STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES

New York State Contract # (See Award Document)

(for State use only)

CENTRALIZED CONTRACT FOR THE ACQUISITION OF

Heavy Equipment Rental (Statewide)

BETWEEN

THE NEW YORK STATE OFFICE OF GENERAL SERVICES

AND

(SEE AWARD DOCUMENT FOR CONTRACTORS)

THIS AGREEMENT (hereinafter the "Contract" or the "Agreement") is made by and between the People of the State of New York, acting by and through the Commissioner of the New York State Office of General Services ("OGS"), acting pursuant to authority granted under State Finance Law §163, whose office is on the 41st Floor, Tower Building, Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242 (hereinafter "OGS" or "State"), and Contractor Name herein after "Contractor") with offices at Contractor Address. OGS and the Contractor are collectively referred to herein as "the Parties."

WITNESSETH:

WHEREAS, OGS issued a solicitation referenced as Solicitation #22935, for Heavy Equipment Rental (Statewide), which was advertised in the July 7, 2015 edition of the New York State Contract Reporter as required by the New York State Economic Development Law.

WHEREAS, OGS issued a periodic recruitment Solicitation for Award 22935, which was advertised in the January 19, 2017 edition of the New York State Contract Reporter as required by the New York State Economic Development Law.

WHEREAS, the January 19, 2017 Solicitation provided that the Contract awards for periodic recruitment Solicitation 22935 will be supplemental awards for Award 22935 – Heavy Equipment Rental.

WHEREAS, the solicitation was for a backdrop contract for a Bidder's complete Product Line that meets the Contract definition of Heavy Equipment., with Rental via an Authorized User competitive Rental Quote Process.

WHEREAS, the State has determined the Contractor submitted a responsive proposal, and is willing to provide the complete Product Line specified, at or below the Ceiling Prices set forth in the Contract Pricelist, to Authorized Users, at locations specified by the Authorized Users in the counties set forth herein.

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

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APPENDICES

APPENDIX A: *Standard Clauses for New York State Contracts (January 2014)*

APPENDIX B: *General Specifications (May 2015)*

APPENDIX C: *Heavy Equipment Rental Contract Documents:*

Number 1: *Contractor Information*

Number 2: *Report of Contract Usage*

Number 3: *Insurance Requirements*

Number 4: *Contract Modification Procedure*

Number 5: *Contract Price List*

Number 6: *Rental Quote Forms*

SECTION I: SCOPE AND GENERAL INFORMATION

I.1 SCOPE

This Contract sets forth the terms and conditions governing Heavy Equipment Rental as specified herein. This centralized Contract is for use by Authorized Users, as defined in Appendix B §2 *Definitions*, which 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. See also, Section II.15 *Non-State Agencies Participation*.

This contract is a backdrop Contract for the Product Line and associated Ceiling Prices set forth in Appendix C: *Heavy Equipment Rental Contract Documents*, Number 5: *Contract Price List.* Heavy Equipment Rental shall be on an as-needed basis by Authorized Users via a competitive Rental Quote process (see Section II.10 *Procurement Method*), with Rental provided, at a minimum, to Authorized User locations in the counties set forth in Appendix C: *Heavy Equipment Rental Contract Documents*, Number 1: *Contractor Information.*

Purchase of Heavy Equipment is not permitted under this Contract. This Contract is intended for short term Rental (i.e., Daily, Weekly or Monthly). Long term leasing (e.g., six month or more Rental Period), is not permitted under this Contract.

I.2 DEFINITIONS

Terms used in the Contract that have a capitalized first letter shall be defined in accordance with Appendix B §2 *Definitions*, which is hereby incorporated by reference, and with the definitions listed below.

"Authorized User" as defined in Appendix B §2 *Definitions*.

"Business Day(s)" shall mean Monday through Friday, from 8am ET to 5pm ET.

"Ceiling Price" shall refer to a maximum price that Contractor may charge an Authorized User for a service offered under the Contract.

"Consumables" shall mean a Product intended to be used in the operation of Heavy Equipment and then must be replaced for continued operation (e.g., fuel, lubricants, filters, tips, teeth, blades, cutting edges).

"Contract" as defined in Appendix B §2 *Definitions*.

"Contract Pricelist" shall refer to the Excel document, set forth in Appendix C: *Heavy Equipment Rental Contract Documents*, Number 5: *Contract Price List* which lists, among other things, a description of the Heavy Equipment available for Rental, a Ceiling Price for Daily, Weekly and Monthly Rental Periods, and Delivery Charge(s), for the Heavy Equipment available for Rental.

"Contractor" as defined in Appendix B §2 *Definitions*.

"Daily" shall refer to a Rental Period of twenty-four (24) consecutive hours or less, computed from the hour of commencement of the Rental Period up to but not including the same hour in the next day and shall apply when the number of hours the Heavy Equipment is operated in any twenty-four (24) hours period does not exceed eight (8) hours of use.

"Delivery" shall mean the transport of the Heavy Equipment from the Delivery Origin to the location designated by the Authorized User on the Purchase Order (e.g., location where the Authorized User shall use the Heavy Equipment or the vehicle that the Authorized User shall use to transport the Heavy Equipment), and the return of the Heavy Equipment from the location designated by the Authorized User to the location designated by the Contractor.

"Delivery Charge" shall mean the total dollar amount charged to the Authorized User for Delivery. The Delivery Charge is in addition to the Daily, Weekly or Monthly Rental Price.

"Delivery Origin" shall mean the location from which the Contractor delivers Heavy Equipment to the Authorized User (i.e., Contractor's place of business or other location specified by the Contractor). The Delivery Origin shall be expressed as the applicable NYS County on the Rental Quote form.

"Executive Agency(ies)" shall mean all State departments, offices or institutions but, for the purposes of this Contract, excludes the State University of New York and City University of New York. Furthermore, such term shall not include the legislature, the judiciary, public benefit corporation, public authority, or local government entity.

"Heavy Equipment" shall refer to equipment which is intended for heavy work such as earthmoving, construction, lifting containers or materials, drilling holes in earth or rock, concrete or paving application or street sweeping (e.g., aerial lifts, large towable air compressors, generators and light towers, concrete saws, earth compactors and rollers, backhoes, motor graders, skid-steer loaders, bulldozers, wheel loaders, trenchers, utility tractors, excavators, forklifts, sweepers and utility vehicles), and other related attachments and equipment.

"Make" shall refer to the Heavy Equipment OEM company name (e.g., Case, Caterpillar, John Deere).

"Model" shall refer to the OEM name or code used to identify particular a subset of a Make (e.g., 621F, 908H2, 624K)

"Model Year" shall mean the year used to designate a discrete Model, irrespective of the calendar year in which the equipment was actually produced, provided that the production period does not exceed twenty-four (24) months.

"Monthly" shall refer to a Rental Period of twenty-eight (28) consecutive calendar days, computed from the date of commencement of the Rental Period up to but not including the same date in the next calendar month and shall apply when the number of hours the Heavy Equipment is operated in any twenty-eight (28) day period does not exceed 176 hours of use.

"M/WBE" shall refer to a business certified with NYS Empire State Development (ESD) as a Minority and/or Women-owned Business Enterprise

"N/A" is a common abbreviation for *not applicable* or *not available*, used to indicate when information in a certain field on a table is not provided, either because it does not apply to a particular case in question or because it is not available.

