



# Invitation for Bids (Revised)

<b>BID OPENING</b> <b>DATE: February 14, 2018</b> <b>TIME: 11:00 A.M. EST</b> <b>INVITATION FOR BIDS NUMBER: 23091</b>	<b>TITLE: Group 05500</b> Fuel Oil, Heating (Grades #2, #4, #6, Kerosene and Bioheating Fuel) (Statewide) <b>Classification Codes: 15 Fuels &amp; Lubricants</b>
<b>CONTRACT PERIOD: August 31, 2018 – August 27, 2020 with renewal options</b>	
<b>DESIGNATED CONTACTS:</b> In accordance with the Procurement Lobbying Law [State Finance Law § 139-j(2)(a)], the following individuals are the Designated Contacts for this Solicitation. All questions relating to this Solicitation must be addressed to the Designated Contacts.	
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<b>Bidder's Federal Tax Identification Number:</b> <i>(Do Not Use Social Security Number)</i>		<b>NYS Vendor Identification Number:</b> <i>(See New York State Vendor File Registration Clause)</i>		
Legal Business Name of Company Bidding:				
D/B/A – Doing Business As (if applicable):				
Street	City	State	County	Zip Code
E-mail Address:		Company Web Site:		

If applicable, place an "x" in the appropriate box(es) <i>(check all that apply)</i>			
<input type="checkbox"/> NYS Small Business # Employees	<input type="checkbox"/> Service Disabled Veteran Owned Business	<input type="checkbox"/> NYS Minority Owned Business	<input type="checkbox"/> NYS Women Owned Business

If you are not bidding, place an "x" in the box and return this page only. <input type="checkbox"/> WE ARE NOT BIDDING AT THIS TIME BECAUSE:
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<b>FOR PROCUREMENT SERVICES USE ONLY</b>				
LITERATURE <input type="checkbox"/>	LETTER <input type="checkbox"/>	FLASH DRIVE <input type="checkbox"/>	OTHER <input type="checkbox"/>	# of Binders/Packages: _____
PURC. MEMO <input type="checkbox"/>	CD/DVD <input type="checkbox"/>	SDHC CARD <input type="checkbox"/>	_____	Documented by: _____

## **Bidder Certification and Affirmation**

Bidder certifies and affirms as follows:

1. This Bid is an irrevocable offer for 60 days from the date of submission to the New York State (“NYS”) Office of General Services (“OGS”), or for such longer period as is set forth in the Invitation for Bids.
2. The Bidder can and will provide and make available, at a minimum, the Products, deliverables and/or services as described in the Invitation for Bids.
3. The Bidder has read and understands the provisions of the Invitation for Bids, and all appendices, attachments, and exhibits attached thereto, including Appendix A (Standard Clauses for New York State Contracts) and Appendix B (General Specifications).
4. The information contained in this Bid is complete, true, and accurate.
5. The Bidder understands and agrees to comply with the requirements of the Procurement Lobbying Law, State Finance Law § 139-j and § 139-k, and with OGS’s procedures relating to permissible contacts during a procurement as required by State Finance Law § 139-j(3) and § 139-j(6)(b). Such requirements and procedures are posted at [https://ogs.ny.gov/aboutOgs/regulations/defaultSFL\\_139j-k.asp](https://ogs.ny.gov/aboutOgs/regulations/defaultSFL_139j-k.asp).

The signer affirms under penalties of perjury that he or she is duly authorized to legally bind the Bidder referenced above and that he or she signed this Bidder Certification as the legally binding act of the Bidder.

\_\_\_\_\_  
Print Full Bidder Entity Name

By: \_\_\_\_\_  
Signature of Person Authorized to  
Legally Bind the Bidder

\_\_\_\_\_  
Print Name of Signatory

\_\_\_\_\_  
Print Title of Signatory

\_\_\_\_\_  
Date

**RETURN THIS PAGE AS PART OF BID**

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**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

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**APPENDICES**

- Appendix A – *Standard Clauses for NYS Contracts* (January 2014)
- Appendix B – *General Specifications* (April 2016)

**ATTACHMENTS**

- Attachment 1 – *Second Revised Pricing*
- Attachment 2 – *NYS Required Certifications*
- Attachment 3 – *Encouraging Use of NYS Businesses*

Attachment 4 – *Insurance Requirements*

Attachment 5 – *Bidder Information Questionnaire*

Attachment 6 – *Bidder Submission Checklist*

Attachment 7 – *Bidder Questions Form*

Attachment 8 – *Report of Contract Usage*

Attachment 9 – *Revised Delivery Schedule – State Agencies*

Attachment 10 – *Revised Delivery Schedule – Local Governments & Other Eligible Non-State Agencies*

Attachment 11 – *M/WBE Utilization Plan*

Attachment 12 – *Fuel Supplier Certificate*

## 1. INTRODUCTION

### 1.1 Overview

This Solicitation is issued by the New York State (“NYS”) Office of General Services (“OGS”), Procurement Services to provide Authorized Users with a means of acquiring various types of Fuel Oil, e.g., Heating (Grades #2, #4, #6, Kerosene, and biodiesel).

This Solicitation outlines the terms and conditions and all applicable information required for submitting a Bid. Bidders should pay strict attention to the Bid submission date and time to prevent disqualification. Bidders are strongly encouraged to read the language of this Solicitation thoroughly and to precisely follow the instructions included in the Solicitation and all attachments.

The resulting Commodities contract(s) under this Award will be centralized contracts based on filed requirements. This is a statewide contract. It is the State’s intent to award contract(s) by item within a County on the basis of lowest price to responsive and responsible Bidder(s), who is able to meet the terms and conditions of this Solicitation, and who offer the best overall pricing in accordance with “Method of Award” clause described herein. The awarded Bidder(s) will be granted a contract for a two-year term, with renewal options as further described herein. Detailed information on the procurement process is set forth in the *Method of Award* section of this Solicitation.

There are M/WBE Goals but there aren’t any SDVOB goals.

### 1.2 Scope

The purpose of this Solicitation and the resultant Contracts is to provide Authorized Users with a means of acquiring various grades of Fuel Oil, e.g., Heating (Grades #2, #4, #6, Kerosene, and biodiesel) by bulk delivery to Authorized Users storage facility for use in the Authorized Users. The product shall be Contractor furnished, delivered and unloaded as specified herein.

This solicitation consists of different fuel oil types (e.g., Grades #2, #4, #6, Kerosene, and biodiesel). All products provided shall be homogenous fuel oil, kerosene, or biodiesel blends suitable for burner appliances, and they shall conform to the requirements of ASTM D396 (Fuel Oil), ASTM D3699 (Kerosene), ASTM D6751, biodiesel latest revision(s) thereof, or approved equivalent method, except as listed differently elsewhere herein.

This Solicitation is based on the fuel oil (heating) requirements submitted to OGS by authorized users in various counties. The specific users, counties and tank types are listed in the Delivery Schedule. See attachments 9 and 10.

There shall be no blending of other than pure distillates or unused residual fuel oils for product provided via this contract.

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

It is the intent of this Solicitation to make one (1) award each in the following fuel types for the following counties:

COUNTY	FUEL TYPE	OPIS POSTING LOCATION
<b>Albany</b>	2-MT	Albany
<b>Albany</b>	2-MT (0.0015%) B5	Albany/Wall Street
<b>Albany</b>	2-TW	Albany
<b>Albany</b>	2-TW B2	Albany/Wall Street
<b>Albany</b>	2-TW B5	Albany/Wall Street
<b>Albany</b>	6-MT (0.5%)	Boston
<b>Albany</b>	KERO (Heating)	Albany
<b>Allegany</b>	2-MT	Buffalo
<b>Allegany</b>	2-TW	Buffalo
<b>Bronx</b>	2-MT	Long Island
<b>Bronx</b>	2-MT B5	Long Island/Wall Street
<b>Bronx</b>	2-TW	Long Island
<b>Bronx</b>	4-MT (0.15%) NYC B2	NY Barge
<b>Broome</b>	2-MT	Syracuse
<b>Broome</b>	2-TW	Syracuse
<b>Broome</b>	6-MT (0.5%)	Boston
<b>Broome</b>	KERO (Heating)	Syracuse
<b>Cattaraugus</b>	2-MT	Buffalo
<b>Cayuga</b>	2-MT	Syracuse
<b>Cayuga</b>	2-TW	Syracuse
<b>Cayuga</b>	KERO (Heating)	Syracuse
<b>Chautauqua</b>	2-MT	Buffalo
<b>Chautauqua</b>	2-TW	Buffalo
<b>Chemung</b>	2-MT	Syracuse
<b>Chemung</b>	2-TW	Syracuse
<b>Chenango</b>	2-TW	Utica
<b>Chenango</b>	KERO (Heating)	Utica
<b>Clinton</b>	2-MT	Albany
<b>Clinton</b>	2-MT B2	Albany/Wall Street
<b>Clinton</b>	2-TW	Albany
<b>Clinton</b>	2-TW B2	Albany/Wall Street
<b>Clinton</b>	KERO (Heating)	Albany
<b>Columbia</b>	2-MT	Newburgh
<b>Columbia</b>	2-TW	Newburgh
<b>Columbia</b>	KERO (Heating)	Newburgh

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

COUNTY	FUEL TYPE	OPIS POSTING LOCATION
<b>Cortland</b>	2-TW	Syracuse
<b>Delaware</b>	2-MT	Albany
<b>Delaware</b>	2-TW	Albany
<b>Delaware</b>	2-TW B5	Albany/Wall Street
<b>Dutchess</b>	2-MT	Newburgh
<b>Dutchess</b>	2-TW	Newburgh
<b>Dutchess</b>	2-TW B2	Newburgh/Wall Street
<b>Dutchess</b>	2-TW B5	Newburgh/Wall Street
<b>Dutchess</b>	6-MT (0.5%)	Boston
<b>Erie</b>	2-MT	Buffalo
<b>Erie</b>	2-TW	Buffalo
<b>Essex</b>	2-MT	Albany
<b>Essex</b>	2-MT B2	Albany/Wall Street
<b>Essex</b>	2-TW	Albany
<b>Essex</b>	2-TW B2	Albany/Wall Street
<b>Essex</b>	KERO (Heating)	Albany
<b>Franklin</b>	2-MT	Albany
<b>Franklin</b>	2-TW	Albany
<b>Franklin</b>	2-TW B2	Albany/Wall Street
<b>Franklin</b>	KERO (Heating)	Albany
<b>Fulton</b>	2-MT	Utica
<b>Fulton</b>	2-TW	Utica
<b>Fulton</b>	4-MT (0.5%)	Boston
<b>Fulton</b>	KERO (Heating)	Utica
<b>Genesee</b>	2-TW	Buffalo
<b>Greene</b>	2-MT	Newburgh
<b>Greene</b>	2-TW	Newburgh
<b>Greene</b>	2-TW B2	Newburgh/Wall Street
<b>Greene</b>	2-TW B5	Newburgh/Wall Street
<b>Greene</b>	6-MT (0.5%)	Boston
<b>Hamilton</b>	2-TW	Utica
<b>Hamilton</b>	2-MT	Utica
<b>Hamilton</b>	KERO (Heating)	Utica
<b>Herkimer</b>	2-MT	Utica
<b>Herkimer</b>	2-TW	Utica
<b>Herkimer</b>	KERO (Heating)	Utica
<b>Jefferson</b>	2-MT	Utica
<b>Jefferson</b>	2-TW	Utica



**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

COUNTY	FUEL TYPE	OPIS POSTING LOCATION
<b>Jefferson</b>	2-TW B2	Utica/Wall Street
<b>Jefferson</b>	KERO (Heating)	Utica
<b>Kings</b>	2-MT	Long Island
<b>Kings</b>	2-MT B2	Long Island/Wall Street
<b>Kings</b>	2-MT B5	Long Island/Wall Street
<b>Kings</b>	2-TW	Long Island
<b>Kings</b>	2-TW B2	Long Island/Wall Street
<b>Kings</b>	2-TW B5	Long Island/Wall Street
<b>Lewis</b>	2-TW	Utica
<b>Lewis</b>	KERO (Heating)	Utica
<b>Livingston</b>	2-MT	Buffalo
<b>Livingston</b>	2-TW	Buffalo
<b>Livingston</b>	2-MT B2	Buffalo/Wall Street
<b>Madison</b>	2-TW	Utica
<b>Monroe</b>	2-TW	Buffalo
<b>Monroe</b>	2-TW B5	Buffalo/Wall Street
<b>Montgomery</b>	2-MT	Utica
<b>Montgomery</b>	2-TW	Utica
<b>Montgomery</b>	KERO (Heating)	Utica
<b>Nassau</b>	2-MT	Long Island
<b>Nassau</b>	2-MT B2	Long Island/Wall Street
<b>Nassau</b>	2-TW	Long Island
<b>Nassau</b>	2-TW B2	Long Island/Wall Street
<b>Nassau</b>	2-TW B5	Long Island/Wall Street
<b>New York</b>	2-MT	Long Island
<b>New York</b>	2-MT B5	Long Island/Wall Street
<b>New York</b>	2-TW	Long Island
<b>New York</b>	4-MT (0.15%) B2	NY Barge
<b>Niagara</b>	2-TW	Buffalo
<b>Oneida</b>	2-MT	Utica
<b>Oneida</b>	2-TW	Utica
<b>Oneida</b>	2-TW B2	Utica/Wall Street
<b>Oneida</b>	KERO (Heating)	Utica
<b>Onondaga</b>	2-TW	Utica
<b>Onondaga</b>	KERO (Heating)	Utica
<b>Ontario</b>	2-MT	Buffalo
<b>Ontario</b>	2-TW	Buffalo
<b>Ontario</b>	KERO (Heating)	Buffalo

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

COUNTY	FUEL TYPE	OPIS POSTING LOCATION
<b>Orange</b>	2-MT	Newburgh
<b>Orange</b>	2-MT B2	Newburgh/Wall Street
<b>Orange</b>	2-TW	Newburgh
<b>Orange</b>	2-TW B2	Newburgh/Wall Street
<b>Orange</b>	2-TW B5	Newburgh/Wall Street
<b>Orleans</b>	2-TW	Buffalo
<b>Orleans</b>	KERO (Heating)	Buffalo
<b>Oswego</b>	2-MT	Utica
<b>Oswego</b>	2-TW	Utica
<b>Oswego</b>	KERO (Heating)	Utica
<b>Otsego</b>	2-MT	Albany
<b>Otsego</b>	2-TW	Albany
<b>Otsego</b>	2-TW B5	Albany/Wall Street
<b>Otsego</b>	KERO (Heating)	Albany
<b>Putnam</b>	2-MT	Newburgh
<b>Putnam</b>	2-TW	Newburgh
<b>Putnam</b>	2-TW B2	Newburgh/Wall Street
<b>Putnam</b>	2-TW B5	Newburgh/Wall Street
<b>Queens</b>	2-MT B2	Long Island/Wall Street
<b>Queens</b>	2-TW B2	Long Island/Wall Street
<b>Queens</b>	2-MT B5	Long Island/Wall Street
<b>Rensselaer</b>	2-MT	Albany
<b>Rensselaer</b>	2-TW	Albany
<b>Rensselaer</b>	KERO (Heating)	Albany
<b>Rensselaer</b>	2-TW B2	Albany/Wall Street
<b>Rensselaer</b>	2-TW B5	Albany/Wall Street
<b>Richmond</b>	2-MT	Long Island
<b>Richmond</b>	2-MT B5	Long Island/Wall Street
<b>Richmond</b>	2-MT B2	Long Island/Wall Street
<b>Richmond</b>	2-TW	Long Island
<b>Richmond</b>	2-TW B2	Long Island/Wall Street
<b>Richmond</b>	2-TW B5	Long Island/Wall Street
<b>Rockland</b>	2-MT	Newburgh
<b>Rockland</b>	2-MT B2	Newburgh/Wall Street
<b>Rockland</b>	2-TW	Newburgh
<b>Rockland</b>	2-TW B2	Newburgh/Wall Street
<b>Rockland</b>	KERO (Heating)	Newburgh
<b>Saratoga</b>	2-MT	Albany

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

COUNTY	FUEL TYPE	OPIS POSTING LOCATION
<b>Saratoga</b>	2-TW	Albany
<b>Saratoga</b>	2-TW B2	Albany/Wall Street
<b>Saratoga</b>	2-TW B5	Albany/Wall Street
<b>Saratoga</b>	KERO (Heating)	Albany
<b>Schenectady</b>	2-TW	Albany
<b>Schoharie</b>	2-MT	Albany
<b>Schoharie</b>	2-TW	Albany
<b>Schoharie</b>	2-TW B2	Albany/Wall Street
<b>Schuyler</b>	2-TW	Syracuse
<b>Seneca</b>	2-MT	Syracuse
<b>Seneca</b>	2-TW	Syracuse
<b>Seneca</b>	KERO (Heating)	Syracuse
<b>St. Lawrence</b>	2-MT	Albany
<b>St. Lawrence</b>	2-MT (0.0015%) B5	Albany/Wall Street
<b>St. Lawrence</b>	2-TW	Albany
<b>St. Lawrence</b>	2-TW B2	Albany/Wall Street
<b>St. Lawrence</b>	KERO (Heating)	Albany
<b>Steuben</b>	2-TW	Syracuse
<b>Suffolk</b>	2-MT	Long Island
<b>Suffolk</b>	2-MT (0.0015%) B5	Long Island/Wall Street
<b>Suffolk</b>	2-MT B2	Long Island/Wall Street
<b>Suffolk</b>	2-TW	Long Island
<b>Suffolk</b>	2-TW B5	Long Island/Wall Street
<b>Suffolk</b>	2-TW B2	Long Island/Wall Street
<b>Sullivan</b>	2-MT	Newburgh
<b>Sullivan</b>	2-TW	Newburgh
<b>Sullivan</b>	2-TW B5	Newburgh/Wall Street
<b>Sullivan</b>	KERO (Heating)	Newburgh
<b>Tioga</b>	2-MT	Syracuse
<b>Tioga</b>	2-TW	Syracuse
<b>Tompkins</b>	2-TW	Syracuse
<b>Ulster</b>	2-MT	Newburgh
<b>Ulster</b>	2-MT (0.0015%) B5	Newburgh/Wall Street
<b>Ulster</b>	2-TW B2	Newburgh/Wall Street
<b>Ulster</b>	2-TW	Newburgh
<b>Ulster</b>	2-TW B5	Newburgh/Wall Street
<b>Ulster</b>	6-MT (0.5%)	Boston
<b>Warren</b>	2-MT	Albany

COUNTY	FUEL TYPE	OPIS POSTING LOCATION
Warren	2-TW	Albany
Warren	2-MT B2	Albany/Wall Street
Warren	2-TW B2	Albany/Wall Street
Warren	KERO (Heating)	Albany
Washington	2-MT	Albany
Washington	2-TW	Albany
Washington	2-TW B2	Albany/Wall Street
Washington	6-MT (0.5%)	Boston
Washington	KERO (Heating)	Albany
Wayne	2-TW	Buffalo
Wayne	KERO (Heating)	Buffalo
Westchester	2-MT	Long Island
Westchester	2-MT B2	Long Island/Wall Street
Westchester	2-MT B5	Long Island/Wall Street
Westchester	2-TW	Long Island
Westchester	2-TW B5	Long Island/Wall Street
Westchester	2-TW B2	Long Island/Wall Street
Westchester	KERO (Heating)	Newark, NJ
Wyoming	2-TW	Buffalo
Wyoming	KERO (Heating)	Buffalo
Yates	2-TW	Syracuse

**1.3 Estimated Quantities**

A Contract resulting from this Solicitation shall be an estimated quantity Contract. No specific quantities are represented or guaranteed and the State provides no guarantee of individual Authorized User participation. The estimated quantities are based on requirements submitted to OGS by authorized users to purchase from the resulting Contract. These authorized users have agreed not to enter into any other contracts for Fuel Oil (Heating) they filed for during the resulting contract period, and will purchase all their Fuel Oil (Heating) requirement needs from awarded contracts. See clauses 6.15 Delivery Clauses, of this Solicitation. No specific quantities are represented or guaranteed and the State provides no guarantee of individual Authorized User participation. The Contractor must furnish all quantities actually ordered at or below the Contract prices. The anticipated quantity of the award for this Solicitation, based on historical purchases under previous awards, is approximately 26,843,623 gallons annually for all items combined. The individual value of each resultant Contract is indeterminate and will depend upon the number of Contracts issued and the competitiveness of the pricing offered, see clauses 6.15 Delivery Clauses,

Numerous factors could cause the actual quantities of Products purchased under a Contract resulting from this Solicitation to vary substantially from the estimates in the Solicitation. Such factors include, but are not limited to, the following:

- There is no guarantee of quantities to be purchased, nor is there any guarantee that demand will continue in any manner consistent with previous purchases.

- The individual value of each Contract is indeterminate and will depend upon actual Authorized User demand and actual quantities ordered during the contract period.
- The State reserves the right to terminate any Contract prior to the end of the term pursuant to the terms and conditions of the Contract. Appendix B, Section 43 (Termination) subparagraph (b) (For Convenience) is hereby deleted for purposes of this Solicitation.
- Contract pricing that is lower than anticipated could result in a higher quantity of purchases by Authorized Users than anticipated.
- In accordance with the *Delivery Schedules* clause, the Contractor(s) shall accept orders from and deliver to any State Agency placing an order through this contract even if the State Agency does not appear on the Delivery Schedule at the time of the bid opening and may accept orders for any non-State Agency or Political Subdivision not appearing on the Delivery Schedule at the time of the bid opening.
- Contract pricing that is higher than anticipated could result in a lower quantity of purchases by Authorized Users than anticipated.

