4, *Fuel Card Services and Authorized User Options*, that can be utilized at Fuel Locations located throughout New York State, and nationwide, for Fuel supplied by multiple oil companies, and Associated Product; and
- B. The Contractor shall provide NYS Authorized Users with a tiered discount structure, as indicated in Appendix E, *Fuel and Associated Product Discounts*, and shall apply the discount as specified in Section III.2, *Fuel and Associated Product Discounts*.
- C. The Fuel Cards provided by the Contractor shall be used to purchase Fuel and Associated Product at Fuel Locations, as defined herein. Roadside assistance (i.e., towing, jump starts, Fuel delivery and tire repair provided by a mobile service), is not included in the scope of this Contract.
- D. No software licenses, other than the license to access Octane, shall be provided by the Contractor under this Contract, and no license rights are required for Authorized Users to access the Fuel Card Services provided under this contract. The Parties further acknowledge that the Contractor may make available mobile software applications (e.g., Octane) within the scope of the Contract. The State has not reviewed the associated licenses for acceptability; accordingly, the Authorized User is obligated to review and make an independent determination, with the advice of legal counsel as necessary, about the acceptability of a particular license before authorizing usage.
- E. The Contractor may offer alternative Fuel Location payment options to allow out-of-network Fuel and Associated Product purchases within the scope of the Contract (e.g., WEXPay). The State has not reviewed the associated transaction processing rules and terms of use for this service; accordingly, the Authorized User is obligated to review and make an independent determination, with the advice of legal counsel as necessary, before authorizing usage of this service.

I.2 CONTRACT TERM

The Contract will commence on the date of the OGS Contract Award Notification document sent to the Contractor, after execution and approval by the Office of the State Comptroller. The Contract will be in effect for three (3) years with an option to renew for up to two (2) additional one (1) year terms. The State may further extend this Contract for up to one (1) additional year or until a new contract is entered into, upon mutual written consent of the State and the Contractor. To be effective and binding, all renewals and extensions must be approved by the Office of State Comptroller. Authorized User may engage the Contractor for services pursuant to this Contract at any time during the term of the Contract.

If at any time the Contract is canceled, terminated or expires, the Contractor has the affirmative obligation to extend appropriate and reasonable cooperation to assure the orderly transition of Contract services to the subsequent contractor.

I.3 ELIGIBLE PARTICIPANTS

Authorized Users of NYS Contracts (See Appendix B, §5, *Definitions*, and §39, *Participation in Centralized Contracts*), including Non-State Users listed in Table One (<http://www.ogs.ny.gov/purchase/snt/othersuse.asp>) are permitted to use this Contract. Authorized Users are not mandated to use this Contract. This Contract may be extended with the 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”).

SECTION II. GENERAL TERMS

II.1 DEFINITION OF TERMS

Terms used in this Contract that are capitalized shall be defined in accordance with Appendix B, (§5 *Definitions*). Appendix B is hereby amended to add the following definitions:

- A. **Associated Product:** A non-Fuel Product that may be purchased with the Fuel Card in an Emergency situation, and car washes. Associated Products purchased in an Emergency situation are limited to Products that are required for continued safe operation of the vehicle (e.g., motor oil, transmission fluid, windshield wipers and fluid, and tire repair).
- B. **Cardholder:** The Authorized User to which a Fuel Card has been assigned. The Authorized User may allocate Fuel Cards to an individual, vehicle and/or department.
- C. **Central Bill/Central Pay:** The process under which each Authorized User is assigned a single Fuel Card account for all cards issued to such Authorized User, and receives a single monthly invoice for all activity charged against or credited to such account. Notwithstanding the foregoing, a separate account and invoice may be allowed, if required to implement a fictitious name account or sub-account, as described in Section III.4(I).
- D. **Fleet Contact Person:** The designated administrator of the Authorized User's Fuel Card Services program. The Fleet Contact Person's duties may be designated to multiple persons according to the structure and business practices of the Authorized User. However, each Authorized User must have one Fleet Contact Person.
- E. **Fuel Card Services:** Services related to the use of a Fuel Card, including, but not limited to, the ability to purchase Fuel and Associated Product from Fuel Locations, applicable tax deduction, customized pricing and billing, usage reporting and card security.
- F. **Fuel:** A consumable material or substance used to produce energy for powering vehicles and small engines (e.g., automobiles, trucks, heavy and light duty equipment). Included in this definition are conventional fuels (e.g., gasoline and diesel) and alternative fuels (e.g., hydrogen, propane, compressed natural gas (CNG), liquefied natural gas (LNG), methanol, ethanol and electricity). Note: The Contractor shall not be required to provide Fuel Locations that supply all Fuel types identified herein. However, at a minimum, the Contractor must provide Fuel Locations in all New York State counties that supply conventional Fuels.
- G. **Fuel Card:** A Contractor-issued electronic payment card for use by an Authorized User to purchase Fuel and Associated Product at Fuel Locations. The card shall be accepted at Fuel Locations located throughout New York State, and nationwide, for Fuel supplied by multiple oil companies (e.g., Exxon Mobil, Chevron, Hess, Gulf and Shell).
- H. **Fuel Location:** Fuel stations or outlets, including retail and commercial locations, where an Authorized User may use the Fuel Card to purchase Fuel and Associated Product. Note: It is not required that all Fuel types be offered at all Fuel Locations.
- I. **May:** The permissive in a contract clause or specification. "May" does not mean "required." Also see "Shall" and "Must."
- J. **Must:** The imperative in a contract clause or specification. "Must" is synonymous with "required." Also see "Shall" and "May."
- K. **Personal Identification Number (PIN):** A numeric identification code used for security purposes to identify Fuel Card Authorized Users when making transactions. "Personal Identification Number (PIN)" is synonymous with "Driver Identification Number (DIN)."

- L. **Primary Fuel Discount(s):** The NYS discount(s) that an Authorized User of the Fuel Card will receive for Fuel purchases at all of the Contractor's Fuel Locations.
- M. **Procurement Services Group (PSG):** A division of the New York State Office of General Services which is authorized by law to issue centralized, statewide contracts for use by New York agencies, political subdivisions, schools, libraries and others authorized by law to participate in such contracts.
- N. **Secondary Fuel Discount(s):** The NYS discount(s) that an Authorized User of the Fuel Card will receive, in addition to the Primary Fuel Discount(s), for Fuel purchases at Fuel Locations. If available, Secondary Fuel Discounts will be specified by the Contractor in Appendix E, *Fuel and Associated Product Discounts*. The Secondary Fuel Discount is added to the Primary Fuel Discount to obtain the total discount applicable to a specific transaction.
- O. **Shall:** The imperative in a contract clause or specification. "Shall" is synonymous with "required." Also see "Must" and "May."
- P. **State Agency:** Any state department, or division, board, commission, or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the State University of New York or the City University of New York, including all their constituent units except community colleges of the State University of New York and the independent institutions operating statutory or contract colleges on behalf of the state.

II.2 ENTIRETY OF AGREEMENT / ORDER OF PRECEDENCE

The Contractor agrees to perform this Contract and to furnish the Fuel Card Services in connection therewith in accordance with all the conditions, covenants, and representations set forth in the following documents. 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.

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.

Conflicts between these documents shall be resolved in the following descending order of precedence, which supersedes the order of precedence stated in Appendix B.

- A. Appendix A – Standard Clauses for NYS Contracts
- B. Contract – This Agreement exclusive of all other Appendices
- C. Appendix B – OGS General Specifications
- D. Appendix C – Contractor's Executive Law, Article 15-A (M/WBE) Requirements
- E. Appendix D – Contract Insurance Requirements
- F. Appendix E – Fuel and Associated Product Discounts
- G. Appendix F – Contractor Contact Information
- H. Appendix G – Contractor Order Forms (Participation Addendum)
- I. Appendix H – Contractor Additional Terms and Conditions
- J. Appendix I – Contract Quarterly Sales Report Form

II.3 AMENDMENTS TO APPENDIX B

The following modifications are made to Appendix B for this Contract:

- A. Clause 5, *Definitions*, is amended by adding the defined terms listed in Section II.1, *Definition of Terms*.
- B. Clause 44, *Purchase Orders*, is clarified as follows: The Parties recognize that Purchase Orders will not be issued to the Contractor. See also Section V.2, *Procurement Instructions*.
- C. Clause 62, *Contract Billings*, is deleted and replaced with the following language:

CONTRACT BILLINGS AND PAYMENTS

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

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

b. Payment of Contract purchases made by an Authorized User when the State Comptroller is responsible for issuing such payment. The Authorized User and Contractor agree that payments for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payments shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller website at www.osc.state.ny.us, by e-mail at epunit@osc.state.ny.us, or by telephone at 518-474-4032. Contractor acknowledges that it will not receive payment on any invoices submitted under this Contract that are payable by the State Comptroller if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

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

- D. The Parties agree to reserve the following clauses from Appendix B, as no license rights are required for Authorized Users to access the Fuel Card Services provided under this contract:

78. *Software License Grant*;

79. *Product Acceptance*;

80. *Audit of Licensed Product Usage*;

81. *Ownership/Title to Project Deliverables*;

- 82. *Proof of License;*
- 83. *Product Version;*
- 84. *Changes to Product or Service Offerings;*
- 85. *No Hardstop/Passive License Monitoring; and*
- 86. *Source Code Escrow for Licensed Product*

II.4 ABILITY TO CONDUCT CREDIT EVALUATIONS

- A. The Contractor is precluded from conducting credit evaluations for State Agencies.
- B. The Contractor may conduct credit evaluations for Non-State Agencies (see Table One and Two at <http://www.ogs.ny.gov/purchase/snt/othersuse.asp> for listing of eligible entities) intending to use the Contract and deny services to Non-State Agencies that do not meet the Contractor's standard commercial risk qualifications. The Contractor shall notify the Non-State Agency in writing that their use of the Contract has been denied based on an unsatisfactory credit rating.

II.5 DISPUTE RESOLUTION POLICY

An Authorized User may, at their option, choose to utilize the following dispute resolution process. The parties understand and agree that the provision of services is subject, at times, to conditions beyond the control of Contractor which may affect the provision of such service in some instances. It is the intention of both parties to attempt to resolve any ongoing disputes, first, through a dispute resolution process as provided below:

- A. **First Level:** In the event of any dispute arising between the Contractor and an Authorized User regarding services provided pursuant to this Contract, the complaining party shall notify the other and shall make a good faith effort to resolve the dispute within thirty (30) days and shall adhere to the precedence of application of Contract documents set forth in Appendix B §4, *Conflict of Terms*. For disputes regarding individual Fuel Card transactions, the Authorized User must notify the Contractor within sixty (60) days of the date of the invoice listing the disputed transaction in order for the Contractor to conduct a review with the applicable Fuel Location.
- B. **Second Level:** In the event that a dispute cannot be satisfactorily resolved by good faith efforts at the First level, then either party may, upon satisfaction of conditions set forth herein, refer the entire matter to the New York State Contract Administrator responsible for administration of the Contract for a determination. Conditions precedent to referral of a dispute to the Second and Third Levels of this dispute resolution procedure are: (i) any such referral must be made, if at all, within thirty (30) days of the time that notice of the dispute was first given by the complaining party to the other, and (ii) no duty or obligation arising hereunder which is the subject of a dispute, specifically including but not limited to any and all service obligations and any and all payment obligations arising hereunder may be refused, deferred, declined, withheld, delayed or diminished during the pendency of this dispute resolution process. The Procurement Services Group (PSG), or other authorized designee, will make a determination on the dispute within ten (10) business days of receipt of the matter from the complaining party and will notify both parties of its determination simultaneously. The determination of the PSG shall be final and binding upon the parties unless within ten (10) business days of receipt thereof, either party gives written notice of appeal to the Commissioner of General Services and provides therewith all matter pertinent to the dispute.
- C. **Third Level:** In the event that a party is unsatisfied with the resolution of a dispute at the First and Second Levels, that party may, within ten (10) business days of receipt of the Second Level determination, refer the entire matter, in writing, to the Commissioner of General Services as a final appeal. The appealing party must provide, with its notice of appeal, all documents pertinent to the appeal, including a written description of the facts and circumstances giving rise to the dispute; the

reason why that party is aggrieved and copy of this dispute resolution procedure. The Commissioner of General Services or a designated representative thereof shall render a decision resolving the dispute within thirty (30) days of receipt of all necessary and pertinent information. The decision of the Commissioner of General Services shall be final and binding upon both parties except that neither party shall be precluded from pursuing any legal remedy it may have. The decision of the Commissioner of General Services may be admitted as evidence of administrative determinations of fact in any legal proceeding pertaining to a dispute arising under this Contract.

- D. Notwithstanding any of the above, Contractor shall be obligated to provide continuous services and shall be liable for any breaches of this Contract, which in the State's discretion, cannot be resolved through the dispute resolution process.

II.6 PERFORMANCE AND BID BONDS

In accordance with Appendix B, §58 *Performance/Bid Bond*, the Commissioner of OGS has determined that no performance, payment or Bid bond, or negotiable irrevocable letter of credit or other form of security for the faithful performance of the Contract shall be required at any time during the Initial term, or any renewal term, for this Contract.

II.7 SUBCONTRACTORS

The Contractor may use Subcontractors to fulfill services; however, NYS will only contract with the Contractor. The Contractor will be considered the "prime" Contractor and shall be fully responsible for all performance of the Contract, including work performed by Subcontractors. No subcontract entered into by the Contractor shall relieve the Contractor of any liabilities or obligations in this Contract. The Contractor accepts full responsibility for the actions of any employee or Subcontractor's employees who perform requested Fuel Card Services.

The Contractor shall be responsible for informing the Subcontractors of all terms, conditions and requirements of this Contract and shall coordinate and control the work of the Subcontractors.

If Subcontractors will be used, Contractor must notify OGS in writing prior to start date. A Contractor will be required to submit a list of Subcontractors to OGS for approval prior to the Subcontractors beginning to provide services. OGS reserves the right to require the Contractor to provide evidence of the Subcontractor's financial stability (e.g., financial statements) and technical qualifications (e.g., resumes, references, and qualifications) at any time during the Contract term, and reserves the right to withdraw prior approval of a Subcontractor in the best interest of the State or for cause, or upon a finding of non-responsibility.

II.8 INSURANCE REQUIREMENTS

Contractor insurance requirements are set forth in Appendix D, *Contract Insurance Requirements*.

II.9 INFORMATION SECURITY BREACH AND NOTIFICATION ACT.

Section 208 of the State Technology Law (STL) and Section 899-aa of the General Business Law (GBL) require that State entities and persons or businesses conducting business in New York who own or license computerized data which includes private information including an individual's unencrypted personal information plus one or more of the following: social security number, driver's license number or non-driver ID, account number, credit or debit card number plus security code, access code or password which permits access to an individual's financial account, must disclose to a New York resident when their private information was, or is reasonably believed to have been, acquired by a person without valid authorization. Disclosure of breach of that private information to all individuals affected or potentially affected must occur in the most expedient time possible without unreasonable delay, after necessary measures to determine the scope of the breach and to restore integrity, but with delay if law enforcement determines it impedes a criminal investigation. When

notification is necessary, the State entity or person or business conducting business in New York must also notify the following New York State agencies: the Attorney General, the Office of Cyber Security & Critical Infrastructure Coordination (CSCIC) and the Consumer Protection Board (CPB). Information relative to the law and the notification process is available at: <http://www.cscic.state.ny.us/security/securitybreach/>.

II.10 SUMMARY OF POLICY AND PROHIBITIONS ON PROCUREMENT LOBBYING LAW

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

More information on OGS’s implementation of the Procurement Lobbying Law can be found at: http://www.ogs.state.ny.us/aboutOgs/regulations/defaultSFL_139j-k.html.

II.11 IRAN DIVESTMENT ACT

As a result of the Iran Divestment Act of 2012 (Act), Chapter 1 of the 2012 Laws of New York, a new provision has been added to the State Finance Law (SFL), § 165-a, effective April 12, 2012. Under the Act, the Commissioner of the Office of General Services (OGS) will be developing a list (prohibited entities list) of “persons” who are engaged in “investment activities in Iran” (both are defined terms in the law). Pursuant to SFL § 165-a(3)(b), the initial list is expected to be issued no later than 120 days after the Act’s effective date, at which time it will be posted on the OGS website.

By entering into this Contract, Contractor (or any assignee) certifies that once the prohibited entities list is posted on the OGS website, it will not utilize on such Contract any subcontractor that is identified on the prohibited entities list.

Additionally, Contractor agrees that after the list is posted on the OGS website, should it seek to renew the Contract, it will be required to certify at the time the Contract is renewed or assigned that it or its assignee is not included on the prohibited entities list.

During the term of the Contract, should OGS receive information that a person is in violation of the above-referenced certification, OGS will offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment which is in violation of the Act within 90 days after the determination of such violation, then OGS shall take such action as may be appropriate including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

OGS reserves the right to reject any request for assignment for an entity that appears on the prohibited entities list prior to the award of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the prohibited entities list after contract award.

II.12 NOTICES

All notices, demands, designations, certificates, requests, offers, consents, approvals and other instruments given pursuant to this Agreement 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 below. The parties may from time

to time, specify any address in the United States as its address for purpose of notices under this Agreement by giving fifteen (15) days written notice to the other party. The parties agree to mutually designate individuals as their respective representatives for purposes of this Agreement. Contact information for the designated individuals will be set forth on the Contract Award Notification (CAN) and on the Contractor Information page for this Contract, which will be posted on the OGS website.

II.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.

II.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.

II.15 COUNTERPARTS

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute the same Agreement. Any signature page of any such counterpart may be attached or appended to any counterpart to complete a fully executed counterpart of this Agreement and shall bind such party.

SECTION III. CONTRACTOR RESPONSIBILITIES

III.1 GENERAL RESPONSIBILITIES

The following general Contractor responsibilities shall apply to this Contract:

- A. Contractor must provide a dedicated Contract Administrator to support the management of the Contract on a timely basis. Information regarding the administrator shall be set forth in Appendix F – *Contractor Contact Information*. Contractor shall not replace identified key personnel without prior written notification to the NYS Contract Administrator.
- B. Upon receipt of an Authorized User’s request to engage the services of the Contractor, and a completed NYS form FT-505.1, *Government Entity Credit Card Refund or Credit Election* (http://www.tax.ny.gov/pdf/current_forms/misc/ft505_1.pdf), the Contractor may begin to work with the Authorized User to implement a Fuel Card Services program. *Note: The Contractor must counter-sign form FT-505.1 and submit it to the NYS Department of Taxation and Finance before taxes can be deducted.*
- C. Contractor is authorized to take instructions from each Authorized User’s Fleet Contact Person as indicated on the Participation Addendum, or other designated agency official with authority to act on behalf of the Authorized User.
- D. Contractor will comply with all local, state and federal laws applicable to its provision of the Fuel Card Services. Contractor will also agree to an examination of its books and records pertinent to its provision of the Fuel Card Services hereunder in accordance with the provisions of Appendix A, §10, *Records*.

III.2 FUEL AND ASSOCIATED PRODUCT DISCOUNTS

The Contractor shall provide a Primary Fuel Discount at all Fuel Locations where the Authorized User may use the Fuel Card, and may also offer Secondary Fuel Discounts and Associated Product Discount(s), as indicated

in Appendix E, *Fuel and Associated Product Discounts*, to all Authorized Users. Discounts shall be calculated and applied as follows:

A. **Fuel Discount(s):** The Primary NYS Fuel Discount shall be calculated based on the aggregate volume of all Authorized User Fuel Card purchases under the Contract, for Fuel purchases at Fuel Locations. Tiered discounts shall be calculated monthly, based on the aggregate volume of all Authorized User Fuel transactions made during the applicable billing cycle at the time of invoicing, and be applied to the monthly Central Bill for the applicable billing cycle. In order to allow for the aggregation of the NYS discount, all Authorized Users of the Contract shall be invoiced on the same billing cycle. The NYS Fuel Discount shall be applied, prior to deduction of the applicable tax(es), to the gross monthly sales amount of each Authorized User's Fuel purchases at all Fuel Locations.