"NYS" shall mean New York State

"NYS Contract Price" shall mean the dollar amount charged to the Authorized User for Product provided under the Contract.

"NYS Vendor ID" shall refer to the ten-character identifier issued by New York State when a vendor is registered on the Vendor File.

"OEM" shall mean Original Equipment Manufacturer.

"OGS" shall mean the New York State Office of General Services.

"Procurement Services" shall mean a division of the New York State Office of General Services which is authorized by law to issue centralized, statewide contracts for use by New York agencies, political subdivisions, schools, libraries and others authorized by law to participate in such contracts. Procurement Services was formerly known as Procurement Services Group (PSG) and New York State Procurement (NYSPro).

"Product Line" shall mean a group of related Heavy Equipment offered for Rental by a single company in their usual course of business.

"Rental" shall mean the provision of Heavy Equipment owned by the Contractor to an Authorized User for a mutually agreed-upon time period (Daily, Weekly or Monthly) and for a mutually agreed-upon price.

"Rental Period" shall mean the time period from the date and time upon which transit of the Heavy Equipment to the location designated by the Authorized User (e.g., location where the Authorized User shall use the Heavy Equipment or the vehicle that the Authorized User shall use to transport the Heavy Equipment), begins and the

date and time upon which transit of the Heavy Equipment ends at the Contractor's place of business or other location designated by the Contractor.

"Rental Price" shall mean the NYS Contract Price charged to the Authorized User for a Rental, inclusive of the Delivery Charge, if applicable.

"Rental Quote" shall refer to a quote for Heavy Equipment Rental, or notification of the unavailability of the requested Heavy Equipment, provided by a Contractor to an Authorized User in response to a Rental Quote Request, on a Rental Quote form. See Appendix C: *Heavy Equipment Rental Contract Documents:* Number 6: *Rental Quote Forms.*

"Rental Quote Request" shall refer to a request from an Authorized User for a Rental Quote. See Appendix C: *Heavy Equipment Rental Contract Documents:* Number 6: *Rental Quote Forms.*

"Rental Quote Process" shall refer to the competitive procurement process that a Contractor must participate in to provide Heavy Equipment Rental under the Contract.

"Small Business" as defined in State Finance Law Section 160(8).

"State Agency(ies)" shall refer to all New York State departments, offices or institutions, including Executive Agencies.

"Weekly" shall refer to a Rental Period of seven (7) consecutive calendar days, computed from the date of commencement of the Rental Period up to but not including the same date in the following week and shall apply when the number of hours the Heavy Equipment is operated in any seven (7) day period does not exceed forty (40) hours of use.

SECTION II: GENERAL TERMS AND CONDITIONS

This section sets forth the general terms and conditions of the Contract.

II.1 APPENDIX A

Appendix A: *Standard Clauses for New York State Contracts*, dated January 2014, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein.

II.2 APPENDIX B

Appendix B: *Office of General Services General Specifications*, dated May 2015, attached hereto, is hereby expressly made a part of this Contract as fully as if set forth at length herein and shall govern any situations not covered by this Contract or Appendix A.

II.2.1 APPENDIX B MODIFICATIONS

The following Appendix B clauses are hereby modified for the purposes of this solicitation:

A. Section 32, *Product Delivery*, is deleted in its entirety and replaced by Section III.4 of this Contract, *Delivery*.

B. Section 60, *Indemnification*, is deleted and replaced with the following:

   60. <u>INDEMNIFICATION</u> Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully defend, indemnify and hold harmless the Authorized Users from suits, actions, damages and costs of every name and description relating to personal injury and damage to real or personal tangible property caused by any intentional act or negligence of Contractor, its agents, employees, partners or Subcontractors, which shall arise from or result directly or indirectly from this

Contract, without limitation; provided, however, that the Contractor shall not indemnify to the extent any claim, loss or damage arising hereunder is due to the negligent act, failure to act, gross negligence or willful misconduct of the Authorized Users.

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit, or other suit 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 in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters.

C. Section 65, *Product Acceptance*, is deleted in its entirety and replaced by Section III.4.3 of this Contract, *Acceptance*.

II.3 APPENDIX C

Appendix C: *Heavy Equipment Rental Contract Documents,* is hereby expressly made part of this Contract as fully as if set forth at length herein.

II.4 CONFLICT OF TERMS

The Contract between the Parties shall be comprised of the following documents. Conflicts among the documents comprising the Contract shall be resolved in the following order of precedence:

A. Appendix A: *Standard Clauses for New York State Contracts (January 2014)*;
B. This document (Base Agreement), the portion of the Contract preceding the Parties' signatures;
C. Appendix B: *Office of General Services General Specifications* (May 2015); and
D. Appendix C: *Heavy Equipment Rental Contract Documents*.

II.5 MERCURY ADDED CONSUMER PRODUCTS

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

II.6 ENVIRONMENTAL ATTRIBUTES AND NYS EXECUTIVE ORDER NO. 4

New York State is committed to environmental sustainability and endeavors to procure products with reduced environmental impact. One example of this commitment may be found in Executive Order No. 4 (Establishing a State Green Procurement and Agency Sustainability Program), which imposes certain requirements on state agencies, authorities, and public benefit corporations when procuring commodities, services, and technology. More

information on Executive Order No. 4, including specifications for offerings covered by this Contract, may be found at http://ogs.ny.gov/EO/4/Default.asp. The Executive Order No. 4 specification for lubricating oil, high detergent, adopted in February 2009, for example, specifies that where lubricating oil with post-consumer material content is available at a competitive cost and meets the entity's form, function and utility requirements, all affected state entities shall, to the maximum extent practicable, purchase lubricating oil that meets or exceeds a minimum percentage of post-consumer material content by weight of 55 percent. State entities subject to Executive Order No. 4 are advised to become familiar with the specifications that have been developed in accordance with the Order, and to incorporate them, as applicable, when making purchases under this Contract.

II.7 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 bid 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 "*Remanufactured, Recycled, Recyclable or Recovered Materials*" in Appendix B, OGS General Specifications.

II.8 INSURANCE REQUIREMENTS

Contractor shall comply with the insurance requirements as described in Appendix C: *Heavy Equipment Rental Contract Documents*, Number 3: *Insurance Requirements*. If requested by Procurement Services, Contractor must provide proof of current insurance, certifications, licensing, etc. throughout the Contract period.

II.9 NEW YORK STATE VENDOR RESPONSIBILITY

If it is found by the State that the Contractor's responses to the Vendor Responsibility Questionnaire were intentionally false or intentionally incomplete, on such finding, OGS may terminate the Contract. Contractor agrees it shall recertify its Questionnaire no later than the end of the eleventh month of each Contract year.

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

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

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

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

II.10 PROCUREMENT METHOD

The following procurement instructions shall apply to this Contract. OGS reserves the right to change the processes set forth in this Section and in Appendix C: *Heavy Equipment Rental Contract Documents:* Number 6: *Rental Quote Forms,* in non-material and non-substantive ways without seeking a contract amendment.