By submitting a Bid, Bidder acknowledges the foregoing and agrees that actual good faith purchasing volumes during the term of the resulting Contracts could vary substantially from the estimates provided in this Solicitation.

**1.4 Key Events/Dates**

**Key Events/Dates**

<b>EVENT</b>	<b>DATE</b>	<b>TIME</b>
Solicitation Release	1/3/2018	N/A
Closing Date for Bidder Questions	1/10/2018	N/A
OGS Procurement Services’ Responses to Bidder Questions	1/23/2018 ( <i>tentative</i> )	N/A
<b>Bid Opening / Due date for Bids</b>	<b>2/14/2018</b>	<b>11:00 AM ET</b>
Contract Approval Date / Award Publish Date	3/5/2018 ( <i>tentative</i> )	N/A

**1.5 Pre-Bid Conference**

There is no pre-bid conference for this Solicitation.

**1.6 Bidder Questions**

All questions regarding this Solicitation should be submitted using Attachment 7 – *Bidder Questions Form*, citing the applicable Solicitation document name and document section. The completed form must be emailed to OGS.sm.PS\_CM\_FleetFuelRoads@ogs.ny.gov by the date and time indicated in the *Key Events/Dates* section. Questions submitted after the deadline indicated may not be answered. A Bidder is strongly encouraged to submit questions as soon as possible. Answers to all questions of a substantive nature will be provided to all prospective Bidders in the form of a question and answer document which will be posted to the OGS website and will not identify the Bidder asking the question. Notification of this posting will be advertised in the NYS Contract Reporter.

If Bidder intends to submit a Bid that deviates from the requirements of the Solicitation in any way, the proposed deviations should be submitted during the *Questions* period so that they may be given due consideration prior to the submission of Bids. See *Bid Deviations* for additional information.

**1.7 MWBE Interest in Participating with Bidders**

If a New York State certified MWBE would like to indicate its interest in working with participating Bidders, please send an e-mail entitled “Solicitation 23091 MWBE INTEREST [Your company name]” to [ogs.sm.ps\\_cm\\_fleetfuelroads@ogs.ny.gov](mailto:ogs.sm.ps_cm_fleetfuelroads@ogs.ny.gov) on or before the date and time indicated in *Key Events/Dates*. The e-mail should include:

1. Company Name
2. Contact Name, Phone Number, Mailing Address, E-Mail Address
3. Brief description of company type (for example “Company ABC is an Authorized Dealer for XYZ”).
4. NYS Empire State Development Certification Type (Minority- and/or Women-Owned Business Enterprise).

A list of all NYS certified MWBEs who have expressed interest in this Solicitation through the timely submission of such e-mail, will be included in a Purchasing Memorandum posted through the New York State Contract Reporter in accordance with the *New York State Contract Reporter* section.

### **1.8 NYS Contract Reporter**

Bidders must register with the New York State Contract Reporter (“NYSCR”) at <https://www.nyscr.ny.gov> in order to receive notifications about this Solicitation. Navigate to the “I want to find contracts to bid on” page to register for your free account. In order to receive e-mail notifications regarding updates to the content or status of a particular ad, you must “bookmark the ad” on the upper right hand side of the ad, then return to your Account, view your list of bookmarked ads, and then select “send me notification updates” option listed to the right of the ad. Answers to all questions of a substantive nature will be posted in the form of a question and answer document and released through the NYSCR. Any updates to Solicitation documents will also be posted and released through the NYSCR. If you do not opt-in to receive notification updates regarding a particular ad, you will not receive e-mail notifications regarding updates, including e-mail notifications regarding the posting of the question and answer document and updates to Solicitation documents. Be advised that submission of responses to the Solicitation that do not reflect and take into account updated information may result in your Bid being deemed non-responsive to the Solicitation.

### **1.9 Summary of Policy And Prohibitions On Procurement Lobbying**

Pursuant to State Finance Law § 139-j and § 139-k, this Solicitation includes and imposes certain restrictions on communications between OGS and a Bidder during the procurement process. A Bidder is restricted from making contacts from the earliest posting, on a governmental entity’s website, in a newspaper of general circulation, or in the procurement opportunities newsletter of intent to solicit offers/Bids through final award and approval of the Procurement Contract by OGS and, if applicable, the Office of the State Comptroller (“restricted period”) to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in State Finance Law § 139-j(3)(a). Designated staff, as of the date hereof, is identified on the first page of this Solicitation and in the *MWBE Designated Contacts* and *Insurance Designated Contacts* sections. OGS employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the Bidder pursuant to these two statutes. Certain findings of non-responsibility can result in rejection for Contract award and, in the event of two findings within a four-year period, the Bidder is debarred from obtaining governmental Procurement Contracts for four years. Further information about these requirements can be found on the OGS website at: <https://www.ogs.ny.gov/acpl/>

### **1.10 Definitions**

Capitalized terms used in this Solicitation shall be defined in accordance with Appendix B, Definitions, or as below.

**ASTM:** The acronym, “ASTM” shall be used as a designation for the American Society for Testing and Materials. All ASTM references in the specification are understood to refer to the most recent edition of that specification/standard.

“**Bid Deviation**” shall refer to any variance submitted or proposed by a Bidder, which deviates from, adds extraneous terms to, conflicts with or offers an alternative to any term, condition, specification or requirement of the Solicitation.

**Biodiesel (B100):** a fuel comprised of mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, designated B100 or 100% biodiesel fuel, as defined in ASTM D6751. ASTM D6751 covers low sulfur biodiesel (B100) for use as a blend component with diesel or other fuel oils.

“**Business Day**” shall refer to Monday through Friday from 8:00 AM – 5:00 PM ET, excluding NYS Holidays and federal holidays.

“**Delivery**” shall be the act of taking an ordered product to a person or place. Refer to *Product Delivery* clause in this Solicitation.

**Human Needs Customer:** High priority customer such as residences hospitals and nursing homes for which failure to get heating oil could be life threatening.

**Item:** shall mean a specific fuel type (column C of Attachment 1) in a specific county (column B of Attachment 1) with its own unique number assigned to it as listed in column A of attachment 1.

**Kerosene:** a thin oil distilled from petroleum or shale oil, used as a fuel for heating and cooking.

**May:** denotes the permissive in a Contract clause or specification. “May” does not mean “required.” See also “Shall” and “Must.”

**MT - Delivery by Motor Transport.** Minimum delivery of 5,500 gallons at one time into one or more storage tanks at one location (one delivery ID from the Delivery Schedule),

**Must:** denotes the imperative in a Contract clause or specification. “Must” is synonymous with “required.” See also “Shall” and “May.”

“**MWBE**” shall refer to a business certified with NYS Empire State Development (“ESD”) as a Minority- and/or Women-owned Business Enterprise.

**No. 2 (#2):** The symbol No. 2 and/or #2 shall be used as a grade designation for distillate fuel oil used.

**No. 2B2 (#2B2):** The symbol No. 2B2 or #2B2 shall be used as a grade designation for distillate fuel oil that is a mix of 98% petroleum and 2% soy based product meeting the requirements of ASTM D396 (Fuel Oil).

**No. 2B5 (#2B5):** The symbol No. 2B5 or #2B5 shall be used as a grade designation for distillate fuel oil that is a mix of 95% petroleum and 5% soy based product meeting the requirements of ASTM D396 (Fuel Oil).

**No. 4 (#4):** The symbol No. 4 and/or #4 shall be used as a grade designation for heavy distillate fuel oil and/or distillate/residual fuel blends used in commercial/industrial burners equipped for this viscosity range.

**No. 6 (#6):** The symbol No. 6 and/or #6 shall be used as a grade designation for heavy residual fuels used in industrial burners equipped for this viscosity range. Preheating is usually required for handling and proper atomization of this product.

“**NYS Holidays**” refers to the legal holidays for State employees in the classified service of the executive branch, as more particularly specified on the website of the NYS Department of Civil Service. This includes the

following: New Year’s Day; Martin Luther King Day; Washington’s Birthday (observed); Memorial Day; Independence Day; Labor Day; Columbus Day; Veteran’s Day; Thanksgiving Day; and Christmas Day.

“**NYS Vendor ID**” shall mean the ten-character identifier issued by New York State when a vendor is registered on the Vendor File.

“**Posting Day**” and “**Posted Price**” shall refer to the actual OPIS day the prices are posted.

“**Preferred Source Products**” shall refer to those Products that have been approved in accordance with State Finance Law § 162.

“**Preferred Source Program**” shall refer to the special social and economic goals set by New York State in State Finance Law § 162 that require a governmental entity purchase select Products from designated organizations when the Products meet the “form, function and utility” requirements of the governmental entity. Under State Finance Law § 163, purchases of Products from Preferred Sources are given the highest priority and are exempt from the competitive bidding requirements. The New York State Preferred Sources include: The Correctional Industries Program of the Department of Corrections and Community Supervision (“Corcraft”); New York State Preferred Source Program for People Who Are Blind (“NYSPSP”); and the New York State Industries for the Disabled (“NYSID”). These requirements apply to a state agency, political subdivisions and public benefit corporations (including most public authorities).

“**Procurement Services**” shall refer to a business unit of OGS, formerly known as New York State Procurement (“NYSP”) and Procurement Services Group (“PSG”).

“**SDVOB**” shall refer to a NYS-certified Service-Disabled Veteran-Owned Business

“**Shall**” denotes the imperative in a Contract clause or specification. “Shall” is synonymous with “required”. See also “Must” and “May”.

**TW:** - Delivery by Tank Wagon of less than 5,500 gallons.

### **1.11 Appendices and Attachments**

The following appendices and attachments, attached hereto, are hereby expressly made a part of this Solicitation as fully as if set forth at length herein.

Appendix A – Standard Clauses for NYS Contracts (January 2014)

Appendix B – General Specifications (April 2016)

Attachment 1 – *Pricing*

Attachment 2 – *NYS Required Certifications*

Attachment 3 – *Encouraging Use of NYS Businesses*

Attachment 4 – *Insurance Requirements*

Attachment 5 – *Bidder Information Questionnaire*

Attachment 6 – *Bidder Submission Checklist*

Attachment 7 – *Bidder Questions Form*

Attachment 8 – *Report of Contract Usage*

Attachment 9 – *Delivery Schedule – State Agencies*

Attachment 10 – *Delivery Schedule – Local Governments & Other Eligible Non-State Agencies*

Attachment 11 – *M/WBE Utilization Plan*

Attachment 12 – *Fuel Supplier Certificate*



### 1.12 Conflict of Terms

Conflicts among the documents shall be resolved in the following order of precedence:

1. Appendix A, Standard Clauses for New York State Contracts;
2. The Solicitation, including all appendices and attachments;
3. Appendix B, General Specifications;
4. Bidder's Bid.

## 2. BIDDER QUALIFICATIONS

Bidder is advised that the State's intent in having the requirements listed below is to ensure that only qualified and reliable Contractors perform the work of the resulting Contract. Bidder shall have the burden of demonstrating to the satisfaction of Procurement Services that it can perform the work required. Procurement Services retains the right to request any additional information pertaining to the Bidder's ability, qualifications, financial capacity, financial stability, and procedures used to accomplish all work under the resulting Contract as it deems necessary to ensure safe and satisfactory work. A Bidder shall meet the following qualifications:

EITHER 1a OR 1b:

- 1a. The Bidder must either own or operate a permanently established bulk storage plant with stationary tankage from which delivery will be made.
- 1b. The Bidder must be an established refiner, distributor, or authorized dealer of a distributor, who owns and operates, or leases and operates a bulk storage plant with stationary tankage. A Bid from an authorized dealer of a distributor should include a certificate executed by the distributor, stating that the Bidder is an authorized dealer of the distributor and that all qualifications, requirements and specifications of this Solicitation will be met (as indicated in Section 4.10 and Attachment 12). The Bidder must also be registered as a distributor with the New York State Department of Taxation and Finance and/or be a licensed importer, transporter or terminal operator, if applicable.

AND ALL OF THE FOLLOWING:

2. The Bidder's or distributor's bulk storage plant(s) must have sufficient capacity and/or other facilities which, in the opinion of the Commissioner of General Services, shall protect the interests of the State. Such facilities are subject to inspection prior to award, and if found not to be compliant with these requirements, the Bid may be rejected.
3. The bulk storage plant must be located within a reasonable distance from the place or point to which deliveries are to be made by transport, within the guaranteed delivery period of 24 (twenty-four) hours.
4. The Bidder's source of supply is with a reputable oil refiner either directly or through the refiner's authorized distributor. **Bidder should supply a certificate** from the refiner or distributor, as applicable, that guarantees the refiner or distributor will furnish the Bidder/Contractor with fuel oil (heating) for the life of the Contract. New York State reserves the right to request updated supplier certification at any time during the contract.
5. The Bidder's delivery trucks for fuel oil (heating), except motor transports, are equipped with meters to accurately measure the quantity of fuel. Bobtails used for the delivery of fuel oil (heating) must have a meter with ticket printer, which will provide a printed receipt giving an accurate accounting of the amount of fuel delivered. Delivery ticket shall be locked in the printer from the start of delivery until the delivery is completed and recorded.

6. Vendors furnishing liquefied fuel oil (heating) to New York State must be registered in accordance with applicable provisions of the New York State Tax Law amendments effective September 1, 1998 or as may be amended. Also, if vendors intend to supply clear fuel, they must possess a valid IRS Form 637UV.
7. Bidder must maintain service facilities and have trained personnel qualified to service the product furnished at the using agency within 48 hours.
8. A Bidder must certify its commitment to obtain all necessary proof of insurance with its bid via Attachment 5 – Bidder Information Questionnaire. See Attachment 4 – Insurance Requirements for detailed insurance requirements.

Additional information that may be requested from the Bidder includes, but is not limited to, the following:

- Satisfactory evidence that a Bidder has maintained an organization capable of performing the work specified herein, if requested, through submission of a Dun & Bradstreet Business Information Report or other equivalent evidence.
- Evidence of business establishment with adequate inventories of the product(s) offered, and capacity to process and ship large orders to the awarded Region(s). The Commissioner may require a certificate from the Bidder showing the number of years the Bidder has been active in supplying the product(s) offered and the size and location of the inventories regularly maintained.
- References that demonstrate the ability of the Bidder to perform jobs similar in scope to the size, nature and complexity of the applicable Lot/County.
- Documentation to demonstrate a Bidder's ability to service the county(ies) on which they bid in order to meet the delivery requirements set forth in Section 7.19, Delivery.

Note: Failure by a Bidder to provide any of the above information as requested by OGS or to meet any of the above qualifications in whole or in part may result in a rejection of that Bidder's bid.

### 3. SPECIFICATIONS

#### **3.1 Product Requirements**

The Bidder guarantees that the product supplied will meet or exceed the minimum specifications listed in Section 7 – Fuel Specifications and Section 8 – Biodiesel Fuel Specifications

#### **3.2 Local Laws and/or Mandates**

The State makes no guarantee that the filed requirements submitted by Authorized Users are in compliance with any applicable local laws or mandates regarding fuel types, such as the New York City Biodiesel Mandate. Bidders are advised to review filed requirements prior to bidding and confirm with Authorized Users, as necessary, that filed requirements are in compliance with any applicable local laws or mandates.

Any questions, errors or requests for clarification regarding filed requirements should be submitted during the Bidder Questions period for this Solicitation, so that they may be resolved or corrected prior to bid submission.

During the term of any contract resulting from this Solicitation, Authorized Users and Contractors will share responsibility for ensuring and maintaining compliance with any applicable local laws or mandates regarding fuel types.

### 4. BID SUBMISSION

#### **4.1 Performance and Bid Bonds**

There are no bonds for this Contract. 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 is required at any time during the term of the resulting Contract.

#### **4.2 NYS Vendor File Registration**

Prior to being awarded a Contract pursuant to this Solicitation, the Bidder and any authorized resellers who accept payment directly from the State, must be registered in the New York State Vendor File (Vendor File) administered by the Office of the State Comptroller (OSC). This is a central registry for all vendors who do business with New York State Agencies and the registration must be initiated by a State Agency. Following the initial registration, a unique New York State ten-digit vendor identification number (Vendor ID) will be assigned to your company and to each of your authorized resellers (if any) for use on all future transactions with New York State. Additionally, the Vendor File enables a vendor to use the Vendor Self-Service application to manage all vendor information in one central location for all transactions related to the State of New York.

If Bidder is already registered in the New York State Vendor File, the Bidder must enter its Vendor ID on the first page of this Solicitation. Authorized resellers already registered should list the Vendor ID number along with the authorized reseller information.

If the Bidder is not currently registered in the Vendor File, the Bidder must request assignment of a Vendor ID from OGS. Bidder must complete the OSC Substitute W-9 Form ([http://www.osc.state.ny.us/vendors/forms/ac3237s\\_fe.pdf](http://www.osc.state.ny.us/vendors/forms/ac3237s_fe.pdf)) and submit the form to OGS in advance of Bid submission. Please send this document to the Designated Contact identified in the Solicitation. In addition, if an authorized reseller is to be used that does not have a Vendor ID, an OSC Substitute W-9 form should be completed by each authorized reseller and submitted to OGS. OGS will initiate the vendor registration process for all Bidders and authorized resellers. Once the process is initiated, registrants will receive an e-mail identifying their Vendor ID and instructions on how to enroll in the online Vendor Self-Service application.

For more information on the Vendor File please visit the following website:  
[http://www.osc.state.ny.us/vendor\\_management](http://www.osc.state.ny.us/vendor_management)

#### **4.3 Format and Content of Bid Submission**

The complete Bid package must be received by OGS Procurement Services by the date and time of the Bid opening. Late Bids shall be rejected, except as provided by Appendix B, *Late Bids*. Any Bid pricing or portions thereof submitted on CD or flash drive that are incomplete or that cannot be opened/accessed may be rejected. With respect to any Bid documents in Excel format, only those cells provided for entering Bid pricing and information are to be accessed by the Bidder.

E-mail or facsimile Bid submissions are not acceptable.

It is recommended that the Bidder open, review and save/download all electronic files to the Bidder's hard drive and/or to a secure back-up. Only completed files (in the specified format) should be saved to a CD or flash drive.

Bidders are responsible for the accuracy of their Bids. All Bidders are directed to take extreme care in developing their Bids. Bidders are cautioned to carefully review their Bids prior to Bid submission. A Bid that fails to conform to the requirements of the Solicitation may be considered non-responsive and may be rejected.

#### **4.4 Content**

A complete Bid consists of ONE copy of each of the following:

1. CD or flash drive containing:

- a. Pages 1 and 2 of the Solicitation (signed and scanned) (PDF);
  - b. Completed Attachment 1 – Pricing for all Products offered in the Bid (Excel);
  - c. Completed Attachment 2 – NYS Required Certifications with original ink signatures (PDF);
  - d. Completed Attachment 3 – Encouraging Use of NYS Businesses (PDF);
  - e. Proof of compliance with Attachment 4 – Insurance Requirements (PDF);
  - f. Completed Attachment 5 – Bidder Information Questionnaire (Excel);
  - g. Completed Attachment 6 – Bidder Submission Checklist (Excel);
  - h. Completed ST-220CA, Contractor Certification, notarized with original ink signatures (PDF);
  - i. Completed MWBE 100, MWBE Utilization Plan (if applicable) (PDF);
  - j. Completed Form EEO100, Equal Employment Opportunity Staffing Plan (PDF);
  - k. Standard Vendor Responsibility Questionnaire (completed and scanned to PDF) or Certification that Questionnaire has been completed online (PDF).
  - l. Supplier Certificate (See Section 4.10 or Attachment 12) from the refiner or distributor that shows Bidder has an agreement with refiner or distributor and will be provided sufficient fuel oil to meet contractual volume
2. One original paper version of each of the following (to be placed in a loose leaf binder and tabbed):
- a. Pages 1 and 2 of the Solicitation with original ink signatures;
  - b. Completed Attachment 2 – NYS Required Certifications with original ink signatures;
  - c. Completed Attachment 3 – Encouraging Use of NYS Businesses;
  - d. Proof of compliance with Attachment 4 – Insurance Requirements;
  - e. Completed Attachment 5 – Bidder Information Questionnaire;
  - f. Completed Attachment 6 – Bidder Submission Checklist;
  - g. Completed ST-220CA, Contractor Certification, notarized with original ink signatures;
  - h. Completed MWBE 100, MWBE Utilization Plan (if applicable);
  - i. Completed Form EEO100, Equal Employment Opportunity Staffing Plan;
  - j. Standard Vendor Responsibility Questionnaire or Certification that Questionnaire has been completed online.
  - k. Supplier Certificate (See Section 4.10 or Attachment 12) from the refiner or distributor that shows Bidder has an agreement with refiner or distributor and will be provided sufficient fuel oil to meet contractual volume

Also, please note that in the case of discrepancies between paper copies and CD or flash drive submissions of the documents required in both formats, the electronic (CD or flash drive) copy shall take precedence over the paper copy.

A Bidder should note that any indicators or messages that have been built into the attachments are informational only and provided solely for the purpose of assisting Bidders in completing the attachments. The presence or absence of notes or indicators is not a determination by the State as to the sufficiency of the attachments with respect to the Solicitation requirements. Bidders remain responsible for reviewing the attachments to ensure compliance with the Solicitation requirements.

#### **4.5 Pricing Page Instructions**

Please reference Attachment 1 – Pricing Pages for detailed instructions on how to submit pricing.

A Bidder shall submit its proposed pricing by Item contained in Attachment 1 – Pricing Pages “Bid Price Submittal Sheet” tab. The price per gallon is based on OPIS as of November 2, 2017. Soy pricing is based on the posting as of November 1, 2017 settlement price as per the Wall Street Journal.