If applicable, Secondary Fuel Discount(s) shall be applied, prior to deduction of the applicable tax(es), to the gross monthly sales amount of each Authorized User's Fuel purchases at the specified Fuel Locations. The Secondary Fuel Discount is added to the Primary Fuel Discount to obtain the total discount applicable to a specific transaction.

B. **Associated Product Discount(s):** The NYS Associated Product discount(s), if applicable, shall be applied to an Authorized User's monthly Central Bill for the applicable billing cycle. If Contractor deducts applicable tax(es) for Associated Products, the NYS discount shall be applied prior to deduction of the tax(es).

C. **Updating Contractor Discount(s):** The Fuel discount(s) set forth in Appendix E, *Fuel and Associated Product Discounts*, shall not decrease during the Contract term. Contractor may increase the Contract discount offered at any time, without prior approval by OGS and the Office of the State Comptroller, provided that OGS be notified at the time of the increase in discount.

Associated Product Discount(s), if available, shall not decrease without the prior approval of OGS and the Office of the State Comptroller. In order to request a decrease in discount, a Contractor shall submit a notarized request to OGS on company letterhead. Such request shall include a justification for the discount change. If approved, OGS staff will notify Contractor in writing. Discount decreases shall not be effective until approval by OGS and OSC. Contractor may increase the Contract discount offered at any time, without prior approval by OGS and the Office of the State Comptroller, provided that OGS be notified at the time of the increase in discount.

III.3 FUEL LOCATION NETWORK

The Contractor must provide, for the life of the Contract, a network of Fuel Locations that allow Cardholders to fuel their vehicles with Fuel supplied by multiple oil companies (e.g., Exxon Mobil, Chevron, Hess, Gulf and Shell), and to purchase Associated Product, in all counties in New York State, and also nationwide locations. The Contractor shall not be required to provide a Fuel Location in each county that supplies all Fuel types identified in Section II.1, *Definition of Terms*. However, at a minimum, Contractor must provide Fuel Locations that supply conventional Fuels in each New York State county. Contractor is not required to provide Fuel Locations for non-conventional Fuels. Contractor shall maintain a searchable database of Fuel Locations that accept the Fuel Card on their company website.

III.4 FUEL CARD SERVICES AND AUTHORIZED USER OPTIONS

The Contractor shall provide the following Fuel Card Services and options per the Authorized User's specifications.

A. Individual Fuel Cards shall be assignable by an Authorized User to a specific:

1. Individual, identified by name or Personal Identification Number;

2. Vehicle, identified by the Authorized User vehicle number and/or vehicle license plate;
 3. Authorized User agency, division or business unit; or
 4. Any combination of 1, 2, and 3.
- B. The Authorized User shall have the ability to assign two (2) prompts to each Fuel Card, for Cardholder input at the Fuel pump or other keypad provided at the Fuel Location, in order to track and authorize every Fuel and Associated Product purchase. When assigning prompts, the Authorized User shall have the ability to choose from the following options:
1. Driver ID. Each Driver ID may be assigned to one card, multiple cards or all Authorized User cards. The Driver ID may be assigned to an individual driver, vehicle or organizational unit. The Authorized User may elect to assign either a four (4) or six (6) digit number to be entered, and may either assign numbers randomly generated by the Contractor or numbers assigned by the Fleet Contact Person;
 2. Odometer reading. *Note: Standard prompting at each Fuel Location will require that a six (6) digit odometer reading be entered at the Fuel pump. Authorized Users that are fueling an asset without an odometer reading (e.g., Fuel containers), may elect to enter an assigned number (e.g., "000000") for this prompt; and*
 3. No prompts or only one (1) prompt. *Note: Only select Fuel Locations will accept Fuel Cards with either no assigned prompts or only one (1) prompt. The Authorized User is obligated to review and make an independent determination of the applicability of these options before choosing to implement them.*
- C. The Authorized User shall have the ability to limit each Fuel Card purchase to:
1. Fuel only (i.e, Fuel Card shall not be authorized for Associated Product purchases);
 2. Fuel Location;
 3. Number of Fuel or Associated Product purchases or transactions per day, week or month;
 4. Number of gallons of Fuel; or
 5. Any combination of 1, 2, and 3.
- D. Fuel Cards shall be sorted, bundled and delivered according to an Authorized User's specifications (e.g., by Cardholder name, individual Fuel Card user name, and/or department location).
- E. Fuel Cards shall be provided with custom embossing that includes up to three lines of data (e.g., Authorized User name and/or name of department(s) within such entity, vehicle number or Fuel Card user name).
- F. Fuel Cards shall be issued with a three (3) year active period. Upon Authorized User approval, the Contractor will issue replacement cards 45 days prior to expiration of the Fuel Cards. Fuel Cards shall not be cancelled by the Contractor for inactivity.
- G. The Authorized User shall have the ability to manage Fuel Card accounts at the Contractor's website, including, but not limited to:
1. Changes to Fuel Card user options;
 2. PIN management;
 3. Addition and deletion of individual Cardholder's, as allocated by the Authorized User;
 4. Cancellation and replacement of Fuel Cards; and

5. The ability to set Fuel Card transactions report parameters (see also Section III.6A, *Authorized User Transaction Reports and Inquiries*, below).
- H. Internal management controls capability to include processes for:
1. Authorization of Fuel Cards, including card renewals;
 2. Preventing inappropriate usage of Fuel Card by Cardholder (e.g., limit purchase to Fuel tank size);
 3. Cancellation of Fuel Cards;
 4. Lost or stolen Fuel Cards;
 5. Increase/decrease of Fuel Card limits;
 6. The level of Authorized User data embedded in the Fuel Card; and
 7. The maintenance and security of Authorized User data.
- I. Certain Authorized Users engaged in law enforcement or other investigative activities will require additional accounts or sub-accounts, in a fictitious name or names, where such cards are embossed with such fictitious name, and include generic or card issuer specific card backgrounds, where for such accounts:
1. No information is transmitted to any merchant, nor any information embossed, printed, appearing or encoded on a Fuel Card associates the card, card holder, driver, vehicle or account with the State of New York or its agencies to any person or entity other than the card issuer; and
 2. The Contractor further agrees to keep confidential the true nature and identity of the Cardholder using such fictitious name, from any third parties, except as required by law, or with and to the extent of the express written permission of the Authorized User. See also Section III.6, *Reporting*.

III.5 TAX DEDUCTION

The Contractor shall deduct all applicable federal, state and local government taxes for Fuel purchases prior to invoicing the Authorized User. Reference “Federal Tax Law Excise Taxes (Including Fuel Tax Credits and Refunds)” Publication 510 (Rev. July 2011), available at <http://www.irs.gov/pub/irs-pdf/p510.pdf>. The Authorized User shall certify its tax exempt status, if applicable, by completing a “Certificate of Buyer of Taxable Fuel,” provided by the Contractor, and/or NYS form FT-505.1, *Government Entity Credit Card Refund or Credit Election*. *Note: The Contractor must counter-sign form FT-505.1 and submit it to the NYS Department of Taxation and Finance before taxes can be deducted. The Contractor may claim a refund of the taxes that were paid by the Authorized User for the Fuel purchase by filing form FT-505, Claim for Refund of Taxes Paid on Government Entity Credit Card Purchases of Fuel, with the NYS Department of Taxation and Finance.*

If applicable, taxes that shall be deducted include, but are not limited to:

- A. Federal Excise Tax;
- B. New York State Excise Tax;
- C. New York State Petroleum Business Tax;
- D. New York State Sales Tax; and
- E. Any local Sales Tax levied by a political subdivision of the State of New York.

III.6 REPORTING

The Contractor shall provide the following reports to OGS and the Authorized Users.

A. **Authorized User Transaction Reports and Inquiries:** The Contractor shall provide on-demand, online reports, based on Authorized User input criteria, of its purchases made with the Fuel Card. It is anticipated that in most cases daily and monthly reporting will be necessary to provide the information needed to reconcile payments and to monitor Fuel Card usage. The Contractor shall provide a website that OGS and the Authorized User may access to produce Authorized User transaction reports in both Excel and text formats. Authorized User Transaction reports will be available to OGS and the Authorized User online, on a rolling 24 month basis. After the 24th month, the data will be available from Contractor's archives. OGS shall require the ability to produce reports that include data for multiple Authorized Users, and also statewide reports. The Authorized User, at their discretion, may opt to have the Contractor remove information which may identify individual Cardholders from the data available to OGS. The transaction reports and the data collected to produce the reports are confidential and may only be shared with other parties with the prior approval of the Authorized User. Data for activity on fictitious accounts, as described in Section III.4(I), shall not be made available to OGS without prior approval by the Authorized User.

Unless otherwise specified by an Authorized User, the data that is required per transaction, in a searchable on-line database, includes:

1. Identification of Authorized User, including agency name and State assigned agency code;
2. Fuel Card account number;
3. Fuel Card status (active or inactive)
4. Identification of Cardholder, as allocated by the Authorized User (i.e., individual, vehicle and/or department);
5. Transaction time, date and Fuel Location (available in separate fields);
6. Odometer reading, if Cardholder input is required for the transaction;
7. Fuel type or Associated Product description;
8. Number of gallons in tenths;
9. Gross/pump price per gallon;
10. Retail price of Associated Product;
11. Applicable NYS discount(s) and taxes exempted;
12. Net price per gallon;
13. Net price of Associated Product;
14. Total amount per transaction; and
15. Total amount of purchases per Fuel Card.

B. **Exception Reports:** The Contractor shall provide on-demand, online reporting that includes the identification of Fuel Card usage outside the specified Fuel Card options, including:

1. Weekend and after hour purchase;
2. Unauthorized Fuel Location, Fuel type, or Associated Product purchases;
3. Multiple purchases in the same day;
4. Fuel purchases beyond the capacity of the vehicle's Fuel tank; and
5. Fuel purchases in excess of the authorized quantity.

C. **Quarterly Summary Reports for Control Agencies:** Contractor shall furnish quarterly reports, containing a summary of all Authorized User Fuel and Associated Product Contract transactions that have occurred during the quarter, to OGS, for purposes of supporting program monitoring and Contract administration. Reports shall be delivered within thirty (30) days of the close of the quarterly period. Quarterly periods will end on March 31st, June 30th, September 30th and December 31st. 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 quarterly report.

The report is to be submitted electronically in Microsoft Excel format to the Office of General Services, Procurement Services Group, Tower Bldg., Empire State Plaza, Albany, NY 12242, to the attention of the individual shown on the front page of the Contract Award Notification and shall reference the Group Number, the Award Number, Contract Number, sales period, and Contractor's (or other authorized agent) name.

The sales report template is attached hereto as Appendix I. An Excel template will be forwarded to the Contractor upon Award. OGS reserves the right to require additional data in the sales report, and update the template, as it deems necessary. Data for activity on fictitious accounts, as described in Section III.4(I), shall not be made available to OGS without prior approval by the Authorized User.

The State shall have the right to verify said report 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 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.

III.7 TRAINING

The Contractor shall provide implementation and on-going training related to the Fuel Card Services program to the Authorized Users throughout the term of the Contract. The Contractor must provide each Authorized User with all necessary training for the Fuel Card Services program, including user manuals and system documentation, at no additional cost. Such training will provide the Authorized User with:

- A. A thorough understanding of Fuel Card acceptance and processing;
- B. An understanding of Authorized User reports and reconciliation procedures;
- C. Guidance in developing Authorized User internal reports; and
- D. An understanding of security requirements and fraud prevention/detection.

III.8 HELP DESK SERVICES

The Contractor must provide Help Desk Services for Authorized Users based on a twenty-four (24) hours per day, seven (7) days per week basis, including holidays, in order to address all Authorized User customer assistance needs and technical issues. The Authorized User assistance line(s) must be a toll free number(s) which provide direct assistance, intake service with follow-up resolution and requests for escalated assistance. Transaction authorization and verification, and the ability to report and cancel lost or stolen Fuel Cards, must be available on a twenty-four hours per day, seven (7) day per week basis, including holidays.

III.9 INVOICING

Unless otherwise agreed upon in writing between the Authorized User and the Contractor, Fuel and Associated Product costs must be invoiced on a monthly basis to each participating Authorized User. In order to allow for the aggregation of the NYS discount, all Authorized Users of the Contract shall be invoiced on the same billing

cycle. *Note: See Appendix B, §62 Contract Billings and Payments (as amended) and §64 Interest on Late Payments.* Invoices shall, at minimum, include the following level of detail:

- A. Total gallons of Fuel in tenths, and volume of Associated Product purchased during the billing period;
- B. Total Gross/pump price of Fuel, and retail price of Associated Product purchased;
- C. NYS discount(s) deducted;
- D. Taxes deducted; and
- E. Net amount due from the Authorized User.

In addition to the summary invoice described above, a transaction detail report must be available for download from a secure location at the Contractor's website or submitted directly to the Authorized User in an Excel spreadsheet. The transaction detail report must match the billing cycle of the invoice and provide the level of detail listed in Section III.6A, *Authorized User Transaction Reports and Inquiries*.

III.10 SECURITY & CONFIDENTIALITY

The Contractor is responsible for Authorized Users' security needs, the security of the transaction data and processing procedures and for compliance with all applicable state laws pertaining to the security of transaction data in connection with the provision of Services hereunder; provided, however, that Contractor will not be responsible for any security breaches or non-compliance with Federal or State law or terms of this Contract which results from any act or omission of the Authorized User or a third party unrelated to the negligence of Contractor.

The Contractor is also responsible for compliance with all applicable state and federal laws pertaining to the security of data. Additionally, the Contractor must adhere to the security and confidentiality procedures of Authorized User and implement procedures sufficient to enforce such privacy for all services provided under the Contract. To that end, the Contractor's employees may be required to sign agreements to adhere to such laws, rules and/or procedures. The Contractor must store any electronic payment processing data in an encrypted data format sufficient to preserve such security.

The Contractor will be required to comply with the confidentiality and security requirements of Appendix B, §69. *Security*. Individually identifiable material and information relating to a Cardholder, security codes or encryption methods, or other confidential information regarding the Authorized User's business operations or data, shall be held confidential in accordance with these requirements and shall not be disclosed by the Contractor, its officers, agents or employees or Subcontractors, without the prior written approval of the Authorized User and, where applicable, the individual Cardholder, as allocated by the Authorized User.

Except as directed by OGS, a court of competent jurisdiction, or as necessary to comply with applicable New York State or Federal law(s) or regulation(s), and with the written consent of the individual Cardholder, where applicable (see Section III.4(I) above), no data records or other information may be otherwise used, released or sold to any third party by the Contractor. The Contractor is further prohibited from releasing data records or other information to its joint venture, partners, employees, agents or subcontractors, either during the term of the Contract or in perpetuity thereafter, unless such party is directly processing the data or providing a service that requires access to the data. Where such party is directly processing the data or providing a service that requires access to the data, the Contractor shall be responsible for insuring such party's compliance with the provisions of this paragraph. The Contractor shall be responsible for assuring that any agreement between the Contractor and any of its joint venture, partners, officers, agents, employees or subcontractors contains a provision that strictly conforms to these provisions.

The Contractor shall have in place a comprehensive security, fraud prevention and internal control plan, which will ensure the anonymity of Cardholder information and that access to such information is controlled and restricted to authorized personnel only.

III.11 IMPLEMENTATION PLANS

As an Authorized User implements a Fuel Card Services program, the Contractor must agree to work with each Authorized User to develop a mutually agreed upon implementation plan which specifies the timetable for deliverables, and procedures and training for the Fuel Card Services program.

III.12 OTHER SERVICES

The following additional Fuel Card Services shall be provided by the Contractor.

- A. Integration of the Contractor's Fuel Card Services with Chevin FleetWave software, so that Authorized Users may use Contractor provided reports with existing resources;
- B. Security alerts identifying Fuel Card usage outside the Authorized User specified Fuel Card options sent via email to an individual designated by the Authorized User; and
- C. Acceptance of electronic Automated Clearing House (ACH) payments from State Agencies in accordance with the Guidelines and Rules posted on the Office of the State Comptroller's website. <http://www.osc.state.ny.us/epay/epayguide.pdf>.

SECTION V. AUTHORIZED USER RESPONSIBILITIES

V.1. GENERAL

The Authorized User shall be responsible for the following general responsibilities:

- A. Each Authorized User agrees to be bound by the terms and conditions of this Contract.
- B. The State acknowledges that it has entered into a centralized agreement with the Contractor for Fuel Card Services.

V.2 PROCUREMENT INSTRUCTIONS

The following procurement instructions shall apply to this Contract.

- A. An Authorized User will review the Fuel discount and Fuel Card Services listed on the Contract Award Notification (CAN), which is the award document prepared by OGS to notify Authorized Users of a Contract award. OGS reserves the right to add additional procurement instructions in the CAN, in addition to the general instructions contained in this Contract.
- B. An Authorized User shall seek to engage the services of the Contractor by submitting the following to the Contractor Contact Administrator:
 1. A completed Participation Addendum (attached hereto as Appendix G). *Note: Purchase Orders will not be issued to the Contractor.*
 2. If applicable, NYS form FT-505.1, *Government Entity Credit Card Refund or Credit Election*, (available at http://www.tax.ny.gov/pdf/current_forms/misc/ft505_1.pdf); *Note: The Contractor must counter-sign form FT-505.1 and submit it to the NYS Department of Taxation and Finance before taxes can be deducted.*
 3. Upon receipt of a Participation Addendum, the Contractor will work with the Authorized User's designated Fleet Contact Person to implement a Fuel Card Services program. The Fleet Contact

Person will then complete the Contractor's Fleet Program Setup spreadsheet, which describes Authorized User options such as driver and vehicle information, Fuel Card type (i.e., Fuel only or Fuel and Associated Product), embossing requirements and Fuel Card control settings (e.g., driver or vehicle PIN, card reader prompts, and card usage limits). If applicable, the Fleet Contact Person will also be required to complete a "Certificate of Buyer of Taxable Fuel" form, provided by the Contractor, so that Federal Excise taxes may be deducted prior to invoicing.

- C. An Authorized User reserves the right to secure through separate procurement methods all or part of the Fuel Card Services from any other contract sources.

V.3 FLEET CONTACT PERSON

The Authorized User shall designate a Fleet Contact Person for their Fuel Card program. The Fleet Contact Person's duties may be designated to multiple persons according to the structure and business practices of the Authorized User. However, each Authorized User must have one Fleet Contact Person. The Fleet Contact Person's responsibilities shall include, but are not limited to:

- A. Creation of account with the Contractor;
- B. Receipt of Fuel Cards;
- C. Physical security of Fuel Cards;
- D. Establishment of Cardholder account access;
- E. Distribution of Fuel Card usage procedures to appropriate agency staff;
- F. Management of the account (e.g., requesting Fuel Cards, making changes to Fuel Card Authorize User options, and terminating Fuel Cards);
- G. Monitoring agency accounts with the Contractor to ensure that account and Fuel Card information is current.
- H. Maintaining a record of all authorized persons who have physical access to the Fuel Cards.
- I. Termination of lost/stolen cards as appropriate.
- J. Review of monthly invoices for appropriateness of card usage following the agency determined reconciliation process.
- K. Ensuring that the card is used only for appropriate purchases in conjunction with State business and rules.
- L. Establishment of agency card restrictions and controls for the fleet;
- M. Review of transactions to ensure that Fuel Card users are in compliance with agency restrictions and controls; and
- N. Receipt of agency activity reports and statements

Group 79008-22445 Fuel Card Services Contract

IN WITNESS WHEREOF, the parties therefore hereby execute their mutual agreement to the terms of this Contract. This agreement shall be executed and shall be a binding Contract between the parties as set forth in Appendix B, Clause 38, *Contract Creation/Execution*. The State further warrants that, where Contractor is asked to execute multiple original copies of this signature page along with a complete original copy of the Contract, the approved signature page(s) will be affixed by the State, upon final approval by the NYS Comptroller, to additional copies of this Contract which conform exactly to the complete original copy as submitted by Contractor and executed simultaneously therewith.