A. When utilizing the Contract, the Authorized User should be familiar with and follow the terms and conditions governing its use. The Authorized User is accountable and responsible for compliance with the requirements of public procurement processes. The Authorized User, when purchasing from OGS contracts, should hold the Contractor accountable for Contract compliance and meeting the Contract terms, conditions, specifications, and other requirements. Also, in recognition of market fluctuations over time, Authorized Users are encouraged to seek improved pricing whenever possible. Authorized Users have the responsibility to document purchases which should include:

- A statement of need and associated requirements;
- Obtaining all necessary prior approvals;
- A summary of the Contract alternatives considered for the purchase, if any; and
- The reason(s) supporting the resulting purchase.

B. An Authorized User shall review the Contracts and associated Contractor information and Contract Pricelists on the OGS website under Contract Award 22935, and determine which Contractors offer the type of Heavy Equipment required for Rental in the county where the Heavy Equipment shall be used.

C. <u>Rental Quote Process</u>: Rental to Authorized Users under this Contract shall be made through a competitive Rental Quote Process as described below. The Contractor shall only provide a Rental under this Contract when the Authorized User has submitted a Rental Quote Request and subsequently requests a Rental as the result of this Rental Quote Process. See Appendix C: *Heavy Equipment Rental Contract Documents:* Number 6: *Rental Quote Forms,* for forms used in the Rental Quote Process.

1. When a need is identified, an Authorized User is required to obtain all internal/control agency approvals necessary prior to initiating the Rental Quote Process. Upon internal/control agency approvals, the Authorized User shall complete a Rental Quote Request. The Rental Quote Request shall identify such things as the number and type of Heavy Equipment needed, a description of the Heavy Equipment needed, and delivery and pickup requirements.

2. Upon completion of a Rental Quote Request, the Authorized User shall submit the request to at least three (3) Contractors for response. Rental Quote Requests may be submitted via email or fax, or in person. The emails and faxes shall be sent to the email address(es) and fax numbers set forth in Appendix C: *Heavy Equipment Rental Contract Documents*: Number 1: *Contractor Information*. The Contractor shall be responsible for providing updated email address(es) during the Contract period to the Procurement Services Contract Administrator identified on the Contact Award Notification page posted at the OGS website.

3. From the send date and time of either the email or fax that includes the Rental Quote Request, or when it was presented in person, Contractors shall have a minimum of one (1) complete Business Day, not including either the day that the email or fax was sent, or the day it was presented in person, to submit a Rental Quote. The Authorized User reserves the right to set Rental Quote submittal deadlines that are shorter than one (1) business day in the event of an Emergency. The Rental Quote submittal deadline shall be included on each Rental Quote Request.

4. A Contractor must provide Rental Quotes to the Authorized User, using the method specified by the Authorized User on the Rental Quote Request, on the Rental Quote form included in Appendix C: *Heavy Equipment Rental Contract Documents:* Number 6: *Rental Quote Forms*. Instructions for completion are included on the form. A Rental Quote submitted in a format other than on the Rental Quote form may be rejected by the Authorized User.

5. The Authorized User shall be responsible for reviewing all Rental Quotes received and for selecting the Contractor with the lowest price, including the cost of Delivery, which can meet the requested need for Heavy Equipment Rental. The determination of whether or not the Heavy Equipment offered in the Rental Quote meets the Authorized User need is at the sole discretion of the Authorized User. If at least three (3) Rental Quotes are not submitted, the Authorized User must justify the reasonableness of the Contractor selection in their procurement record.

5. Authorized Users are instructed to notify the Contractor that has been selected to provide the Rental within two (2) business days of the deadline for submittal of the Rental Quote. Such notification may be via email, fax or phone, or in person, to the Contractor contact information set forth in Appendix C: *Heavy Equipment Rental Contract Documents*: Number 1: *Contractor Information*. Contractors that submitted a Rental Quote but have not been selected shall be notified at the Authorized User's discretion.

   The Contractor is requested, but not obligated, to refrain from scheduling Rental of the Heavy Equipment specified in the Rental Quote to another customer on the Rental date(s) requested by the Authorized User, for two (2) business days from the deadline for submittal of the Rental Quote.

6. Upon selection of the Contractor to provide the Rental, the Authorized User shall issue a Purchase Order to the Contractor following the Authorized User's standard procedures (see Section II.11.1 *Purchase Orders)*, and ensure that a copy of Rental Quote Request, Rental Quotes received and other pertinent documents are maintained for audit purposes following the Authorized User's standard procedures.

D. <u>Authorized User Procurement Rights</u>: Authorized Users reserve the right in the Rental Quote Process to:

1. Reject any or all responses received in response to a Rental Quote Request;
2. Withdraw the Rental Quote Request at any time, at the Authorized User's sole discretion;
3. Issue a Purchase Order for all or part of the number of pieces of Heavy Equipment requested in a Rental Quote Request;
4. Disqualify any Contractor submitting a Rental Quote whose conduct and/or proposal fails to conform to the requirements of the Rental Quote Request;
5. Seek clarifications and revisions of Rental Quotes;
6. Prior to the Rental Quote Request submittal deadline, amend the specifications to correct errors or oversights, or to supply additional information, as it becomes available;
7. Prior to the Rental Quote Request submittal deadline, direct Contractors to submit modifications addressing subsequent Rental Quote Request amendments;
8. Change any of the schedule dates with notification to all Contractors that received a Rental Quote Request from the Authorized User;
9. Eliminate any mandatory, non-material specifications that cannot be complied with by all of the Contractors that have submitted a Rental Quote in response to a Rental Quote Request;
10. Waive any requirements in the Rental Quote Request that are not material;
11. Utilize any and all ideas submitted in the Rental Quotes received;
12. Adopt all or any part of a Contractor's Rental Quote in selecting the optimum provider of the Heavy Equipment Rental.
13. Negotiate with the Contractor responding to the Rental Quote Request within the Rental Quote Request requirements to serve the best interests of the State. This includes requesting clarifications of any or all Contractor's Rental Quotes;
14. Require clarification at any time during the Rental Quote Process and/or require correction of arithmetic or other apparent errors for the purpose of assuring a full and complete understanding of a Contractor's

Rental Quote and/or to determine a Contractor's compliance with the requirements of the Rental Quote Request;

15. Select an alternate provider for the Heavy Equipment Rental other than the selected Contractor in the event of unsuccessful negotiations or, optionally, in other specified circumstances as detailed in the Rental Quote Request; and
16. Use information obtained through site visits, management interviews, and the state's investigation of a Contractor's qualifications, experience, ability or financial standing, and any material or information submitted by the Contractor in response to the Authorized User's request for clarifying information in the course of evaluation and/or selection under the Rental Quote Request.

E. New York State Reserved Rights: The State reserves the right to:

1. Use an on-line process, such as reverse auction, to make acquisitions under the Contracts. Contractor agrees to participate in an on-line process established by OGS;
2. Exclude from the Contract any equipment that, at the sole discretion of the State, does not meet the Contract definition of Heavy Equipment;
3. Aggregate the volume of Authorized User requests for Heavy Equipment Rental by combining requests under one Rental Quote Request; and
4. Issue a Rental Quote Request with general specifications for Heavy Equipment that may be utilized by all Authorized Users over a period of time.

II.11 PURCHASE ORDERS AND INVOICING

All Purchase Orders and invoices shall include the following information.