Attachment 1 – Price Pages will limit the number of decimal places for a dollar amount that a Bidder enters.

#### **4.6 Bid Envelopes and Packages**

All Bids should have a label on the outside of the envelope or package itemizing the following information:

1. BID ENCLOSED (preferably bold, large print, all capital letters)
2. Solicitation number # 23091
3. Bid Opening Date and Time
4. The number of boxes or packages (e.g., 1 of 2; 2 of 2)

Failure to complete all information on the Bid envelope and/or package may necessitate the opening of the Bid prior to the scheduled Bid opening.

#### **4.7 Bid Delivery**

Bids shall be delivered to the following address on or before 11:00 a.m. ET, on or before the Bid opening date:

State of New York Executive Department  
Office of General Services  
Procurement Services  
Corning Tower - 38th Floor Reception Desk  
Empire State Plaza  
Albany, NY 12242

Bidder assumes all risks for timely, properly submitted deliveries. The time of Bid receipt is determined by OGS according to the clock at the above-noted location. A Bidder is strongly encouraged to arrange for delivery of Bids to OGS prior to the date of the Bid opening. Late Bids shall be rejected, except as provided in Appendix B, Late Bids. All Bids and accompanying documentation shall become the property of the State of New York and shall not be returned.

#### **4.8 Important Building Access Procedures**

To access the Corning Tower, all visitors must check in by presenting photo identification at the information desk. Delays may occur due to a high volume of visitors. Visitors conducting Procurement Services business are encouraged to pre-register for building access by contacting the Procurement Services receptionist at (518) 474-6262 at least 24 hours prior to the visit. Visitors who are not pre-registered will be directed to a designated phone to call the Procurement Services receptionist. The receptionist will register the visitor at that time but delays may occur. Building access procedures may change or be modified at any time.

#### **4.9 NYS Required Certifications**

A Bidder is required to submit the signed New York State Required Certifications (Attachment 2 – NYS Required Certifications) with its Bid.

#### **4.10 Supplier Certificate**

Bids will be accepted only from established refiners, distributors, or authorized dealers. Through the Bidder's submission of a Supplier Certificate from the refiner or distributor the supplier guarantees that the Bidder is an authorized dealer or distributor and has agreed to supply the Bidder with all quantities of Products required by the Bidder in fulfillment of its obligations under any resultant Contract with the State. Bidders shall use the certificate attached to this Solicitation to document this level of support (see Attachment 12 – Supplier Certificate).

The Supplier Certificate is to be forwarded by the Bidder to its proposed supplier for completion, and returned to the Bidder for inclusion with its Bid. The Commissioner reserves the right to investigate or make any inquiry into the capabilities of any Bidder to properly perform under any resultant Contract. See Appendix B, Section 39, Employees, Subcontractors, and Agents.

#### **4.11 Bid Deviations**

Bids must conform to the terms set forth in the Solicitation. As set forth in Bidder Questions, if Bidder intends to submit a Bid that deviates from the requirements of the Solicitation in any way, the proposed deviations should be submitted during the Questions period so that they may be given due consideration prior to the submission of Bids. Material deviations (including additional, inconsistent, conflicting, or alternative terms) submitted with the Bid may render the Bid non-responsive and may result in rejection of the Bid.

Bidder is advised that OGS will not entertain any exceptions to Appendix A (Standard Clauses for New York State Contracts). OGS will also not entertain exceptions to the Solicitation or Appendix B (General Specifications) that are of a material and substantive nature.

Extraneous terms 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.

#### **4.12 Bid Opening Results**

Procurement Services posts Bid information on the OGS web page. The web page makes selected information available about the Solicitation. Such information is anticipated to be available online within two business days after the Bid opening.

The Bid Opening Results Page is available at: <https://nyspro.ogs.ny.gov/nyspro-bid-openings>.

#### **4.13 Bid Liability**

The State of New York will not be held liable for any cost incurred by the Contractor for work performed in the production of a Bid or for any work performed prior to the formal execution of a Contract.

#### **4.14 NYS Reserved Rights**

New York State reserves the right, in its sole discretion, to:

- A. Reject any or all Bids received in response to the Solicitation;
- B. Withdraw the Solicitation at any time at the sole discretion of the State;
- C. Make an award under the Solicitation in whole or in part;
- D. Disqualify any Bidder whose conduct and/or Bid fails to conform to the requirements of the Solicitation;
- E. Seek clarifications and revisions of the Bid;
- F. Amend the Solicitation prior to the Bid opening to correct errors or oversights, or to supply additional information as it becomes available;
- G. Direct Bidders, prior to the Bid opening, to submit Bid modifications addressing subsequent Solicitation amendments;
- H. Change any of the schedule dates with notification through the NYS Contract Reporter;
- I. Eliminate any mandatory, non-material requirements that cannot be complied with by all of the prospective Bidders;
- J. Waive any requirements that are not material;
- K. Utilize any and all ideas submitted in the Bids received;
- L. Adopt all or any part of a Bidder's Bid in selecting the optimum configuration;

- M. Negotiate with a Bidder within the Solicitation requirements to serve the best interests of the State. This includes requesting clarifications of any or all Bids;
- N. Require clarification at any time during the procurement process and/or require correction of arithmetic or other apparent errors for the purpose of assuring a full and complete understanding of a Bidder's Bid and/or to determine a Bidder's compliance with the requirements of the Solicitation;
- O. Select and award the Contract to other than the selected Bidder in the event of unsuccessful negotiations or in other specified circumstances as detailed in the Solicitation;
- P. Accept and consider for Contract Award Bids with non-material Bid Deviations or non-material Bid defects such as errors, technicalities, irregularities, or omissions;
- Q. Use any information which OGS obtains or receives from any source and determines relevant, in OGS's sole discretion, for the purposes of bid evaluation and Contractor selection;
- R. Consider a proper alternative where an evidently incorrect reference/parameter/component/product/model/code number is stated by the State or the Bidder;
- S. Reject an obviously unbalanced Bid as determined by the State; and
- T. Conduct Contract negotiations with -the next lowest responsible Bidder, should the Agency be unsuccessful in negotiating with the selected Bidder;
- U. Make no award for any Product, region, or lot, as applicable, for reasons including, but not limited to, unbalanced, unrealistic or excessive Bidder pricing, a change in Authorized User requirements and/or Products, or an error in the Solicitation (e.g., use of incorrect reference, pack size, description, etc.). In such case, evaluation and ranking of Bids may be made on the remaining Products, regions, or lots.
- V. Offer a Bidder the opportunity to provide supplemental information or clarify Bid, including the opportunity to explain or justify the balance, realism, and/or reasonableness of pricing.
- W. Conduct pre-award meetings with individual Bidders to determine their capability of meeting any of the requirements of the Solicitation specifications.
- X. Investigate or make any inquiry into the capacity of any Bidder to properly perform under any resultant Contract Award, and subsequently during the duration of the contract term.

#### **4.15 Incorporation**

Portions of the successful Bidder's Bid and of this Solicitation shall be incorporated into a final Contract, with a separate document executed by Contractor and OGS. A final Contract will be formalized either through a separate contract document or through a contract award letter incorporating the Bid, each having its own provision governing conflict of terms.

### **5. METHOD OF AWARD**

#### **5.1 Method of Award**

Award shall be made on the basis of one award per item in each county by grade of oil and mode of transport (method of delivery) to the lowest responsive and responsible bidder offering the lowest total price per item. A separate award will be made for each item number.

No awards will be made for counties without any filed requirements. In the event that the same Bidder is awarded multiple items, the awards will be combined into a single Contract.

Additionally, in order to attempt to ensure an adequate supply of oil during the contract period, the State reserves the right at its sole option and discretion to limit the number of items and/or total gallons awarded to any one bidder on requirements in one county or combination of counties included in this Invitation for Bids.

Financial review is solely based on information submitted in Attachment 1, which includes ranking of bids and may be completed prior to Qualifications and Requirements review.

All pricing recommended for award will be subject to comparison to the previous year's pricing and current market trends in order to gauge the reasonableness of price. Pricing found not to be in line with current and historical trends may be removed from consideration for an Award.

## **5.2 Notification of Award**

Tentative award of the Contract shall consist of written notice to that effect by OGS to a selected Bidder, who shall execute a Contract upon a determination by OGS that the Bidder is responsive and responsible.

Non-awardees will also be notified that their Bid was not selected for award.

## **6. TERMS AND CONDITIONS**

### **6.1 Contract Term and Extensions**

The Contract will be in effect for a term of up to two years. The Contract term shall commence after all necessary approvals or August 31, 2018 (the later of the two) and shall become effective upon mailing or electronic communication of the final executed documents to the Contractor (see Appendix B, *Contract Creation/Execution*).

All OGS Centralized Contracts resulting from this Solicitation shall have a co-terminus end date notwithstanding non-renewals or contract cancelations, At the State's option, the Contract may be extended for three (3) years, in increments as deemed to be in the best interest of the State. Whether the optional extensions are exercised is at the sole discretion of the State. A Contractor shall retain the right to decline a Contract extension offered under this section. Any Contract extension will be under the same terms and conditions, subject to any additional applicable statutory and policy requirements. Any extensions provided under this section shall apply in addition to any rights set forth in Appendix B, *Contract Term – Extension*.

### **6.2 Short term Extension**

This section shall apply in addition to any rights set forth in Appendix B, *Contract Term – Extension*. In the event a replacement Contract has not been issued, any Contract let and awarded hereunder by the State may be extended unilaterally by the State for an additional period of up to three months upon notice to the Contractor with the same terms and conditions as the original Contract and any approved modifications. Filed Requirements and Delivery Schedules may be updated by OGS for any mutually agreed upon extension. With the concurrence of the Contractor, the extension may be for a period of up to six months in lieu of three months. However, this extension automatically terminates should a replacement Contract be issued in the interim.

### **6.3 Price**

Pricing will be collected using Attachment 1 – *Pricing* in accordance with the Instructions tab listed within Attachment 1.

**Prices quoted shall be billed gross gallons, F.O.B. agency storage tanks.** Prices quoted shall include all applicable customs, taxes, license and research fees (e.g. NORA), and surcharges. Bid prices must be expressed in U.S. currency and shall be submitted to four (4) decimal places (priced in dollars per gallon).

Pricing for contract purchases shall be based on the pricing in effect at the time the Authorized User places the order (Prompt Will-call). Authorized Users that are on automatic delivery shall be priced on the day of delivery, unless the Authorized User requests a delivery. The price shall then reflect the day of the order.



Pricing shall reflect the day of delivery for orders placed by the Authorized User that go beyond the guaranteed delivery timeframe of 24 (twenty-four) hours. For example, the Authorized User orders 500 gallons of fuel oil on Wednesday, and requests that the delivery be made on the following Tuesday.

For situations where an Authorized user wants to place an order for an unusually large volume of fuel (e.g., 40,000 gallons or more than a truck load, or delivering over a period of time), the Contractor and Authorized User should contact OGS Procurement Services. OGS's intent is for all parties to have the same expectations for delivery and price.

Truck delivery ticket volumes and Contract User's gauged volumes must agree within a tolerance of 0.5% of the total delivered volume for delivery volumes greater than 500 gallons and up to 1% for delivery volumes less than or equal to 500 gallons. If the volume difference exceeds the tolerance level, the Contract User's measured volume, if available, will be used for invoice payment. Contract Users reserve the right to reject "rogue" trucks which have been identified as having repeated meter inaccuracies. Trucks without sealed and calibrated meters will not be permissible for deliveries.

It shall be the Contractor's responsibility to satisfy Authorized User requirements by furnishing blended product when called for during the time period indicated in the Solicitation.

Any special allowances should not be included in the bid price as they cannot be considered in evaluating bids. However, if the Bidder extends such allowances during the term of the contract to Federal, State, Local Governments or to commercial users in the normal course of doing business, New York State requires that such allowances will also be available to the State in the maximum amount extended to others who contract to purchase fuel oil under similar contractual terms and conditions.

Bid prices shall be firm except that price revisions will be permitted in accordance with the PRICE REVISION CLAUSE set forth in this solicitation and with respect to certain taxes and duties as follows:

"After-imposed tax" means any new or increased Federal, State and local excise tax or duty, except social security or other employment taxes, on fuel oil purchased under any contract to be awarded hereunder which the contractor is required to pay or bear the burden of as the result of legislative, judicial, or administrative action taking effect after the date of contract award.

"After-relieved tax" means any amount of Federal, State and local excise tax or duty, except social security or other employment taxes, that would otherwise have been payable on fuel purchased under any contract to be awarded hereunder which the contractor is not required to pay or bear the burden of, or for which the contractor obtains a refund or drawback, as the result of legislative, judicial or administrative action taking effect after the date of contract award.

The bid price shall include all applicable Federal, State, Local taxes and duties as stated in Appendix B Section 8 "Taxes" included with this Invitation for Bids.

**NOTE:** The State of New York and its political subdivisions are exempt from New York State and local sales taxes and federal excise taxes.

The price for fuel oil under any contract to be awarded hereunder shall be increased by the amount of any after-imposed tax, unless the legislative, judicial or administrative act says otherwise, if the contractor states in writing that such contract price does not include any contingency for such after-imposed tax. Such increase shall be prospective only and becomes effective upon such written notice and on the effective date of the next schedule price revision.

The price for fuel oil under any contract to be awarded hereunder shall be decreased by the amount of any after-relieved tax. Such decrease shall be effective when realized or by no later than the next scheduled price revision.

The contractor shall promptly notify the Procurement Services Contract Management Specialist of all matters relating to any excise tax or duty that reasonably may be expected to result in either an increase or decrease in the contract price for fuel thirty days (30) prior to adding to invoices.

**6.4 OPIS Posting Locations**

The following OPIS Posting Locations have been established for purposes of this solicitation. Contractor’s pricing will be based on the established OPIS Posting Locations identified below.

For Fuel No. 2, No.2B2, No. 2B5 and Kerosene, a fixed OPIS Posting Location has been established for each county. The fixed OPIS Posting Locations are set forth in the table below and in Attachment 1 – Price Pages. Prices posted are Rack prices.

<b>Albany</b>	<b>Buffalo</b>	<b>Long Island</b>	<b>Newburgh</b>	<b>Syracuse</b>	<b>Utica</b>
Albany	Allegany	Bronx	Columbia	Broome	Chenango
Clinton	Cattaraugus	Kings	Dutchess	Cayuga	Fulton
Delaware	Chautauqua	Nassau	Greene	Chemung	Hamilton
Essex	Erie	New York	Orange	Cortland	Herkimer
Franklin	Genesee	Suffolk	Putnam	Schuyler	Jefferson
Otsego	Livingston	Richmond	Rockland	Seneca	Lewis
Rensselaer	Monroe	Westchester*	Sullivan	Steuben	Madison
St Lawrence	Niagara	Queens	Ulster	Tioga	Montgomery
Saratoga	Ontario			Tompkins	Oneida
Schenectady	Orleans			Yates	Onondaga
Schoharie	Wayne				Oswego
Warren	Wyoming				
Washington					

*\*For Kerosene the Posting Location will be Newark.*

For Fuel No. 4 (.5%), and No. 6 (0.5%) the OPIS Posting Location will be Boston Reseller as listed in the OPIS Oil Price Daily.

For Fuel No. 6 (0.3%) B2 and No. 4 (0.15%) B2, the OPIS Posting Location will be NY Barge Reseller as listed in the OPIS Oil Price Daily.

As of July 2016 Number 2 fuel will no longer include a description designation of NYC as part of a fuel type. All number 2 fuel throughout the state now consists of .0015% sulfur including biodiesel.

**Upon Contract award, a Contractor’s pricing will be based on the established OPIS Posting Location designated in Attachment 1 – Price Pages.**

Should postings differ from current description and/or format, a posting determined, by the Commissioner in his/her sole discretion; to be most reflective of market conditions will be used.

To follow are two historic examples that have occurred.

**Example 1 from April 2016**

Please be advised that as of April 22, 2016, the weekly fuel price adjustments for Buffalo kerosene will be based solely on the low posting published in OPIS’s Oil Price Daily, as was the basis of the original bid (June 19, 2014) and award (November 20, 2014), due to inconsistent reporting of both a high and a low posted price.

**Example 2 from February 2016**

Please be advised that as of January 29, 2016, the weekly fuel price adjustments for Utica kerosene will be based solely on the low posting published in OPIS's Oil Price Daily, as was the basis of the original bid (June 19, 2014) and award (November 20, 2014), due to inconsistent reporting of both a high and a low posted price.

**6.4.1 Location Change or Substitution**

Should the designated posting locations become unavailable or differ from the current description and/or format, a posting determined by the Commissioner in her/her sole discretion, to be most reflective of market conditions will be used.

**6.4.2 Calculation Change or Substitution**

Should the product revision calculation become unavailable or differ from the current description and/or format, a calculation determined by the Commissioner in her/her sole discretion, to be most reflective of market conditions will be used.

**6.4.3 Product Change or Substitution**

Should the product originally awarded become unavailable or cannot be supplied by the Contractor for any reason (except as provided for in the Saving/Force Majeure clause of Appendix B), the new product and price determined by the Commissioner in his/her sole discretion, to be most reflective of market conditions will be used.

**6.5 Price Adjustments/Revisions**

Contract prices for fuel grades shall be firm except that price revisions will be permitted in accordance with the following procedures:

Price revisions (increases or decreases) to the original contract price shall be based on prices posted in the OPIS Oil Price Daily every Thursday. The Bidder shall use the reference as designated in Attachment 1 - Pricing on a per item basis. Bidders are restricted to the postings as indicated in Attachment 1 of this solicitation ONLY. Selection of alternate listings will NOT be permitted.

The low price shown in the OPIS Oil Price Daily postings will be used to compute price revisions during the Contract period. Procurement Services will compute any price revisions by determining the difference between the Posted Price on November 2, 2017 and the Posted Price on every Thursday during the contract period beginning with the OPIS Oil Price Daily the Thursday immediately preceding the contract start date. If the OPIS Oil Price Daily is not posted on Thursday, the previous business day's posting in which the specified prices are available will be utilized. Base prices are listed in this Solicitation, for each reference. The term "Posting Day" or "Posted Price" as used throughout the Solicitation and any resulting Contract refers to the actual day the prices are posted.

Should postings become unavailable or differ from current descriptions and/or format, a posting determined, by the Commissioner, in his or her sole discretions, to be most reflective of market conditions will be used. The same applies if OGS were to utilize a weekly pricing schedule. Corrections to prices in the OPIS Oil Price Daily will be considered only when caused by a typographical or clerical error on the part of said service provider.

Should the weekly price revision cycle not provide adequate price adjustments, because of rapid changes in worldwide petroleum prices, the State reserves the right to increase the frequency of the price revisions to a daily basis. The daily basis will utilize postings Monday through Friday with applicable price changes to be effective as of the start of business on the following day. Weekend prices will be based on Friday's posting.

The Friday posting will also stay in effect on Monday holidays. Prices in effect for mid-week or Friday holidays will be the same as for the preceding day.

The following clauses shall apply to all price adjustments under any Contract awarded:

- (1) Price increases are limited to changes in the OPIS Posting Location as listed in Appendix 1. Increases in Contract costs or prices to compensate for other increases in the cost of doing business, regardless of the cause or nature of such costs of the Contractor, will not be allowed during the Contract period.
- (2) Price adjustments will continue using the same method if the contract is extended or renewed.
- (3) The contract price and any adjustments will only be carried out to four (4) decimal places (priced in dollars per gallon).

### **6.6 Best Pricing Offer**

During the Contract term, if the Commissioner becomes aware that the Contractor is selling substantially the same or a smaller quantity of a Product 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, after consultation with the Contractor, may be reduced to a lower price on a prospective basis at the discretion of the Commissioner. The Commissioner reserves the right to request information to verify pricing for the purposes of this clause.

### **6.7 Price Structure**

- a) If, during the Contract Term, the Contractor is unable or unwilling to meet contractual requirements in whole or in part based on the price structure of the Contract, it shall immediately notify the Office of General Services, Procurement Services in writing. Such notification shall not relieve the Contractor of its responsibilities under the Contract. The State may, but is not required to, consider an equitable adjustment in the Contract terms and/or pricing in the circumstances outlined in Appendix B, *Savings/Force Majeure*.
- b) Should the Commissioner in his or her sole discretion determine during the Contract Term that (i) the Contract price structure is unworkable, detrimental, or injurious to the State, or (ii) the Contract price structure results in prices which are unreasonable, excessive, or not truly reflective of current market conditions, and no adjustment in the Contract terms and/or pricing is mutually agreeable, the State may terminate the Contract upon 10 business days written notice mailed to the Contractor.
- c) Should a posting location become unavailable or unworkable, the Commissioner reserves the right to switch to the most appropriate index and/or location, and adjust the bid price accordingly (see OPIS Posting Location examples).

### **6.8 Prevailing Wage Rates – Public Works and Building Services Contracts**

Work being bid is subject to the prevailing wage rate provisions of New York State Labor Law. See "Prevailing Wage Rates - Public Works and Building Services Contracts" in Appendix B, General Specifications and see "WAGE AND HOUR PROVISIONS" in Appendix A clause 6. Any federal or State determination of a violation of any public works law or regulation, or labor law or regulation, or any OSHA violation deemed "serious or willful" may be grounds for a determination of vendor non-responsibility and rejection of bid.

The applicable Prevailing Wage Rate Schedule for this project is **PRC # 2017901016**

For access to the Department of Labor (DOL) Public Works information including Prevailing Wage Schedule and updates, use the following link:

<https://www.labor.ny.gov/workerprotection/publicwork/PWContents.shtm>

Important Note: The above PRC number MUST be noted on all purchase orders issued for purchase from this contract.