CONTRACTOR

Signature: Kirk S. Weber

Printed Name: Kirk S. Weber

Title: President/CEO

Company Name: Wright Express Financial

Federal ID: 84-1425616 *Services Corporation*

NYS Vendor ID 1000009725

THE PEOPLE OF THE STATE OF NEW YORK

Signature: Anne G. Phillips

Printed Name: Anne G. Phillips

Title: Acting Deputy Commissioner

Office of General Services

APPROVED AS TO FORM
NYS ATTORNEY GENERAL

MAY 17 2012

Lorraine I. Remo
LORRAINE I. REMO
PRINCIPAL ATTORNEY

APPROVED AS TO FORM
ERIC T. SCHNEIDERMAN
New York State Attorney General

Charlath E. Brown
6/22/12

APPROVED
THOMAS P. DINAPOLI
New York State Comptroller

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

CORPORATE ACKNOWLEDGMENT

STATE OF Utah }

: ss.:

COUNTY OF Salt Lake }

On the 25 day of April in the year 2012, before me personally came: Kirk S. Weiler, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in Salt Lake County; that he/she/they is (are) President/CEO (the President or other officer or director or attorney in fact duly appointed) of Wright Express Financial Services, 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.

Dena Kay Nafus
Notary Public Signature



APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

PLEASE RETAIN THIS DOCUMENT
FOR FUTURE REFERENCE.

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STANDARD CLAUSES FOR NYS CONTRACTS

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

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

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

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

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

required to be covered by the provisions of the Workers' Compensation Law.

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

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

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

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

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

10. RECORDS. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term

specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.

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

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

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.

In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00

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

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

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

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

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

Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

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

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

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

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

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

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

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the

bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES.

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

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

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

NYS Department of Economic Development
Division for Small Business
30 South Pearl St -- 7th Floor
Albany, New York 12245
Telephone: 518-292-5220
Fax: 518-292-5884
<http://www.empire.state.ny.us>

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

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

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

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

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

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

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

21. RECIPROCITY AND SANCTIONS PROVISIONS.

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

22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT.

Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.

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

24. PROCUREMENT LOBBYING.

To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or

intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.

To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

APPENDIX B
GENERAL SPECIFICATIONS

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GENERAL

1. **APPLICABILITY** The terms and conditions set forth in this Appendix B are expressly incorporated in and applicable to the resulting procurement contracts let by the Office of General Services Procurement Services Group, or let by any other Authorized User where incorporated by reference in its Bid Documents. Captions are intended as descriptive and are not intended to limit or otherwise restrict the terms and conditions set forth herein.

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

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

4. **CONFLICT OF TERMS** Unless otherwise set forth in the procurement or contract documents, conflicts among documents shall be resolved in the following order of precedence:

- a. **Appendix A** (Standard Clauses for NYS Contracts)
- b. **Mini-Bid Project Definition** if applicable and in accordance with the terms and conditions of the Back-Drop Contract.
- c. **Contract and other writing(s)** setting forth the final agreements, clarifications and terms between the Bid Documents and Contractor's Bid. In the latter circumstance, clarifications must specifically note in writing what was offered by the Contractor and what was accepted by the State. If not, such clarifications shall be considered last in the order of precedence under this paragraph.
- d. **Bid Documents** (Other than Appendix A).
 - i. Bid Specifications prepared by the Authorized User.
 - ii. Appendix B (General Specifications).
 - iii. Incorporated Contract Appendices, if any, following the order of precedence as stated for Contract above.
- e. **Contractor's Bid or Mini-Bid Proposal.**
- f. **Unincorporated Appendices** (if any).

5. **DEFINITIONS** Terms used in this Appendix B shall have the following meanings:

AFFILIATE Any individual or other legal entity, (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) that effectively controls another company in which (a) the Bidder owns more than 50% of the ownership; or (b) any individual or other legal entity which owns more than 50% of the ownership of the Bidder. In addition, if a Bidder owns less than 50% of the ownership of another legal entity, but directs or has the right to direct such entity's daily operations, that entity will be an Affiliate.

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

ATTORNEY GENERAL Attorney General of the State of New York.

AUTHORIZED USER(S) Agencies, or any other entity authorized by the laws of the State of New York to participate in NYS centralized contracts (including but not limited to political subdivisions, public authorities, public benefit corporations and certain other entities set forth in law), or the State of New York acting on behalf of one or more such Agencies or other entities, provided that each such Agency or other entity shall be held solely responsible for liabilities or payments due as a result of its participation.

BID OR BID PROPOSAL An offer or proposal submitted by a Bidder to furnish a described product or a solution, perform services or means of achieving a practical end, at a stated price for the stated Contract term. As required by the Bid Documents, the Bid or proposal may be subject to modification through the solicitation by the Agency of best and final offers during the evaluation process prior to recommendation for award of the Contract.

BIDDER/OFFERER Any individual or other legal entity (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) which submits a Bid in response to a Bid Solicitation. The term Bidder shall also include the term "offeror." In the case of negotiated Contracts, "Bidder" shall refer to the "Contractor."

BID DOCUMENTS Writings by the State setting forth the scope, terms, conditions and technical specifications for a procurement of Product. Such writings typically include, but are not limited to: Invitation for Bids (IFB), Request for Quotation (RFQ), Request for Proposals (RFP), addenda or amendments thereto, and terms and conditions which are incorporated by reference, including but not limited to, Appendix A (Standard Clauses for NYS Contracts), Appendix B, (General Specifications). Where these General Specifications are incorporated in negotiated Contracts that have not been competitively Bid, the term "Bid Documents" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

BID SPECIFICATION A written description drafted by the Authorized User setting forth the specific terms of the intended procurement, which may include: physical or functional characteristics, the nature of a commodity or construction item, any description of the work to be performed, Products to be provided, the necessary qualifications of the Bidder, the capacity and capability of the Bidder to successfully carry out the proposed Contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform work. Where these General Specifications are incorporated in negotiated Contracts that have not been competitively Bid, the term "Bid Specifications" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

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

COMPTROLLER Comptroller of the State of New York.

CONTRACT The writing(s) which contain the agreement of the Commissioner and the Bidder/Contractor setting forth the total legal obligation between the parties as determined by applicable rules of law, and which most typically include the following classifications of public procurements:

a. Agency Specific Contracts Contracts where the specifications for a Product or a particular scope of work are described and defined to meet the needs of one or more Authorized User(s).

b. Centralized Contracts Single or multiple award Contracts where the specifications for a Product or general scope of work are described and defined by the Office of General Services to meet the needs of Authorized Users. Centralized Contracts may be awarded through multiple awards or through adoption of another jurisdiction's contract or on a sole source, single source, emergency or competitive basis. Once established, procurements may be made from the selected Contractor(s) without further competition or Mini-Bid unless otherwise required by the Bid Specifications or Contract Award Notification.

c. Back-Drop Contracts Multiple award Centralized Contracts where the Office of General Services defines the specifications for a Product or general scope of work to meet the needs of Authorized Users. Bids may be submitted either at a date and time certain or may be accepted on a continuous or periodic recruitment basis, as set forth in the Bid Specifications. Selection of a Contractor(s) from among Back-Drop contract holders for an actual Product, project or particular scope of work may subsequently be made on a single or sole source basis, or on the basis of a Mini-Bid among qualified Back-Drop contract holders, or such other method as set forth in the Bid Document.

d. Piggyback Contract A Contract let by any department, agency or instrumentality of the United States government, or any department, agency, office, political subdivision or instrumentality of any state or state(s) which is adopted and extended for use by the OGS Commissioner in accordance with the requirements of the State Finance Law.

e. Contract Letter A letter to the successful Bidder(s) indicating acceptance of its Bid in response to a solicitation. Unless otherwise specified, the issuance of a Letter of Acceptance forms a Contract but is not an order for Product, and Contractor should not take any action with respect to actual Contract deliveries except on the basis of Purchase Orders sent from Authorized User(s).

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

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

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

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

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

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

ERROR CORRECTIONS Machine executable software code furnished by Contractor which corrects the Product so as to conform to the applicable warranties, performance standards and/or obligations of the Contractor.

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

INVITATION FOR BIDS (IFB) A type of Bid Document which is most typically used where requirements can be stated and award will be made based on lowest price to the responsive and responsible Bidder(s).

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

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

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

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

MINI-BID PROJECT DEFINITION A Bid Document containing project specific Bid Specifications developed by or for an Authorized User which solicits Bids from Contractors previously qualified under a Back-Drop Contract.

MULTIPLE AWARD A determination and award of a Contract in the discretion of the Commissioner to more than one responsive and responsible Bidder who meets the requirements of a specification, where the multiple award is made on the grounds set forth in the Bid Document in order to satisfy multiple factors and needs of Authorized Users (e.g., complexity of items, various manufacturers, differences in performance required to accomplish or produce required end results, production and distribution facilities, price, compliance with delivery requirements, geographic location or other pertinent factors).

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

OGS The New York State Office of General Services.

PROCUREMENT RECORD Documentation by the Authorized User of the decisions made and approach taken during the procurement process and during the contract term.

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

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

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

REQUEST FOR PROPOSALS (RFP) A type of Bid Document that is used for procurements where factors in addition to cost are considered and weighted in awarding the contract and where the method of award is "best value," as defined by the State Finance Law.

REQUEST FOR QUOTATION (RFQ) A type of Bid Document that can be used when a formal Bid opening is not required (e.g., discretionary, sole source, single source or emergency purchases).

RESPONSIBLE BIDDER A Bidder that is determined to have financial and organizational capacity, legal authority, satisfactory previous performance, skill, judgment and integrity, and that is found to be competent, reliable and experienced, as determined by the Commissioner. For purposes of being deemed responsible, a Bidder must also be determined to be in compliance with Sections 139-j and 139-k of the State Finance Law relative to restrictions on contacts during the procurement process and disclosure of contacts and prior findings of non-responsibility under these statutes.

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

SINGLE SOURCE A procurement where two or more Bidders can supply the required Product, and the Commissioner may award the contract to one Bidder over the other.

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

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

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

STATE State of New York.

SUBCONTRACTOR Any individual or other legal entity, (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) who has entered into a contract, express or implied, for the performance of a portion of a Contract with a Contractor.

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

VIRUS Any computer code, whether or not written or conceived by Contractor, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product, or any other associated software,

firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Product manufacturer.

BID SUBMISSION

6. INTERNATIONAL BIDDING All offers (tenders), and all information and Product required by the solicitation or provided as explanation thereof, shall be submitted in English. All prices shall be expressed, and all payments shall be made, in United States Dollars (\$US). Any offers (tenders) submitted which do not meet the above criteria will be rejected.

7. BID OPENING Bids may, as applicable, be opened publicly. The Commissioner reserves the right at any time to postpone or cancel a scheduled Bid opening.

8. BID SUBMISSION All Bids are to be packaged, sealed and submitted to the location stated in the Bid Specifications. Bidders are solely responsible for timely delivery of their Bids to the location set forth in the Bid Specifications prior to the stated Bid opening date/time.

A Bid return envelope, if provided with the Bid Specifications, should be used with the Bid sealed inside. If the Bid response does not fit into the envelope, the Bid envelope should be attached to the outside of the sealed box or package with the Bid inside. If using a commercial delivery company that requires use of their shipping package or envelope, Bidder's sealed Bid, labeled as detailed below, should be placed within the shipper's sealed envelope to ensure that the Bid is not prematurely opened.

All Bids must have a label on the outside of the package or shipping container outlining the following information:

"BID ENCLOSED (bold print, all capitals)

- Group Number
- IFB or RFP Number
- Bid Submission date and time"

In the event that a Bidder fails to provide such information on the return Bid envelope or shipping material, the receiving entity reserves the right to open the shipping package or envelope to determine the proper Bid number or Product group, and the date and time of Bid opening. Bidder shall have no claim against the receiving entity arising from such opening and such opening shall not affect the validity of the Bid or the procurement.

Notwithstanding the receiving agency's right to open a Bid to ascertain the foregoing information, Bidder assumes all risk of late delivery associated with the Bid not being identified, packaged or labeled in accordance with the foregoing requirements.

All Bids must be signed by a person authorized to commit the Bidder to the terms of the Bid Documents and the content of the Bid (offer).

9. FACSIMILE SUBMISSIONS Unless specifically prohibited by the terms of the Bid Specifications, facsimile Bids may be SUBMITTED AT THE SOLE OPTION AND RISK OF THE BIDDER. Only the FAX number(s) indicated in the Bid Specifications may be used. Access to the facsimile machine(s) is on a "first come, first serve" basis, and the Commissioner bears no liability or responsibility and makes no guarantee whatsoever with respect to

the Bidder's access to such equipment at any specific time. Bidders are solely responsible for submission and receipt of the entire facsimile Bid by the Authorized User prior to Bid opening and must include on the first page of the transmission the total number of pages transmitted in the facsimile, including the cover page. Incomplete, ambiguous or unreadable transmissions in whole or in part may be rejected at the sole discretion of the Commissioner. Facsimile Bids are fully governed by all conditions outlined in the Bid Documents and must be submitted on forms or in the format required in the Bid Specifications, including the executed signature page and acknowledgment.

10. AUTHENTICATION OF FACSIMILE BIDS The act of submitting a Bid by facsimile transmission, including an executed signature page or as otherwise specified in the Bid Documents, shall be deemed a confirming act by Bidder which authenticates the signing of the Bid.

11. LATE BIDS For purposes of Bid openings held and conducted by OGS, a Bid must be received in such place as may be designated in the Bid Documents or if no place is specified in the OGS Mailroom located in the Empire State Plaza, Albany, New York 12242, at or before the date and time established in the Bid Specifications for the Bid opening. For purposes of Bid openings held and conducted by Authorized Users other than OGS, the term late Bid is defined as a Bid not received in the location established in the Bid Specifications at or before the date and time specified for the Bid opening.

Any Bid received at the specified location after the time specified will be considered a late Bid. A late Bid shall not be considered for award unless: (i) no timely Bids meeting the requirements of the Bid Documents are received or, (ii) in the case of a multiple award, an insufficient number of timely Bids were received to satisfy the multiple award; and acceptance of the late Bid is in the best interests of the Authorized Users. Bids submitted for continuous or periodic recruitment contract awards must meet the submission requirements associated with their specifications. Delays in United States mail deliveries or any other means of transmittal, including couriers or agents of the Authorized User shall not excuse late Bid submissions. Similar types of delays, including but not limited to, bad weather, or security procedures for parking and building admittance shall not excuse late Bid submissions. Determinations relative to Bid timeliness shall be at the sole discretion of the Commissioner.

12. BID CONTENTS Bids must be complete and legible. All Bids must be signed. All information required by the Bid Specifications must be supplied by the Bidder on the forms or in the format specified. No alteration, erasure or addition is to be made to the Bid Documents. Changes may be ignored by the Commissioner or may be grounds for rejection of the Bid. Changes, corrections and/or use of white-out in the Bid or Bidder's response portion of the Bid Document must be initialed by an authorized representative of the Bidder. Bidders are cautioned to verify their Bids before submission, as amendments to Bids or requests for withdrawal of Bids received by the Commissioner after the time specified for the Bid opening, may not be considered.

13. EXTRANEIOUS TERMS Bids must conform to the terms set forth in the Bid Documents, as extraneous terms or material deviations (including additional, inconsistent, conflicting or alternative terms) may render the Bid non-responsive and may result in rejection of the Bid.

Extraneous term(s) submitted on standard, pre-printed forms (including but not limited to: product literature, order forms, license agreements, contracts or other documents) that are attached or referenced with submissions shall not be considered part of the Bid or

resulting Contract, but shall be deemed included for informational or promotional purposes only.

Only those extraneous terms that meet all the following requirements may be considered as having been submitted as part of the Bid:

- a. Each proposed extraneous term (addition, deletion, counter-offer, deviation, or modification) must be specifically enumerated in a writing which is not part of a pre-printed form; and
- b. The writing must identify the particular specification requirement (if any) that Bidder rejects or proposes to modify by inclusion of the extraneous term; and
- c. The Bidder shall enumerate the proposed addition, counter offer, modification or deviation from the Bid Document, and the reasons therefore.

No extraneous term(s), whether or not deemed "material," shall be incorporated into a Contract or Purchase Order unless submitted in accordance with the above and the Commissioner or Authorized User expressly accepts each such term(s) in writing. Acceptance and/or processing of the Bid shall not constitute such written acceptance of Extraneous Term(s).

14. CONFIDENTIAL/TRADE SECRET MATERIALS

a. Contractor Confidential, trade secret or proprietary materials as defined by the laws of the State of New York must be clearly marked and identified as such upon submission by the Bidder. Marking the Bid as "confidential" or "proprietary" on its face or in the document header or footer shall not be considered by the Commissioner or Authorized User to be sufficient without specific justification as to why disclosure of particular information in the Bid would cause substantial injury to the competitive position of the Bidder. Bidders/Contractors intending to seek an exemption from disclosure of these materials under the Freedom of Information Law must request the exemption in writing, setting forth the reasons for the claimed exemption. Acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures. Properly identified information that has been designated confidential, trade secret, or proprietary by the Bidder will not be disclosed except as may be required by the Freedom of Information Law or other applicable State and federal laws.

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

15. RELEASE OF BID EVALUATION MATERIALS Requests concerning the evaluation of Bids may be submitted under the

Freedom of Information Law. Information, other than statistical or factual tabulations or data such as the Bid Tabulation, shall only be released as required by law after Contract award. Bid Tabulations are not maintained for all procurements. Names of Bidders may be disclosed after Bid opening upon request. Written requests should be directed to the Commissioner.

16. FREEDOM OF INFORMATION LAW During the evaluation process, the content of each Bid will be held in confidence and details of any Bid will not be revealed (except as may be required under the Freedom of Information Law or other State law). The Freedom of Information Law provides for an exemption from disclosure for trade secrets or information the disclosure of which would cause injury to the competitive position of commercial enterprises. This exception would be effective both during and after the evaluation process. If the Bid contains any such trade secret or other confidential or proprietary information, it must be accompanied in the Bid with a written request to the Commissioner to not disclose such information. Such request must state with particularity the reasons why the information should not be available for disclosure and must be provided at the time of submission of the Bid. Notations in the header, footer or watermark of the Bid Document will not be considered sufficient to constitute a request for non-disclosure of trade secret or other confidential or proprietary information. Where a Freedom of Information request is made for trademark or other confidential or proprietary information, the Commissioner reserves the right to determine upon written notice to the Bidder whether such information qualifies for the exemption for disclosure under the law. Notwithstanding the above, where a Bid tabulation is prepared and Bids publicly opened, such Bid tabulation shall be available upon request.