II.11.1 PURCHASE ORDERS

Authorized User Purchase Orders are to include the following information:

A. Contract number;
B. Contractor business name;
C. Rental Quote Request number, if applicable;
D. Make, Model and description of the Heavy Equipment to be provided for Rental;
E. Description of attachments to be included with the Heavy Equipment, if applicable;
F. Rental Period;
G. Delivery location; and
H. NYS Contract Price for the Rental.

II.11.2 INVOICES

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

Invoices shall include, at a minimum, the following information:

A. Contract number;
B. Contractor business name;
C. Rental Quote Request Number, if applicable;
D. Make, Model, description and Rental Price of the Heavy Equipment provided for Rental;
E. Description and Rental Price of attachments included with the Heavy Equipment, if applicable;

F. Price of Consumables and provided with the Rental
G. Rental Period and location;
H. Delivery Charge;
I. Repair costs, if applicable; and
J. Total NYS Contract Price for the Rental.

II.12 CONTRACT PAYMENTS

Payments cannot be processed until the Rental Period has ended and an invoice has been received by the Authorized User. Payment shall be made by the Authorized User and shall be based on any invoice used in the Contractor's normal course of business. However, such invoice must contain all requirements in Section II.11 *Purchase Orders and Invoicing*. See also Appendix B §48 *Contract Invoicing*. Upon mutual agreement between the Contractor and Authorized User, the Contractor may issue one (1) invoice that covers multiple Rentals that have been completed during the applicable month.

II.13 "OGS OR LESS" GUIDELINES APPLY

Rental of the Product Line included in this Contract are subject to the "OGS or Less" provisions of New York State Finance Law § 163(3)(a)(v). This means that State Agencies can acquire Heavy Equipment Rental from sources other than the Contractor provided that such Heavy Equipment Rental is substantially similar in form, function or utility to the Heavy Equipment Rental herein and are:

1. Lower in price

   -And/Or-

2. Available under terms which are more economically efficient to the State agency (e.g. delivery terms, warranty terms, etc.).

State agencies are reminded that they must provide the Contractor an opportunity to match the non-contract savings at least two (2) business days prior to Rental. In addition, Rentals made under "OGS or Less" flexibility must meet all applicable requirements of law including, but not limited to, advertising in the New York State Contract Reporter, prior approval of the Comptroller's Office and competitive bidding of requirements exceeding the discretionary bid limit.

II.14 REPORT OF CONTRACT USAGE

Contractor shall furnish a report of all Heavy Equipment Rentals under the Contract during each quarterly period, no later than fifteen (15) days following the close of the quarterly period. Quarterly periods shall end on March 31st, June 30th, September 30th and December 31st. If the Contract period begins or ends in a fractional portion of a reporting period only the actual Contract Rentals for this fractional period should be reported in that quarterly report. Rentals by all Authorized Users under the Contract shall be reported in the same report and be indicated as required. A template for such report is included in Appendix C: *Heavy Equipment Rental Contract Documents*: Number 2: *Report of Contract Usage*. All fields of information shall be accurate and complete. The report is to be submitted electronically via email utilizing the template provided, in Microsoft Excel 2003, or newer (or as otherwise directed by OGS), to the attention of the individual shown on the front page of the Contract Award Notification and shall reference the OGS group number, award number, Contract Number, Rental period, and Contractor's business name, and all other fields required. OGS reserves the right to amend the report template during the Contract period.

II.15 NON-STATE AGENCIES PARTICIPATION

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 §26 *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 Section III.1.1 *Delivery Charge* 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. Questions regarding an organization's eligibility to purchase from New York State Contracts may also be directed to Procurement Services Customer Services at 518-474-6717.

II.16 CONTRACT PERIOD AND RENEWALS

All Contracts awarded under solicitation 22935 shall terminate simultaneously three (3) years from the date of OGS approval of the first Contract awarded. If mutually agreed between OGS and the Contractor, the Contract may be renewed under the same terms and conditions for up to two (2) additional years. The Contract renewal may be exercised for partial periods such as an additional three month, six month, twelve month, or 24 month period.

Notwithstanding the foregoing, all Contracts awarded under solicitation 22935 may be terminated for convenience upon issuance of a new statewide award for Heavy Equipment Rental. See Appendix B §46 *Termination.*

II.16.1 SHORT TERM EXTENSION

In the event a replacement Contract has not been issued, this Contract may be extended unilaterally by the State for an additional period of up to one (1) month upon notice to the Contractor with the same terms and conditions as the original Contract. With the concurrence of the Contractor, the extension may be for a period of up to three (3) months in lieu of one (1) month. However, this extension terminates should a replacement award for Heavy Equipment Rental be issued in the interim.

II.17 POOR PERFORMANCE

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

Office of General Services
Procurement Services
Customer Services
38th Floor Corning Tower
Empire State Plaza
Albany, NY 12242

Tel: 518-474-6717
Fax: 518-474-2437
Email: customer.services@ogs.ny.gov

II.18 CONTRACT ADVERTISING

In addition to the requirements set forth in Appendix B §11 *Advertising Results*, any Contractor advertisements, promotional literature and/or Contract description(s) of Contract awards must be reviewed and approved by Procurement Services prior to issuance.

II.19 OVERLAPPING CONTRACT ITEMS

Products/services available in this Contract may also be available from other New York State contracts. Authorized Users shall be advised to select the most cost effective procurement alternative that meets their program requirements and to maintain a procurement record documenting the basis for this selection.

II.20 CONTRACTOR REQUIREMENTS AND PROCEDURES FOR PARTICIPATION BY NEW YORK STATE CERTIFIED MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES AND EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND WOMEN

II.20.1 NEW YORK STATE LAW

Pursuant to New York State Executive Law Article 15-A and Parts 140–145 of Title 5 of the New York Codes, Rules and Regulations (“NYCRR”), the New York State Office of General Services (“OGS”) is required to promote opportunities for the maximum feasible participation of New York State-certified Minority- and Women-owned

Business Enterprises ("MWBEs") and the employment of minority group members and women in the performance of OGS contracts.

II.20.2 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 and the regulations promulgated thereunder. These requirements include equal employment opportunities for minority group members and women ("EEO") and contracting opportunities for 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. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, a finding of 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 and applicable law.

II.20.3 EQUAL EMPLOYMENT OPPORTUNITY (EEO)

A. The provisions of Article 15-A of the Executive Law and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall 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. In addition, Contractor agrees to comply with the Non-Discrimination Requirements set forth in clause 5 of Appendix A.

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 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 all subcontractors.
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 and 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.

II.20.4 CONTRACT GOALS

A. OGS hereby establishes an overall goal of 10% for MWBE participation, 5% for Minority-Owned Business Enterprises ("MBE") participation and 5% for Women-Owned Business Enterprises ("WBE") participation (based on the current availability of 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.

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 §§ 140–45. Questions regarding compliance with MWBE participation goals should be directed to the Designated Contacts within the OGS Office of Minority- and Women-Owned Business Enterprises. 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).

II.20.5 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, and the estimated or, if known, actual dollar amounts to be paid to an 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 New York State 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. By entering into the Contract, Bidder/Contractor understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR § 140.1, may be applied towards the achievement of the applicable MWBE participation goal. When an MWBE is serving as a broker on the Contract, only 25 percent of all sums paid to a broker shall be deemed to represent the commercially useful function performed by the MWBE.