**6.9 Ordering**

Purchase Orders shall be made in accordance with the terms set forth in Appendix B, *Purchase Orders*. Authorized Users may submit orders over the phone, and, if available, may submit orders electronically via web-based ordering, e-mail, or facsimile at any time. Orders submitted shall be deemed received by Contractor on the date submitted.

All orders shall reference Contract number, requisition, and/or Purchase Order number (if applicable). Upon Contractor’s receipt of an order, confirmation is to be provided to the Authorized User electronically or via facsimile. Order confirmation should be sufficiently detailed, and include, at a minimum, purchase price, date of order, delivery information (if applicable), Authorized User name, and sales representative (if applicable).

**6.91 Procurement Card**

Bidders shall indicate (via Attachment 5 0 *Bidder Information Questionnaire*) if they will accept the New York State Procurement Card. For all purchases executed using a New York State Procurement Card, Contractor shall provide an itemized receipt with each delivery.

**6.10 Minimum Order**

Minimum delivery shall be 150 gallons to each delivery location (site) as determined by the Delivery Schedule. Minimum order for Motor Transport deliveries shall be 5,500 gallons. Deliveries under 150 gallons are at the Contractor’s option, except for tank top-offs for testing.

All deliveries requested by an Authorized User of less than the minimum order size, including tank top-offs for tank testing, shall qualify for contract pricing. The following tiered schedule may be utilized by the Contractor:

Determination for total gross tank capacity shall include all manifolded tanks. All locations granted a request from the Contractor for “automatic replenishment” per section 8.3, shall be exempt from minimum order requirements, including other factors out of the control of Authorized Users (e.g., short filling, mechanical issues, inadequate fuel supply). In no case shall a surcharge be applied to a location while on “automatic replenishment.”

<b>Tank Capacity (in gallons)</b>	<b>Amount Delivered</b>	<b>Optional Surcharge</b>
275 or more	Under 150 to 75	\$50.00
	Under 75	\$75.00
<b>Tank Capacity (in gallons)</b>	<b>Amount Delivered</b>	<b>Optional Surcharge</b>
Less than 275	Under 150 to 75	\$25.00
	Under 75	\$50.00

Upon written direction by OGS, an Authorized User shall have one (1) delivery per tank per contract year for tank top-off testing that is exempt from any minimum order surcharge.

If delivering to same property, but to separate tanks, minimum delivery charge will only be applicable if total delivery to property is less than minimum order size.

### 6.11 Invoicing and Payment

Invoicing and payment shall be made in accordance with the terms set forth in Appendix B, *Contract Invoicing*. The Contractor is required to provide the Authorized User with one invoice for each Purchase Order at the time of order. The invoice must include detailed line item information to allow Authorized Users to verify that pricing at point of receipt matches the Contract price on the original date of order. At a minimum, the following fields must be included on each invoice:

- Contractor Name
- Contractor Billing Address
- Contractor Federal ID Number
- NYS Vendor ID Number
- Account Number
- NYS Contract Number
- Name of Authorized User indicated on the Purchase Order
- NYS Agency Unit ID (if applicable)
- Customer Delivery Location ID number as shown on Delivery Schedule (if applicable)
- Authorized User's Purchase Order Number
- Order Date
- Invoice Date
- Invoice Number
- Invoice Amount
- Product Descriptions
- Unit Price
- Quantity
- Unit of Measure
- Dates of Service/Delivery

Cost centers or branch offices within an Authorized User may require separate invoicing as specified by each Authorized User. The Contractor's billing system shall be flexible enough to meet the needs of varying ordering systems in use by different Authorized Users. Visit the following link for further guidance for vendors on invoicing: <https://bsc.ogs.ny.gov/content/vendor-information> .

### 6.12 Product Delivery

Delivery of all Contract Products shall be made in accordance with Appendix B, *Product Delivery and Shipping/Receipt of Product*. Delivery shall be made as specified and in accordance with instructions furnished with each order, unless otherwise directed in writing. Contractor must be prepared, at all times, to make prompt delivery. Every bid states what the maximum time a delivery will take from the moment of order, but the time shall never exceed 24 hours. In State declared emergencies, fuel must be delivered within eight (8) to twelve (12) hours of notification. Should there be an after-hours or weekend emergency or should agency run out of fuel oil at any time creating an emergency situation, the Contractor shall be required to provide product within four (4) hours of a telephone call from the agency.

Delivery shall be made in accordance with instructions on the Purchase Order from each Authorized User. If there is a discrepancy between the Purchase Order and what is listed on the Contract, it is the Contractor's obligation to seek clarification from the ordering Authorized User and, if applicable, from OGS, Procurement Services. On occasion, to prevent fuel run outs during storms or other emergency situations, the Contractor must allow Authorized Users the flexibility to manually schedule deliveries to top-off tank inventories. Normal deliveries are considered to be Monday thru Friday (8:00 am - 5:00 pm). Saturday/Sunday deliveries are not standard and are to be made on an emergency basis (and not a regular basis) ONLY, or if a run out is

imminent before the next normal delivery day. Delivery of heating oil should give first priority to “human needs customers”.

Failure to make prompt delivery may result in an Authorized User’s submission of a Contract Performance Report to OGS. Per Appendix B, Section 48(a), (d) and (e), the Authorized User shall have the right to purchase sufficient heating fuel on the open market to fill such tank or tanks and to charge any increase in price paid over the current contract price to the account of the Contractor.

Authorized Users shall be responsible for insuring that tanks are accessible to the Contractor. Authorized Users should also make certain that receiving personnel are available at time of delivery. Authorized User is responsible to ensure sufficient tank capacity is available for the minimum required delivery for a Motor Transport order (i.e. 5,500 gallons). Failure of the Authorized User to make appropriate delivery arrangements, including tank capacity for MT, which prevents the delivery of product upon Contractor’s arrival at delivery site, may result in a charge to the Authorized User for the Contractor’s transportation costs. The Contractor must notify the Authorized User of the attempted delivery prior to charging for any future delivery attempts for the same circumstance. The Contractor must state the amount that would be charged for the direct cost of this subsequent delivery attempt, and provide supporting documentation that substantiates the direct cost for the failed delivery at the fault of the Authorized User. The Authorized User must agree in writing to any such costs for subsequent delivery attempts, prior to the Contractor making the subsequent delivery. At no time should a charge be applied to an Authorized User for an attempted delivery that failed at no fault of their own.

**6.13 Method of Delivery**

**TW:** Delivery by tank wagon into storage tanks of less than 5,500 gallons at one time into one tank.

**MT:** Minimum delivery of 5,500 gallons to one or more tanks from one fixed location of the delivery vehicle. All such deliveries shall first be recorded directly into the transporting vehicle.

No. 2 fuel oil tank wagon deliveries shall be delivered by tank wagons used exclusively for transporting No. 2 including bio-fuels.

**6.14 Automatic Replenishment**

Requests for automatic replenishment are preferred in WRITING from an Authorized User, but may be required by the Contractor. A Contractor shall provide written notification back to any Authorized User’s request for automatic replenishment on any tank with a total gross capacity equal to or greater than 375 gallons. Automatic replenishment for tank capacities less than 375 gallons will be at the Contractor’s option and may be subject to a minimum order charge (see clause 6.14). Determination for total gross tank capacity shall include all manifolded tanks. The Contractor shall maintain a record of the estimated consumption of fuel oil, Kerosene, or No. 2, including bio-fuels, as the case may be using the “degree day” or equivalent method, and shall replenish the Authorized User’s tank or tanks without further notice from the Authorized User, whenever necessary to insure an adequate supply at all times.

If the Contractor, after having accepted the request from the Authorized User, permits the level of the fuel to fall below the percentages of the total capacity of the Authorized User’s tank or tanks indicated in the following table, and does not meet the requirement to deliver on an emergency basis within four (4) hours, the Authorized User shall have the right to purchase sufficient fuel on the open market to fill such tank or tanks and to charge any increase in price paid over the current contract price to the account of the Contractor. The Contractor shall permit the other vendor to supply fuel oil into Contractor-owned tank(s), and shall not hold the Authorized User or the other supplying source liable in any way for said delivery.

MINIMUM LEVEL	TOTAL - TANK CAPACITY/GALS
10%	Under 5,500

15%	5,500 and over
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**6.15 Delivery Schedules**

The delivery schedules, based on Authorized Users’ requirements submitted to Procurement Services by Requirement Letter RL204, are available as a guide to indicate proposed delivery points and estimated annual quantities. Bidders are advised that these delivery schedules may be revised up to the date of the Bid opening to accommodate the addition of delivery points and quantities. Bidders should therefore make note of the revisions. This information is available to clarify delivery conditions, where possible. Any specific questions regarding the site conditions should be directed to the end-user via any communication available, as shown on the Delivery Schedule. The Delivery Schedules are attachments in this Solicitation, and any updates, (if any) are available upon direct request to OGS Procurement Services via the e-mail list under the designated contact on the front page of this solicitation.

Contractors shall be obligated to deliver under the resulting contract to any State agency which places a purchase order under said contract, whether or not such delivery location is identified in the delivery schedules. Any political subdivision or other non-State entity which has not filed a requirement with OGS as of the date of the Bid, shall be eligible to receive deliveries and/or be added to the Delivery Schedule at Contractor's option. This being done upon placement of a valid purchase order (or other ordering mechanism between the contractor and the ordering entity) to the Contractor's address as indicated in the award. Contractors must notify OGS of any new business created from authorized users request for delivery so that OGS Procurement Services can make adjustments to the delivery schedules to capture these new accounts. All cases shall require Contractors to notify both contract user and OGS of any locations not identified on the Delivery Schedule within 30 days after the first delivery. See the “New Accounts” clause of this solicitation.

At any time during the contract, Contractors may be advised in writing by OGS regarding political subdivisions or other Non-State entities which have filed on a timely basis but do not appear, through no fault of their own, on the delivery schedule.

Filed requirements and delivery schedules may be updated by OGS for any mutually agreed upon extension.

NOTE: On occasion entities may appear on the wrong delivery schedule as entities self-report. For example, a non- State entity may appear on the Agency schedule on occasion or vice versa. OGS does review and seek clarification of information on the delivery schedules but does not catch all errors.

Please note that number 2 NYC B2 and NYC B5 fuel type volumes have been combined on the Price Pages with number 2 MT or TW as applicable because the pricing methodology is the same. The Delivery Schedules have not been revised to reflect this. However, the Bid Pricing Page – Attachment 1 has been revised.

**6.16 Product Returns and Exchanges**

In addition to the provisions of Appendix B, *Title and Risk of Loss*, *Product Substitution*, and *Rejected Product*, Products returned or exchanged due to quality problems, duplicated shipments, outdated Product, incorrect Product shipped, Contractor errors otherwise not specified, or Products returned or exchanged due to Authorized User errors, shall be replaced with specified Products or the Authorized User shall be credited or refunded for the full purchase price.

Products shall be replaced within guaranteed delivery timeframes (regular or emergency or applicable) with written notification to the Contractor of the Authorized User’s intent to return or exchange the Product. Contractor can charge only a restocking fee for Product returned or exchanged due to Authorized User error that is determined not to be suitable for resale; the restocking fee cannot exceed the net price of the returned or exchanged Product.



Any credit or refund shall be applied against the next bill/invoice submitted by the Contractor to the Authorized User. If no credit or refund, or only a partial credit or refund, is made in such fashion, the Contractor shall pay to the Authorized User the amount of such credit or refund or portion thereof still outstanding, within 30 calendar days of demand.

**6.17 Fuels #2 B2, #2 B5, #4 B2, #6 B2, # 4(.5%) AND #6 (.5%)**

No. 4 (.15%) & 6 (.3%) B2 Revisions (increases or decreases) to the original contract price shall be based on prices posted in the OPIS Oil Price Daily NY Barge Reseller 2% Bio-blend every Thursday.

The B2 biodiesel pricing shall be based on 98% of the OPIS Oil Price Daily No. 2 Oil plus 2% of the Soybean Oil price based on the posted price of Soybean Oil per pound as shown in The Wall Street Journal's "Cash Prices - Fats and Oils" for each Thursday's published Price.

The B5 biodiesel pricing shall be based on 95% of the OPIS Oil Price Daily No. 2 Oil plus 5% of the Soybean Oil price based on the posted price of Soybean Oil per pound as shown in The Wall Street Journal's "Cash Prices - Fats and Oils" for each Thursday's published Price.

No. 4 (.5%) and No. 6 (.5%) shall be based Boston published location pricing of the OPIS Oil Price Daily every Thursday.

The Wall Street Journal published price on November 2, 2017 for Soybean Oil is \$.3353/lb. Using this price and the multiplier of 7.6465 to convert lbs. to gallons creates a price of \$2.5638/gal for Soybean Oil.

Follow these steps to compute No. 2B2 & 2B5 price change using Albany Posting Location:

**EXAMPLE**

- Convert Soybean Oil price from lbs. to gallons using the multiplier of 7.6465 (Wall Street Journal's Wednesday's settlement price)
- Calculate 2% / 5% of converted weekly Soybean Oil price per gallon
- Calculate 98% / 95% of the No. 2 fuel oil average posted price specific to fuel type (OPIS Oil Price Daily Thursday's posting)
- Add Soybean Oil price to Fuel Oil price
- Add/Subtract total from base price (see Section 7.21 of the Solicitation) Based on a + or – figure
- Add this adjustment to your initial bid price each week
- These prices become effective on Friday of each week for the entire contract

**6.18 Unanticipated Excessive Purchase**

The State reserves the right to negotiate lower pricing, or to advertise for Bids, for any unanticipated excessive purchase.

**6.19 Contract Administration**

The Bidder shall provide a sufficient number of Customer Service employees who are knowledgeable and responsive to Authorized User needs and who can effectively service the Contract. Bidder shall also provide an Emergency Contact in the event of an emergency occurring outside Business Day.

Bidder shall provide a dedicated Contract Administrator to support the updating and management of the Contract on a timely basis. Information regarding the Customer Service, Emergency Contact, and Contract Administrator shall be set forth in Attachment 5 – *Bidder Information Questionnaire*. Contractor must notify OGS within five Business Days if it's Contract Administrator, Emergency Contact, or Customer Service

employees change, and provide an interim contact person until the position is filled. Changes shall be submitted electronically via e-mail to the OGS Contract Management Specialist.

### **6.20 NYS Financial System (SFS)**

New York State is currently operating on an Enterprise Resource Planning (ERP) system, Oracle PeopleSoft software, referred to as the Statewide Financial System (SFS). SFS is currently on PeopleSoft Financials version 9.2. SFS supports requisition-to-payment processing and financial management functions.

The State is also implementing an eProcurement application that supports the requisitioning process for State Agencies to procure Products in SFS. This application provides catalog capabilities. Contractors with Centralized Contracts have the ability to provide a “hosted” or “punch-out” catalog that integrates with SFS and is available to Authorized Users via a centralized eMarketplace website. Additional information may be found at: <https://nyspro.ogs.ny.gov/content/nys-emarketplace-1>

There are no fees required for a Contractor’s participation in the catalog site development or management. Upon completion and activation of an on-line catalog, State Agencies will process their orders through the SFS functionality and other Authorized Users can access the catalog site to fulfill orders directly.

The State is also implementing the PeopleSoft Inventory module in the near future to track inventory items within the item master table. Further information regarding business processes, interfaces, and file layouts may be found at: [www.sfs.ny.gov](http://www.sfs.ny.gov) and <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

### **6.21 Insurance**

The Contractor shall maintain in force at all times during the term of the Contract, policies of insurance pursuant to the requirements outlined in Attachment 4 – *Insurance Requirements*.

### **6.22 Report of Contract Usage**

Contractor shall submit Attachment 8 – *Report of Contract Usage* including total sales to Authorized Users of this Contract by Contractor, and all authorized resellers, dealers and distributors, if any, semi-annually (twice per year – due January 15<sup>th</sup> for sales July 1<sup>st</sup> through December and due July 15<sup>th</sup> for sales January 1<sup>st</sup> through June 30<sup>th</sup>). 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 included in the *semi-annual* report.

Contractors shall specify if any authorized resellers, dealers or distributors are NYS Certified Minority- and/or Women-Owned Business Enterprises (MWBs), small business enterprises (SBEs), or Service-Disabled Veteran-Owned Businesses (SDVOBs).

The report is to be submitted electronically via e-mail in Microsoft Excel to OGS Procurement Services, to the attention of the individual listed on the front page of the Contract Award Notification and shall reference the Contract Group Number, Award Number, Contract Number, Sales Period, and Contractor's name.

The report in Attachment 8 – *Report of Contract Usage* contains the minimum information required. Additional related sales information, such as detailed user purchases may be required by OGS and must be supplied upon request. Failure to submit reports on a timely basis may result in Contract cancellation and designation of Contractor as non-responsible.

### **6.23 Contractor Requirements and Procedures for Business Participation Opportunities for NYS Certified M/WBE and EEO for Minority Group Members and Women**

#### **I. Policy Statement**

The New York State Office of General Services (“OGS”), 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 Disparity Study found evidence of statistically significant disparities between the level of participation of minority- and women-owned business enterprises in State procurement contracting versus the number of minority- and women-owned business enterprises that were ready, willing and able to participate in State procurements. As a result of these findings, the Disparity Study made recommendations concerning the implementation and operation of the statewide certified minority- and women-owned business enterprises program. The recommendations from the Disparity Study culminated in the enactment and the implementation of New York State Executive Law Article 15-A, which requires, among other things, that OGS establish goals for maximum feasible participation of New York State certified minority- and women-owned business enterprises (“MWBE”) and the employment of minority groups members and women in the performance of New York State contracts.

**II. General Provisions**

- A. OGS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 (“MWBE Regulations”) for all State contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The Contractor agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to OGS, to fully comply and cooperate with OGS in the implementation of New York State Executive Law Article 15-A. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for New York State Certified minority- and women-owned business enterprises (“MWBEs”). Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) or other applicable federal, State or local laws.
- C. The Contractor further agrees to be bound by the provisions of Article 15-A and the MWBE Regulations. If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.
- D. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility, breach of contract, withholding of funds, liquidated damages pursuant to clause IX of this section and/or enforcement proceedings as allowed by the Contract.

**III. Equal Employment Opportunity (EEO)**

- A. Contractor shall comply with the provisions of Article 15-A set forth below. These provisions apply to all Contractors, and any subcontractors, awarded a subcontract over \$25,000, for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials, or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting State agency (the “Work”) except where the Work is for the beneficial use of the Contractor.

1. Contractor and subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation. This requirement does not apply to: (i) the performance of work or the provision of services or any other activity that is unrelated, separate or distinct from the Contract; or (ii) employment outside New York State.
2. By entering into this Contract, Contractor certifies that the text set forth in clause 12 of Appendix A, attached hereto and made a part hereof, is Contractor's equal employment opportunity policy.

**B. Form EEO 100 - Staffing Plan.**

To ensure compliance with this section, the Contractor agrees to submit or has submitted with the Bid a staffing plan on Form EEO 100 to OGS to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and federal occupational categories.

**C. Form EEO 101 - Workforce Utilization Reporting Form (Commodities and Services) ("Form EEO-101-Commodities and Services")**

1. The Contractor shall submit, and shall require each of its subcontractors to submit, a Form EEO-101-Commodities and Services to OGS to report the actual workforce utilized in the performance of the Contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The Form EEO-101-Commodities and Services must be submitted electronically to OGS at [EEO\\_CentCon@ogs.ny.gov](mailto:EEO_CentCon@ogs.ny.gov) on a quarterly basis during the term of the Contract by the 10th day of April, July, October, and January.
2. Separate forms shall be completed by Contractor and any subcontractor.
3. In limited instances, the Contractor or subcontractor may not be able to separate out the workforce utilized in the performance of the Contract from its total workforce. When a separation can be made, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided relates to the actual workforce utilized on the Contract. When the workforce to be utilized on the Contract cannot be separated out from the Contractor's or subcontractor's total workforce, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided is the Contractor's or subcontractor's total workforce during the subject time frame, not limited to work specifically performed under the Contract.

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

**IV. Contract Goals**

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

- A. OGS hereby establishes an overall goal of 20% for MWBE participation, 10% for Minority-Owned Business Enterprises (“MBE”) participation and 10% for Women-Owned Business Enterprises (“WBE”) participation (based on the current availability of qualified MBEs and WBEs). The total Contract goal can be obtained by utilizing any combination of MBE and /or WBE participation for subcontracting and supplies acquired under the Contract.

The following table outlines the specific goals for each region/county:

<b>REGION/COUNTY</b>	<b>OVERALL GOAL</b>	<b>MBE</b>	<b>WBE</b>
<b><u>Finger Lakes Region:</u></b>  Monroe, Niagara, Orleans, Wayne, Erie, Genesee, Livingston, Ontario, Wyoming	<b>10%</b>	<b>0%</b>	<b>10%</b>
<b><u>Mohawk Valley Region:</u></b>  Schoharie	<b>10%</b>	<b>0%</b>	<b>10%</b>
<b><u>Mid-Hudson Region:</u></b>  Sullivan, Ulster, Westchester, Orange, Rockland, Putnam	<b>20%</b>	<b>10%</b>	<b>10%</b>
<b><u>NYC Metro Region:</u></b>  Queens, Richmond, Kings, New York, Bronx	<b>20%</b>	<b>10%</b>	<b>10%</b>
<b><u>Long Island Region:</u></b>  Nassau, Suffolk	<b>20%</b>	<b>10%</b>	<b>10%</b>

- B. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the Contract goals established in clause IV-A hereof, Contractor should reference the directory of New York State Certified MWBEs found at the following internet address: <https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528>. The MWBE Regulations are located at 5 NYCRR § 140 – 145. Questions regarding compliance with MWBE participation goals should be directed to the Designated Contacts within the OGS Office of Minority- and Women Owned Businesses and Community Relations. Additionally, following Contract execution, Contractor is encouraged to contact the Division of Minority and Women’s Business Development ((518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

- C. Contractor must document “good faith efforts” to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of the Contract (see clause VII below).