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

a. “Public Works” and “Building Services” - Definitions

i. Public Works Labor Law Article 8 applies to contracts for public improvement in which laborers, workers or mechanics are employed on a “public works” project (distinguished from public “procurement” or “service” contracts). The State, a public benefit corporation, a municipal corporation (including a school district), or a commission appointed by law must be a party to the Contract. The wage and hours provision applies to any work performed by Contractor or Subcontractors.

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

b. Prevailing Wage Rate Applicable to Bid Submissions A copy of the applicable prevailing wage rates to be paid or provided are annexed to the Bid Documents. Bidders must submit Bids which are based upon the prevailing hourly wages, and supplements in cash or equivalent benefits (i.e., fringe benefits and any cash or non-cash compensation which are not wages, as defined by law) that equal or exceed the applicable prevailing wage rate(s) for the location where the work is to be performed. Bidders may not submit Bids based upon hourly wage rates and supplements below the applicable prevailing wage rates as established by the New York State Department of Labor. Bids that fail to comply with this requirement will be disqualified.

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

d. Public Posting & Certified Payroll Records In compliance with Article 8, Section 220 of the New York State Labor Law:

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

ii. Payroll Records Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. For public works contracts over \$25,000 where the Contractor maintains no regular place of business in New York State, such records must be kept at the work site. For building services contracts, such records must be kept at the work site while work is being performed.

iii. Submission of Certified Payroll Transcripts for Public Works Contracts Only Contractors and Subcontractors on public works projects must submit monthly payroll transcripts to the Authorized User that has prepared or directs the preparation of the plans and specifications for a public works project, as set forth in the Bid Specifications. For Mini-Bid solicitations, the payroll records must be submitted to the entity preparing the agency Mini-Bid project specification. For “agency specific” Bids, the payroll records should be submitted to the entity issuing the purchase order. For all other OGS Centralized Contracts, such records should be submitted to the individual agency issuing the purchase order(s) for the work. Upon mutual agreement of the Contractor and the Authorized User, the form of submission may be submitted in a specified disk format acceptable to the Department of Labor provided: 1) the Contractor/Subcontractor retains the original records; and, (2) an original signed letter by a duly authorized individual of the Contractor or Subcontractor attesting to the truth and accuracy of the records accompanies the disk. This provision does not apply to Article 9 of the Labor Law building services contracts.

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

Day’s Labor Eight hours shall constitute a legal day’s work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law.

No laborers, workmen or mechanics in the employ of the Contractor, Subcontractor or other person doing or contracting to do all or part of the work contemplated by the Contract shall be permitted or required to work more than eight hours in any one calendar day or more than five calendar days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. “Extraordinary emergency” shall be deemed to include situations in which sufficient laborers, workers and mechanics cannot be employed to carry on public work expeditiously as a result of such restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the NYS

Commissioner of Labor for the preservation of the Contract site or for the protection of the life and limb of the persons using the Contract site.

18. TAXES

a. Unless otherwise specified in the Bid Specifications or Contract, the quoted Bid price includes all taxes applicable to the transaction.

b. Purchases made by the State of New York and certain non-State Authorized Users are exempt from New York State and local sales taxes and, with certain exceptions, federal excise taxes. To satisfy the requirements of the New York State Sales tax exemption, either the Purchase Order issued by a State Agency or the invoice forwarded to authorize payment for such purchases will be sufficient evidence that the sale by the Contractor was made to the State, an exempt organization under Section 1116 (a) (1) of the Tax Law. Non-State Authorized Users must offer their own proof of exemption upon request. No person, firm or corporation is, however, exempt from paying the State Truck Mileage and Unemployment Insurance or Federal Social Security taxes, which remain the sole responsibility of the Bidder/Contractor.

c. Pursuant to Revised Tax Law 5-a, Contractor will be required to furnish sales tax certification on its behalf and for its affiliates, and subcontractors for Contracts with a value greater than \$100,000 in accordance with provisions of the law.

d. Purchases by Authorized Users other than the State of New York may be subject to certain taxes which were not included in the Bid price, and in those instances the tax should be computed based on the Contract price and added to the invoice submitted to such entity for payment.

19. **EXPENSES PRIOR TO CONTRACT EXECUTION** The Commissioner and any Authorized User(s) are not liable for any costs incurred by a Vendor, Bidder or Contractor in the preparation and production of a Bid, Mini-Bid or best and final offers or for any work performed prior to Contract execution.

20. **ADVERTISING RESULTS** The prior written approval of the Commissioner is required in order for results of the Bid to be used by the Contractor as part of any commercial advertising. The Contractor shall also obtain the prior written approval of the Commissioner relative to the Bid or Contract for press or other media releases.

21. PRODUCT REFERENCES

a. **“Or Equal”** In all Bid Specifications the words “or equal” are understood to apply where a copyrighted, brand name, trade name, catalog reference, or patented Product is referenced. References to such specific Product are intended as descriptive, not restrictive, unless otherwise stated. Comparable Product will be considered if proof of compatibility is provided, including appropriate catalog excerpts, descriptive literature, specifications and test data, etc. The Commissioner’s decision as to acceptance of the Product as equal shall be final.

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

22. **REMANUFACTURED, RECYCLED, RECYCLABLE OR RECOVERED MATERIALS** Upon the conditions specified in the Bid Specifications and in accordance with the laws of the State of New York, Contractors are encouraged to use recycled, recyclable or

recovered materials in the manufacture of Products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the Product or packaging unless such use is precluded due to health, welfare, safety requirements or in the Bid Specifications. Contractors are further encouraged to offer remanufactured Products to the maximum extent practicable without jeopardizing the performance or intended end use of the Product and unless such use is precluded due to health, welfare, safety requirements or by the Bid Specifications. Where such use is not practical, suitable, or permitted by the Bid Specifications, Contractor shall deliver new materials in accordance with the “Warranties” set forth below.

Items with recycled, recyclable, recovered, refurbished or remanufactured content must be identified in the Bid or Bidder will be deemed to be offering new Product.

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

24. PRICING

a. **Unit Pricing** If required by the Bid Specifications, the Bidder should insert the price per unit specified and the price extensions in decimals, not to exceed four places for each item unless otherwise specified, in the Bid. In the event of a discrepancy between the unit price and the extension, the unit price shall govern unless, in the sole judgment of the Commissioner, such unit pricing is obviously erroneous.

b. **Net Pricing** Unless otherwise required by the Bid Specifications, prices shall be net, including transportation, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination(s) indicated in the Bid Specifications, subject to the cash discount.

c. **“No Charge” Bid** When Bids are requested on a number of Products as a Group or Lot, a Bidder desiring to Bid “no charge” on a Product in the Group or Lot must clearly indicate such. Otherwise, such Bid may be considered incomplete and be rejected, in whole or in part, at the discretion of the Commissioner.

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

e. **Third Party Financing** If Product acquisitions are financed through any third party financing, Contractor may be required as a condition of Contract Award to agree to the terms and conditions of a “Consent & Acknowledgment Agreement” in a form acceptable to the Commissioner.

f. **Best Pricing Offer** During the Contract term, if substantially the same or a smaller quantity of a Product is sold by the Contractor outside of this Contract upon the same or similar terms and conditions as that of this Contract at a lower price to a federal, state or local governmental entity, the price under this Contract, at the discretion of the Commissioner, shall be immediately reduced to the lower price.

Price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after:

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

(ii) **Commercial Price List Reductions:** Where NYS Net Prices are based on a discount from Contractor’s list prices, the date Contractor

lowers its pricing to its customers generally or to similarly situated government customers during the Contract term; or

(iii) Special Offers/Promotions Generally: Where Contractor generally offers more advantageous special price promotions or special discount pricing to other customers during the Contract term for a similar quantity, and the maximum price or discount associated with such offer or promotion is better than the discount or Net Price otherwise available under this Contract, such better price or discount shall apply for similar quantity transactions under this Contract for the life of such general offer or promotion; and

(iv) Special Offers/Promotions to Authorized Users: Contractor may offer Authorized Users, under either this Contract or any other Contracting vehicle, competitive pricing which is lower than the NYS Net Price set forth herein at any time during the Contract term and such lower pricing shall not be applied as a global price reduction under the Contract pursuant to the foregoing paragraph (iii).

Unless otherwise specified in the Bid Specifications, Contractor may offer lower prices or better terms (see Modification of Contract Terms) on any specific Purchase Order(s) from any Authorized User without being in conflict with, or obligation to comply on a global basis, with the terms of this clause.

g. Best and Final Prices As specified in the Bid Documents and Contract, a Contractor may be solicited at the time of issuance of a Purchase Order or Mini-Bid award for best and final pricing for the Product or service to be delivered to the Authorized User. Contractors are encouraged to reduce their pricing upon receipt of such request.

25. DRAWINGS

a. Drawings Submitted With Bid When the Bid Specifications require the Bidder to furnish drawings and/or plans, such drawings and/or plans shall conform to the mandates of the Bid Documents and shall, when approved by the Commissioner, be considered a part of the Bid and of any resulting Contract. All symbols and other representations appearing on the drawings shall be considered a part of the drawing.

b. Drawings Submitted During the Contract Term Where required to develop, maintain and deliver diagrams or other technical schematics regarding the scope of work, Contractor shall do so on an ongoing basis at no additional charge, and must, as a condition of payment, update drawings and plans during the Contract term to reflect additions, alterations, and deletions. Such drawings and diagrams shall be delivered to the Authorized User's representative.

c. Accuracy of Drawings Submitted All drawings shall be neat and professional in manner and shall be clearly labeled as to locations and type of product, connections and components. Drawings and diagrams are to be in compliance with accepted drafting standards. Acceptance or approval of such plans shall not relieve the Contractor from responsibility for design or other errors of any sort in the drawings or plans, or from its responsibility for performing as required, furnishing product, services or installation, or carrying out any other requirements of the intended scope of work.

26. SITE INSPECTION Where a site inspection is required by the Bid Specifications or Project Definition, Bidder shall be required to inspect the site, including environmental or other conditions for pre-existing deficiencies that may affect the installed Product, equipment, or environment or services to be provided and, which may affect Bidder's ability to properly deliver, install or otherwise provide the required Product. All inquiries regarding such conditions shall be made in writing. Bidder shall be deemed to have knowledge of any deficiencies or conditions which such inspection or inquiry might have disclosed. Bidder must provide a detailed explanation with its Bid if

additional work is required under this clause in order to properly complete the delivery and installation of the required Product or provide the requested service.

27. PROCUREMENT CARD The State has entered into an agreement for purchasing card services. The Purchasing Card enables Authorized Users to make authorized purchases directly from a Contractor without processing a Purchase Order or Purchase Authorizations. Purchasing Cards are issued to selected employees authorized to purchase for the Authorized User and having direct contact with Contractors. Cardholders can make purchases directly from any Contractor that accepts the Purchasing Card.

The Contractor shall not process a transaction for payment through the credit card clearinghouse until the purchased products have been shipped or services performed. Unless the cardholder requests correction or replacement of a defective or faulty Product in accordance with other Contract requirements, the Contractor shall immediately credit a cardholder's account for products returned as defective or faulty.

28. SAMPLES

a. Standard Samples Bid Specifications may indicate that the Product to be purchased must be equal to a standard sample on display in a place designated by the Commissioner and such sample will be made available to the Bidder for examination prior to the opening date. Failure by the Bidder to examine such sample shall not entitle the Bidder to any relief from the conditions imposed by the Bid Specifications.

b. Bidder Supplied Samples The Commissioner reserves the right to request from the Bidder/Contractor a representative sample(s) of the Product offered at any time prior to or after award of a contract. Unless otherwise instructed, samples shall be furnished within the time specified in the request. Untimely submission of a sample may constitute grounds for rejection of Bid or cancellation of the Contract. Samples must be submitted free of charge and be accompanied by the Bidder's name and address, any descriptive literature relating to the Product and a statement indicating how and where the sample is to be returned. Where applicable, samples must be properly labeled with the appropriate Bid or Contract reference.

A sample may be held by the Commissioner during the entire term of the Contract and for a reasonable period thereafter for comparison with deliveries. At the conclusion of the holding period the sample, where feasible, will be returned as instructed by the Bidder, at the Bidder's expense and risk. Where the Bidder has failed to fully instruct the Commissioner as to the return of the sample (i.e., mode and place of return, etc.) or refuses to bear the cost of its return, the sample shall become the sole property of the receiving entity at the conclusion of the holding period.

c. Enhanced Samples When an approved sample exceeds the minimum specifications, all Product delivered must be of the same enhanced quality and identity as the sample. Thereafter, in the event of a Contractor's default, the Commissioner may procure a Product substantially equal to the enhanced sample from other sources, charging the Contractor for any additional costs incurred.

d. Conformance with Sample(s) Submission of a sample (whether or not such sample is tested by, or for, the Commissioner) and approval thereof shall not relieve the Contractor from full compliance with all terms and conditions, performance related and otherwise, specified in the Bid Specifications. If in the judgment of the Commissioner the sample or product submitted is not in accordance with the specifications or testing requirements prescribed in the Bid

Specifications, the Commissioner may reject the Bid. If an award has been made, the Commissioner may cancel the Contract at the expense of the Contractor.

e. Testing All samples are subject to tests in the manner and place designated by the Commissioner, either prior to or after Contract award. Unless otherwise stated in the Bid Specifications, Bidder samples consumed or rendered useless by testing will not be returned to the Bidder. Testing costs for samples that fails to meet Contract requirements may be at the expense of the Contractor.

f. Requests For Samples By Authorized Users Requests for samples by Authorized Users require the consent of the Contractor. Where Contractor refuses to furnish a sample, Authorized User may, in its sole discretion, make a determination on the performance capability of the Product or on the issue in question.

BID EVALUATION

29. BID EVALUATION The Commissioner reserves the right to accept or reject any and all Bids, or separable portions of offers, and waive technicalities, irregularities, and omissions if the Commissioner determines the best interests of the State will be served. The Commissioner, in his/her sole discretion, may accept or reject illegible, incomplete or vague Bids and his/her decision shall be final. A conditional or revocable Bid which clearly communicates the terms or limitations of acceptance may be considered, and Contract award may be made in compliance with the Bidder's conditional or revocable terms in the offer.

30. CONDITIONAL BID Unless the Bid Specifications provides otherwise, a Bid is not rendered non-responsive if the Bidder specifies that the award will be accepted only on all or a specified group of items or Product included in the specification. It is understood that nothing herein shall be deemed to change or alter the method of award contained in the Bid Documents.

31. CLARIFICATIONS / REVISIONS Prior to award, the Commissioner reserves the right to seek clarifications, request Bid revisions, or to request any information deemed necessary for proper evaluation of Bids from all Bidders deemed to be eligible for Contract award. Failure to provide requested information may result in rejection of the Bid.

32. PROMPT PAYMENT DISCOUNTS While prompt payment discounts will not be considered in determining the low Bid, the Commissioner may consider any prompt payment discount in resolving Bids which are otherwise tied. However, any notation indicating that the price is net, (e.g., net 30 days), shall be understood to mean only that no prompt payment discount is offered by the Bidder. The imposition of service, interest, or other charges, except pursuant to the provisions of Article 11-A of the State Finance Law, which are applicable in any case, may render the Bid non-responsive and may be cause for its rejection.

33. EQUIVALENT OR IDENTICAL BIDS In the event two offers are found to be substantially equivalent, price shall be the basis for determining the award recipient. If two or more Bidders submit substantially equivalent Bids as to pricing or other factors, the decision of the Commissioner to award a Contract to one or more of such Bidders shall be final.

34. PERFORMANCE AND RESPONSIBILITY QUALIFICATIONS The Commissioner reserves the right to investigate or inspect at any time whether or not the Product, services,

qualifications or facilities offered by the Bidder/Contractor meet the requirements set forth in the Bid Specifications/Contract or as set forth during Contract negotiations. Contractor shall at all times during the Contract term remain responsible and responsive. A Bidder/Contractor must be prepared, if requested by the Commissioner, to present evidence of legal authority to do business in New York State, integrity, experience, ability, prior performance, organizational and financial capacity as well as where applicable, a statement as to supply, plant, machinery and capacity of the manufacturer or source for the production, distribution and servicing of the Product offered/Bid. If the Commissioner determines that the conditions and terms of the Bid Documents, Bid Specifications or Contract are not complied with, or that items, services or Product proposed to be furnished do not meet the specified requirements, or that the legal authority, integrity experience, ability, prior performance, organization and financial capacity or facilities are not satisfactory, the Commissioner may reject such Bid or terminate the Contract.

35. DISQUALIFICATION FOR PAST PERFORMANCE AND FINDINGS OF NON-RESPONSIBILITY Bidder may be disqualified from receiving awards if Bidder, or anyone in Bidder's employment, has previously failed to perform satisfactorily in connection with public Bidding or contracts or is deemed non-responsive.

36. QUANTITY CHANGES PRIOR TO AWARD The Commissioner reserves the right, at any time prior to the award of a specific quantity Contract, to alter in good faith the quantities listed in the Bid Specifications. In the event such right is exercised, the lowest responsible Bidder meeting Bid Specifications will be advised of the revised quantities and afforded an opportunity to extend or reduce its Bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its Bid price may result in the rejection of its Bid and the award of such Contract to the lowest responsible Bidder who accepts the revised qualifications.

37. TIMEFRAME FOR OFFERS The Commissioner reserves the right to make awards within sixty (60) days after the date of the Bid opening or such other period of time as set forth in the Bid Documents, during which period, Bids must remain firm and cannot be withdrawn. Pursuant to Section 163(9)(e) of the State Finance Law and Section 2-205 of the Uniform Commercial Code when applicable, where an award is not made within the sixty (60) day period or other time specified as set forth in the Bid Documents, the Bids shall remain firm until such later time as either a Contract is awarded or the Bidder delivers to the Commissioner written notice of the withdrawal of its Bid. Any Bid which expressly states therein that acceptance must be made within a shorter specified time, may at the sole discretion of the Commissioner, be accepted or rejected.

TERMS & CONDITIONS

38. CONTRACT CREATION / EXECUTION Except for contracts governed by Article 11-B of the State Finance Law, subject to and upon receipt of all required approvals as set forth in the Bid Specifications a Contract shall be deemed executed and created with the successful Bidder(s), upon the Commissioner's mailing or electronic communication to the address on the Bid/Contract of: (i) the final Contract Award Notice; (ii) a fully executed Contract; or (iii) a Purchase Order authorized by the Commissioner.

39. PARTICIPATION IN CENTRALIZED CONTRACTS The following shall not limit or inhibit the OGS Commissioner's authority under State Finance Law, Section 163 (10) (e) (Piggybacking):

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

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

c. Voluntary Extension Purchase Orders issued against a State Centralized Contract by any Authorized User not provided for in the Bid Specifications shall be honored by the Contractor at its discretion and only with the approval of the OGS Commissioner and any other approvals required by law. Contractors are encouraged to voluntarily extend service Contracts to those additional entities authorized to utilize commodity Contracts under Section 163 (3) (iv) of the State Finance Law.

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

e. Contract Migration Authorized Users holding individual Contracts with a Contractor at the time that Contractor is awarded a Centralized Contract for the same Products or services shall be permitted to migrate to that Centralized Contract effective with its commencement date. Such migration shall not operate to diminish, alter or eliminate any right that the Authorized User otherwise had under the terms and conditions of their individual Contract.

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

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

Other than where such terms are more advantageous for the Authorized User(s) than those set forth in the Contract, no alteration or modification of the terms of the Contract, including substitution of Product, shall be valid or binding against Authorized User(s) unless authorized by the Commissioner or specified in the Contract Award Notification. No such alteration or modification shall be made by unilaterally affixing such terms to Product upon delivery (including, but not limited to, attachment or inclusion of standard pre-printed

order forms, product literature, "shrink wrap" terms accompanying software upon delivery, or other documents) or by incorporating such terms onto order forms, purchase orders or other documents forwarded by the Contractor for payment, notwithstanding Authorized User's subsequent acceptance of Product, or that Authorized User has subsequently processed such document for approval or payment.