D. OGS will review the submitted MWBE Utilization Plan and advise the Bidder of OGS acceptance or issue a notice of deficiency within 30 days of receipt.

E. 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.

F. OGS may disqualify a Bidder's bid/proposal as being non-responsive under the following circumstances:

(a) If a Bidder fails to submit an 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.

G. 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.

H. 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.

II.20.6 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 <u>OGS Office of Minority- and Women-Owned Business Enterprises for guidance.</u>**

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) business 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.

II.20.7 REQUIRED GOOD FAITH EFFORT

A. 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, copies of such solicitations, and any responses thereto.
   2. A list of the certified MWBEs appearing in the Empire State Development ("ESD") 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.

II.20.8 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, 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 – Vendor training**" 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, 29th Floor Corning Tower, Empire State Plaza, Albany, NY 12242. Phone: 518-486-9284; Fax: 518-486-9285.

F. It is the Contractor's responsibility to report subcontractor and supplier payments. Failure to respond to payment audits in a timely fashion through the NYSCS, or by paper to OGS, may jeopardize future payments pursuant to the MWBE liquidated damages provisions in clause IX below.

II.20.9 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.

II.20.10 FRAUD

Any suspicion of fraud, waste, or abuse involving the contracting or certification of MWBEs shall be immediately reported to ESD's Division of Minority and Women's Business Development at (855) 373-4692.

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

II.21. PARTICIPATION OPPORTUNITIES FOR NEW YORK STATE 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:
http://ogs.ny.gov/Core/docs/CertifiedNYS_SDVOB.pdf

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: http://ogs.ny.gov/Core/SDVOBA.asp?_sm_au_=iVVjF227tLtF4JJH

II.22 CENTRALIZED CONTRACT MODIFICATIONS

A. OGS, an Authorized User, or the Contractor may request 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 or services, make price level revisions, delete products or services, 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: *Heavy Equipment Rental Contract Documents*, Number 4: *Contract Modification Procedure*. The Contractor shall submit all requests in the form and format contained in Appendix C: *Heavy Equipment Rental Contract Documents*, Number 4: *Contract Modification Procedure*.

   The form contained within Appendix C: *Heavy Equipment Rental Contract Documents*, Number 4: *Contract Modification Procedure* 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 §27 *Modification of Contract Terms*.

II.23 EXTENSION OF USE

The Contract may be extended to additional states or governmental jurisdictions upon mutual written agreement between New York State (the lead contracting State) and the Contractor. Political subdivisions and other authorized entities within each participating state or governmental jurisdiction may also participate in the Contract if such state normally allows participation by such entities.

II.23.1 EXTENSION OF USE COMMITMENT

The Contractor agrees to honor all Purchase Orders from Authorized Users (see Section II.22 *Extension of Use*) which are in compliance with the pricing, terms, and conditions set forth in the Contract.

Any unilateral limitations/restrictions imposed by the Contractor on Authorized Users shall be grounds for cancellation of the Contract.

II.24 PERFORMANCE AND BID BONDS

There are no bonds required for the Contract. In accordance with Appendix B §44 *Performance/Bid Bond*, the Commissioner of OGS has determined that no performance, payment or Bid bond, or negotiable irrevocable letter of credit or other form of security for the faithful performance of the Contract shall be required at any time during the initial term, or any renewal term, for the Contract.

II.25 WEB ACCESSIBILITY

Responsibility for Content: Contractor is solely responsible for administration, content, intellectual property rights and all materials at Contractor's website. Contractor is solely responsible for its actions and those of its agents, employees, resellers, Sub-Contractors or assigns, and agrees that neither Contractor nor any of the foregoing has any authority to act or speak on behalf of the State. As applicable, Contractor agrees to comply with the Office of Information Technology Services f/k/a Office for Technology policy NYS-P08-005 Accessibility of Web-Based Information and Applications, as may be amended, the stated purpose of which is to make State Agency web-based Intranet and Internet information accessible for persons with disabilities. In accordance with such policy, the following language is incorporated into this Contract:

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

II.26 ADDITIONAL REQUIREMENTS

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

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

II.27 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 contract vendors "on behalf of" State agencies and public authorities and require certain reports from contract vendors. 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 NYECL §19-0323, to be used under this contract, will comply with the specifications and provisions of the Law, and 6 NYCRR Parts 248 and 249.

II.28 ESTIMATED QUANTITIES

This Contract is an Indefinite Delivery, Indefinite Quantity (IDIQ) Contract. The Contractor must furnish all quantities or dollar values actually ordered. The individual value of the Contract is indeterminate. See Appendix B §29 *Estimated/Specific Quantity Contracts* and §26 *Participation in Centralized Contracts*.

Numerous factors could cause the actual volume of Product purchased under the Contract to vary substantially. Such factors include, but are not limited to, the following:

- Such Contract is a nonexclusive Contract;
- There is no guarantee of volume to be purchased, nor is there any guarantee that demand will continue in any manner consistent with previous purchases;
- The individual value of the 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 the Contract for cause or convenience prior to the end of the term pursuant to the terms and conditions of the Contract.

In Procurement Services' experience, depending on the price of a particular Product, the actual volume of purchases for that Product could be substantially in excess of, or substantially below, estimated volumes. Specifically, if actual contract pricing is lower than anticipated or historical pricing, actual quantities purchased could be substantially greater than the estimates; conversely, if actual contract pricing is higher than anticipated or historical pricing, actual quantities purchased could be substantially lower than the estimates. Contractor acknowledges the foregoing and agrees that actual good faith purchasing volumes during the term of the resulting Contract could vary substantially from any estimates provided.

SECTION III: SPECIAL TERMS AND CONDITIONS

III.1 HEAVY EQUIPMENT RENTAL PRICES

Pricing for Heavy Equipment Rental under the Contract shall be subject to the following terms and conditions. Heavy Equipment Rental Prices shall not exceed the prices charged to other government or private entities in the Contractor's normal course of business. See also Appendix B §15 *Pricing.*

A. Daily Rental: The Daily Rental Price shall be for a Rental Period of twenty-four (24) consecutive hours or less, computed from the hour of commencement of the Rental Period up to but not including the same hour in the next day and shall apply when the number of hours the Heavy Equipment is operated in any twenty-four (24) hour period does not exceed eight (8) hours of use.

A “double shift,” if offered, shall mean sixteen (16) hours of use per day, and the Rental Price shall be one (1) and a half times the Daily Rental Price.

A “triple shift,” if offered, shall mean twenty-four (24) hours of use per day, and the Rental Price shall be two (2) times the Daily Rental price.

B. Weekly Rental: The Weekly Rental Price shall be for a Rental Period of seven (7) consecutive calendar days, computed from the date of commencement of the Rental Period up to but not including the same date in the following week and shall apply when the number of hours the Heavy Equipment is operated in any seven (7) day period does not exceed forty (40) hours of use.

C. Monthly Rental: The Monthly Rental price shall be for a Rental Period of twenty-eight (28) consecutive calendar days, computed from the date of commencement of the Rental Period up to but not including the same date in the next calendar month and shall apply when the number of hours the Heavy Equipment is operated in any twenty-eight (28) day period does not exceed 176 hours of use.