V. MWBE Utilization Plan

- A. In accordance with 5 NYCRR § 142.4, Bidders are required to submit a completed Utilization Plan on Form MWBE 100 with their bid.
- B. The Utilization Plan shall list the MWBEs the Bidder intends to use to perform the Contract, a description of the Contract scope of work the Bidder intends the MWBE to perform to meet the goals on the Contract, the estimated or, if known, actual dollar amounts to be paid to a MWBE, and

performance dates of each component of the Contract that the Bidder intends to be performed by a MWBE. By signing the Utilization Plan, the Bidder acknowledges that making false representations or including information evidencing a lack of good faith as part of, or in conjunction with, the submission of a Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of a contract for cause, loss of eligibility to submit future bids, and/or withholding of payments. Any modifications or changes to the agreed participation by NYS Certified MWBEs after the Contract award and during the term of the Contract must be reported on a revised MWBE Utilization Plan and submitted to OGS.

- C. OGS will review the submitted MWBE Utilization Plan and advise the Bidder of OGS acceptance or issue a notice of deficiency within twenty (20) days of receipt.
- D. If a notice of deficiency is issued; Bidder agrees that it shall respond to the notice of deficiency, within seven (7) business days of receipt, by submitting to OGS a written remedy in response to the notice of deficiency. If the written remedy that is submitted is not timely or is found by OGS to be inadequate, OGS shall notify the Bidder and direct the Bidder to submit, within five (5) business days of notification by OGS, a request for a partial or total waiver of MWBE participation goals on Form BDC 333. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid or proposal.
- E. OGS may disqualify a Bidder's bid/proposal as being non-responsive under the following circumstances:
  - (a) If a Bidder fails to submit a MWBE Utilization Plan;
  - (b) If a Bidder fails to submit a written remedy to a notice of deficiency;
  - (c) If a Bidder fails to submit a request for waiver; or
  - (d) If OGS determines that the Bidder has failed to document good faith efforts.
- F. If awarded a Contract, Contractor certifies that it will follow the submitted MWBE Utilization Plan for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in clause IV-A of this Section.
- G. Bidder/Contractor further agrees that a failure to submit and/or use such completed MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, OGS shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsiveness.

VI. Request for Waiver

- A. Prior to submission of a request for a partial or total waiver, Bidder/Contractor shall speak to the Designated Contacts of the OGS Office of Minority- and Women-Owned Businesses and Community Relations for guidance.
- B. In accordance with 5 NYCRR § 142.7, a Bidder/Contractor who is able to document good faith efforts to meet the goal requirements, as set forth in clause VII below, may submit a request for a partial or total waiver on Form BDC 333, accompanied by supporting documentation. A Bidder may submit the request for waiver at the same time it submits its MWBE Utilization Plan. If a request for waiver is submitted with the MWBE Utilization Plan and is not accepted by OGS at that time, the provisions of clauses V(C), (D) & (E) will apply. If the documentation included with the Bidder's/Contractor's waiver request is complete, OGS shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.
- C. Contractor shall attempt to utilize, in good faith, any MBE or WBE identified within its MWBE Utilization Plan, during the performance of the Contract. Requests for a partial or total waiver of

established goal requirements made subsequent to Contract award may be made at any time during the term of the Contract to OGS, but must be made no later than prior to the submission of a request for final payment on the Contract.

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

**VII. Required Good Faith Efforts**

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

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

**VIII. Monthly MWBE Contractor Compliance Report**

- A. In accordance with 5 NYCRR § 142.10, Contractor is required to report Monthly MWBE Contractor Compliance to OGS during the term of the Contract for the preceding month's activity, documenting progress made towards achievement of the Contract MWBE goals. OGS requests that all Contractors use the New York State Contract System ("NYSCS") to report subcontractor and supplier payments made by Contractor to MWBEs performing work under the Contract. The NYSCS may be accessed at <https://ny.newnycontracts.com/>. This is a New York State-based system that all State agencies and authorities will be implementing to ensure uniform contract compliance reporting throughout New York State.
- B. When a Contractor receives a payment from a State agency or Authorized User following a purchase from an OGS Procurement Services contract, it is the Contractor's responsibility to pay its subcontractors and suppliers in a timely manner. On or after the first day of each month, the Contractor will receive an email or fax notification ("audit notice") indicating that a representative of

its company needs to log-in to the NYSCS to report the company's MWBE subcontractor and supplier payments for the preceding month. The Contractor must also report when no payments have been made to a subcontractor or supplier in a particular month with entry of a zero dollar value in the NYSCS. Once subcontractor and supplier payments have been entered into the NYSCS, the subcontractor(s) and supplier(s) will receive an email or fax notification advising them to log into the NYSCS to confirm that they actually received the reported payments from the Contractor. It is the Contractor's responsibility to educate its MWBE subcontractors and suppliers about the NYSCS and the need to confirm payments made to them in the NYSCS.

- C. To assist in the use of the NYSCS, OGS recommends that all Contractors and MWBE subcontractors and suppliers sign up for the following two webinar trainings offered through the NYSCS: "Introduction to the System for Vendors" and "Contract Compliance Reporting - Vendor Training" to become familiar with the NYSCS. To view the training schedule and to register visit: <https://ny.newnycontracts.com/events.asp>
- D. As soon as possible after the Contract is approved, Contractor should visit <https://ny.newnycontracts.com> and click on "Account Lookup" to identify the Contractor's account by company name. Contact information should be reviewed and updated if necessary by choosing "Change Info." It is important that the staff member who is responsible for reporting payment information for the Contractor be listed as a user in the NYSCS. Users who are not already listed may be added through "Request New User." When identifying the person responsible, please add "- MWBE Contact" after his or her last name (i.e., John Doe – MWBE Contact) to ensure that the correct person receives audit notices from the NYSCS. NYSCS Technical Support should be contacted for any technical support questions by clicking on the links for "Contact Us & Support" then "Technical Support" on the NYSCS website.
- E. If Contractor is unable to report MWBE Contractor Compliance via the NYSCS, Contractor must submit a Monthly MWBE Contractor Compliance Report on Form MWBE 102 to OGS, by the 10th day of each month during the term of the Contract, for the preceding month's activity to: OGS MWBE Office, 29<sup>th</sup> floor Corning Tower, Empire State Plaza, Albany, NY 12242. Phone: 518-486-9284; Fax: 518-486-9285.
- F. It is the Contractor's responsibility to report subcontractor and supplier payments. Failure to respond to payment audits in a timely fashion through the NYSCS, or by paper to OGS, may jeopardize future payments pursuant to the MWBE liquidated damages clause in clause IX below.

**IX. Breach of Contract and Liquidated Damages**

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



determination unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the Division of Minority and Women’s Business Development pursuant to Subdivision 8 of Section 313 of the Executive Law, in which event the liquidated damages shall be payable if the Director renders a decision in favor of the OGS.

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

#### **6.24 Participation Opportunities for NYS Certified Service-Disabled Veteran Owned Businesses**

Article 17-B of the New York State Executive Law provides for more meaningful participation in public procurement by certified Service-Disabled Veteran-Owned Businesses (“SDVOBs”), thereby further integrating such businesses into New York State’s economy. OGS recognizes the need to promote the employment of service-disabled veterans and to ensure that certified service-disabled veteran-owned businesses have opportunities for maximum feasible participation in the performance of OGS contracts.

In recognition of the service and sacrifices made by service-disabled veterans and in recognition of their economic activity in doing business in New York State, Bidders/Contractors are strongly encouraged and expected to consider SDVOBs in the fulfillment of the requirements of the Contract. Such participation may be as subcontractors or suppliers, as protégés, or in other partnering or supporting roles.

For purposes of this procurement, OGS conducted a comprehensive search and determined that the Contract does not offer sufficient opportunities to set specific goals for participation by SDVOBs as subcontractors, service providers, and suppliers to Contractor. Nevertheless, Bidder/Contractor is encouraged to make good faith efforts to promote and assist in the participation of SDVOBs on the Contract for the provision of services and materials. The directory of New York State Certified SDVOBs can be viewed at: <https://www.ogs.ny.gov/veterans/default.asp>

Bidder/Contractor is encouraged to contact the Division of Service-Disabled Veteran’s Business Development at 518-474-2015 to discuss methods of maximizing participation by SDVOBs on the Contract.

ALL FORMS ARE AVAILABLE AT: <https://ogs.ny.gov/Veterans/default.asp>

#### **6.25 Use of Recycled or Remanufactured Materials**

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

#### **6.26 Surplus/Take-Back/Recycling**

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

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

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

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

**6.26 Consumer Products Containing Mercury**

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

**6.28 Guarantee**

The Contractor guarantees to furnish adequate protection from damage to Authorized User’s buildings, grounds and/or equipment occurring on account of or in connection with, or occasioned by, or resulting from the furnishing and delivering of fuel under the resultant Contract and shall be liable for any damages for which he or his employees are responsible.

This liability includes but is not limited to oil spills occurring during delivery. The Contractor shall provide constant surveillance during delivery by having a person in attendance at all times at the point of transfer. Oil spills of any size shall be immediately reported to the agency Business Office to effect contact with a representative of the Department of Environmental Conservation. More information can be viewed here: <http://www.dec.ny.gov/chemical/8428.html>

A call can be placed twenty-four hours a day with the New York State Oil Spill Hotline at 1-800-457-7362.

**6.29 Engineering Service**

Contractor must be prepared at all times to furnish engineering service when so requested and/or to investigate a complaint and report to the Authorized User and OGS on any complaint that might arise in connection with the use of Contractor’s Fuel in State equipment. This engineering service will include but not be limited to the diagnosis of fuel related engine problems in the Authorized User’s equipment utilizing the contractor’s fuel.

**6.30 Bulk Delivery and Alternate Packaging**

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

### **6.31 Diesel Emission Reduction Act**

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

The Law may be applicable to vehicles used by Contractors “on behalf of” State Agencies and public authorities and require certain reports from Contractors. All heavy duty diesel vehicles must have BART by the deadline provided in the Law. The Law also provides a list of exempted vehicles. Regulations set forth in 6 NYCRR Parts 248 and 249 provide further guidance. The Bidder hereby certifies and warrants that all heavy duty vehicles, as defined in the Law, to be used under this Contract, will comply with the specifications and provisions of the Law, and 6 NYCRR Parts 248 and 249.

### **6.32 NYS Vendor Responsibility**

OGS conducts a review of prospective Contractors (“Bidders”) to provide reasonable assurances that the Bidder is responsive and responsible. A For-Profit Business Entity Questionnaire (hereinafter “Questionnaire”) is used for non-construction Contracts and is designed to provide information to assess a Bidder’s responsibility to conduct business in New York based upon financial and organizational capacity, legal authority, business integrity, and past performance history. By submitting a Bid, Bidder agrees to fully and accurately complete the Questionnaire. The Bidder acknowledges that the State’s execution of the Contract will be contingent upon the State’s determination that the Bidder is responsible, and that the State will be relying upon the Bidder’s responses to the Questionnaire, in addition to all other information the State may obtain from other sources, when making its responsibility determination.

OGS recommends each Bidder file the required Questionnaire online via the New York State VendRep System. To enroll in and use the VendRep System, please refer to the VendRep System Instructions and User Support for Vendors available at the Office of the State Comptroller’s (OSC) website at <http://www.osc.state.ny.us/vendrep/index.htm> or to enroll, go directly to the VendRep System online at <https://portal.osc.state.ny.us>.

Vendors must provide their New York State Vendor Identification Number when enrolling. For information on how to request assignment of a Vendor ID, see the *NYS Vendor File Registration* section. OSC provides direct support for the VendRep System through user assistance, documents, online help, and a help desk. The OSC Help Desk contact information is located at <http://www.osc.state.ny.us/portal/contactbuss.htm>. Bidders opting to complete and submit the paper questionnaire can access this form and associated definitions via the OSC website at [http://www.osc.state.ny.us/vendrep/forms\\_vendor.htm](http://www.osc.state.ny.us/vendrep/forms_vendor.htm).

In order to assist the State in determining the responsibility of the Bidder prior to Contract award, the Bidder must complete and certify (or recertify) the Questionnaire no more than six (6) months prior to the Bid due date. A Bidder’s Questionnaire cannot be viewed by OGS until the Bidder has certified the Questionnaire. It is recommended that all Bidders become familiar with all of the requirements of the Questionnaire in advance of the Bid opening to provide sufficient time to complete the Questionnaire.

The Bidder agrees that if it is awarded a Contract the following shall apply:

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

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

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

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

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

### **6.33 NYS Tax Law Section 5-a**

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

A Contractor is required to file the completed and notarized Form ST-220-CA with the Bid to OGS certifying that the Contractor filed the ST-220-TD with DTF. Only the Form ST-220-CA is required to be filed with OGS. The ST-220-CA can be found at [http://www.tax.ny.gov/pdf/current\\_forms/st/st220ca\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220ca_fill_in.pdf) . The ST-220-TD can be found at [http://www.tax.ny.gov/pdf/current\\_forms/st/st220td\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220td_fill_in.pdf) . Contractor should complete and return the certification forms within five (5) business days of request (if the forms are not completed and returned with Bid submission). Failure to make either of these filings may render a Contractor non-responsive and non-responsible. Contractor shall take the necessary steps to provide properly certified forms within a timely manner to ensure compliance with the law. The ST-220-TD only needs to be filed once with DTF, unless the information changes for the Contractor, its affiliates, or its Subcontractors.

Vendors may call DTF at 518-485-2889 with questions or visit the DTF web site at <http://www.tax.ny.gov/> for additional information.

### **6.34 Non-State Agencies Participation in Centralized Contracts**

New York State political subdivisions and others authorized by New York State law may participate in Centralized Contracts. These include, but are not limited to, local governments, public authorities, public school and fire districts, public and nonprofit libraries, and certain other nonpublic/nonprofit organizations. See Appendix B, *Participation in Centralized Contracts*. For Purchase Orders issued by the Port Authority of New York and New Jersey (or any other authorized entity that may have delivery locations adjacent to New York State), the terms of the *Price* clause shall be modified to include delivery to locations adjacent to New York State.

Upon request, all eligible non-State agencies must furnish Contractors with the proper tax exemption certificates and documentation certifying eligibility to use State contracts. A list of categories of eligible entities is available on the OGS web site (<https://www.ogs.ny.gov/purchase/snt/othersuse.asp>). Questions regarding an organization's eligibility to purchase from New York State Contracts may also be directed to NYS Procurement Services Customer Services at 518-474-6717.

### **6.35 Extension of Use**

Any Contract resulting from this Solicitation may be extended to additional States or governmental jurisdictions upon mutual written agreement between New York State and the Contractor. Political subdivisions and other authorized entities within each participating state or governmental jurisdiction may also participate in any resultant Contract if such state normally allows participation by such entities. New York State reserves the right to negotiate additional discounts based on any increased volume generated by such extensions.

### **6.36 New Accounts**

Contractor may ask State Agencies and other Authorized Users to provide information in order to facilitate the opening of a customer account, including documentation of eligibility to use New York State Contracts, agency code, name, address, and contact person. State Agencies shall not be required to provide credit references.

Contractors must notify OGS Procurement Services of any new business created from Authorized Users' requests for delivery, so that OGS Procurement Services can make adjustments to the delivery schedules to capture these new accounts. All cases shall require Contractors to notify both contract user and OGS Procurement Services of any locations not originally on the Delivery Schedules, within thirty (30) days after the first delivery is made.

### **6.37 Centralized Contract Modifications**

A. OGS, an Authorized User, or the Contractor may suggest modifications to the Centralized Contract or its Appendices. Except as specifically provided herein, modifications to the terms and conditions set forth herein may only be made with mutual written agreement of the parties. Modifications may take the form of an update or an amendment. "Updates" are changes that do not require a change to the established Centralized Contract terms and conditions. A request to add new Products at the same or better price level is an example of an update. "Amendments" are any changes that are not specifically covered by the terms and conditions of the Centralized Contract, but inclusion is found to be in the best interest of the State. A request to change a contractual term and condition is an example of an amendment.

B. Updates to the Centralized Contract and the Appendices may be made in accordance with the contractual terms and conditions to incorporate new Products, make price level revisions, delete Products, or to make such other updates to the established Centralized Contract terms and conditions, not resulting in a change to such terms and conditions, which are deemed to be in the best interest of the State.

C. OGS reserves the right to consider modifications which are not specifically covered by the terms of the Centralized Contract, but are judged to be in the best interest of the State. Such modifications are deemed amendments to the Centralized Contract and may require negotiations between Contractor and OGS before execution.

D. All modifications proposed by Contractor shall be processed in accordance with Appendix C, Contract Modification Procedure. The Contractor shall submit all requests in the form and format contained in Appendix C, Contract Modification Procedure. The form contained within Appendix C is subject to change at the sole discretion of OGS.

E. Modifications proposed by OGS or an Authorized User, including updates and amendments, shall be processed in accordance with the terms of the Centralized Contract and Appendix B, *Modification of Contract Terms*.

### **6.38 Traffic Infractions**

Neither the State nor Authorized Users will be liable for any expense incurred by the Contractor's personnel for any parking fees or as a consequence of any traffic infraction or parking violation attributable to employees of the Contractor in performance of the Contract.

## **7. FUEL SPECIFICATIONS**

### **7.1 Fill and Vent Requirements**

Agencies must ensure that fill and vent equipment adequately meet NYS Standards. Contractors have the responsibility of reporting faulty equipment to the end users and the appropriate NYS regulatory agencies.

NOTE: Bidder's delivery trucks WILL BE EQUIPPED WITH METERS, with the exception of motor transports, to accurately measure quantities delivered. Metered deliveries must be accompanied by a delivery ticket showing brand or grade and number of gallons delivered.

Supplementing Clauses 31 and 32 of Appendix B, General Specifications for Procurement Contracts, orders will call for delivery within a specified number of hours after date of order. As much time as possible will be allowed the Contractor for making deliveries; however, the Contractor shall be in a position to make bulk deliveries within twenty-four (24) hours after receipt of order.

Contractor must be prepared, at all times, to make prompt delivery as ordered. In State declared emergencies, fuel must be delivered within eight (8) to twelve (12) hours of notification. Contractors must be prepared to deliver in a timely manner, on a one-time basis per Agency tank, that amount of fuel oil necessary to fill subject tanks for the purpose of tank testing conducted by OGS at various locations providing minimum order requirements are met. (See "MINIMUM ORDER SIZE" clause).

Normal deliveries are considered to be Monday through Friday. Saturday/Sunday deliveries are to be made in accordance with Clause 32 of Appendix B – Weekend and Holiday Deliveries.

Agencies are responsible for making certain that the delivery site is made ready for proper delivery by the Contractor. Failure of the agency to make appropriate arrangements preventing delivery of product upon Contractor's arrival at delivery site may result in a charge to the agency for the Contractor's transportation costs for that particular trip. Agencies should also make certain that receiving personnel are available at time of delivery.

Agencies should also refer to CL-804 dated July 7, 2014 as they are responsible for the implementation of monitoring programs to insure compliance by supplier with these specification requirements. Circular Letters (CL) are found on the OGS website under Announcements.

## **7.2 Topping Off Tanks**

Agency requests to top-off tanks for testing purposes must be honored as described elsewhere herein. The requesting agency may be required to sign a waiver of liability and responsibility on behalf of the Contractor.

Bidder must maintain service facilities and have trained personnel qualified to service the product furnished at the using agency within 48 hours.

## **7.4 Non-Complying Product – Delivery**

Deliveries of fuel oil may be sampled at the Contractor's loading point or at the point of delivery by a representative of the purchasing Agency's personnel. The methods of sampling and testing will be as listed elsewhere herein.

When it is found that fuel oil delivered does not comply with the specification requirements, the Contractor, at its own cost and expense, may be required to remove all such sub-standard fuel oil from the purchaser's tank(s) and replace it with fuel oil meeting the specifications, if such removal is so instructed by the purchasing agency within a maximum time period of twenty-four (24 hrs.) hours.

When an inspection of the tank(s) after the removal of the sub-standard product indicates that the delivered product has rendered the tank(s) unsuitable for use, then the Contractor may be responsible for cleaning of the tank(s) so affected.

## **7.5 Non-Complying Product Delivery Deduction**

Deductions shown hereafter will be made from the invoice price, or subsequent agency invoices, for delivering fuel oil that does not comply with the detailed specifications, whether or not the fuel oil in question has been consumed by the purchasing Agency. The maximum of all combined deductions shall not exceed ten (10%) percent for an individual delivery, excluding gallon adjustments for temperature and/or water & sediment in excess of one percent.

## **7.6 Non-Complying Product – Flash Point – Price Deduction**

When the delivered fuel oil's flash point is found to be lower than the minimum requirement, but not greater than six (6) degrees Fahrenheit lower than that minimum; a deduction from the contracted price shall be taken at the rate of one-half (0.5%) percent for every two (2) degrees Fahrenheit below the specified limit.

Additionally, when the delivered fuel oil's flash point is found to be lower than the minimum requirement by greater than six (6) degrees Fahrenheit; a deduction from the contracted price shall be taken at the rate of one (1.0%) percent for every two (2) degrees Fahrenheit below the specified limit which is greater than 6 degrees Fahrenheit lower. (i.e., 10 degrees below specification limit: the deduction for the 1st 6 degrees Fahrenheit is 1.5%; the deduction for the next 4 degrees Fahrenheit is 2%; and the total deduction is 3.5% for being ten degrees Fahrenheit below the limit.)