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

42. ESTIMATED / SPECIFIC QUANTITY CONTRACTS

Estimated quantity contracts are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Contract term. No guarantee of any quantity(s) is implied or given. Purchases by Authorized Users from Contracts for services and technology are voluntary.

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

43. EMERGENCY CONTRACTS In the event that a disaster emergency is declared by Executive Order under Section 28 of Article 2-B of the Executive Law, or the Commissioner determines pursuant to his/her authority under Section 163 (10) (b) of the State Finance Law that an emergency exists requiring the prompt and immediate delivery of Product, the Commissioner reserves the right to obtain such Product from any source, including but not limited to this Contract(s), as the Commissioner in his/her sole discretion determines will meet the needs of such emergency. Contractor shall not be entitled to any claim or lost profits for Product procured from other sources pursuant to this paragraph. The reasons underlying the finding that an emergency exists shall be included in the procurement record.

44. PURCHASE ORDERS Unless otherwise authorized in writing by the Commissioner, no Product is to be delivered or furnished by Contractor until transmittal of an official Purchase Order from the Authorized User. Unless terminated or cancelled pursuant to the authority vested in the Commissioner, Purchase Orders shall be effective and binding upon the Contractor when placed in the mail or electronically transmitted prior to the termination of the contract period, addressed to the Contractor at the address for receipt of orders set forth in the Contract or in the Contract Award Notification.

All Purchase Orders issued pursuant to Contracts let by the Commissioner must bear the appropriate Contract number and, if necessary, required State approvals. As deemed necessary, the Authorized User may confirm pricing and other Product information with the Contractor prior to placement of the Purchase Order. The State reserves the right to require any other information from the Contractor which the State deems necessary in order to complete any Purchase Order placed under the Contract. Unless otherwise specified, all Purchase Orders against Centralized Contracts will be placed by Authorized Users directly with the Contractor and any discrepancy between the terms stated on the vendor's order form, confirmation or acknowledgment, and the Contract terms shall be resolved in favor of

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

If, with respect to an Agency Specific Contract let by the OGS Commissioner, a Purchase Order is not received by the Contractor within two weeks after the issuance of a Contract Award Notification, it is the responsibility of the Contractor to request in writing that the appropriate Authorized User forward a Purchase Order. If, thereafter, a Purchase Order is not received within a reasonable period of time, the Contractor shall promptly notify in writing the appropriate purchasing officer in OGS. Failure to timely notify such officer may, in the discretion of the OGS Commissioner and without cost to the State, result in the cancellation of such requirement by the OGS Commissioner with a corresponding reduction in the Contract quantity and price.

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

46. WEEKEND AND HOLIDAY DELIVERIES Unless otherwise specified in the Bid Specifications or by an Authorized User, deliveries will be scheduled for ordinary business hours, Monday through Friday (excluding legal holidays observed by the State of New York). Deliveries may be scheduled by mutual agreement for Saturdays, Sundays or legal holidays observed by the State of New York where the Product is for daily consumption, an emergency exists, the delivery is a replacement, delivery is late, or other reasonable circumstance in which event the convenience of the Authorized User shall govern.

47. SHIPPING/RECEIPT OF PRODUCT

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

b. Shipping Charges Unless otherwise stated in the Bid Specifications, all deliveries shall be deemed to be freight on board (F.O.B.) destination tailgate delivery at the dock of the Authorized User. Unless otherwise agreed, items purchased at a price F.O.B. Shipping point plus transportation charges shall not relieve the

Contractor from responsibility for safe and proper delivery notwithstanding the Authorized User's payment of transportation charges. Contractor shall be responsible for ensuring that the Bill of Lading states "charges prepaid" for all shipments.

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

48. TITLE AND RISK OF LOSS Notwithstanding the form of shipment, title or other property interest, risk of loss shall not pass from the Contractor to the Authorized User until the Products have been received, inspected and accepted by the receiving entity. Acceptance shall occur within a reasonable time or in accordance with such other defined acceptance period as may be specified in the Bid Specifications or Purchase Order. Mere acknowledgment by Authorized User personnel of the delivery or receipt of goods (e.g., signed bill of lading) shall not be deemed or construed as acceptance of the Products received. Any delivery of Product that is substandard or does not comply with the Bid Specifications or Contract terms and conditions, may be rejected or accepted on an adjusted price basis, as determined by the Commissioner.

49. RE-WEIGHING PRODUCT Deliveries are subject to re-weighing at the point of destination by the Authorized User. If shrinkage occurs which exceeds that normally allowable in the trade, the Authorized User shall have the option to require delivery of the difference in quantity or to reduce the payment accordingly. Such option shall be exercised in writing by the Authorized User.

50. PRODUCT SUBSTITUTION In the event a specified manufacturer's Product listed in the Contract becomes unavailable or cannot be supplied by the Contractor for any reason (except as provided for in the Savings/Force Majeure Clause) a Product deemed in writing by the Commissioner to be equal to or better than the specified Product must be substituted by the Contractor at no additional cost or expense to the Authorized User. Unless otherwise specified, any substitution of Product prior to the Commissioner's written approval may be cause for cancellation of Contract.

51. REJECTED PRODUCT When Product is rejected, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of rejection by the Authorized User. Upon notification of rejection, risk of loss of rejected or non-conforming Product shall remain with Contractor. Rejected items not removed by the Contractor within ten calendar days of notification shall be regarded as abandoned by the Contractor, and the Authorized User shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse the Authorized User for any and all costs and expenses incurred in storage or effecting removal or disposition after the ten-calendar day period.

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

performed to cause the least inconvenience to the Authorized User(s) and with proper consideration for the rights of other Contractors or workers. The Contractor shall promptly perform its work and shall coordinate its activities with those of other Contractors. The Contractor shall clean up and remove all debris and rubbish from its work as required or directed. Upon completion of the work, the building and surrounding area of work shall be left clean and in a neat, unobstructed condition, and everything in satisfactory repair and order.

53. REPAIRED OR REPLACED PARTS / COMPONENTS

Where the Contractor is required to repair, replace or substitute Product or parts or components of the Product under the Contract, the repaired, replaced or substituted Products shall be subject to all terms and conditions for new parts and components set forth in the Contract including Warranties, as set forth in the Additional Warranties Clause herein. Replaced or repaired Product or parts and components of such Product shall be new and shall, if available, be replaced by the original manufacturer's component or part. Remanufactured parts or components meeting new Product standards may be permitted by the Commissioner or Authorized User. Before installation, all proposed substitutes for the original manufacturer's installed parts or components must be approved by the Authorized User. The part or component shall be equal to or of better quality than the original part or component being replaced.

54. ON-SITE STORAGE With the written approval of the Authorized User, materials, equipment or supplies may be stored at the Authorized User's site at the Contractor's sole risk.

55. EMPLOYEES, SUBCONTRACTORS & AGENTS All employees, Subcontractors or agents performing work under the Contract must be trained staff or technicians who meet or exceed the professional, technical and training qualifications set forth in the Bid Specifications or the Bid Documents, whichever is more restrictive, and must comply with all security and administrative requirements of the Authorized User. The Commissioner reserves the right to conduct a security background check or otherwise approve any employee, Subcontractor or agent furnished by Contractor and to refuse access to or require replacement of any personnel for cause based on, including but not limited to, professional, technical or training qualifications, quality of work or change in security status or non-compliance with Authorized User's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract terms. The Commissioner reserves the right to reject and/or bar from the facility for cause any employee, Subcontractor, or agents of the Contractor.

56. ASSIGNMENT The Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the contract or its right, title or interest therein, or its power to execute such contract to any other person, company, firm or corporation in performance of the contract without the prior written consent of the Commissioner or Authorized User (as applicable). Failure to obtain consent to assignment from the Authorized User shall revoke and annul such Contract. Notwithstanding the foregoing, the State shall not hinder, prevent or affect assignment of money by a Contractor for the benefit of its creditors. Prior to a consent to assignment of monies becoming effective, the Contractor shall file a written notice of such monies assignment(s) with the Comptroller. Prior to a consent to assignment of a Contract, or portion thereof, becoming effective, the Contractor shall submit the request to assignment to the Commissioner and seek written agreement from the Commissioner which will be filed with the Comptroller. The Commissioner reserves the right to reject any proposed assignee in his/her discretion.

Upon notice to the Contractor, the Contract may be assigned without the consent of the Contractor to another State Agency or subdivision of the State pursuant to a governmental reorganization or assignment

of functions under which the functions are transferred to a successor Agency or to another Agency that assumes OGS responsibilities for the Contract.

57. SUBCONTRACTORS AND SUPPLIERS The Commissioner reserves the right to reject any proposed Subcontractor or supplier for bona fide business reasons, which may include, but are not limited to: they are on the Department of Labor's list of companies with which New York State cannot do business; the Commissioner determines that the company is not qualified; the Commissioner determines that the company is not responsible; the company has previously provided unsatisfactory work or services; the company failed to solicit minority and women's business enterprises (M/WBE) Bidders as required by prior Contracts.

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

59. SUSPENSION OF WORK The Commissioner, in his/her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, in the best interests of the Authorized User. In the event of such suspension, the Contractor will be given a formal written notice outlining the particulars of such suspension. Examples of the reason for such suspension include, but are not limited to, a budget freeze or reduction on State spending, declaration of emergency, contract compliance issues or other such circumstances. Upon issuance of such notice, the Contractor is not to accept any Purchase Orders, and shall comply with the suspension order. Activity may resume at such time as the Commissioner issues a formal written notice authorizing a resumption of performance under the Contract.

An Authorized User may issue a formal written notice for the suspension of work for which it has engaged the Contractor for reasons specified in the above paragraph. The written notice shall set forth the reason for such suspension and a copy of the written notice shall be provided to the Commissioner.

60. TERMINATION

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

b. For Convenience: By written notice, this Contract may be terminated at any time by the State for convenience upon sixty (60) days written notice or other specified period without penalty or other early termination charges due. Such termination of the Contract shall not affect any project or Purchase Order that has been issued under the Contract prior to the date of such termination. If the Contract is terminated pursuant to this subdivision, the Authorized User shall remain liable for all accrued but unpaid charges incurred through the date of the termination. Contractor shall use due diligence and provide any outstanding deliverables.

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

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

61. SAVINGS/FORCE MAJEURE A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, strikes, fires, explosions, actions of the elements, floods, or other similar causes beyond the control of the Contractor or the Commissioner in the performance of the Contract which non-performance, by exercise of reasonable diligence, cannot be prevented. Contractor shall provide the Commissioner with written notice of any force majeure occurrence as soon as the delay is known.

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

Notwithstanding the above, at the discretion of the Commissioner where the delay or failure will significantly impair the value of the Contract to the State or to Authorized Users, the Commissioner may:

- a. Accept allocated performance or deliveries from the Contractor. The Contractor, however, hereby agrees to grant preferential treatment to Authorized Users with respect to Product subjected to allocation; and/or
- b. Purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the Contract quantities without penalty or liability to the State; or
- c. Terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.

In addition, the Commissioner reserves the right, in his/her sole discretion, to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (i) the volatility is due to causes outside the control of Contractor; (ii) the volatility affects the marketplace or industry, not just the particular Contract source of supply; (iii) the effect on pricing or availability of supply is substantial; and (iv) the volatility so affects Contractor's performance

that continued performance of the Contract would result in a substantial loss.

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

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

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

63. DEFAULT – AUTHORIZED USER

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

b. Failure to Make Payment. In the event a participating Authorized User fails to make payment to the Contractor for Products delivered, accepted and properly invoiced, within 60 days of such delivery and acceptance, the Contractor may, upon 10 days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional shipments of Product or provision of services to such entity until such time as reasonable arrangements have been made and assurances given by such entity for current and future Contract payments.

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

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

64. INTEREST ON LATE PAYMENTS

a. **State Agencies** The payment of interest on certain payments due and owed by Agency may be made in accordance with Article 11-A of the State Finance Law (SFL §179-d et. Seq.) and Title 2 of the New York Code of Rules and Regulations, Part 18 (Implementation of Prompt Payment Legislation -2 NYCRR §18.1 et seq.).

b. By Non-State Agencies The terms of Article 11-A apply only to procurements by and the consequent payment obligations of Agencies. Neither expressly nor by any implication is the statute applicable to Non-State Authorized Users. Neither OGS nor the State Comptroller is responsible for payments on any purchases made by a Non-State Agency Authorized User.

c. By Contractor Should the Contractor be liable for any payments to the State hereunder, interest, late payment charges and collection fee charges will be determined and assessed pursuant to Section 18 of the State Finance Law.

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

a. Cover/Substitute Performance In the event of Contractor's material breach, the Commissioner may, with or without formally Bidding: (i) Purchase from other sources; or (ii) If the Commissioner is unsuccessful after making reasonable attempts, under the circumstances then existing, to timely obtain acceptable service or acquire replacement Product of equal or comparable quality, the Commissioner may acquire acceptable replacement Product of lesser or greater quality.

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

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

c. Bankruptcy In the event that the Contractor files a petition under the U.S. Bankruptcy Code during the term of this Centralized Contract, Authorized Users may, at their discretion, make application to exercise its right to set-off against monies due the Debtor or, under the Doctrine of Recoupment, credit the Authorized User the amounts owed by the Contractor arising out of the same transactions.

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

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

e. Deduction/Credit Sums due as a result of these remedies may be deducted or offset by the Authorized User from payments due, or to become due, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the Authorized User the amount of such claim

or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, liquidated damages, etc., which arise from the administration of the Contract.

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

67. TOXIC SUBSTANCES Each Contractor furnishing a toxic substance as defined by Section 875 of the Labor Law, shall provide such Authorized User with not less than two copies of a material safety data sheet, which sheet shall include for each such substance the information outlined in Section 876 of the Labor Law.

Before any chemical product is used or applied on or in any building, a copy of the product label and Material Safety Data Sheet must be provided to and approved by the Authorized User agency representative.

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

69. SECURITY Contractor warrants, covenants and represents that it will comply fully with all security procedures of the Authorized User(s) in performance of the Contract including but not limited to physical, facility, documentary and cyber security rules, procedures and protocols.

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

71. CONTRACT TERM - RENEWAL In addition to any stated renewal periods in the Contract, any Contract or unit portion thereof let by the Commissioner may be extended by the Commissioner for an additional period(s) of up to one year with the written concurrence of the Contractor and Comptroller. Such extension may be exercised on a month to month basis or in other stated periods of time during the one year extension.

72. ADDITIONAL WARRANTIES Where Contractor, product manufacturer or service provider generally offers additional or more advantageous warranties than set forth below, Contractor shall offer or pass through any such warranties to Authorized Users. Contractor hereby warrants and represents:

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

b. Title and Ownership Warranty Contractor warrants, represents and conveys (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver perpetual license rights to any Products transferred to Authorized User under this Contract. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor fully indemnifies the Authorized User for any loss, damages or actions arising from a breach of said warranty without limitation.

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

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

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

Where Contractor, the Independent Software Vendor "ISV," or other third party manufacturer markets any Project Deliverable delivered by or through Contractor with a standard commercial warranty, such standard warranty shall be in addition to, and not relieve the Contractor from, Contractor's warranty obligations during the project warranty and extended warranty period(s). Where such standard commercial warranty covers all or some of the Project warranty or extended warranty period(s), Contractor shall be responsible for the coordination during the Project warranty or extended warranty period(s) with ISV or other third party manufacturer(s) for warranty repair or replacement of ISV or other third party manufacturer's Product.

Where Contractor, ISV or other third party manufacturer markets any Project Deliverable with a standard commercial warranty which goes

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

e. Replacement Parts Warranty If during the regular or extended warranty period's faults develop, the Contractor shall promptly repair or, upon demand, replace the defective unit or component part affected. All costs for labor and material and transportation incurred to repair or replace defective Product during the warranty period shall be borne solely by the Contractor, and the State or Authorized User shall in no event be liable or responsible therefor.

Any part of component replaced by the Contractor under the Contract warranty shall be replaced at no cost to the Authorized User and guaranteed for the greater of: a) the warranty period under paragraph (d) above; or b) if a separate warranty for that part or component is generally offered by the manufacturer, the standard commercial warranty period offered by the manufacturer for the individual part or component.

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

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

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

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

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

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

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

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

75. INDEMNIFICATION RELATING TO THIRD PARTY RIGHTS The Contractor will also indemnify and hold the Authorized Users harmless from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs that may be finally assessed against the Authorized Users in any action for infringement of a United States Letter Patent, or of any copyright, trademark, trade secret or other third party proprietary right except to the extent such claims arise from the Authorized Users gross negligence or willful misconduct, provided that the State shall give Contractor: (i) prompt written notice of any action, claim or threat of infringement suit, or other suit, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action at the expense of Contractor.

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

The foregoing provisions as to protection from third party rights shall not apply to any infringement occasioned by modification by the Authorized User of any Product without Contractor's approval.

In the event that an action at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the service or Product under the Contract infringes any patent, copyright or proprietary right, and Contractor is of the opinion that the allegations in such action in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the

Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract. Contractor shall in such event protect the interests of the Authorized User and secure a continuance to permit the Authorized User to appear and defend its interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the Authorized User may have. This constitutes the Authorized User's sole and exclusive remedy for patent infringement, or for infringement of any other third party proprietary right.

76. LIMITATION OF LIABILITY Except as otherwise set forth in the Indemnification Paragraphs above, the limit of liability shall be as follows:

a. Contractor's liability for any claim, loss or liability arising out of, or connected with the Products and services provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the Purchase Order for the Products and services, or parts thereof forming the basis of the Authorized User's claim, (said amount not to exceed a total of twelve (12) months charges payable under the applicable Purchase Order) or (ii) one million dollars (\$1,000,000), whichever is greater.

b. The Authorized User may retain such monies from any amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted against the Authorized User unless Contractor at the time of the presentation of claim shall demonstrate to the Authorized User's satisfaction that sufficient monies are set aside by the Contractor in the form of a bond or through insurance coverage to cover associated damages and other costs.

c. Notwithstanding the above, neither the Contractor nor the Authorized User shall be liable for any consequential, indirect or special damages of any kind which may result directly or indirectly from such performance, including, without limitation, damages resulting from loss of use or loss of profit by the Authorized User, the Contractor, or by others.

77. INSURANCE Contractor shall secure and maintain insurance coverage as specified in the Bid Documents and shall promptly provide documentation of specified coverages to the Authorized User. If specified, the Contractor may be required to add the Authorized User as an additional insured.

THE FOLLOWING CLAUSES PERTAIN TO TECHNOLOGY & NEGOTIATED CONTRACTS

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

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

interest in any trademark, trade name, or service mark is granted hereunder.

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

c. Licensed Documentation If commercially available, Licensee shall have the option to require the Contractor to deliver, at Contractor's expense: (i) one (1) hard copy and one (1) master electronic copy of the Documentation in a mutually agreeable format; (ii) based on hard copy instructions for access by downloading from the Internet (iii) hard copies of the Product Documentation by type of license in the following amounts, unless otherwise mutually agreed:

- Individual/Named User License - one (1) copy per License
- Concurrent Users - 10 copies per site
- Processing Capacity - 10 copies per site

Software media must be in a format specified by the Authorized User, without requiring any type of conversion.