D. Overtime and Extended Rental Period Charges: Where Heavy Equipment is operated in excess of the above stated hourly maximums, as determined by the equipment hour/usage meter, such excess shall be charged at the following rates. If the Heavy Equipment does not have an hour/usage meter, then the hours used shall be determined by the Authorized User.

1. 1/16th of the Daily Rental price for each hour used in excess of eight (8) hours in any one (1) day;
2. 1/80th of the Weekly Rental price for each hour used in excess of forty (40) in any one weekly period; and
3. 1/352nd of the Monthly Rental price for each hour used in excess of 176 in any 28 consecutive day period.

After the Rental Period has expired, the Rental price for a fraction of any Authorized User requested extended Rental Period shall be at the fractions listed above.

E. Consumables: At the beginning of the Rental Period, the Contractor shall provide the Authorized User with a price list for Consumables that may be used with the Heavy Equipment during the Rental Period (see Section III.3 *Rental Service Requirements*, Paragraph F *Consumables*). All charges for Consumables are to be detailed on the Rental invoice issued to the Authorized User.

F. Repairs. The cost of repairs (e.g., labor, travel costs, parts, and supplies) shall be the responsibility of the Contractor unless it is determined that the breakdown or damage is the direct result of the Authorized User’s negligence. In the event of physical damage to equipment caused by negligence by the Authorized User, necessary repair/replacement costs shall be borne by the Authorized User. These costs are not to exceed the current labor rates and OEM’s suggested retail prices for charges for similar service to other government or private entities in the Contractor’s normal course of business. All charges for repairs are to be detailed on the Rental invoice issued to the Authorized User.

G. Downtime: Deductions from the Rental Price shall not be made for reasonable downtime. Reasonable downtime shall include time necessary for an Authorized User to perform routine service (e.g., grease components prior to use, add diesel exhaust fluid, change oil) or minor repairs requiring less than one (1) hour, and time for the Contractor to repair or replace Heavy Equipment. See Sections III.3 *Rental Service Requirements*, Paragraph G *Maintenance,* Paragraph H *Routine Service*, and Paragraph I *Repair.*

H. Early Return: Unless otherwise agreed-upon by the Contractor, the Rental Price shall not be subject to any deduction in the event that the Authorized User returns the Heavy Equipment to the Contractor before the expiration of the previously agreed-upon Rental Period. The Contractor shall not assess additional early return charges to the Authorized User.

III.1.1 DELIVERY CHARGE

The Delivery Charge is the total dollar amount charged to the Authorized User for Delivery of the Heavy Equipment from the Delivery Origin to the location designated by the Authorized User on the Purchase Order (e.g., location where the Authorized User shall use the Heavy Equipment or the vehicle that the Authorized User shall use to transport the Heavy Equipment), and the return of the Heavy Equipment from the location designated by the Authorized User to the location designated by the Contractor. The Delivery Charge may include fees for the following services provided by the Contractor to the Authorized User.

A. Loading/Unloading: Any fee for loading the Heavy Equipment onto the vehicle that shall be used to transport the Heavy Equipment, and/or for unloading the Heavy Equipment once it has reached the intended destination.

B. Transportation Charge: The charge for the Contractor to transport the Heavy Equipment to the location designated by the Authorized User and from that location to the return location designated by the Contractor, which shall be calculated using one of the following methods. If the Contractor offers more than one method of calculation for the transportation charge for the Heavy Equipment Rental, then the method utilized shall be at the discretion of the Authorized User. The Transportation Charge may include travel time and/or mileage, as applicable, for the return of the empty vehicle from the Authorized User's Delivery location after drop off of the Heavy Equipment, and the return of the empty vehicle back to the Authorized User's Delivery location for pickup of the Heavy Equipment from the Authorized User. Whether or not such charges are included in the Delivery Charge shall be identified on the Contract Pricelist.

   1. Per Mile. A per mile transportation charge shall be calculated by multiplying the per mile price by the number of miles traveled for Delivery. *Note: In the event that the mileage used for calculation is considered to be excessive by the Authorized User, or exceeds the mileage estimate previously agreed-upon, the Contractor shall be required to provide a reasonable explanation for the mileage. The Authorized User shall not be responsible for mileage charges that are determined to be excessive.*

   2. Per Hour. A per hour transportation charge for Delivery to the Authorized User shall be calculated by multiplying the per hour price by the number of hours accrued for Delivery of the Heavy Equipment. The time accrued shall not include time used by the Contractor for personnel breaks, fueling or lodging. If the time accrued includes a fractional number of hours, (e.g., 45 minutes or one and a half hours), then the per hour transportation charge for that fractional time period shall be prorated and adjusted to be rounded to the nearest quarter hour of the per hour charge, as applicable. *Note: In the event that the number of hours used for calculation is considered to be excessive by the Authorized User, or exceeds the number of hours estimate previously agreed-upon, the Contractor shall be required to provide a reasonable explanation for the number of hours. The Authorized User shall not be responsible for per hour charges that are determined to be excessive.*

   3. Flat Rate. A flat rate transportation charge shall be equal to either the flat rate identified on the Contract Pricelist, or a lower dollar amount mutually agreed-upon prior to the Rental Period.

C. Other: Other Contractor costs associated with providing the Delivery (e.g., tolls, highway and other special permit fees) shall only be included in the Delivery Charge if they are previously agreed-upon, and are costs that the Contractor has incurred specifically in relation to the individual Authorized User's Delivery.

The above fees shall only be included in the Delivery Charge if the Authorized User receives the applicable service (i.e., loading/unloading, transportation charge, other) with the Rental. An Authorized User may utilize their own personnel and equipment for loading/unloading and transportation. Additionally, if the Heavy Equipment moves from one customer to another the Delivery Charge for the first customer shall not overlap that of the second customer.

In the event that an Authorized Users requests Delivery of multiple pieces of Heavy Equipment, only a single loading/unloading charge, that is the one highest for the Heavy Equipment loaded, shall be allowed as long as it is

physically possible to load all the equipment on a single trailer. Only one (1) transportation charge shall also be applied in such situations.

III.1.2 CEILING PRICE

The Contractor shall provide Ceiling Prices for all Heavy Equipment available for Rental under the Contract, and applicable Delivery Charges, for inclusion on the Contract Pricelist (see Section III.1.3 *Contract Pricelist*).

A. OGS reserves the right to reject Product from the Contract Pricelist that is determined, at the sole discretion of OGS, to have an unreasonably high Ceiling Price. Such determination shall be based on available industry Heavy Equipment Rental pricing guide(s) and comparison with Rental Prices offered by competitors in the same geographic area.

B. All Rental Prices included on a Rental Quote shall be equal to or less than the Ceiling Price listed on the Contract Pricelist. A Rental Quote that includes a Rental Price that exceeds the published Ceiling Price(s) for the Rental of the Heavy Equipment shall be deemed non-responsive and shall result in the rejection of the Rental Quote for that Rental Quote Request.