### **7.7 Non-Complying Product – Water & Sediment Content – Price Deduction**

When the delivered fuel oil's water and sediment content is found to be greater than three hundredths (0.03%) of a percent for Kerosene, No. 1 and No. 2, a deduction from the contracted price shall be taken at the rate of one (1%) percent for every two hundredths (0.02%) of a percent above the specified limit. (i.e., 0.02% above limit equals a 1% deduction, 0.04% above limit equals a 2% deduction, and 0.06% above equals a 3% deduction).

No. 4 fuel oil shall have an excess water and sediment content adjustment at the rate of one-tenth percent (0.1%) of invoice for every one-tenth (0.1%) in excess of five-tenths (0.5%) up to and including one percent (1.0%) and at the rate of two-tenths percent (0.2%) of invoice for every one-tenth percent (0.1%) in excess of one percent (1.0%).

No. 6 fuel oil shall have an adjustment in quantity in lieu of the aforementioned price percentage adjustment. The No. 6 fuel oil deduction in quantity shall be made for all water and sediment in excess of one (1.0%) per cent volume, i.e., 30000 gallons delivered with two (2% or 0.02) percent combined water & sediment by volume:  $30,000 \times (0.02 - 0.01)$  equals a three hundred (300) gallon deduction. Payment should be adjusted for a 29,700-gallon delivery.

### **7.8 Non-Complying Product – Viscosity – Price Deduction**

When the delivered fuel oil's viscosity is found to be greater than two (2) seconds above the specified maximum requirements, a deduction from the contracted price shall be taken at the rate of one tenth (.1%) percent for every two seconds above the specified limit. (i.e., 2 seconds above limit equals a .1% deduction, 4 seconds above limit equals a .2% deduction, 6 seconds above equals a .3% deduction).

### **7.9 Non-Complying Product – Sulfur Content – Price Deduction**

When the delivered fuel oil's sulfur content is found to be greater than one tenth (0.10%) of a percent above the specified maximum requirements for the respective delivery area a deduction from the contracted price shall be taken at the rate of one (1%) percent for every one tenth (0.10%) of a percent above the specified limit. (i.e., 0.10% above limit equals a 1% deduction, 0.20% above limit equals a 2% deduction, and 0.30% above equals a 3% deduction.).

### **7.10 Non-Complying Product – Ash Content – Price Deduction**

When the delivered fuel oil's ash content is found to be greater than two thousandths (0.002%) of a percent above the maximum but less than two hundredths (0.02%) of a percent above the specified maximum ash requirement, a deduction from the contracted price shall be taken at the rate of one (1.0%) percent of the total price.

When the delivered fuel oil's ash content is found to be two hundredths (0.02%) of a percent, or more, above the maximum but less than four hundredths (0.04%) of a percent above the specified maximum ash requirement, a deduction from the contracted price shall be taken at the rate of two (2.0%) percent of the total price.

When the delivered fuel oil's ash content is found to be four hundredths (0.04%) of a percent, or more, above the maximum but less than six hundredths (0.06%) of a percent above the specified maximum ash requirement, a deduction from the contracted price shall be taken at the rate of four (4.0%) percent of the total price.

When the delivered fuel oil's ash content is found to be six hundredths (0.06%) of a percent, or more, above the specified maximum, but less than eight hundredths (0.08%) of a percent above the specified maximum ash requirement, a deduction from the contracted price shall be taken at the rate of six (6.0%) percent of the total price.



When the delivered fuel oil’s ash content is found to be eight hundredths (0.08%) of a percent, or greater, above the specified maximum requirements for the ash content, a deduction based on the contracted price shall be assessed at the rate of ten (10%) percent of the total price of the product regardless of whether the fuel oil delivery is removed or not removed.

When the delivered fuel oil's ash content is found to be greater than the maximum allowed in Table I or Table II (as appropriate for the fuel grade) a deduction from the total price shall be taken as described in the following summary table.

**SUMMARY TABLE**

<b>Ash content (%) greater than</b>	<b>Ash content (%) less than</b>	<b>Deduction taken on Total Price</b>
Spec Req. +0.002%	Spec Req. +0.02%	1.0%
Spec Req. +0.02%	Spec Req. +0.04%	2.0%
Spec Req. +0.04%	Spec Req. +0.06%	4.0%
Spec Req. +0.06%	Spec Req. +0.08%	6.0%
Spec Req. +0.08%		10.0% regardless if fuel removed or not

**7.11 Non-Complying Product – btu per gallon content – price deduction**

The respective grade of fuel oil provided under State contract must meet the minimum BTU per gallon requirements for each sulfur level as described herein. If the fuel oil, which is subject to independent testing laboratory analysis is found to be non-conforming with these specifications pertaining to BTU per gallon levels, a deduction will be assessed against the contractor by adjusting the invoice as follows:

When the product delivered contains less than the permitted minimum BTU per gallon level, the invoice will be adjusted by dividing the actual BTU/gallon level delivered by the minimum BTU/gallon requirement for the type of fuel oil purchased, multiplying the quotient by the contract adjusted per gallon price at the time of delivery, and then multiplying that figure by total gallons delivered.

**EXAMPLE**

For delivery of 1.0% maximum sulfur No. 6:

Gallons delivered - 4000  
 BTU/gallon per analysis - 145,000  
 BTU/gallon per specification - 147,000

145,000 X price/gallon X 4,000 = adjusted total product  
 147,000 cost on invoice

NOTE: When more than the minimum BTU/gallon levels are delivered, there will be no adjustment of price, and delivery will be considered in conformance with this provision of the specifications relative to its BTU content.

Address inquiries relative to these Specifications to [OGS.sm.PS\\_CM\\_FleetFuelRoads@ogs.ny.gov](mailto:OGS.sm.PS_CM_FleetFuelRoads@ogs.ny.gov)

### **7.12 Winter blend requirements**

Contractors of No. 2 fuel oil, including Bio-blends, at their option, may provide a winter blend upon agency request. Invoice for winter blend will show separate pricing for No. 2, including bio-blends and kerosene as necessary. The price for No. 2, including bioblends, shall be the contract price and the price for kerosene shall be no greater than the contractor's prevailing price for kerosene (or, if applicable, contractor's awarded price for kerosene). Agencies shall obtain price quote for kerosene prior to ordering and the State reserves the right to determine if price is reasonable. If agreement on price cannot be obtained, agencies shall follow purchasing guidelines to purchase winter blend in the open market. If additives rather than Kerosene is used to provide winter protection, the contractor is allowed to charge market price for additive, and as with Kerosene, list price as a separate line item on invoice.

### **7.13 Environment reporting requirements**

Certain customers using the State fuel oil contract must provide reports regarding the emissions from their fuel oil heating plants. At the customers' request, the contractor will be required to provide written documentation for each delivery to prove that the fuel delivered is in compliance with EPA standards in effect for the type of fuel delivered to the customer under the State fuel oil contract. OGS Procurement Services has provided a fuel supplier certificate (see Attachment 8), which can be used for this purpose. Contractors can use another form of reporting (such as Bill of Lading/Delivery Ticket) providing the following information is included:

#### **FOR DISTILLATE OIL:**

- 1) Supplier's name and address
- 2) The date/deliveries covered by the certificate
- 3) The type of fuel delivered
- 4) Sulfur content of the fuel
- 5) Heating value (BTU)
- 6) A signed statement that the fuel complies with ASTM D396-06-Standard Specifications for fuel oil or latest revision thereof
- 7) Location of the oil when tested
- 8) Test method used to determine the sulfur content of the oil

### **7.14 Flash Point**

The specified minimum Flash Point for Fuel Oils provided under this contract shall be as specified in Table I and Table II, elsewhere herein, for the respective fuel oil being provided. Delivered product having a flash point below that specified in Table I or Table II, but not greater than twenty (20) degrees Fahrenheit less shall be adjusted in price as specified elsewhere herein for NON-COMPLYING PRODUCT. Delivered product having a flash point greater than twenty (20) degrees Fahrenheit below that specified shall be removed from the purchasing agency's tank and replaced with product conforming to specifications. The Flash Point shall be determined using ASTM Test Method D93 (IP #34/85), latest revision thereof.

### **7.15 Water and Sediment**

The specified maximum Water & Sediment content for Fuel Oils provided under this contract shall be as specified in Table I and Table II, elsewhere herein. Delivered product having a water & sediment content greater than the specified percent shall be adjusted in price as specified elsewhere herein for NON-COMPLYING PRODUCT. Delivered product having a water & sediment greater than the specified percent shall be removed from the purchasing agency's tank and replaced with product conforming to specifications, at purchasing agency's discretion based on excessive filter maintenance and/or poor burner performance.

The Water & Sediment content shall be determined using - ASTM Test Method D1796 (IP #75/82), latest revision thereof, or approved equivalent method; or the sum of the results of ASTM D95 (IP #74/84) plus (+) ASTM D473-07 (2012), latest revision thereof, or approved equivalent method, relative to the individual characteristics of the product being tested

**7.16 Viscosity**

The specified maximum Viscosity for Fuel Oils provided under this contract shall be as specified in Table I and Table II, elsewhere within this specification. Delivered product having a viscosity greater than that specified for the respective product shall be adjusted in price as specified elsewhere herein for NON-COMPLYING PRODUCT. Delivered product having a viscosity greater than the specified shall be removed from the purchasing agency’s tank and replaced with product conforming to specifications, at purchasing agency’s discretion based on excessive filter maintenance and/or poor burner performance. The Viscosity shall be determined using - ASTM Test Method D445-12 (IP #71-84), latest revision thereof, or approved equivalent method, and ASTM D2161-10, conversion of Kinematic Viscosity to Saybolt Universal Seconds (SUS) or to Saybolt Furol Seconds (SFS), latest revision thereof, or approved equivalent method, - relative to the individual characteristics of the product being tested.

After receiving a written request by purchasing agency, the contractor’s delivery ticket will state the fuel’s viscosity (cSt, SUS, SFS).

**7.17 Nitrogen**

After receiving a written request by the purchasing agency, the contractor’s delivery ticket will state the nitrogen content.

**7.18 Sulfur**

The specified maximum Sulfur content for Fuel Oils provided under this contract shall be as defined in Table I and II of the detailed specifications and further modified in “Summary of EPA Sulfur Content Requirements”. Delivered product having a sulfur content greater than that allowed shall be adjusted in price as specified elsewhere herein for NON-COMPLYING PRODUCT.

Delivered product having a sulfur content greater than that allowed by NYCRR, Title 6 Environmental Conservation Law, Chapter III Air Resources, Subchapter A, Subpart 225-1.2 (d) Table 2 shall be removed from the purchasing agency’s tank and replaced with product conforming to specifications. The Sulfur content shall be determined using - ASTM Test Method D129 or D4294 (IP #61/84), latest revision thereof, or approved equivalent method, relative to the individual characteristics of the product being tested.

NOTE: All No. 2 fuel oil for the purpose of this Solicitation and resulting contract shall have sulfur content no greater than fifteen parts per million, as indicated below, for the life of the contract.

**Section §19-0325 of the Environmental Conservation Law requires the following:**

**§19-0325. SULFUR REDUCTION REQUIREMENTS**

1. ON OR AFTER JULY FIRST, TWO THOUSAND TWELVE, ALL NUMBER TWO HEATING OIL SOLD FOR USE IN RESIDENTIAL, COMMERCIAL, OR INDUSTRIAL HEATING WITHIN THE STATE SHALL NOT HAVE A SULFUR CONTENT GREATER THAN FIFTEEN PARTS PER MILLION.
2. THE GOVERNOR MAY, BY ISSUING AN EXECUTIVE ORDER, TEMPORARILY SUSPEND THE APPLICABILITY OF THIS SECTION AT ANY TIME BASED ON THE GOVERNOR’S DETERMINATION, AFTER CONSULTING WITH THE NEW YORK ENERGY RESEARCH AND DEVELOPMENT AUTHORITY,

THAT MEETING THE REQUIREMENT OF SUBDIVISION ONE OF THIS SECTION IS NOT FEASIBLE DUE TO LACK OF ADEQUATE SUPPLY OF THE REQUIRED FUEL.

**7.19 ASH Content**

The specified maximum ASH content for Fuel Oils provided under this contract shall be one tenth (0.10%), or five hundredths (0.05%), of a percent, maximum by weight. These respective maximum ash contents shall be as listed for an individual product in Table I or Table II herein. Additionally, a product having excessive ash content shall be removed and/or adjusted in price as specified elsewhere herein. The Ash content shall be determined using - ASTM Test Method D482-12 (IP #4/81), latest revisions thereof or approved equivalent method, relative to the individual characteristics of the product being tested.

Delivered product having an ash content above the maximum by greater than two thousandths (0.002%) of a percent above the maximum but less than one tenth (0.10%) of a percent above the maximum shall be adjusted in price as stated elsewhere herein for NON-COMPLYING PRODUCT. Delivered product having an ash content of one tenth (0.10%) of a percent by weight, or greater, above the maximum specified shall be removed from the site upon the State’s request and the contractor shall take a deduction on price as stated elsewhere herein regardless of whether the fuel oil delivery is removed or not removed. Respective ash contents shall be listed elsewhere herein.

**7.20 BTU per Gallon Content**

The specified minimum BTU PER GALLON content for Fuel Oils provided under this contract shall be as specified in Table I, Table II and Table III, elsewhere herein. Delivered product having a BTU PER GALLON content less than the specified percent shall be adjusted in price as specified elsewhere herein for NON-COMPLYING PRODUCT; "Btu content shall be determined using ASTM D240-09, latest revision".

**GENERAL:**

Fuel Oils furnished shall conform to the physical and chemical requirements as listed under Table I, Table II, and Table III and to the Sulfur in Fuel limitations listed in the Environmental Protection Agency (EPA) requirement summary below:

**SUMMARY OF EPA SULFUR CONTENT (REQUIREMENTS)**

Sulfur in Fuel Limitation		
Maximum percent sulfur by weight - ASTM - D129-11 or D4294-10 (or legal local limit per EPA requirements when stricter)	Residual #4 & #6 and biodiesel	Distillate #1 & #2
Geographical Area of the State and biodiesel	Blends B2	Blends B2 & B5
New York City	0.30	0.0015
Nassau, Rockland, and Westchester Co.	0.37	0.0015
Suffolk County: Towns of Babylon, Brookhaven, Huntington, Islip and Smith Town	.50	0.0015
Erie and Niagara Counties	.50	0.0015

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

Remainder of State .50 0.0015

Owners and/or operators of commercial, industrial, or residential emission sources that fire number two heating oil on or after July 1, 2012 are limited to the purchase of number two heating oil with 0.0015 percent sulfur by weight or less.

Owners and/or operators of a stationary combustion installation that fires distillate oil other than number two heating oil are limited to the purchase of distillate oil with 0.0015 percent sulfur by weight or less on or after July 1, 2014.

Owners and/or operators of any stationary combustion installation that fires distillate oil including number two heating oil are limited to the firing of distillate oil with 0.0015 percent sulfur by weight or less on or after July 1, 2016.

TABLE I

REQUIREMENT No. 4	A.S.T.M. TEST NO.	Kerosene (see Note)	No.1	No. 2
Gravity, °API Minimum: 20	D1298-12B	36	35	30
Maximum: 30	D287-12B D4052-11	52	46	38
Flash Point; °F Minimum: --		100	100	----
Minimum: 130	D93-12	----	----	120
Freeze Point, °F Maximum:	D2386-06	-22°F	----	----
Pour Point, °F Maximum : 21	D97-12	---	-9	21
Water & Sediment, %Volume, Maximum: 0.5	D1796-11 D473-07	None	Trace	Trace
Viscosity, SUS/100°F Maximum: 125	D2161-10 D445 (IP #71-84)	----	33	38
Minimum: 45		----	----	33
Viscosity, Kinematic, Maximum: 26.4 (Centistokes @104°F)\	D445-12	1.9	2.2	3.6

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

Minimum: 5.8		1.0	1.4	1.8
Carbon Residue, %Maximum by Weight based on 10% distillate residue: ---- based on Total residue: 9.0	D189-06 e1	----	0.10	0.35
Ash, % maximum by weight: 0.1	D482-12	----	0.05	0.05
Corrosion, Maximum 3 hours ---- @122°F	D130-12	Strip #3	Strip #3	Strip #3
Sulfur, wt. % Maximum 1.5 Or Legal Local Limit Per EPA requirements when stricter	D129-11	0.0015	0.0015	0.0015
BTU Per Gallon, Minimum 143M (Bomb Calorimeter)	D240-09	131,000	136,000	139,000
Cloud Point, °F Nominal	D5772-10	-35	-35	40

**NOTES ON CLOUD POINT REQUIREMENTS:**

This note is intended to provide information and guidance to end users of the fuels described in the Table I with respect to cloud point requirements and to low temperature performance of these fuels in general. Cloud point of fuel is the temperature at which wax crystals begin to form in the fuel and, as such, can be an indicator of the temperature at which users may begin to experience operational problems relating to filter clogging, etc. However, numerous factors can contribute to operational problems relating to fuel temperature including filter type, condition, fuel feed rate, fuel viscosity, equipment condition and numerous other factors. For these reasons, cloud point may not necessarily well correlate with such problems, but may be used as an indicator of temperatures where users may begin to experience operational difficulties. It should be noted that the No. 2 fuel oil specification (ASTM D396) does not contain requirements for cloud point. It is important for end users to realize that the cloud point requirements listed need to be viewed as guidance regarding fuel considerations in low temperature conditions. Users having fuel storage locations that are known to experience temperatures as low or lower than the cloud points listed should consult with the fuel vendor to assure that fuel delivered to such locations will be appropriate for low temperature storage and use. Some measures to consider in consultation with fuel vendors may be the use of fuel additives or the further blending of fuel with very low pour point/cloud point fuels such as kerosene. Such measures are the sole responsibility of the end users and should be discussed and arranged with fuel vendors in advance of any delivery. Please see the section WINTER BLEND REQUIREMENTS earlier in this document for further guidance.

**NOTE:**

In addition to the other requirements of this specification, Kerosene shall pass a sixteen (16) hour burning test, after first weighing, using ASTM test method D187, or approved equivalent method with the following minimum results at the end of the required burn period:

- a. Maximum flame drop: 5mm (0.197”);

**GROUP 05500 – Fuel Oil, Heating (Grades #2, #4, #6, Kerosene, and Bioheating Fuel) (Statewide)**

- b. Maximum change - flame width: 6mm (0.236”);
- c. No mushroom development;
- d. Only slight white deposit permissible on globes;
- e. Tensile strength of wick fibre shall be uninjured;
- f. Maximum char: 1/4”;
- g. Steady, free-burning without undue sensitivity to drafts;
- h. Flame shall hold its shape for duration of test; and
- i. Rate of Burning, after 1st weighing, shall be 18 thru 26 grams per hour

TABLE II

Heavy residual fuel oil (#6) shall conform to the following requirements:

1 A.S.T.M. Test No.	.50% Max. Sulfur D129-11 or D4294-10	1.00% Max. Sulfur D129-11 or D4294-10	0.50% Max. Sulfur D129-11 or D4294-10	0.30% Max. Sulfur D129-11 or D4294-10
Gravity (60°F) D287-12b	Min. 6.0 Max. 18.0	Min. 10.0 Max. 20.0	Min. 10.0 Max. 23.0	Min. 10.0 Max. 25.0
Flash Point F°	D93-12 Min. 140	Min. 140	Min. 140	Min. 140
Viscosity at 122°F D2161-10	Min. 140 Max. 300	Min. 100 Max. 300	Min. 50 Max. 300	Min. 30 Max. 300
NOTE: Viscosity Std. per ASTM #D396, Table #2, Saybolt Furol Seconds [DO NOT REVISE].				
All #6 fuel oil regardless of sulfur content: Water by Distillation (D95-05(2010): Sediment by Extraction (D473-07(2012)): Total Water & Sediment: (D95-05(2010) + (D473-07(2012) or D1796-11)				
Water Content shall not exceed 1.0%;				
Sediment content shall not exceed 0.5%;				
W & S combined content shall not exceed 1.5%.				
Ash (% by weight) D482-12	Max. 0.100	Max. 0.100	Max. 0.100	Max. 0.100
Carbon Residue, % Weight based on Total residue: D189-06(2010)e1 regardless of sulfur content	17% max.			
BTU per gallon	D240-09 Min. 149,000	Min. 147,000	Min. 144,000	Min. 143,000

**SECTION 8. BIODIESEL SPECIFICATIONS**

**8.1 BIODIESEL USAGE CONSIDERATIONS**

There are many positive benefits attributed to the use of B2 and B5 biodiesel as compared to normal solely petroleum based fuel. The most mentioned are decreased emissions of various pollutants, reduced reliance on uncertain petro fuel sources, renewable fuel source and safety in handling. However, there are also a number of properties of biodiesel that potentially impact on equipment, storage and OEM warranty coverage. These considerations are detailed below.

Fuel Filters: Fuel filters on the system should be checked frequently upon initial biodiesel blend use and changed as necessary. Biodiesel blends have excellent solvent properties and may affect cellulosic filters due to solubility of resin and binders used in those filters. Glass fiber based filters manufactured without the use of binders are probably not affected.

Sediment: Use of No. 2 fuel can leave a deposit in the bottom of fueling lines, tanks, and delivery systems over time. The use of biodiesel blends can dissolve this sediment and result in the need to change filters more frequently when first using biodiesel blends until the whole system has been cleaned of the deposits left by the petroleum based No. 2 fuel.