Contractor hereby grants to Licensee a perpetual license right to make, reproduce (including downloading electronic copies of the Product) and distribute, either electronically or otherwise, copies of Product Documentation as necessary to enjoy full use of the Product in accordance with the terms of license.

d. Product Technical Support & Maintenance Licensee shall have the option of electing the Product technical support and maintenance ("maintenance") set forth in the Contract by giving written notice to Contractor any time during the Centralized Contract term. Maintenance term(s) and any renewal(s) thereof are independent of the expiration of the Centralized Contract term and will not automatically renew.

Maintenance shall include, at a minimum, (i) the provision of error corrections, updates, revisions, fixes, upgrade and new releases to Licensee, and (ii) Help Desk assistance with locally accessible "800" or toll free, local telephone service, or alternatively on-line Help Desk accessibility. Contractor shall maintain the Products so as to provide Licensee with the ability to utilize the Products in accordance with the Product documentation without significant functional downtime to its ongoing business operations during the maintenance term.

Authorized User shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon notice to Contractor. In the event that Authorized User does not initially acquire or discontinues maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product without any additional penalties or other charges, by paying Contractor the amount which would have been due under the Contract for the period of time that such maintenance had lapsed, at then current NYS net maintenance rates.

e. Permitted License Transfers As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated site not originally specified in the license, including transfers between Agencies ("permitted license transfers"). Licensee(s) do not have to obtain the approval of Contractor for permitted license transfers, but must give thirty (30) days prior written notice to Contractor of such move(s) and certify in writing that the Product is not in use at the prior site. There shall be no additional

license or other transfer fees due Contractor, provided that: i) the maximum capacity of the consolidated machine is equal to the combined individual license capacity of all licenses running at the consolidated or transferred site (e.g., named users, seats, or MIPS); or ii) if the maximum capacity of the consolidated machine is greater than the individual license capacity being transferred, a logical or physical partition or other means of restricting access will be maintained within the computer system so as to restrict use and access to the Product to that unit of licensed capacity solely dedicated to beneficial use for Licensee. In the event that the maximum capacity of the consolidated machine is greater than the combined individual license capacity of all licenses running at the consolidated or transferred site, and a logical or physical partition or other means of restricting use is not available, the fees due Contractor shall not exceed the fees otherwise payable for a single license for the upgrade capacity.

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

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

g. Archival Back-Up and Disaster Recovery Licensee may use and copy the Product and related Documentation in connection with: i) reproducing a reasonable number of copies of the Product for archival backup and disaster recovery procedures in the event of destruction or corruption of the Product or disasters or emergencies which require Licensee to restore backup(s) or to initiate disaster recovery procedures for its platform or operating systems; ii) reproducing a reasonable number of copies of the Product and related Documentation for cold site storage. "Cold Site" storage shall be defined as a restorable back-up copy of the Product not to be installed until and after the declaration by the Licensee of a disaster; iii) reproducing a back-up copy of the Product to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed herein. "Disaster Recovery" shall be defined as the installation and storage of Product in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development.

h. Confidentiality Restrictions The Product is a trade secret, copyrighted and proprietary product. Licensee and its employees will keep the Product strictly confidential, and Licensee will not disclose or otherwise distribute or reproduce any Product to anyone other than as

authorized under the terms of Contract. Licensee will not remove or destroy any proprietary markings of Contractor.

i. Restricted Use by Licensee Except as expressly authorized by the terms of license, Licensee shall not:

- (i) Copy the Product;
- (ii) Cause or permit reverse compilation or reverse assembly of all or any portion of the Product;
- (iii) Export the Licensed Software in violation of any U.S. Department of Commerce export administration regulations.

79. PRODUCT ACCEPTANCE Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User(s) shall have thirty (30) days from the date of delivery to accept hardware products and sixty (60) days from the date of delivery to accept all other Product. Where the Contractor is responsible for installation, acceptance shall be from completion of installation. Failure to provide notice of acceptance or rejection or a deficiency statement to the Contractor by the end of the period provided for under this clause constitutes acceptance by the Authorized User(s) as of the expiration of that period. The License Term shall be extended by the time periods allowed for trial use, testing and acceptance unless the Commissioner or Authorized User agrees to accept the Product at completion of trial use.

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User shall have the option to run testing on the Product prior to acceptance, such tests and data sets to be specified by User. Where using its own data or tests, Authorized User must have the tests or representative set of data available upon delivery. This demonstration will take the form of a documented installation test, capable of observation by the Authorized User, and shall be made part of the Contractor's standard documentation. The test data shall remain accessible to the Authorized User after completion of the test.

In the event that the documented installation test cannot be completed successfully within the specified acceptance period, and the Contractor or Product is responsible for the delay, Authorized User shall have the option to cancel the order in whole or in part, or to extend the testing period for an additional thirty (30) day increment. Authorized User shall notify Contractor of acceptance upon successful completion of the documented installation test. Such cancellation shall not give rise to any cause of action against the Authorized User for damages, loss of profits, expenses, or other remuneration of any kind.

If the Authorized User elects to provide a deficiency statement specifying how the Product fails to meet the specifications within the testing period, Contractor shall have thirty (30) days to correct the deficiency, and the Authorized User shall have an additional sixty (60) days to evaluate the Product as provided herein. If the Product does not meet the specifications at the end of the extended testing period, Authorized User, upon prior written notice to Contractor, may then reject the Product and return all defective Product to Contractor, and Contractor shall refund any monies paid by the Authorized User to Contractor therefor. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to the amounts set forth in the Limitation of Liability Clause for any liability for costs incurred at the direction or recommendation of Contractor.

80. AUDIT OF LICENSED PRODUCT USAGE Contractor shall have the right to periodically audit, no more than annually, at Contractor's expense, use of licensed Product at any site where a copy of the Product resides provided that: (i) Contractor gives Licensee(s) at least thirty (30) days advance written notice, (ii) such audit is conducted during such party's normal business hours, (iii) the audit is conducted by an independent auditor chosen on mutual agreement of the parties. Contractor shall recommend a minimum of three (3) auditing/accounting firms from which the Licensee will select one (1). In no case shall the Business Software Alliance (BSA), Software Publishers Association (SPA), Software and Industry Information Association (SIIA) or Federation Against Software Theft (FAST) be used directly or indirectly to conduct audits, or be recommended by Contractor; (iv) Contractor and Licensee are each entitled to designate a representative who shall be entitled to participate, and who shall mutually agree on audit format, and simultaneously review all information obtained by the audit. Such representatives also shall be entitled to copies of all reports, data or information obtained from the audit; and (v) if the audit shows that such party is not in compliance, Licensee shall be required to purchase additional licenses or capacities necessary to bring it into compliance and shall pay for the unlicensed capacity at the NYS Net Price in effect at time of audit, or if none, then at the Contractor's U.S. Commercial list price. Once such additional licenses or capacities are purchased, Licensee shall be deemed to have been in compliance retroactively, and Licensee shall have no further liability of any kind for the unauthorized use of the software.

81. OWNERSHIP/TITLE TO PROJECT DELIVERABLES

a. Definitions

(i) For purposes of this paragraph, "Products." A deliverable furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), whether printed in hard copy or maintained on diskette, CD, DVD or other electronic media c) third party software, d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components, and e) any properties embodied therein, whether in tangible or intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, source code, object code).

(ii) For purposes of this paragraph, "Existing Products." Tangible Products and intangible licensed Products that exist prior to the commencement of work under the Contract. Contractor bears the burden of proving that a particular product was in existence prior to the commencement of the Project.

(iii) For purposes of this paragraph, "Custom Products." Products, preliminary, final or otherwise, which are created or developed by Contractor, its Subcontractors, partners, employees or agents for Authorized User under the Contract.

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

(i) Existing Products:

1. Hardware - Title and ownership of Existing Hardware Product shall pass to Authorized User upon Acceptance.

2. Software - Title and ownership to Existing Software Product(s) delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other independent software vendor proprietary owner ("Existing Licensed

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

(ii.) **Custom Products:** Effective upon creation of Custom Products, Contractor hereby conveys, assigns and transfers to Authorized User the sole and exclusive rights, title and interest in Custom Product(s), whether preliminary, final or otherwise, including all trademark and copyrights. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction and marketing by or through Contractor, its agents, employees, or Subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under a Purchase Order, project definition or work order in the course of Contractor’s business. Authorized User may, by providing written notice thereof to the Contractor, elect in the alternative to take a non-exclusive perpetual license to Custom Products in lieu of Authorized User taking exclusive ownership and title to such Products. In such case, Licensee on behalf of all Authorized Users shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purpose(s) as stated in paragraph (b)(i)(2), above.

c. **Transfers or Assignments to a Third Party Financing Agent** It is understood and agreed by the parties that a condition precedent to the consummation of the purchase (s) under the Contract may be the obtaining of acceptable third party financing by the Authorized User. The Authorized User shall make the sole determination of the acceptability of any financing proposal. The Authorized User will make all reasonable efforts to obtain such financing, but makes no representation that such financing has been obtained as of the date of Bid receipt. Where financing is used, Authorized User may assign or transfer its rights in Licensed Products (existing or custom) to a third party financing entity or trustee (“Trustee”) as collateral where required by the terms of the financing agreement. Trustee’s sole rights with respect to transferability or use of Licensed Products shall be to exclusively sublicense to Authorized User all of its Licensee’s rights under the terms and conditions of the License Agreement; provided, further, however, in the event of any termination or expiration of such sublicense by reason of payment in full, all of Trustee’s rights in such Licensed Product shall terminate immediately and Authorized User’s prior rights to such Existing Licensed Product shall be revived.

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

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

82. **PROOF OF LICENSE** The Contractor must provide to each Licensee who places a Purchase Order either: (i) the Product developer’s certified License Confirmation Certificates in the name of such Licensee; or (ii) a written confirmation from the Proprietary owner accepting Product invoice as proof of license. Contractor shall submit a sample certificate, or alternatively such written confirmation from the proprietary developer. Such certificates must be in a form acceptable to the Licensee.

83. **PRODUCT VERSION** Purchase Orders shall be deemed to reference Manufacturer’s most recently released model or version of the Product at time of order, unless an earlier model or version is specifically requested in writing by Authorized User and Contractor is willing to provide such version.

84. **CHANGES TO PRODUCT OR SERVICE OFFERINGS**

a. **Product or Service Discontinuance** Where Contractor is the Product Manufacturer/Developer, and Contractor publicly announces to all U.S. customers (“date of notice”) that a Product is being withdrawn from the U.S. market or that maintenance service or technical support provided by Contractor (“withdrawn support”) is no longer going to be offered, Contractor shall be required to: (i) notify the Commissioner, each Licensee and each Authorized User then under contract for maintenance or technical support in writing of the intended discontinuance; and (ii) continue to offer Product or withdrawn support upon the Contract terms previously offered for the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice; and (iii) at Authorized User’s option, provided that the Authorized User is under contract for maintenance on the date of notice, either: provide the Authorized User with a Product replacement or migration path with at least equivalent functionality at no additional charge to enable Authorized User to continue use and maintenance of the Product.

In the event that the Contractor is not the Product Manufacturer, Contractor shall be required to: (i) provide the notice required under the paragraph above, to the entities described within five (5) business days of Contractor receiving notice from the Product Manufacturer, and (ii) include in such notice the period of time from the date of notice that the Product Manufacturer will continue to provide Product or withdraw support.

The provisions of this subdivision (a) shall not apply or eliminate Contractor’s obligations where withdrawn support is being provided by an independent Subcontractor. In the event that such Subcontractor

ceases to provide service, Contractor shall be responsible for subcontracting such service, subject to state approval, to an alternate Subcontractor.

b. Product or Service Re-Bundling In the event that Contractor is the Product manufacturer and publicly announces to all U.S. customers (“date of notice”) that a Product or maintenance or technical support offering is being re-bundled in a different manner from the structure or licensing model of the prior U.S. commercial offering, Contractor shall be required to: (i) notify the State and each Authorized User in writing of the intended change; (ii) continue to provide Product or withdrawn support upon the same terms and conditions as previously offered on the then-current NYS Contract for the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice; and (iii) shall submit the proposed rebundling change to the Commissioner for approval prior to its becoming effective for the remainder of the Contract term. The provisions of this section do not apply if the Contractor is not the Product manufacturer.

85. NO HARDSTOP/PASSIVE LICENSE MONITORING

Unless an Authorized User is otherwise specifically advised to the contrary in writing at the time of order and prior to purchase, Contractor hereby warrants and represents that the Product and all Upgrades do not and will not contain any computer code that would disable the Product or Upgrades or impair in any way its operation based on the elapsing of a period of time, exceeding an authorized number of copies, advancement to a particular date or other numeral, or other similar self-destruct mechanisms (sometimes referred to as “time bombs,” “time locks,” or “drop dead” devices) or that would permit Contractor to access the Product to cause such disablement or impairment (sometimes referred to as a “trap door” device). Contractor agrees that in the event of a breach or alleged breach of this provision that Authorized User shall not have an adequate remedy at law, including monetary damages, and that Authorized User shall consequently be entitled to seek a temporary restraining order, injunction, or other form of equitable relief against the continuance of such breach, in addition to any and all remedies to which Authorized User shall be entitled.

86. SOURCE CODE ESCROW FOR LICENSED PRODUCT

If Source Code or Source Code escrow is offered by either Contractor or Product manufacturer or developer to any other commercial customers, Contractor shall either: (i) provide Licensee with the Source Code for the Product; or (ii) place the Source Code in a third party escrow arrangement with a designated escrow agent who shall be named and identified to the State, and who shall be directed to release the deposited Source Code in accordance with a standard escrow agreement acceptable to the State; or (iii) will certify to the State that the Product manufacturer/developer has named the State, acting by and through the Authorized User, and the Licensee, as a named beneficiary of an established escrow arrangement with its designated escrow agent who shall be named and identified to the State and Licensee, and who shall be directed to release the deposited Source Code in accordance with the terms of escrow. Source Code, as well as any corrections or enhancements to such source code, shall be updated for each new release of the Product in the same manner as provided above and such updating of escrow shall be certified to the State in writing. Contractor shall identify the escrow agent upon commencement of the Contract term and shall certify annually that the escrow remains in effect in compliance with the terms of this paragraph.

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

FOR NEGOTIATED CONTRACTS THE FOLLOWING CLAUSES ARE RESERVED BECAUSE BIDDING DOES NOT APPLY:

Clauses: 7, 8, 9, 10, 11, 12, 13, 16, 15, 21, 25, 26, 28, 29, 30, 31, 32, 33, 36, 49, 50, 52, 54 and 3

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

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

POLICY STATEMENT

New York State Office of General Services, as part of its responsibility, recognizes the need to promote the employment of minority group members and women and to ensure that certified minority and women-owned business enterprises have opportunities for maximum feasible participation in the performance of OGS contracts.

In 2006, the State of New York commissioned a disparity study to evaluate whether minority and women-owned business enterprises had a full and fair opportunity to participate in state contracting. The findings of the study were published on April 29, 2010, under the title "The State of Minority and Women-Owned Business Enterprises: Evidence from New York" ("the Disparity Study"). The report found evidence of statistically significant disparities between the level of participation of minority and women-owned business enterprises in state procurement contracting verses the number of minority and women-owned business enterprises that were ready, willing and able to participate in state procurements. As a result of these findings, the Disparity Study made recommendations concerning the implementation and operation of the statewide certified minority and women-owned business enterprises program.

Equal Employment Opportunity Requirements

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

Bidder further agrees to submit with the bid a staffing plan (Form EEO 100) identifying the anticipated work force to be utilized on the Contract and if awarded a contract, will, upon request, submit to OGS a workforce utilization report (Form EEO 101) identifying the work force actually utilized on the Contract if known.

Further, pursuant to 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 and sub-contractors will not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex (including gender expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

Business Participation Opportunities for New York State Certified Minority- and Women-Owned Business Enterprises (MWBE)

For purposes of this procurement, OGS has conducted a comprehensive search and has determined that the contract does not offer any opportunities for participation by MWBEs.

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

(12-7-11)

APPENDIX D

Contract Insurance Requirements

CONTRACT INSURANCE REQUIREMENTS

Prior to the start of work the Contractor shall procure at its sole cost and expense, and shall maintain in force at all times during this Contract until Final Completion, policies of insurance as herein below set forth, written by companies authorized by the New York State Insurance Department to issue insurance in the State of New York ("admitted" carriers) with an A.M. Best Company rating of "A-" Class "VII" or better or as acceptable to the New York State Office of General Services (OGS). If, during the term of the policy, a carrier's rating falls below "A-" Class "VII", the insurance must be replaced no later than the renewal date of the policy with an insurer acceptable to the Department and rated at least "A-" Class "VII" in the most recently published Best's Insurance Report. OGS may, at its sole discretion, accept policies of insurance written by a non-authorized carrier or carriers when Certificates and/or other policy documentation is accompanied by a completed Excess Lines Association of New York (ELANY) Affidavit; provided that nothing herein shall be construed to require the Agency to accept insurance placed with a non-authorized carrier under any circumstances.

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

SECTION I. GENERAL CONDITIONS

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

- A. **Coverage Types and Policy Limits.** The types of coverage and policy limits required from the Contractor are specified in Section II, *Specific Coverages and Limits*, below.
- B. **Policy Forms.** Except as may be otherwise specifically provided herein or agreed in writing by OGS, policies must be written on an occurrence basis. Under certain circumstances, the Agency may elect to accept policies written on a claims-made basis provided that, at a minimum, the policy remains in force throughout the performance of the services and for three (3) years after completion of the Contract. If the policy is cancelled or not renewed during that time, the Contractor must purchase at its sole expense Discovery Clause coverage sufficient to complete the 3-year period after completion of the Contract. Written proof of this extended reporting period must be provided to the Agency prior to the policy's expiration or cancellation.
- C. **Certificates of Insurance/Notices.** Contractor shall provide a Certificate or Certificates of Insurance, in a form satisfactory to OGS, before commencing any work under this contract. Certificates shall reference the Contract Number. Certificates shall be mailed to:

Office of General Services
Procurement Services Group
Corning Tower, 38th Floor
Albany, NY 12242
Attn: Wendy Reitzel

Unless otherwise agreed, policies shall be written so as to include a provision that the policy will not be canceled, materially changed, or not renewed without at least thirty (30) days prior written notice except for non-payment as required by law to OGS, Procurement Services Group, Corning Tower, 38th Floor, Albany, NY 12242, Attn: Wendy Reitzel. In addition, if required by the OGS, the Contractor shall deliver to OGS within forty-five (45) days of such request a copy of any or all policies of insurance not previously provided, certified by the insurance carrier as true and complete.

Certificates of Insurance shall:

1. Be in the form approved by OGS.
2. Disclose any deductible, self-insured retention, aggregate limit or any exclusion to the policy that materially changes the coverage required by the contract.
3. Specify the Additional Insureds and Named Insureds as required herein.
4. Refer to this Contract by number and any other attachments on the face of the certificate,
5. When coverage is provided by a non-admitted carrier, be accompanied by a completed ELANY Affidavit, and
6. Be signed by an authorized representative of the insurance carrier or producer.