C. The Ceiling Prices shall include all Contractor costs to maintain and provide to the Authorized User fully functioning Heavy Equipment that meets the requirements set forth in Section III.2 *Heavy Equipment Requirements*, without additional compensation. The Ceiling Price includes, but is not limited to:

   1. Labor, parts, material and equipment costs to maintain the Heavy Equipment as recommended by the OEM. See also Sections III.3 *Rental Service Requirements*, Paragraph G *Maintenance, and* Paragraph H *Routine Service*;
   2. Repairs and replacement of parts resulting from routine use, as necessary. See also Sections III.3 *Rental Service Requirements*, Paragraph G *Maintenance,* Paragraph H *Routine Service*, and Paragraph I *Repair*;
   3. Administrative, reporting, or other requirements, and all associated costs, including, but not limited to, travel, parking fees, permits, licenses, and insurance.

III.1.3 CONTRACT PRICELIST

The following terms and conditions apply to the Contract Pricelist, set forth in Appendix C: *Heavy Equipment Rental Contract Documents*: Number 5: *Contract Pricelist.*

A. OGS shall make the Contract Pricelist available to Authorized Users and post it publically on the OGS website. Where an Authorized User does not have the capability to access Contract information electronically, it shall be the Contractor's responsibility, upon Authorized User request, to furnish, without charge, Contract Pricelists pursuant to the Contract, to Authorized Users who request them. Contract Pricelists may be furnished to Authorized Users in either hard-copy or electronic format. If available in both formats, they shall be furnished in the format preferred by the requesting Authorized User. Upon request, the Contractor shall assist Authorized Users in the use of Contract Pricelists.

B. Updates to the Heavy Equipment listed on the Contract Pricelist (e.g., addition of new Heavy Equipment or deletion of Heavy Equipment) may be requested quarterly (see Section II.21 *Centralized Contract Modifications*), and such changes shall go into effect after all necessary approvals on the first day of the next quarter (e.g. January 1, April 1, July 1 and October 1).

C. Ceiling Prices are firm for the first twelve (12) months of the Contract period. Thereafter, price changes may be requested quarterly (see Section II.21 *Centralized Contract Modifications*), and shall go into effect after all necessary approvals on the first day of the next quarter (e.g. January 1, April 1, July 1 and October 1). OGS reserves the right to request additional information that may be needed in order to determine if the price changes are reasonable.

D. In order to receive OGS approval for changes to the Contract Pricelist, the Contractor must submit a completed Appendix C: *Heavy Equipment Rental Contract Documents*, Number 4: *Contract Modification Procedure* to the Procurement Services Contract administrator. If approved, Procurement Services shall notify the Contractor in writing and post the revised Contract Pricelist to the OGS website.

E. The Authorized User may permit the Contractor to substitute Heavy Equipment for Rental, prior to OGS approval, if the Model listed on the Contract Pricelist is unavailable and the substitute Model is deemed by the Authorized User to be equal or better than the Heavy Equipment listed on the published Contract Pricelist. Rental pricing for such substitute Heavy Equipment shall be equal to the Rental pricing for the Heavy Equipment that is unavailable. The Contractor shall add the substitute Heavy Equipment to the Contract Pricelist with the subsequent quarterly Contract Pricelist update.

III.2 HEAVY EQUIPMENT REQUIREMENTS

The following shall be considered minimum requirements for the Heavy Equipment offered for Rental. The Authorized Users shall include supplemental required specifications in the Rental Quote Requests.

A. Standards, Codes, Rules and Regulations: Heavy Equipment shall comply with all applicable governmental regulations including, but not limited to, those listed below. If applicable, the appropriate decals indicating compliance shall be affixed to the Heavy Equipment.

1. New York State laws, regulations and directives, including but not limited to, New York Codes, Rules and Regulations (NYCRR), New York State Vehicle and Traffic Law (NYSVTL), and New York State Dept. of Motor Vehicles (NYSDMV).
2. Federal Motor Vehicle Safety Standards (FMVSS), Federal Motor Carrier Safety Administration (FMCSA), National Highway Traffic and Safety (NHTSA), Environmental Protection Agency (EPA), and Occupational Safety & Health Administration (OSHA) requirements.
3. Federal Government and New York State (NYCRR) regulations governing the control of air pollution from new motor vehicles and new motor vehicle engines in effect on the date of manufacture. See NYCRR (NY Codes Rules and Regulations), Title 6 *Environmental Conservation,* Part 218, *Emissions Standards for Motor Vehicles and Motor Vehicle Engines*.

B. Standard Equipment: Unless otherwise specified by the Authorized User, any parts, components, equipment, controls, materials, features, performances, capacities, ratings or designs which are standard and/or necessary to form an efficient and complete working unit shall be furnished. Any item not specified by the Authorized User but deemed necessary for the application of the Heavy Equipment shall be supplied and shall meet the industry standards.

C. Manuals: Heavy Equipment shall be furnished with standard manuals (e.g. operation, maintenance and parts manuals) as would normally accompany such Heavy Equipment. Manuals may be provided printed and bound, on CD, or at an online website.

D. Equipment Condition: Prior to the beginning of the Rental Period, Heavy Equipment shall, at a minimum, be provided to the Authorized User in the following condition as applicable to the Heavy Equipment type.

1. Shall be completely assembled, clean, lubricated, serviced, fully functional and capable of performing the task(s) it was designed to perform under the OEM's guidelines. The Contractor shall be responsible for all costs and expenses necessary to provide Heavy Equipment that is in good working condition and repair. The Authorized User shall not be liable for damage caused by improper maintenance of the equipment by the Contractor;
2. All safety devices, including rear view camera and/or backup alarm, shall be in place and operational per the OEM's design. Safety stickers shall be in place and legible;
3. Fuel tank shall be at full capacity;

4. All required documents shall be provided (e.g., vehicle registration, inspection and emissions stickers, certificate of insurance);
5. Shall meet the OEM's minimum recommendations for Gross Vehicle Weight Rating (GVWR), Front Gross Axle Weight Rating (FGAWR), Rear Gross Axle Weight Rating (RGAWR) and curb weight.
6. Shall have vandalism/theft protection covers or other security system in place.

E. Title and Registration: Title to the Heavy Equipment shall at all times remain with the Contractor and nothing contained in this Contract shall be deemed to have the effect of conferring upon the Authorized User any right or title whatsoever in or to the Heavy Equipment. Purchase of Heavy Equipment is not permitted under this Contract. If applicable, the Heavy Equipment shall be registered to the Contractor with license plate affixed and suitable for operation on the highway.

III.3 RENTAL SERVICE REQUIREMENTS

The following shall be considered minimum service requirements for the Rental. The Authorized Users shall include supplemental required specifications in the Rental Quote Requests.

A. Rental Period: The minimum Rental Period that may be offered under the contract is a Daily Rental Period. This Contract is intended for short term Rental (i.e., Daily, Weekly or Monthly). Long term leasing (e.g., six month or more Rental Period), is not permitted under this Contract. Saturday, Sunday and government holidays shall not be excluded from Rental Periods, and the Contractor shall offer Heavy Equipment for Rental on these days if such Rental is offered in the Contractor's usual course of business.

B. Equipment Operators: The Heavy Equipment shall be furnished without operating personnel, and the operation of said Heavy Equipment shall be performed by Authorized User employees.