Solvent Properties: Biodiesel blends are an excellent solvent. They can, if left on a painted surface long enough, dissolve certain types of paints. Therefore, it is recommended to wipe any biodiesel blend spills from painted surfaces immediately. In addition, biodiesel blends can soften and degrade certain types of elastomers and natural rubbers over time. These materials may be used in fuel systems. OEM's of systems should be contacted for specific information and concerns in this area.

Spontaneous Combustion: Biodiesel is made from vegetable oils and/or animal fats which can oxidize and degrade over time. The oxidizing process can produce heat. In certain environments a pile of oil-soaked rags can become hot enough to result in a spontaneous fire. Biodiesel soaked rags should be stored in a safety can or dried individually to avoid the potential for spontaneous combustion.

Storage: All fuels have a shelf life. This is also true with biodiesel and biodiesel blends. Available data indicate that B2 and B5 biodiesel blends should be used within six months of manufacture. Fuels determined to have a Total Acid Number (by ASTM D664-11a) of greater than 0.80 KOH/g are not recommended for use.

OEM Considerations: BEFORE deciding to use B2 and B5 fuel, prospective users should make sure they have checked with the manufacturers of their equipment for considerations and concerns related to that usage.

FURTHER INFORMATION: Additional information regarding biodiesel can also be obtained from National Biodiesel Board at (800) 841-5849 or at their website at: <http://www.biodiesel.org/what-is-biodiesel/biodiesel-faq's>

## **8.2 FINISHED FUEL REQUIREMENTS for B2 and B5 BioDIESEL**

MATERIAL: The finished B2 and B5 biodiesel blends shall be prepared using the following feedstock:

#2 Fuel: As described above and meeting the requirements of ASTM D396-12 (Fuel Oil) and those listed in Table 1 of this spec.

### WORKMANSHIP:

The finished B2 or B5 biodiesel blend shall be completely blended to form a homogeneous mixture, visually free from undissolved water, sediment, and suspended matter. It shall be clear and bright when tested in accordance with ASTM D4176-4 (2009), procedure 1 or 2.

### PHYSICAL AND CHEMICAL REQUIREMENTS:

The biodiesel portion of the finished B2 or B5 biodiesel blends shall be 2% or 5% by volume of B100 biodiesel with a tolerance of +/-1%. Remaining 98% or 95% of the final blend shall be composed of #2 fuel. Final blended product shall meet the requirements listed in Table 3 below.



TABLE III:

PARAMETER	TEST METHOD	REQUIREMENTS	
		B2	B5
Gravity, °API Minimum: Maximum:	Any of the following: D1298-12b D287-12b D4052-11	29.8 37.7	29.8 37.7
Flash Point, °F Minimum:	D93-12	120	120
Pour Point, °F Maximum:	D97-12	21	21
Water & Sediment, % Volume, Maximum:	D1796-11 or D95-05(2010 & D473-07	Trace	Trace
Viscosity, SUS/100° F Minimum: Maximum:	D445-12 D2161-10	33 38	33 38
Carbon Residue, % Max. (w/w) based on 10% distillate residue	D189-06(2010)e1	0.35	0.35
Ash, % Max. (w/w):	D482-12	0.05	0.05
Corrosion, Maximum 3 Hours @ 122° F	D130-12	3	3
Sulfur, % Maximum (w/w): NOTE: Legal local limit to prevail per EPA requirements when stricter	D129-11	0.5	0.5
BTU per Gallon, Minimum:	D240-09	138,000	138,000
Cloud Point, °F, Nominal: See note on page 50	D2500-11	40	40

# **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, licensor, licensee, lessor, lessee or any other party):

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

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

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

required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

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

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

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing

wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

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

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

**9. SET-OFF RIGHTS.** The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract,

plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

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

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

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the

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

**12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.**

In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

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

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

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

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

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

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

**15. LATE PAYMENT.** Timeliness of payment and any interest to be paid to Contractor for late payment shall

be governed by Article 11-A of the State Finance Law to the extent required by law.

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

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

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

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

**19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES.** In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or

(b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

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

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

NYS Department of Economic Development  
Division for Small Business  
Albany, New York 12245  
Telephone: 518-292-5100  
Fax: 518-292-5884  
email: [opa@esd.ny.gov](mailto:opa@esd.ny.gov)

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

NYS Department of Economic Development  
Division of Minority and Women's Business  
Development  
633 Third Avenue  
New York, NY 10017  
212-803-2414  
email: [mwbecertification@esd.ny.gov](mailto:mwbecertification@esd.ny.gov)  
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>

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

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

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

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division

of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

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

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

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

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

**24. PROCUREMENT LOBBYING.** To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are

complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

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

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

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

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

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



seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior

to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

**APPENDIX B**  
**GENERAL SPECIFICATIONS**

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**GENERAL**

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

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

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

**b. BID** A response to the Solicitation submitted by a Bidder to provide Products.

**c. BIDDER** Any person or entity who submits a response to the Solicitation. At the time that a Bidder executes a Contract with the State, the Bidder shall become a "Contractor." See also "Contractor."

**d. BID SPECIFICATIONS** A written description drafted by OGS or an Authorized User setting forth the specific terms of the intended procurement, which may include: physical or functional characteristics, the nature of a Product, 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 this Appendix B is incorporated in negotiated Contracts that have not been competitively solicited, the term "Bid Specifications" shall be deemed to refer to the terms and conditions set forth in the negotiated Contract and associated documentation.

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

**f. CONTRACT** The writings that contain the agreement of the Commissioner and the Contractor setting forth the total legal obligation between the parties as determined by applicable rules of law, and which most typically include the following classifications of public procurements:

- 1. Agency Specific Contracts** Contracts where the written description for a Product or a particular scope of work is described and defined to meet the needs of one or more Authorized Users.

- 2. Centralized Contracts** Single- or multiple-award Contracts where the written description for a Product or general scope of work is described and defined by OGS 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 Contractors without further competition or Mini-Bid unless otherwise required by the Contract.

- 3. Back-Drop Contracts** Multiple-award Centralized Contracts where OGS provides a written description 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 Solicitation. Selection of a Contractor from among Back-Drop contract holders for an actual Product, project or particular scope of work may be subsequently made as set forth in the Contract.

- 4. 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 group of states that is adopted and extended for use by OGS in accordance with the requirements of the State Finance Law.

- 5. Contract Award Letter** A letter to the successful Bidder 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 the Contractor should not take any action with respect to actual Contract deliveries except on the basis of Purchase Orders sent from Authorized Users.

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

**h. CONTRACTOR** Any successful Bidder to whom a Contract has been awarded by the Commissioner.

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

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

**k. 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.

**l. 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.

**m. GROUP** A classification of a Product that is designated by OGS.

**n. INVITATION FOR BIDS (IFB)** A type of Solicitation that is most typically used for procurements where requirements can be stated and award will be made based on lowest price to the responsive and responsible Bidder or Bidders.

**o. LICENSED SOFTWARE** Software transferred upon the terms and conditions set forth in the Contract. "Licensed Software" includes Error Corrections, upgrades, or enhancements, and any deliverables due under a technical support/maintenance or service contract (e.g., Patches, programs, code or data conversion, or custom programming).

**p. LICENSEE** An Authorized User who acquires 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 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.

**q. 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.

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

**s. MINI-BID** A document used by an Authorized User containing transaction-specific requirements soliciting responses from Contractors previously qualified under a Centralized Contract for such Products.

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

**u. PATCH** Software designed to update, fix, or improve the Product or its supporting data. This includes fixing security vulnerabilities and other bugs, including hot fixes, to improve usability or performance.

**v. PRODUCTS** Items or deliverables under any Solicitation or Contract and may include commodities, services and/or technology.

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

**x. REQUEST FOR PROPOSALS (RFP)** A type of Solicitation that is used for procurements where factors in addition to cost are considered and weighted in awarding the contract and where the award will be made based on "best value," as defined

by the State Finance Law, to one or more responsive and responsible Bidders.

**y. REQUEST FOR QUOTATION (RFQ)** A procurement method that can be used in situations such as discretionary, sole source, single source, or emergency purchases and certain Centralized Contracts.

**z. 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.

**aa. RESPONSIVE BIDDER** A Bidder meeting the specifications or requirements prescribed in the Solicitation, as determined by the OGS Commissioner.

**bb. 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.

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

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

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

**ff. 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.

**gg. STATE** State of New York.

**hh. STATE 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.

**ii. SUBCONTRACTOR** Any individual or 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.

**jj. 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.

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

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

### **BID SUBMISSION**

**3. INTERNATIONAL BIDDING** All Bids, including 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 Bids submitted which do not meet the above criteria will be rejected.

**4. 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.

**5. LATE BIDS** Bids must be received at the location designated in the Solicitation at or before the date and time established in the Solicitation for the Bid opening or receipt of Bids.

Any Bid received at the designated location after the established time will be considered a Late Bid. A Late Bid may be rejected and disqualified from award. Notwithstanding the foregoing, a Late Bid may be accepted in the Commissioner's sole discretion where (i) no timely Bids meeting the requirements of the Solicitation are received, (ii) in the case of a multiple award, an insufficient number of timely Bids are received to satisfy the multiple award, or (iii) the Bidder has demonstrated to the satisfaction of the Commissioner that the Late Bid was caused solely by factors outside the control of the Bidder. However, in no event shall the Commissioner be under any obligation to accept a Late Bid.

The basis for any determination to accept a Late Bid shall be documented in the procurement record.

### **6. CONFIDENTIAL/TRADE SECRET MATERIALS**

**a. BIDDER/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/Contractor. 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/Contractor. Bidders/Contractors intending to seek an

exemption from disclosure of these materials under the Freedom of Information Law must request the exemption in writing, setting forth the reasons for the claimed exemption. The Commissioner's or Authorized User's receipt/acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures. Properly identified information that has been designated confidential, trade secret, or proprietary by the Bidder/Contractor will not be disclosed except as may be required by the Freedom of Information Law or other applicable State and federal laws.

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

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

**a. PREVAILING WAGE RATE APPLICABLE TO BIDS** A copy of the applicable prevailing wage rate schedule is incorporated into the Solicitation and may also be obtained by visiting [www.labor.ny.gov](http://www.labor.ny.gov) and typing in the search box: Prevailing Wage Schedule Request. Bidders must submit Bids which are based upon the prevailing hourly wages, and supplements in cash or equivalent benefits (e.g., 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 rates for the location where the work is to be performed. Bidders may not submit Bids based upon hourly wage rates and supplements below the applicable prevailing wage rates as established by the New York State Department of Labor. Bids that fail to comply with this requirement will be disqualified.

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

any Subcontractors utilized on the Contract also comply with the prevailing wage provisions of the New York State Labor Law.

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

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

**ii. Payroll Records** Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. For public works contracts over \$25,000 where the Contractor maintains no regular place of business in the 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 Contracts must submit monthly payroll transcripts to the Authorized User issuing the Purchase Order for the work. This provision does not apply to Article 9 of the Labor Law building services contracts.

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

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

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

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

**8. TAXES**

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

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

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

**9. EXPENSES PRIOR TO CONTRACT EXECUTION** The Commissioner and any Authorized Users are not liable for any costs incurred by a Bidder or Contractor in the preparation and production of a Bid, Mini-Bid, cost proposal revision, or for any work performed prior to Contract execution.

**10. PRODUCT REFERENCES**

**a. "Or Equal"** In all Solicitations or 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 Solicitation or Bid Specifications and the written description of the Products that cannot be reconciled, then the written description shall prevail.

**11. REMANUFACTURED, RECYCLED, RECYCLABLE, OR RECOVERED MATERIALS** Upon the conditions specified in the Solicitation 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 Solicitation. Contractors are further encouraged to offer remanufactured Products to the maximum extent practicable without jeopardizing the performance or intended end use of the Product unless such use is precluded due to health, welfare, safety requirements, or by the Solicitation. Where such use is not practical, suitable, or permitted by the Solicitation, 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.

**12. PRODUCTS MANUFACTURED IN PUBLIC**

**INSTITUTIONS** Bids offering Products that are manufactured or produced in public institutions will be rejected.

**13. PRICING**

**a. Unit Pricing** If required by the Solicitation, 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 Solicitation. 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 Solicitation, prices shall be net, including transportation, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination indicated in the Solicitation or Purchase Order.

**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. Specific price decreases:**

**(i) GSA Changes:** Where net pricing under the Contract is based on an approved GSA schedule, price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after the date the approved GSA schedule pricing decreases during the Contract term; or

**(ii) Commercial Price List Reductions:** Where net pricing under the Contract is based on a discount from Contractor's list prices, price decreases shall take effect automatically during the Contract term and apply to Purchase Orders submitted on or after the date Contractor lowers its pricing on its commercial price lists 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 pricing 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 net pricing 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 Solicitation, Contractor may offer lower prices or better terms (see Modification of Contract Terms) on any specific Purchase Order from any Authorized User without being in conflict with, or having any obligation to comply on a global basis with, the terms of this clause.

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

**14. SITE INSPECTION** Where a Site inspection is required, Bidder shall be required to inspect the Site, including environmental or other conditions, for pre-existing deficiencies that may affect the installed Product or that 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 that 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 provide the required Product.

**15. PURCHASING CARD** The State's Purchasing Card program is designed to be an efficient and cost effective way to expedite purchases. The Purchasing Card (also referred to as the Procurement Card) is a credit card that enables Authorized Users to make authorized purchases directly from a Contractor without processing formal Purchase Orders. Purchasing Cards are issued to selected employees who are authorized to make purchases for the Authorized User. Cardholders can make purchases directly from any Contractor that accepts the Purchasing Card.

**BID EVALUATION**

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

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



Commissioner to award a Contract to one or more of such Bidders shall be final.

**18. 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 Solicitation. In the event such right is exercised, the lowest responsible Bidder meeting the Solicitation requirements 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.

**19. TIMEFRAME FOR OFFERS** The Commissioner reserves the right to make awards within 60 days after the date of the Bid opening or such other period of time as set forth in the Solicitation. The Bids must remain firm until a Contract is awarded, but if a Contract is not awarded within 60 days or other time period set forth in the Solicitation, the Bidder may withdraw its Bid any time thereafter by delivering to the Commissioner written notice of the withdrawal of its Bid.

**20. DEBRIEFINGS** Pursuant to Section 163(9)(c) of the State Finance Law, any unsuccessful Bidder may request a debriefing regarding the reasons that the Bid submitted by the Bidder was not selected for award. Requests for a debriefing must be made within 15 calendar days of notification by OGS that the Bid submitted by the Bidder was not selected for award. Requests should be submitted in writing to a designated contact identified in the Solicitation.

**21. CONTRACT PUBLICITY** Any Contractor press or media releases, advertisements, or promotional literature, regardless of the medium, referring to an awarded Contract must be reviewed and approved by the Commissioner prior to issuance. In addition, Contractor shall not use, for any purpose, the New York State of Opportunity registered trademark or the New York State coat of arms without prior written approval from the State.

## **TERMS & CONDITIONS**

**22. 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 Solicitation, a Contract shall be deemed executed and created with the successful Bidders 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.

**23. CONTRACT TERM - EXTENSION** In addition to any stated extension periods in the Contract, any Contract or portion thereof awarded by the Commissioner may be extended by mutual agreement of the Commissioner and the Contractor for an additional period of up to one year. Such extension for up to an additional one-year period may be exercised on a month-to-month basis or in other stated periods of time.

**24. OFFICIAL USE ONLY/NO PERSONAL USE** The Contract is only for official use by Authorized Users. Use of the Contract for personal or private purposes is strictly prohibited.

### **25. PARTICIPATION IN CENTRALIZED CONTRACTS**

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

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

**c. Voluntary Extension** Purchase Orders issued against a Centralized Contract by any Authorized User not provided for in the Contract 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.

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

**e. Contract Migration** Authorized Users holding individual Contracts with a Contractor at the time that Contractor is

awarded a Centralized Contract for the same Products 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.

**26. MODIFICATION OF CONTRACT TERMS** The terms and conditions set forth in the Contract shall govern all transactions by Authorized Users 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 any Authorized User 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 and Commissioner by the Contractor at the time of such offer.

Other than where such terms are more advantageous for the Authorized User 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 an Authorized User 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.

**27. SCOPE CHANGES** The Commissioner reserves the right to require, by written order, changes to the scope of the Contract, provided that such changes do not materially alter the general scope of the Contract. If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under the Contract, whether or not changed by the order, the Commissioner shall, upon notice from Contractor as hereafter stated, make an equitable adjustment in the Contract price, the delivery schedule or both and shall modify the Contract. The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Commissioner decides that the facts justify it, the Commissioner may provide an adjustment without receipt of a notice from Contractor. In the event of a dispute between the Contractor and the Commissioner, such dispute shall be resolved in accordance with the OGS Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from proceeding with the Contract as changed.

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

With respect to any specific quantity stated in the Contract, the Commissioner reserves the right after award to order up to 20%

more or less (rounded to the next highest whole number) than the specific quantities called for in the Contract. Notwithstanding the foregoing, the Commissioner may purchase greater or lesser percentages of Contract quantities should the Commissioner and Contractor so agree. Such agreement may include an equitable price adjustment.

**29. 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 or 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, as the Commissioner in his or her sole discretion determines will meet the needs of such emergency. Contractor shall not be entitled to any claim for lost profits for Product procured from other sources pursuant to this clause. The reasons underlying the finding that an emergency exists shall be included in the procurement record.

**30. 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 (i) in the case of formal written Purchase Orders, when placed in the mail prior to the termination of the Contract and addressed to the Contractor at the address for receipt of orders set forth in the Contract or in the Contract Award Notification or (ii) in the case of electronic Purchase Orders or Purchasing Card purchases, when electronically transmitted to the Contractor prior to the termination of the Contract.

All Purchase Orders issued pursuant to a Contract let by the Commissioner must be identified with the appropriate Contract number and, if necessary, required State approvals. As deemed necessary, the Authorized User may confirm pricing and other Product information with the Contractor prior to placement of the Purchase Order. The State reserves the right to require any other information from the Contractor which the State deems necessary in order to complete any Purchase Order placed under the Contract. Unless otherwise specified, all Purchase Orders against Centralized Contracts will be placed by Authorized Users directly with the Contractor and any discrepancy between the terms stated on the Contractor's order form, confirmation or acknowledgment, and the Contract terms shall be resolved in favor of the terms most favorable to the Authorized User. Should an Authorized User add written terms and conditions to the Purchase Order that conflict with the terms and conditions of the Contract, the Contractor has the option of rejecting the Purchase Order within five business days of its receipt but shall first attempt to negotiate the additional written terms and conditions in good faith with the Authorized User, or fulfill the Purchase Order. Notwithstanding the above, the Authorized User reserves the right to dispute any discrepancies arising from the presentation of additional terms and conditions with the Contractor.

If, with respect to an Agency Specific Contract let by the 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.

**31. PRODUCT DELIVERY** Delivery must be made as ordered to the address specified on the Purchase Order and in accordance with the terms of the Contract. Delivery shall be made within 30 calendar days after receipt of a Purchase Order by the Contractor, unless otherwise agreed to by the Authorized User and the Contractor. The decision of the Commissioner as to compliance with delivery terms shall be final. The burden of proof for delay in receipt of a Purchase Order shall rest with the Contractor. In all instances of a potential or actual delay in delivery, the Contractor shall immediately notify the Commissioner and the Authorized User, and confirm in writing the explanation of the delay, and take appropriate action to avoid any subsequent late deliveries. Any extension of time for delivery must be requested in writing by the Contractor and approved in writing by the Authorized User. If compliance with the delivery time schedule is a material term of the Contract, failure to meet such delivery time schedule may be grounds for cancellation of the order or, in the Commissioner's discretion, the Contract.

**32. WEEKEND AND HOLIDAY DELIVERIES** Unless otherwise specified in the Contract 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.

**33. SHIPPING/RECEIPT OF PRODUCT**

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

**b. Shipping Charges** Unless otherwise stated in the Contract, 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 the locations and/or personnel specified by the Authorized User in

the Purchase Order. Any losses or delays resulting from the Contractor's failure to deliver Product to the specified locations or personnel shall be borne exclusively by the Contractor.

**34. TITLE AND RISK OF LOSS FOR PRODUCTS OTHER THAN TECHNOLOGY PRODUCTS** Notwithstanding the form of shipment, title or other property interest, risk of loss for Products other than technology Products 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 Contract 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 Contract may be rejected or accepted on an adjusted price basis, as determined by the Commissioner. Title, risk of loss, and acceptance for technology Products shall be governed by the Product Acceptance clause.

**35. PRODUCT SUBSTITUTION** In the event a specified 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 termination of Contract.

**36. 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.

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

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

**39. EMPLOYEES, SUBCONTRACTORS AND AGENTS** All employees, Subcontractors, or agents of the Contractor 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 Contract or the Purchase Order, and must comply with all security and administrative requirements of the Authorized User that are communicated to the Contractor. The Commissioner and the Authorized User reserve the right to conduct a security background check or otherwise approve any employee, Subcontractor, or agent furnished by Contractor and to refuse access to or require replacement of any personnel for cause based on professional, technical or training qualifications, quality of work or change in security status or non-compliance with Authorized User's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract or the Purchase Order. The Commissioner and the Authorized User reserve the right to reject and/or bar from any facility for cause any employee, Subcontractor, or agent of the Contractor.

**40. ASSIGNMENT** In accordance with Section 138 of the State Finance Law, the Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the Contract or its right, title or interest therein, or its power to execute such Contract to any other person, company, firm or corporation in performance of the Contract without the prior written consent of the Commissioner or Authorized User (as applicable); provided, however, any consent shall not be unreasonably withheld, conditioned, delayed or denied. The Commissioner may waive the requirement that such consent be obtained in advance where the Contractor verifies that the assignment, transfer, conveyance, sublease, or other disposition is due to, but not necessarily limited to, a reorganization, merger, or consolidation of the Contractor's business entity or enterprise.