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

- D. **Primary Coverage.** All insurance policies, unless otherwise agreed upon by the Parties, shall provide that the required coverage shall apply on a primary and not on an excess or contributing basis as to any other insurance that may be available to OGS for any claim arising from the Contractor's Work under this contract, or as a result of the Contractor's activities. Any other insurance maintained by OGS shall be excess of and shall not contribute with the Contractor's insurance regardless of the "other insurance" clause contained in OGS's own policy of insurance.
- E. **Policy Renewal/Expiration.** At least thirty (30) days prior to the expiration of any policy required by this contract, evidence of renewal or replacement policies of insurance with terms no less favorable to OGS than the expiring policies shall be delivered to OGS in the manner required for service of notice in Paragraph A.3. *Certificates of Insurance/Notices* above. If, at any time during the term of this contract, the coverage provisions and limits of the policies required herein do not meet the provisions and limits set forth in the Contract or proof thereof is not provided to OGS, the Contractor shall immediately cease Work on the Project. The Contractor shall not resume Work on the Project until authorized to do so by OGS. Any delay, time lost, or additional cost incurred as a result of the Contractor not having insurance required by the Contract or not providing proof of same in a form acceptable to OGS, shall not give rise to a delay claim or any other claim against OGS. Should the Contractor fail to provide or maintain any insurance required by this contract, or proof thereof is not provided to OGS, OGS may withhold further contract payments, treat such failure as a breach or default of the contract, and/or, after providing written notice to the Contractor, require the Surety "if any" to secure appropriate coverage and/or purchase insurance complying with the Contract and charge back such purchase to the Contractor.
- F. **Self-Insured Retention/Deductibles.** Certificates of Insurance must indicate the applicable deductible/self insured retention on each policy. The Contractor shall be solely responsible for all claim expenses and loss payments within the deductible or self-insured retention.
- G. **Subcontractors.** Should the Contractor engage a Subcontractor, the Contractor shall require all Subcontractors, prior to commencement of an agreement between Contractor and the Subcontractor, to secure and keep in force during the term of this contract the insurance requirements of this document on the Subcontractor, as applicable. Proof thereof shall be supplied to the Agency.
- H. **Waiver of Subrogation.** Contractor shall cause to be included in each of its policies insuring against loss, damage or destruction by fire or other insured casualty a waiver of the insurer's right of subrogation against OGS, or, if such waiver is unobtainable (i) an express agreement that such policy shall not be invalidated if Contractor waives or has waived before the casualty, the right of recovery against OGS or (ii) any other form of permission for the release of OGS.

SECTION II. SPECIFIC COVERAGES AND LIMITS

The types of insurance and minimum policy limits shall be as follows:

A. **Commercial General Liability:** Commercial General Liability Insurance, (CGL) covering the liability of the Contractor for bodily injury, property damage, and personal/advertising injury arising from all work and operations under this contract. The limits under such policy shall not be less than the following:

- Each Occurrence limit – 2,000,000;
- General Aggregate – 2,000,000;
- Products/Completed Operations – 2,000,000;
- Personal Advertising Injury – \$1,000,000;
- Damage to Rented Premises - \$50,000; and
- Medical Expense – \$5,000.

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

- premises liability;
- independent contractors;
- blanket contractual liability, including tort liability of another assumed in a contract;
- defense and/or indemnification obligations, including obligations assumed under this contract;
- cross liability for additional insureds;
- products/completed operations for a term of no less than 3 years, commencing upon acceptance of the work, as required by the contract;
- explosion, collapse, and underground hazards;
- contractor means and methods; and
- liability resulting from Section 240 or Section 241 of the New York State Labor Law.

The following ISO forms must be endorsed to the policy:

- CG 00 01 01 96 or an equivalent acceptable by the State – Commercial General Liability Coverage Form
- CG 20 10 11 85, or, an equivalent – Additional Insured-Owner, Lessees or Contractors (Form B)

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

Policies shall name The People of the State of New York and the New York State Office of General Services as Additional Insureds, and such coverage shall be extended to afford Additional Insured status to those entities during the Products/Completed Operations term.

The CGL policy, and any umbrella/excess policies used to meet the “Each Occurrence” limits specified above, must be endorsed to be primary with respects to the coverage afforded the Additional Insureds, and such polic(ies) shall be primary to, and non-contributing with, any other insurance maintained by OGS. Any other insurance maintained by OGS shall be excess of and shall not contribute with the Contractor’s or Subcontractor’s insurance, regardless of the “Other Insurance” clause contained in either party’s policy of insurance.

- B. **Workers' Compensation:** For work to be performed in NYS, the Contractor shall provide and maintain coverage during the life of this Agreement for the benefit of such employees as are required to be covered by the NYS Workers' Compensation Law.

If the Agreement involves work on or near a shoreline, a U.S. Longshore and Harbor Workers' Compensation Act and/or Jones Acts policy as applicable must be provided. Any waiver of this requirement must be approved by the Agency and will only be granted in unique or unusual circumstances.

Evidence of Workers' Compensation and Employers Liability coverage must be provided on one of the following forms specified by the Commissioner of the Workers' Compensation Board:

1. C-105.2 (September 2007, or most current version) – Certificate of Workers' Compensation Insurance
2. U-26.3 – Certificate of Workers' Compensation Insurance from the State Insurance Fund
3. GSI-105/SI-12 – Certificate of Workers' Compensation Self Insurance.

All forms are valid for one year from the date the form is signed/ stamped, or until policy expiration, whichever is earlier.

- C. **Disability Benefits:** For work to be performed in NYS, the Contractor shall provide and maintain coverage during the life of this Agreement for the benefit of such employees as are required to be covered by the NYS Disability Benefits Law. Any waiver of this requirement must be approved by the New York State Workers' Compensation Board and will only be granted in unique or unusual circumstances.

Evidence of Disability Benefits coverage must be provided on one of the following forms specified by the Commissioner of the Workers' Compensation Board:

1. DB-120.1(May 2006 or most current version) – Certificate of Insurance Coverage under the NYS Disability Benefits Law.
2. DB-155 – Certificate of Disability Self Insurance.
3. CE-200 – Certificate of Attestation of Exemption. [**Note:** This form will only be accepted as evidence of an exemption from providing Disability Benefits insurance as required by Law. OGS will not accept this as an exemption from providing Workers' Compensation Insurance].

All forms are valid for one year from the date the form is signed/ stamped, or until policy expiration, whichever is earlier

- D. **Business Automobile Liability:** Commercial Auto Liability insurance covering liability arising out of the use of any motor vehicle in connection with the work, including owned, leased, hired and non owned vehicles bearing or, under the circumstances under which they are being used, required by the Motor Vehicle Laws of the State of New York to bear, license plates. Such policy shall have a combined single limit for Bodily Injury and Property Damage of at least \$2,000,000 and shall name The People of the State of New York and the New York State Office of General Services as additional insureds. The limits may be provided through a combination of primary and umbrella/excess liability policies. If the contract involves the removal of hazardous waste from the project site or otherwise transporting hazardous materials, pollution liability coverage for covered autos shall be provided by form CA 99 48 03 06 or CA 00 12 03 06 and the Motor Carrier Act Endorsement (MCS90) shall be attached.

- E. **Commercial Internet Liability and Network Protection Policy:** Commercial Internet Liability and Network Protection Policy with a limit of not less than \$1,000,000 each occurrence, or an alternative limit acceptable to the State. Such liability must be written on ISO occurrence form EC 0010, or a

substitute form providing equivalent coverage and shall cover liability arising from network security. If coverage is written on a claims-made policy, the Contractor warrants that the applicable retroactive date is the effective date of the Contract; and that continuous coverage will be maintained, or an extended discovery period exercised, for a period of not less than three (3) years after the contract is complete.

F. **Crime:** CRIME INSURANCE, on “loss sustained form” in an amount not less than \$1,000,000, or alternative coverage acceptable to the State, including coverage for:

- Employee Theft;
- Forgery or Alteration;
- Inside the Premises - Theft of Money and Securities;
- Inside the Premises- Robbery or Safe Burglary of Other Property;
- Outside the Premises;
- Computer Fraud; and
- Money Orders and Counterfeit Paper Currency.

Policy must allow for reporting of circumstances or incidents that might give rise to future claims. The policy must include an extended reporting period of no less than three years with respect to events which occurred but were not reported during the term of the policy.

OGS, including its affiliates and subsidiaries, must be included as “Loss Payees” as respects this specific amount as their interests may appear.

Any warranties required by the insurer must be disclosed and complied with. Said insurance shall extend coverage to include the principals.

G. **Umbrella and Excess Liability:** When the limits of the CGL, Auto, and/or Errors and Omissions policies procured are insufficient to meet the limits specified, the Contractor shall procure and maintain Commercial Umbrella and/or Excess Liability policies with limits in excess of the primary; provided, however, that the total amount of insurance coverage is at least equal to the requirements set forth above. Such policies shall follow the same form as the primary. Any insurance maintained by OGS or any additional insured shall be considered excess of and shall not contribute with any other insurance procured and maintained by the Contractor including primary, umbrella and excess liability regardless of the “other insurance” clause contained in either parties policy.

APPENDIX E

Fuel and Associated Product Discounts and Fuel Card Services Fee Schedule

Primary Fuel Discount Tiers

The NYS Primary Fuel Discount will be applied to Fuel purchases at ALL Fuel Locations where Contractor's Fuel Card may be used by NYS Authorized Users.

Calculation of Primary Fuel Discount Tier: The applicable Primary Fuel Discount tier will be calculated by aggregating Fuel purchases by all New York State Authorized Users on a monthly basis at the time of billing.

Application of Primary Fuel Discount: The applicable Primary Fuel Discount tier will be applied at the time of billing, prior to deduction of applicable tax(es), to the total gross monthly sales amount of each Authorized User's Fuel purchases at all Fuel Locations.

	Monthly NYS Gallon Consumption (all Authorized Users)	NYS Primary Fuel Discount
Tier 1	0 - 250,000	1.38 %
Tier 2	250,001 - 500,000	1.43 %
Tier 3	500,001 - 750,000	1.48 %
Tier 4	750,001 and above	1.53 %

Secondary Fuel Discount(s)

The following Secondary Fuel Discount(s) are applicable to specific Fuel Locations.

Application of Secondary Fuel Discount: The Secondary Fuel Discount is added to the Primary Fuel Discount to obtain the total discount applicable to a specific transaction. The applicable Secondary Fuel Discount will be applied, at the time of billing, prior to deduction of applicable tax(es), to the total gross monthly sales amount of each Authorized User's Fuel purchases at the specified Fuel Locations.

Additional Discount #	Fuel Locations where additional discount applies. (Indicate specific oil company or franchisee name)	NYS Secondary Fuel Discount
Disc 1	N/A	0 %
Disc 2	N/A	0 %
Disc 3	N/A	0 %
Disc 4	N/A	0 %

Associated Product Discount(s)

The following Associated Product Discount(s) are applicable to non-Fuel purchases.

Note: Associated Product purchases may only be made in an Emergency situation (i.e., Product is required for continued safe operation of the vehicle), or when the purchase is a car wash.

Associated Product Type	NYS Discount	Unit of Measure (e.g., per item), and method for applying discount.
Fluids (e.g., motor oil, transmission fluid, and windshield washer fluid)	1.38-1.53%	The discount percentage for Associated products will be consistent with the gallon fuel tiers and will be calculated on Total Gross Sales of the gallon tier
Vehicle Parts (e.g., windshield wipers and tires)	1.38-1.53%	The discount percentage for Associated products will be consistent with the gallon fuel tiers and will be calculated on Total Gross Sales of the gallon tier
Emergency Service (e.g., tire repair)	1.38-1.53%	The discount percentage for Associated products will be consistent with the gallon fuel tiers and will be calculated on Total Gross Sales of the gallon tier
Other (e.g., car washes)	1.38-1.53%	The discount percentage for Associated products will be consistent with the gallon fuel tiers and will be calculated on Total Gross Sales of the gallon tier

Fuel Card Services Fee Schedule

Account Set-up Fee	WAIVED
Monthly Card Fee	WAIVED
Replacement Card Fee	WAIVED
International Currency Conversion Fee	1% of the total Transaction value
Reproduced Report Fee*	\$25.00 per request
General Research Fee*	\$15.00 per hour
Regular Mail Fee	\$0.00
Expedited Shipping Fee*	Cost varies by option
Returned Item Fee (<i>e.g.</i> NSF/ACH)*	\$20.00
WEXPay	\$0.00
Octane	\$0.00

*These fees are only charged upon request for the item, or in the case of the Returned Item Fee, upon occurrence.

APPENDIX F

Contractor Contact Information

Contact Information (for Contract Administration Purposes)

Company Name:			
Company Headquarters Address: (From first page of Contract)	Wright Express Financial Services Corporation		
	7090 South Union Park Center		
	Suite 350		
	Midvale, UT 84047		
FEDERAL ID #:	84-1425616		
NYS Vendor ID #:	1000009725		
2. CONTRACT ADMINISTRATION			
Contract Administrator Name:	Stephanie Wood		
	Title:	Paralegal	
Mailing Address:	97 Darling Avenue		
	South Portland, ME 04106		
“Toll” Free Phone Number:	800-761-7191		
Telephone Number:	207-523-7366		
E-mail:	Stephanie_wood@wrightexpress.com		
FAX:	207-523-6377		
3. SALES/BILLING			
Contact Name:	Sharon Linnane		
Title:	Government Account Manager		
Address:	9119 19th Drive NW, Bradenton, FL 34209		
Telephone Number:	941-761-0000		
E-mail:	Sharon_linnane@wrightexpress.com		
FAX:	207-791-1614		
4. HELP DESK/ SERVICE			
Contact Name:	Customer Service Department		
Title:			
Address:	97 Darling Avenue, South Portland, ME 04106		
E-mail:	customerservice@fleetservicesonline.com		
WWW Address:	www.wrightexpress.com		
Telephone Number:	800-492-0669	FAX:	
Contract “Toll” Free Support Phone Number:	800-492-0668	Hours of Availability:	24 hours a day, 7 days a week

APPENDIX G

Contractor Order Forms

(Participation Addendum)

**ADDENDUM TO THE FUEL CARD SERVICES AGREEMENT BETWEEN
WRIGHT EXPRESS FINANCIAL SERVICES CORPORATION (“WEX FSC”)
AND THE STATE OF NEW YORK (the “STATE”)**

CREDIT INFORMATION

Authorized User		Phone #	Fax#	
Headquarters Name and Physical Address (Do not include PO Box)			Applicant's Taxpayer ID # (TIN, FEIN or SSN)	
In Business Since (yyyy) N/A	Year of Incorporation (yyyy) N/A	Number of Vehicles	Avg Monthly Fuel Expenditures \$	Avg Monthly Service Expenditures N/A

ACCOUNT SETUP INFORMATION

Write Authorized User name as you wish it to appear on cards. Limit of 20 characters & spaces. Unless specified, no Authorized User name will appear on cards.

Billing Contact	Billing Address	City	State	Zip+4
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Designate the Fleet Contact authorized to receive all charge cards, reports, and other such information we provide from time to time and to take actions with respect to your account and account access. This is also the person designated by your Authorized User to provide all fleet vehicles, driver and other information we may request.

Authorized Fleet Contact Name	Title	Phone #	Fax #
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Mailing Address (if different from billing address)	City	State	Zip+4
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Email address (required to take advantage of product type card controls)

Card Controls: To help us estimate your credit needs, indicate the types of cards you anticipate using.

If you provide a valid email address above, you can select from these product type options: Fuel Only, EXCLUDING Roadside Assistance Fuel & Associated Products – oil/fluid, quick lube, parts/service, and gen merchandise but EXCLUDING Roadside Assistance

Check here if Authorized User is exempt from motor fuels tax

TERMS

DEFINITIONS:

“Agreement” means: **Contract No. PS65802 effective 06/22/2012** for Fuel Cards and Fuel Management Services (the “Agreement”) between the (State and **WEX FSC**.

“Authorized User” shall mean the entity as defined in the Agreement permitted to purchase services under the Agreement, as specified in the Credit Information section above.

All other capitalized terms used in this Addendum without definition have the meanings set forth in the Agreement.

AGREEMENTS OF WEX FSC AND AUTHORIZED USER:

- This Addendum is to allow the Authorized User to participate under the Agreement between WEX FSC and the State. It does not modify, amend or change the Agreement in any way.
- Authorized User represents that it is authorized or allowed by applicable law to enter into this Addendum and to participate under the Agreement.
- Authorized User requests the services of WEX FSC described in the Agreement and agrees to perform all duties of an Authorized User under the Agreement, including, without limitation, payment of all charges on its account(s) within the time periods provided under the Agreement, payment of any fees provided in the Agreement, and cooperation with respect to providing all necessary information for the administration of the Agreement. Authorized User agrees to be bound by the terms and conditions of the Agreement, including, without limitation, rules for authorized and unauthorized use of cards, disputes of charges, reporting lost and stolen cards, and all other rules and provisions relating to use of Authorized User's account.
- Authorized User acknowledges that its failure to make timely payment in accordance with the terms of the Agreement and/or the Addendum may result in suspension or cancellation of the account(s). The undersigned represents and warrants that he/she is duly authorized to execute this Addendum on behalf of the Authorized User and this Addendum is the valid and binding obligation of the Authorized User, enforceable in accordance with its terms.

INFORMATION SHARING DISCLOSURE: Information regarding your transactions may be provided to accepting merchants or their service providers to facilitate discounts or other promotional campaigns of interest to you.

U.S.A. PATRIOT ACT: Our bank complies with Section 326 of the USA PATRIOT Act which requires all financial institutions to obtain, verify, and record information that identifies each company or person who opens an account. What this means for you: when you open an account, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents for your business.

DISCLAIMER: THIS IS AN APPLICATION FOR SERVICES AND SUBJECT TO APPLICABLE LIMITATIONS SHALL NOT BE BINDING UPON WEX FSC UNTIL FINAL CREDIT APPROVAL HAS BEEN GRANTED BY WEX FSC.

CONTRACTING AGENCY AUTHORIZED SIGNATURE REQUIRED

Any person signing on behalf of the Authorized User has been duly authorized by all necessary action of their governing body, and that the undersigned is authorized to make this application on behalf of the Authorized User.

Signature: _____ Printed Name: _____

Title: _____ Date: _____

Complete and sign addendum. Fax to 1-866-527-8873.

FOR OFFICE USE ONLY	Oppty Number	Sales Code	Plastic Type	Coupon Code NY7	Account Number 04
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APPENDIX H

Contractor Additional Terms and Conditions

Additional Terms and Conditions for the State of New York Statewide Fuel Card Services Program

In the event that any of the terms or conditions contained in this Agreement are found to conflict with any of the terms or conditions contained in the Contract, the terms and/or conditions of the Contract shall prevail.

1. DEFINITIONS:

Terms used in this document that are capitalized, other than those listed below, shall be defined in accordance with the Contract.

“Account(s)” means your credit account(s) maintained with Respondent. An Account may be evidenced by a plastic card or an account number.

“Agreement” means this document, titled “Additional Terms and Conditions for the State of New York Statewide Fuel Card Services Program,” which is included in the terms and conditions of the Contract.

“Business Day” means any day other than a Saturday, Sunday or other day on which Federal banking institutions are generally authorized or required by law or executive order to close.

“Card” means a charge card or an account number issued by Respondent pursuant to this Agreement which is used to access an Account.

“Contract” means the contract entered into between Wright Express Financial Services Corporation and the State of New York, pursuant to Request for Proposals 22445 for Statewide Fuel Card Services.

“Controls” are a set of authorization tools designed to assist you with managing purchases.

“DIN” means the driver identification number.

“Financial Information” means your financial statements including, at a minimum, an income statement for the applicable fiscal year and a balance sheet.

“Fleet Contact Person” means the person you select who is authorized to provide us with the information necessary to establish and/or manage your Account(s) and Cards.

“We”, “us”, and “our” refers to Wright Express Financial Services Corporation.

“You” and “your” refers to an Authorized User of New York State centralized contracts, whose Account is created under the Contract.

2. ESTABLISHMENT OF ACCOUNT: WEX FSC, may extend credit, establish Accounts and issue Cards under this Agreement in accordance with its standard credit policy and procedures. We may modify, suspend or terminate your Account, subject to the terms of the Contract. You agree that this Account will only be used for the purchase of products and services for official government or business purposes and not for personal, family or household purposes. Purchases of lottery tickets or other games of chance, gift cards, pre-paid cards or other cash equivalent charges are prohibited. You shall adopt internal policies and controls to ensure that the Accounts are used strictly for official government, business or commercial purposes. You agree to pay for all charges on your Account according to the terms of this Agreement and all additional charges provided in our response to Request for Proposals 22445, and subject to the provisions of the Contract.

3. CREDIT LINE AND CAPACITY: You agree that, subject to the terms of the Contract: a) we may establish a credit line (limit) for your convenience; b) your Account balance will not exceed your credit line; c) we may suspend your Account without notice if your Account balance exceeds your credit line. You will be advised of your credit line if your Account is approved. We are authorized to provide information about: i) you and your Account to credit reporting agencies, affiliates, lenders, banking examiners, auditors, entities who finance our business and others who may lawfully receive the information; and ii) your transactions to accepting merchants or their service providers so they can offer you discounts or other promotional campaigns.

4. BILLINGS AND PAYMENTS: Billings and payments will be made in accordance with the Contract.

5. 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.

6. APPLICATION OF PAYMENTS: Payments will be applied first to unpaid late fees and then to the unpaid balance of each product or service purchased in the order of its purchase.

7. AMENDMENTS: This Agreement may be amended or modified only through a subsequent written Amendment signed by both parties.

8. PREPAYMENT: You may pay your Account balance, or a portion of it, at any time without penalty.

9. DEFAULT: If you: a) default on this Agreement or any other lending agreement between you and us by not paying any payment when due; b) exceed your credit line; or c) breach any other term of this Agreement or any other lending agreement between you and us, then we may: i) suspend or terminate your Account(s) and/or Cards; ii) demand immediate payment of the entire Account balance; and iii) start a lawsuit for collection of the Account balance, subject to any notice of default and right to cure required by the Contract or applicable law. *Note: Default of this Agreement by an Authorized User shall not result in suspension or termination of the Contract, or Accounts held by other Authorized Users of the Contract.*

10. CARDS AND ACCOUNTS: You request Cards from us for use according to this Agreement by individuals, or in connection with specific vehicles, to be identified to us. All Cards will be valid through the expiration date listed on the Card unless the Card has been suspended or terminated. We may issue renewal Cards prior to their expiration date. You agree that you will destroy expired Cards or Cards for which a replacement Card has been issued. All renewal Cards or any additional Cards you request will be subject to the terms of the Contract and this Agreement as in effect at the time of that renewal or issuance.

You may ask us to: a) issue additional Cards or replacement Cards; b) suspend or terminate Cards; or c) change the authorized use or user(s) of Cards. We may suspend or terminate any Account or Card or refuse to authorize any charge, at any time, subject to the terms of the Contract. Unless you report any errors in your Account information or Cards within three (3) business days of your receipt thereof, we are entitled to rely on that information for processing your Account.

You agree that the Contract and this Agreement control all charges made on your Account by you or any person who uses a Card or your Account. It is your responsibility to notify us of your revocation of any person or user's authority to use or access your Account, Cards, or DINs. Subject to any limitations imposed by law, you will remain liable to us for any charges until such time as we receive notice. You agree that use of a Card and the applicable DIN will constitute authorized use for all purposes. We have no obligation or responsibility to you in the event that any merchant, entity or person refuses to honor a Card. If you choose to leave a Card at a merchant for use by your drivers, then you are responsible for any unauthorized use of that Card and agree to pay for all charges made with that Card. You agree to keep DINs confidential and to ensure that your employees do not disclose any DIN. If any of your employees discloses a DIN or writes a DIN on a Card, then, subject to any

limitations imposed by law, you are liable for any fraudulent use that may result even if the disclosure is inadvertent or unintentional. *Note: Any disputes will be resolved in accordance with the Contract.*

You will promptly notify us of the loss, theft, or unauthorized use of any Card or Account by telephoning us at 800-492-0669 or through our online system. You agree to provide written confirmation of any notice if requested by us.

Subject to any limitations imposed by law, you will be liable to us for all unauthorized use of a Card that occurs before your notification of unauthorized use but you will not be liable for any unauthorized use that occurs after notification.

11. FLEET INFORMATION AND CHARGE CARDS: The Fleet Contact Person, or another person or persons designated by the Fleet Contact Person, is authorized by you to: a) provide us with the information necessary to establish and maintain your Account, Cards, and DINs; b) provide all fleet vehicle, driver and other information that we may request; c) receive all Cards and reports; d) receive other Account information we may provide. You will provide us with advance written notice of any change in or removal of any Fleet Contact Person. Subject to any limitations imposed by law, you will remain liable to us for any unauthorized use until you notify us of any change in or removal of any Fleet Contact Person.

12. MANAGEMENT REPORTS AND DISCLAIMER: As part of our product and services, we provide certain purchase reports, vehicle analysis reports and other management reports and information, in either paper or electronic format. These reports may include information relating to your use of Cards based upon charges and information reported to us. You are responsible for reviewing these reports for accuracy and completeness. These reports will accurately reflect information provided to us by third parties. We cannot guarantee the accuracy or completeness of those reports to the extent that the third party information received by us and contained in the reports is inaccurate or incomplete. *Note: Any disputes will be resolved in accordance with the Contract.*

13. FEES, CHARGES AND ACCEPTANCE OF TERMS: We will assess fees and charges in the amounts listed on the Fee Schedule listed in Appendix E of the Contract. In accordance with the Contract, there shall be no Fuel Card fees, (e.g., annual fees, fees for issuance, renewals and cancellation, or fees for Authorized User option changes), assessed to or collected from Authorized Users. Your use of your Account indicates your agreement to pay the fees and charges and your acceptance of all of the terms and conditions of the Contract and this Agreement (which includes the Fee Schedule).

14. SITE SELECTION PROGRAM: The Site Selection Program enables you to provide us with a list of specific locations where you wish to restrict purchases based on certain specified criteria. If you choose to use the Site Selection Program, we will provide you with appropriate enrollment forms. We reserve the right to not establish site selection criteria for certain sites that may be identified by us as being ineligible for the Site Selection Program. We cannot guarantee that the Site Selection Program will work at independently owned fuel merchants enrolled to accept WEX FSC issued or serviced charge Cards. The Site Selection Program applies only to transactions that are received for authorization by us electronically. You are responsible for payment in full of all charges made at a location that you selected to be an "excluded location" which are made with a valid Card and that are processed by us.

15. DYED FUEL PRODUCTS: You may purchase dyed special fuel using your Cards. You acknowledge that all dyed special fuel purchases will be used exclusively for off-road purposes and according to all applicable laws governing its use. You may be subject to fines or other legal action by governmental authorities for misuse or mishandling of dyed special fuel. We will not be liable in any way for any misuse or mishandling by you of any dyed special fuel. Upon request from applicable governmental authorities, we may provide information regarding your dyed special fuel purchases to them without further authorization from you.

16. **ONLINE PRODUCTS:** Certain products and services offered to you by us may be accessed by you through the Internet. In order to access our online system your users must agree to our Terms of Use, which is attached hereto as Attachment I for your reference. For Authorized Users of the Contract, the Terms of Use attached hereto as Attachment I shall supersede any other version of the Terms of Use displayed or presented on or through our online system. Although we are using both passwords and data base security methods for our online products, security cannot be guaranteed.

17. **ASSOCIATED LICENSES AND TERMS OF USE:** The Authorized User acknowledges that we may make available mobile software applications and alternative Fuel Location payment options within the scope of the Contract (e.g., Octane and WEXPay). The State has not reviewed the associated licenses, transaction processing rules and terms of use for acceptability; accordingly, the Authorized User is obligated to review and make an independent determination, with the advice of legal counsel as necessary, before authorizing usage of these services.

18. **INTERNATIONAL USE OF CARDS:** Cards issued to you for use by your United States based operations may be used in other countries. By use of Cards in any country other than the United States you agree that you will: a) be billed in US Dollars; b) receive reporting from us in English; c) accept the currency conversion fee as reflected in our Fee Schedule; and d) not distribute Cards to employees based in countries other than the United States.

19. **CONTROLS:** You may request that Controls be applied to your Account. The availability and effectiveness of Controls is dependent upon each merchant's adoption of card specifications and the information, including product codes, transmitted to us by them. The product codes are assigned by each merchant, and as such, we have no responsibility for inappropriate product code assignment. Upon notification by an Authorized User, we will address product code errors with merchants in accordance with our dispute process. You understand and acknowledge that only transactions submitted to us for authorization are subject to Controls and that those Controls can only be enforced when the merchant provides sufficient information as part of the authorization. In addition, some Controls do not work at island card readers.

We reserve the right to modify Controls when those Controls, in our opinion, are set at a level such that they are ineffective or not in accordance with the goals of the Controls program. We will notify the Fleet Contact Person in the event that we make such modifications to the Controls. Default values will be assigned by us unless you make your own election(s) through our online product. Additional important information related to Controls is also available online. We shall not be responsible for the prudence of any particular Control level you select. The existence and/or use of Controls does not affect your liability for unauthorized use of Cards. Subject to any limitations imposed by law, you remain liable for transactions made using unreported lost or stolen Cards and/or Card numbers or DINs. You also agree that you will review fraud control data provided by us, such as vehicle analysis reports, for the purpose of detecting fraud that occurs within Control parameters.

20. **REPRESENTATION, WARRANTIES AND ACKNOWLEDGMENTS:** You represent and warrant to us that this Agreement is valid, binding and enforceable against you in accordance with its terms and subject to the terms of the Contract. You agree to provide any evidence of corporate (or other organizational) existence and authorization that we may reasonably request.

As part of our commitment to customer service, our managers periodically will monitor telephone communications between our employees and our customers to ensure that our high quality service standards are maintained. By accepting this Agreement, you hereby consent to such monitoring and recording of telephone communications. You also agree to notify your employees who may be in telephone contact with our representatives that periodic monitoring of conversations will occur. Such consent to monitoring does not apply to conversations between Wright Express Financial Services Corporation and OGS with respect to administration of the centralized contract.

21. **REQUIREMENTS OF A WRITING:** You agree that, subject to applicable law, any additions, updates, and deletions of vehicles, drivers, and Fleet Contact Persons placed by telephone or electronically, and accepted by us, are binding on you.

22. **AUTHORIZED USERS:** We and you shall have the right to share all or any part of this Agreement, and all associated documents and amendments, with any Authorized User. Should any Authorized User open an account with us, the terms of the Contract and this Agreement shall control.

Notwithstanding anything in this Agreement to the contrary, it is understood that the obligations of the State and each Authorized User hereunder shall be exclusively the obligations of the transacting entity and that the neither the State nor any Authorized User will have liability whatsoever in connection therewith. It is further agreed that each Authorized User is severally and not jointly liable to us and neither the State nor any other Authorized User shall have financial or other responsibility or liability for any goods or services that were not furnished for such entity's site or operations.

State Agency Authorized Users shall be eligible to participate in the program without being subject to a credit evaluation.

No Non-State Agency Authorized User (see Table One and Two at <http://www.ogs.ny.gov/purchase/snt/othersuse.asp> for a listing of eligible entities) shall be eligible to participate in the program without being granted credit by us. Credit applications submitted by each Non-State Agency Authorized User will be adjudicated in accordance with our credit policies and we shall have sole and complete discretion over which Non-State Agency Authorized Users are granted or denied credit. Each Non-State Agency Authorized User desiring to participate under this Agreement will be required to complete a Participation Addendum essentially in the format included in Appendix G of the Contract.

23. **FINANCIAL INCENTIVES:** We will apply the discounts listed on Appendix E of the Contract, in accordance with the terms of the Contract.

24. **USA PATRIOT ACT:** We comply with Section 326 of the USA Patriot Act which requires all financial institutions to obtain, verify, and record information that identifies each company or person who opens an Account. We will ask you for your name, address, date of birth, or other applicable information to identify you.

25. **STATE'S LIABILITY:** Liability for State Agency Authorized Users shall be limited by the following: Subject to the availability of lawful appropriations and consistent with Section 8 of the New York State Court of Claims Act, the State shall hold Contractor harmless from and indemnify it for any final judgment of a court of competent jurisdiction to the extent attributable to the negligence of the State or of its officers or employees when acting within the course and scope of their employment.

26. **ENTIRE AGREEMENT:** Subject to the order of precedence stated in the Contract, this Agreement, including the Contract, Appendices to the Contract, any agreements which secure or guaranty your obligations under this Agreement, any electronic payment agreement, enrollment forms and any amendments, modifications, substitutions or replacements of any of those documents, is a final expression of the credit agreement between us and you and may not be contradicted by evidence of any alleged oral agreement. Except as is expressly permitted in this Agreement, no modification of it is effective unless in writing and signed by an authorized officer of you and us.

Unless otherwise agreed upon by the Parties, any terms different from this Agreement or contradictory to this Agreement that are set forth in a Purchase Order or other communication are expressly rejected and shall under no circumstances modify the terms of this Agreement.

This Agreement is governed by and construed in accordance with federal law and the laws of the State of New York (without reference to choice of law rules).

Attachment I

WEXOnline® TERMS OF USE

Appendix A, Standard Clauses for New York State Contracts, (attached hereto as Appendix A of this Contract) is hereby expressly made a part of this Attachment I, as fully as if set forth at length herein.

Please read these terms carefully before using this site.

1. General

Wright Express Corporation ("we," "us" and "our") provides this web site on behalf of its subscribers subject to the following terms of use ("Terms"). These Terms supplement the Contract, all Appendices to the Contract, including Appendix A, Standard Clauses for NYS Contracts, and the customer's (or "you" or "your") credit agreement with Wright Express Financial Services Corporation or one of our card program sponsors and shall be applicable to your account upon your selection of the **WEXOnline®** product. Your continued use of your account and **WEXOnline®** constitutes your acceptance of these Terms. For Authorized Users of the Contract, these Terms of Use shall supersede any other version of the Terms of Use displayed or presented on or through our online system. If you have any questions, please call our Customer Service department.

2. Purpose of the Website

The goal of this web site is to provide you with access to information about your fleet charge card account and to also allow you to perform account maintenance. Do not use this web site if you do not agree with these terms. These Terms supplement the Contract and your credit agreement with Wright Express Financial Services Corporation or one of our card program sponsors and shall be applicable upon your use of the site. Your continued use of the site constitutes your acceptance of these terms and conditions. If you have any questions, please call Customer Service at 1-800-492-0669.

3. Trademarks, Service Marks and Copyrighted Materials

We control and operate this website. All content on this website, including, but not limited to, text, photographs, images, illustrations, audio clips, and video clips, is protected by copyrights, trademarks, service marks, and/or other intellectual property rights (which are governed by United States and worldwide copyright laws and treaty provisions, privacy and publicity laws, and communication regulations and statutes). The content is owned and controlled by us, our affiliates, or by third party content providers, merchants, sponsors and licensors (collectively the "Providers") that have licensed their content or the right to market their products and/or services to you using this site. You agree to abide by all additional copyright notices, information, or restrictions contained in any content that is presented on this site.

You may not use any registered or unregistered trademarks, service marks or copyrighted materials appearing on this website, including but not limited to any logos or characters, without the express written consent of the owner of the mark or copyright. You may not frame, deep link, or otherwise incorporate into another website any of the content or other materials on this website without our express prior written consent.

Violation of trademark and copyright laws may result in significant civil liability or criminal penalties under United States and/or worldwide copyright and trademark laws. You recognize that any reproduction or use of content, except as authorized by the Contract or these Terms, is considered intentional infringement.

4. Use of the Site

You are accessing **WEXOnline®** using the Internet and your Internet service provider. Although we are using both password and database security methods to ensure protection for **WEXOnline®**, security cannot be guaranteed.

You may provide access to your account information by adding others to access your account via an online enrollment. You understand that you are responsible for the level of access that you provide to the users you establish for your account. You understand that you are solely responsible for maintaining the security of your password and User ID against theft or unauthorized use and that any person possessing your password and User ID can order additional cards and take other action with respect to your account. You agree that you shall exercise all precautions commensurate with the highest reasonable standards of security for the protection of your security information. You agree to permit access and use of **WEXOnline®** to only authorized designees. Any account maintenance effected with the use of your User ID and password shall be conclusively presumed to be authorized by you for all purposes and you accept all liability for use of cards ordered and any other transactions effected through **WEXOnline®**. You agree to notify us immediately if you suspect that any User ID or password associated with your account has been lost, stolen, or the subject of unauthorized use. You agree that the security procedures provided with **WEXOnline®** including without limitation, data encryption, are commercially reasonable and adequate for your use. Furthermore, you agree that you shall not circumvent the encrypted data or attempt to obtain unauthorized access to the site or portions of the site which are restricted from general access.

You agree not to use **WEXOnline®** for any purpose except access to your Authorized Users' account(s). In using this site, you agree not to disrupt or interfere with the site, its services, system resources, nor to upload, post or otherwise transmit any viruses or other harmful, disruptive, inappropriate, illegal or destructive files. You also agree not to use, attempt to use, or access other accounts, or create or use a false identity on the site.

5. For Customers Using Electronic Billing Method

You may receive copies of your invoice via **WEXOnline®**. In the event that you elect to receive all your invoices electronically and not via standard U.S. Mail, the invoice shall be deemed delivered to you upon our confirmation of electronic mailing. All the terms and conditions concerning payment and any disputes in billing as set forth in your credit agreement with Wright Express Financial Services Corporation or one of our card program sponsors remain in full force and effect. If you wish to make an inquiry regarding an invoice or a particular transaction, please contact Customer Service at the number listed on your credit agreement.

6. For Customers Using Controls:

These terms and conditions supplement the Contract and your credit agreement with Wright Express Financial Services Corporation or one of our card program sponsors and govern your use of Controls which may be used to help limit purchase capabilities on your cards and accounts.

Controls are subject to the disclosures provided to you, this Section 6 and the Important Information found in the Profile Manager. You should carefully review the Important Information

prior to establishing Controls. Use of Controls is deemed acceptance of these terms and the disclosures found in the Important Information. The availability and effectiveness of Control limits is dependent upon each merchant's adoption of card specifications and the information transmitted to us by them. You understand and acknowledge that only transactions submitted to us for authorization are subject to Controls and that such Controls can only be enforced when the merchant provides sufficient information as part of their request for authorization for us to determine if it meets or exceeds the Controls that you have set. Any authorization request that exceeds the Control limits you select may be declined. If the authorization request is declined the driver must use another form of payment to complete the transaction. We are not liable on account of any merchant's refusal to honor the Card, regardless of the reason, whether or not you have established Controls for your cards or accounts.

The existence and/or use of Controls shall not affect your liability for unauthorized use of Cards. We reserve the right to modify Controls upon notice to you. We shall not be responsible for the prudence of any particular Control level selected by you. You agree that we are authorized to rely on such changes made by you or your authorized users.

7. State's Liability

Liability for State Agency Authorized Users shall be limited by the following:

Subject to the availability of lawful appropriations and consistent with Section 8 of the New York State Court of Claims Act, the State shall hold Contractor harmless from and indemnify it for any final judgment of a court of competent jurisdiction to the extent attributable to the negligence of the State or of its officers or employees when acting within the course and scope of their employment.

8. Questions

For questions concerning these terms or the products described online please call the following number: 1-800-492-0669, or send inquiries to: Wright Express Corporation, P.O. Box 639, Portland, ME 04104. Be sure to include your account number with all inquiries.

APPENDIX I

Contract Quarterly Sales Report Form