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 assignments with the State Comptroller. Prior to a consent to assignment of a Contract, or portion thereof, becoming effective, the Contractor shall submit the request for assignment to the Commissioner and seek written agreement from the Commissioner which will be filed with the

State Comptroller. Commissioner shall use reasonable efforts to promptly respond to any request by Contractor for an assignment, provided that Contractor supplies sufficient information about the party to whom the Contractor proposes to assign the Contract.

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

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

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

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

**43. TERMINATION**

**a. For Cause** For a material breach that remains uncured for more than 30 calendar days or other longer period as specified by written notice to the Contractor, the Contract or Purchase Order may be terminated by the Commissioner or Authorized User respectively. Neither the State nor an Authorized User shall be liable for any of Contractor's costs arising from the failure to perform or the termination, including without limitation costs incurred after the date of termination. 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** This Contract may be terminated at any time by the Commissioner for convenience upon 60 calendar days or other longer period as specified by written notice, 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 fulfill any outstanding Purchase Orders.

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

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

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

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

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

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

**44. SAVINGS/FORCE MAJEURE** A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled and is not due to the negligence or willful misconduct of the affected party. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, terrorism, strikes, fires, explosions, actions of the elements, floods, or

other similar causes beyond the control of the Contractor or the Commissioner in the performance of the Contract where non-performance, by exercise of reasonable diligence, cannot be prevented.

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

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

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

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

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

In addition, the Commissioner reserves the right, in his or 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 to the Contractor. In the event of a dispute between the Contractor and the Commissioner, such dispute shall be resolved in accordance with the OGS Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from performing in accordance with the Contract as changed.

#### 45. **CONTRACT INVOICING**

**a. Invoicing** Contractor and the dealers/distributors/resellers designated by the Contractor, if any, shall provide complete and accurate billing invoices to each Authorized User in order to receive payment. Billing invoices submitted to an Authorized User must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer.

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

**b. Payment of Contract Purchases made by an Authorized User when the State Comptroller is responsible for issuing such payment**

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

**c. Payment of Contract Purchases made by an Authorized User when the State Comptroller is not responsible for issuing such payment**

The Authorized User and Contractor agree that payments for such Contract purchases shall be billed directly by Contractor on invoices/vouchers, together with complete and accurate supporting documentation as required by the Authorized User. Such payments shall be as mandated by the appropriate governing law from the receipt of a proper invoice. Such Authorized User and Contractor are strongly encouraged to establish electronic payments.

#### 46. **DEFAULT – AUTHORIZED USER**

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

**b. Failure to Make Payment** In the event a participating Authorized User fails to make payment to the Contractor for Products delivered, accepted and properly invoiced, within 30

calendar days of such delivery and acceptance, the Contractor may, upon five business days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional provision of Products 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 business days prior to declaring a breach of Contract by any Authorized User, by certified or registered mail, notify both the Commissioner and the purchasing official of the breaching Authorized User of the specific facts, circumstances and grounds upon which a breach will be declared.

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

#### 47. **PROMPT PAYMENTS**

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

**b. By Non-State Agencies** Upon acceptance of Product or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be 30 calendar days, excluding legal holidays, or as mandated by the appropriate governing law from the receipt of a proper invoice. The terms of Article 11-A of the State Finance Law apply only to procurements by and the consequent payment obligations of State Agencies. Neither expressly nor by any implication is the statute applicable to non-State agency 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.

**48. REMEDIES FOR BREACH** Unless otherwise specified by the Authorized User in a Mini-Bid or Purchase Order, in the event that Contractor fails to observe or perform any term or condition of the Contract and such failure remains uncured after 15 calendar days following written notice by the Commissioner or an Authorized User, the Commissioner or an Authorized User may exercise all rights and remedies available at law or in equity. Notwithstanding the foregoing, if such failure is of a nature that it cannot be cured completely within 15 calendar days and Contractor shall have commenced its cure of such failure within such period and shall thereafter diligently prosecute all steps necessary to cure such failure, such 15-day period may, in the sole discretion of the Commissioner or the

Authorized User, be extended for a reasonable period in no event to exceed 60 calendar days. It is understood and agreed that the rights and remedies available to the Commissioner and Authorized Users in the event of breach shall include but not be limited to the following:

**a. Cover/Substitute Performance** In the event of Contractor's material, uncured breach, the Commissioner or Authorized User may, with or without issuing a formal Solicitation: (i) purchase from other sources; or (ii) if the Commissioner or Authorized User is unsuccessful after making reasonable attempts, under the circumstances then-existing, to timely obtain acceptable replacement Product of equal or comparable quality, the Commissioner or Authorized User may acquire acceptable replacement Product of lesser or greater quality. Such purchases may be deducted from the Contract quantity without penalty or liability to the State.

**b. Withhold Payment** In any case where a reasonable question of material, uncured non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Authorized User.

**c. Bankruptcy** In the event that the Contractor files, or there is filed against Contractor, a petition under the U.S. Bankruptcy Code during the term of this Centralized Contract, Authorized Users may, at their discretion, make application to exercise their right to set-off against monies due the debtor or, under the doctrine of recoupment, be credited the amounts owed by the Contractor arising out of the same transactions.

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

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

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

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

**50. 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 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 Safety Data Sheet must be provided to and approved by the Authorized User.

**51. INDEPENDENT CONTRACTOR** It is understood and agreed that the legal status of the Contractor, its Subcontractors, 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.

**52. SECURITY** Contractor warrants, covenants and represents that, in the performance of the Contract, Contractor, its agents, Subcontractors, officers, distributors, resellers and employees will comply fully with all security procedures of the Authorized User set forth in the Contract or Purchase Order or otherwise communicated in advance to the Contractor including but not limited to physical, facility, documentary and cyber security rules, procedures and protocols.

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

**54. WARRANTIES**

**a. Product Performance** Contractor hereby warrants and represents that the Products acquired by the Authorized User under this Contract conform to the manufacturer's specifications, performance standards and Documentation and that the Documentation fully describes the proper procedure for using the Products.

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

**c. Product Warranty** Contractor further warrants and represents that Products, components or parts specified and furnished by or through Contractor, whether specified and furnished individually or as a system, shall be substantially free from defects in material and workmanship and will conform to all requirements of the Contract for the manufacturer's standard commercial warranty period, if applicable, or for a minimum of one year from the date of acceptance, whichever is longer (the "Product warranty period").

During the Product warranty period, defects in the materials or workmanship of Products, components, or parts specified and furnished by or through Contractor, whether specified and

furnished individually or as a system, shall be repaired or replaced by Contractor at no cost or expense to the Authorized User. Contractor shall extend the Product warranty period for individual Products, or for the system as a whole, as applicable, by the cumulative periods of time, after notification, during which an individual Product, or the system as a whole, requires repairs or replacement resulting in down time or is in the possession of the Contractor, its agents, officers, Subcontractors, distributors, resellers or employees ("extended warranty").

Any component or part replaced by the Contractor under the Contract warranties shall be guaranteed for the greater of: (i) the Product warranty period set forth herein; or (ii) the manufacturer's standard commercial warranty period offered for the component or part, if applicable.

All costs for materials, labor, and transportation incurred to repair or replace Products, parts, components, or systems as a whole 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.

Where Contractor, the Third-Party Software vendor, or other third-party manufacturer markets any Product 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 Product warranty and extended warranty periods. Where such standard commercial warranty covers all or some of the Product warranty or extended warranty periods, Contractor shall be responsible for the coordination during the Product warranty or extended warranty periods with Third-Party Software vendor or other third-party manufacturers for warranty repair or replacement of Third-Party Software vendor or other third-party manufacturer's Product.

Where Contractor, Third-Party Software vendor, or other third-party manufacturer markets any Product with a standard commercial warranty that goes beyond the Product warranty or extended warranty periods, Contractor shall notify the Authorized User and pass through the standard commercial warranty to Authorized User at no additional charge; provided, however, that Contractor shall not be responsible for coordinating services under the standard commercial warranty after expiration of the Product warranty and extended warranty periods.

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

Contractor shall not be responsible for any modification of the Products made by an Authorized User without Contractor's approval.

**d. Virus Warranty** The Contractor represents and warrants that any Product acquired under the Contract by the Authorized

User does not contain any known Viruses. Contractor is not responsible for Viruses introduced at an Authorized User's Site.

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

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

**f. Workmanship Warranty** Contractor warrants that the services acquired under this Contract will be provided in a professional and workmanlike manner in accordance with the applicable industry standards, if any. The Authorized User must notify Contractor of any services warranty deficiencies within 90 calendar days from performance of the services that gave rise to the warranty claim.

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

**h. Prompt Notice of Breach** The Authorized User shall promptly notify the Contractor and the Commissioner in writing of any claim of breach of any warranty provided herein.

**i. Additional Warranties** Where Contractor, Product manufacturer or service provider generally offers additional or more advantageous warranties than those set forth herein, Contractor shall offer or pass through any such warranties to Authorized Users.

**j. No Limitation of Rights** The rights and remedies of the State and the Authorized Users provided in this clause are in addition to and do not limit any rights afforded to the State and the Authorized Users by any other clause of the Contract.

**55. LEGAL COMPLIANCE** Contractor represents and warrants that it shall secure all notices and comply with all applicable laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any extensions thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the Solicitation and Contract and any applicable laws, including but not limited to, permits, licensing, and shall provide such proof as required by the Commissioner. Failure to comply or failure to provide proof may constitute grounds for the Commissioner to terminate or suspend the Contract, in whole or in part, or to take any other



action deemed necessary by the Commissioner. Contractor also agrees to disclose information and provide affirmations and certifications to comply with Sections 139-j and 139-k of the State Finance Law.

**56. INDEMNIFICATION** Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully defend, indemnify and hold the Authorized Users harmless from suits, actions, proceedings, claims, losses, damages, and costs (including reasonable attorney fees) of every name and description relating to personal injury and damage to real or personal tangible property caused by any intentional act or negligence of Contractor, its agents, employees, partners or Subcontractors, which shall arise from or result directly or indirectly from this Contract, without limitation; provided, however, that the Contractor shall not be obligated to indemnify an Authorized User for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Authorized User.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit, or other suit for which Contractor is required to fully indemnify an Authorized User, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

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

**57. INDEMNIFICATION RELATING TO INFRINGEMENT** The Contractor shall also defend, indemnify and hold the Authorized Users harmless from all suits, actions, proceedings, claims, losses, damages, and costs of every name and description (including reasonable attorney fees), relating to a claim of infringement of a patent, copyright, trademark, trade secret or other proprietary right provided such claim arises solely out of

the Products as supplied by the Contractor, and not out of any modification to the Products made by the Authorized User or by someone other than Contractor at the direction of the Authorized User without Contractor's approval; provided, however, that the Contractor shall not be obligated to indemnify an Authorized User for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Authorized User.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit alleging infringement, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

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

In the event that an action or proceeding at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the Product under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the Authorized User and attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters. This constitutes the Authorized User's sole and exclusive remedy for infringement of a patent, copyright, trademark, trade secret, or other proprietary right.

**58. LIMITATION OF LIABILITY** Except as otherwise set forth in the Indemnification clause and the Indemnification Relating to Infringement clause, 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 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 forming the basis of the Authorized User's claim or (ii) five hundred thousand dollars (\$500,000), 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.

#### **59. DISPUTE RESOLUTION PROCEDURES**

It is the policy of OGS to provide interested parties, as defined in the OGS Dispute Resolution Procedures, with an opportunity to administratively resolve disputes, complaints or inquiries related to Solicitations, contract awards and contract administration. OGS encourages interested parties to seek resolution of disputes through consultation with OGS staff. All such matters shall be accorded impartial and timely consideration. Interested parties may also file formal written disputes. A copy of the OGS Dispute Resolution Procedures may be obtained by contacting the designated contact for the Solicitation, the Contract manager, or at the OGS website. OGS reserves the right to change the procedures set forth in the Dispute Resolution Procedures without seeking a Contract amendment.

***To the extent the scope of the Solicitation or Contract includes the sale, development, maintenance, or use of information technology Products such as software, computer components, systems, or networks for the processing, and distribution, or storage, or storage of data, the following clauses shall govern, as applicable.***

**60. 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 (e.g., payroll size, number of employees, CPU, MIPS, MSU, concurrent user, workstation, virtual partition). Licensee shall have the right to use those modifications or customizations of the Product that have been purchased by Licensee and to distribute such modifications or customizations for use by any Authorized Users otherwise licensed to use the Product, provided that any modifications or customizations, 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.

Licensee and Contractor may agree to alternative licensing rights (e.g., subscription, term, virtual) for specific Products used by the Contractor in performing the services, provided such agreement is reached prior to Bid, Mini-Bid, RFQ, or Contract award, as applicable. Such licensing rights will be specified in an applicable Purchase Order or other document approved by Licensee and Contractor.

**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. Product Documentation** Contractor shall provide Product Documentation electronically to Licensee at no charge. If Product Documentation is made available to customers in hard copy, Contractor shall provide at no charge one hard copy.

Contractor hereby grants to Licensee a non-exclusive, fully paid-up, royalty-free perpetual license in the Product Documentation to make, reproduce, and distribute, either electronically or otherwise, copies of the Product Documentation as necessary to enjoy full use of the Product in accordance with the Contract.

**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. Contractor shall fully disclose all terms and conditions of maintenance available to Licensee, including the extent to which updates, upgrades, revisions, and new releases are included in maintenance. Maintenance terms and any renewals thereof are independent of the expiration of the Centralized Contract term and shall not automatically renew.

Unless otherwise provided by written agreement between the Contractor and Licensee, maintenance offered shall include, at a minimum, (i) the provision of Error Corrections, updates, enhancements, revisions, Patches, and upgrades to Licensee, and (ii) help desk assistance at no additional cost, either by toll-free telephone or on-line functionality. Contractor shall maintain the Product so as to provide Licensee with the ability to utilize the Product in accordance with the Product Documentation without significant functional downtime to its ongoing business operations during the maintenance term.

Licensee 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 Licensee 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 that would have been due under the Contract for the period of time that such maintenance had lapsed, at then current NYS net maintenance rates. Contractor shall submit written notification to Licensees of the upcoming maintenance end date no later than 60 calendar days prior to such maintenance end date.

**e. Permitted License Transfers** As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated Site not originally specified in the license, including transfers within Agencies, between Agencies, and pursuant to governmental restructuring or reorganization ("permitted license transfers"). Licensees do not have to obtain the approval of Contractor for permitted license transfers, but must give 30 days prior written notice to Contractor of such moves 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 Third Parties** Third parties 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: (i) Licensee gives notice to Contractor of such third party, Site of intended use of the Product, and means of access; and (ii) such third 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 (iii) such third party maintains a logical or physical partition within its computer system so as to restrict use and access to

the program to that portion solely dedicated to beneficial use for Licensee. In no event shall Licensee assume any liability for third party's compliance with the terms of the Non-Disclosure Agreement, nor shall the Non-Disclosure Agreement create or impose any liabilities on the State or Licensee.

**g. Archival Back-Up and Disaster Recovery** 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; (ii) reproducing a reasonable number of copies of the Product and related Documentation for cold site storage; (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. The phrase "cold site storage" means a restorable back-up copy of the Product not to be installed until the need for disaster recovery arises. The phrase "disaster recovery" means 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. Contractor shall fully disclose all archival back-up and disaster recovery options available to Licensee (e.g., cold, warm, and hot back-up), including all terms and conditions, additional charges, or use authorizations associated with such options.

**h. Confidentiality Restrictions** If any portion of the Product or Product Documentation contains confidential, proprietary, or trade secret information, the Contractor shall identify such information in writing to the Licensee. The terms of Licensee's use and disclosure of such information shall be governed by a written agreement between the Contractor and the Licensee, which, in the case of Licensees that are State or local governmental entities, recognizes that they are subject to the New York Freedom of Information Law.

**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; or (iii) export the Licensed Software in violation of the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR).

**61. PRODUCT ACCEPTANCE** Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, an Authorized User shall have 30 days from the date of delivery to accept hardware Products and 60 days from the date of delivery to accept all other Product. Where the Contractor is responsible for installation, acceptance shall be from completion of installation. Title or other property interest and risk of loss shall not pass from Contractor to the Authorized User until the Products have been accepted. Failure to provide notice of acceptance or rejection or a deficiency statement to the Contractor by the end of the period provided for under this clause constitutes acceptance by the Authorized User 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 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 to be specified by Authorized User. Where using its own data or tests, Authorized User must have the tests or data available upon delivery. This demonstration will take the

form of a documented installation test, capable of observation by the Authorized User, which shall be made part of the Contractor's standard documentation and shall be covered by the Product warranty. 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 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.

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, 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 30 days to correct the deficiency, and the Authorized User shall have an additional 60 days to evaluate the Product as provided herein.

If the Product does not meet the specifications at the end of the extended testing period, Authorized User, upon prior written notice to Contractor, may then reject the Product and return all defective Product to Contractor, and Contractor shall refund any monies paid by the Authorized User to Contractor therefor. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to the amounts set forth in the Limitation of Liability clause for any liability for costs incurred at the direction or recommendation of Contractor. When Product is not accepted, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of non-acceptance by the Authorized User. Rejected items not removed by the Contractor within the ten calendar day period shall be regarded as abandoned by the Contractor and the Authorized User shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse the Authorized User for any costs incurred in storage or effecting removal or disposition after the ten calendar day period.

**62. 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. Contractor may conduct such audits remotely or on Site. If conducted remotely and if Contractor makes a license management program available, the Licensee agrees to install such program and use it within a reasonable period of time, provided such program meets Licensee's security or other requirements. If conducted on Site: (i) Contractor shall give Licensee at least 30 days advance written notice, (ii) such audit shall be conducted during Licensee's normal business hours, (iii) the audit shall be conducted by an independent auditor chosen on mutual agreement of the parties. Contractor shall recommend a minimum of three auditing/accounting firms from which the Licensee will select one; and (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. 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 net pricing in effect under the Contract 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.

In the event of an on-Site audit, the Software Alliance, Software Publishers Association (SPA), Software and Industry Information Association (SIIA) or Federation Against Software Theft (FAST) may not be used directly or indirectly to conduct such audit, nor may such entities be recommended by Contractor.

**63. NO HARDSTOP OR PASSIVE LICENSE MONITORING**

Unless otherwise expressly agreed to by the Licensee, the Product and all upgrades shall 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). Any Contractor access to the Product agreed to by Licensee as provided above shall be in accordance with Licensee's security or other requirements. Contractor agrees that in the event of a breach of this provision that Licensee shall not have an adequate remedy at law, including monetary damages, and that Licensee 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 Licensee shall be entitled.

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

This clause shall apply where Contractor is commissioned by the Authorized User to furnish project deliverables as detailed in the Purchase Order.

**a. Definitions**

(i) For purposes of this clause, "Products" means deliverables furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), whether printed in hard copy or maintained on electronic media c) Third-Party Software, d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components, and e) any properties embodied therein, whether in tangible or intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, Source Code, object code).

(ii) For purposes of this clause, "Existing Products" means 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 clause, "Custom Products" means Products, preliminary, final, or otherwise, that are created or developed by Contractor, its Subcontractors, partners, employees, or agents for Authorized User under the Contract.

**b. Title to Project Deliverables** Unless otherwise specified in writing in the Purchase Order, the Authorized User shall have ownership and license rights as follows:

**(i) Existing Products:**

**1. Hardware** - Title and ownership of Existing hardware Products shall pass to Authorized User upon acceptance.

**2. Software** - Title and ownership to Existing software Products delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other Third-Party Software vendor ("Existing Licensed Product"), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with Contractor or the Third-Party Software vendor. Effective upon acceptance, such Product shall be licensed to Authorized User in accordance with the Contractor or Third-Party Software vendor'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 purposes stated in the Solicitation or Authorized User's Purchase Order or work order, including the financing assignment rights set forth in paragraph (c) below; and (b) recognize the State of New York as the Licensee where the Authorized User is a State Agency, department, board, commission, office or institution. Where these rights are not otherwise covered by the Third-Party Software vendor's standard license agreement, the Contractor shall be responsible for obtaining these rights at its sole cost and expense. The Authorized User shall reproduce all copyright notices and any other legend of ownership on any copies authorized under this clause.

**(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 Products, 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 purposes 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 purchases 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 Products, the sale or other transfer shall be at fair market value determined at the time of such sale or other transfer, and must be pursuant to a separate written agreement in a form acceptable to the Authorized User which complies with the terms of this clause.

**e. Contractor's Obligation with Regard to Third-Party Software**

Where Contractor furnishes Existing Licensed Products as a project deliverable, and sufficient rights necessary to effect the purposes of this section are not otherwise provided in the Contractor or the Third-Party Software vendor's standard license agreement, Contractor shall be responsible for obtaining from the Third-Party Software proprietary owner/developer the rights set forth herein to the benefit of the Authorized User at Contractor's sole cost and expense.

**65. 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; (ii) a written confirmation from the proprietary owner accepting Product invoice as proof of license; or (iii) other similar proof of license. All proofs of license must be in a form acceptable to the Licensee.

**66. 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 and each Licensee 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 similarly situated, supported customer, or (b) not less than 12 months from the date of notice; and (iii) at Licensee’s option, and in order to enable Licensee to continue the use and maintenance of the Product, provide Licensee with a Product replacement or migration path with at least equivalent functionality at no additional charge, provided that Licensee is under contract for maintenance on the date of notice and Contractor is offering such replacement or migration path to all of its similarly situated, supported customers without additional charge.

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 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 Commissioner and each Licensee 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 similarly situated, supported customer, or (b) not less than 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.

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