C. Equipment Condition Report: A signed, written equipment condition report shall be provided to the Authorized User for signature prior to the start of the Rental Period, and upon return of the Heavy Equipment to the Contractor. At a minimum, the report shall include a list, as applicable to the Heavy Equipment, of the following:

1. Pre-existing damage and non-functioning features;
2. Operational checks that have been performed;
3. Attachments provided with the Rental;
4. Verification that safety devices are in place and operational and safety stickers are in place and legible;
5. Operators and other manuals included;
6. Tire condition and pressure;
7. Fuel and fluid levels; and
8. Hour/usage meter and odometer readings.

The Contractor and the Authorized User shall review the equipment condition at the point of Delivery as well as at the point of return. If, in the sole opinion of the Authorized User, the Heavy Equipment as delivered does not meet the Contract terms or is in a state of disrepair, it shall be returned and replacement equipment delivered at the Contractor's expense.

D. Standard Rental Agreement/Delivery Ticket: Authorized User personnel accepting the Heavy Equipment shall not be authorized to obligate or bind their entity to contractual terms and conditions; therefore, signature on a standard rental agreement/delivery ticket is merely an acknowledgement of receipt of the Heavy Equipment.

E. Training: General operating instructions for the Heavy Equipment, including instructions regarding safety, maintenance and routine service, shall be given by the Contractor to the Authorized User prior to the start of the Rental Period.

F. Consumables: Authorized Consumables for use with the Heavy Equipment shall be as defined by the Heavy Equipment OEM. The Authorized User is responsible for the cost of all Consumables used during the Rental Period (see Section III.1 *Heavy Equipment Rental Prices,* Paragraph E *Consumables*). With the exception of fuel, the Contractor shall provide the Authorized User with extra authorized Consumables at the beginning of the Rental Period, and a price list for use of the Consumables. Additional Consumables shall be available at the Contractor's location for pickup by the Authorized User. Instructions (verbal and/or included in the Heavy Equipment operations and maintenance manual) shall be provided to the Authorized User detailing the proper procedures for use of Consumables. The Authorized User reserves the right to obtain authorized Consumables from a third party.

Upon return of the Heavy Equipment, the fuel tank shall be refilled to capacity at the Authorized User's expense. The cost of refueling to reach fuel tank capacity shall be included as a separate item on the Contractor's invoice.

G. Maintenance: The Rental Price includes all costs associated with preventative maintenance and normal wear and tear, as defined by the Heavy Equipment OEM. If necessary in order to comply with the OEM's maintenance schedule, maintenance may be performed during the Rental Period. The Contractor shall either inspect and service its equipment at the Rental location at intervals arranged with the Authorized User, or authorize the Authorized User to perform routine maintenance on behalf of the Contractor. The Contractor shall accept full responsibility for maintenance that the Authorized User has been authorized to perform. If performing maintenance at the Authorized User's location, the Contractor is responsible for cleanup and removal of any resultant waste water and products.

H. Routine Service: The Authorized User shall be responsible for performing daily inspections (e.g., general condition of the Heavy Equipment, including oil level, tire condition, cooling systems, batteries) and routine service (e.g., grease components prior to use, add diesel exhaust fluid, change oil) required to keep the Heavy Equipment in good repair and running order. If such routine service is required, it is the Contractor's responsibility to inform the Authorized User and confirm that the Authorized User understands the proper procedure for performing the routine service. The costs of labor and Consumables for routine service shall be the responsibility of the Authorized User.

I. Repair: The Contractor is responsible for repair of any equipment not functioning properly, or becoming non-functional, during the Rental Period, subject to the following:

1. Repairs, other than minor repairs (i.e., repairs that do not require special training and are completed in less than one (1) hour), are to be performed by the Contractor, or arranged for by the Contractor. The Contractor may authorize the Authorized User to perform minor repairs, and shall accept full responsibility for repairs that the Authorized User has been authorized to perform.

2. In the event that Heavy Equipment failure has been mutually agreed upon by the Contractor and the Authorized User to be the fault of the Authorized User, and the Contractor shall make the repairs, the Contractor shall supply the Authorized User with its currently posted hourly repair rate within three (3) business days upon request. Furthermore, the Contractor is required to supply the Authorized User with all applicable invoices within forty-five (45) days after the repairs are completed. Invoices submitted for payment must include the following:

   a) Number of mechanics;
   b) Total hours for repair;
   c) Hourly labor rate;
   d) Cost of parts;
   e) Administrative charges;
   f) Shipping of parts ordered specifically for the repair; and
   g) Pictures of broken parts (when requested).

3. During the Rental Period, any piece of Heavy Equipment that breaks down, or is damaged, shall be repaired or replaced within two (2) business days after notification by the Authorized User. If the Authorized User has previously notified the Contractor that twenty-four (24) hour, seven (7) day a week repair service shall be required for the Rental Period, repair or replacement must be made within ten (10) consecutive hours after notification by the Authorized User. Failure to repair or replace with Heavy Equipment of similar size and capacity within the timeframe specified herein, shall result in a deduction of the Rental Price of 1/8th of the Daily Rental Price per hour of delay, 1/7th of the Weekly Rental Price per calendar day of delay, or 1/28th of the Monthly Rental Price per calendar day of delay, as applicable, until the Heavy Equipment is repaired or replaced. This assessment shall apply regardless of the length of Rental Period.
4. The Rental Period shall be suspended for the time that the Heavy Equipment is unavailable for use due to required repairs, regardless of cause, and the Rental Period extended accordingly, or a monetary adjustment satisfactory to the Authorized User shall be provided.
5. If performing repairs at the Authorized User's location, the Contractor is responsible for cleanup and removal of any resultant waste water and products.

J. 24/7 Contact Information: The Contractor shall provide general contact information for use by the Authorized User during the Rental Period. This general contact information is included in Appendix C: *Heavy Equipment Rental Contract Documents*: Number 1: *Contractor Information* and be posted on the OGS website.

In addition, if required by the Authorized User, the Contractor shall provide a 24/7 emergency contact phone number(s) for the Rental Period. If such contact information is required, the Contractor shall respond to Authorized User calls within two (2) hours from the initial call. If the Contractor fails to respond within two (2) hours, then the Rental Price for the applicable day shall be deducted from the Weekly or Monthly Rental Price.

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

III.4 DELIVERY

Upon Authorized User request, Contractor shall deliver Heavy Equipment anywhere within the boundaries of the New York State counties set forth in Appendix C: *Heavy Equipment Rental Contract Documents*: Number 1: *Contractor Information*, as designated by the Authorized User in the Rental Quote Request and on the Purchase Order. The following terms and conditions apply to Delivery:

A. The Contractor agrees to bear the risk of loss, injury, or destruction of the Heavy Equipment, prior to Delivery of the Heavy Equipment to the Authorized User.

B. Delivery shall be made in accordance with instructions on the Purchase Order from each Authorized User. It shall be presumed by the parties that the Contractor received the Purchase Order on the third business day following the date of the Purchase Order, unless the Contractor provides credible evidence that the order was received on a later date. If there is a discrepancy between the Purchase Order and what was listed in the Rental Quote Request, it is the Contractor's obligation to seek clarification from the ordering Authorized User and, if applicable, from Procurement Services.

C. Delivery must be made within the time frame(s) and to the location(s) mutually agreed-upon between the Authorized User and the Contractor. Failure to comply with agreed-upon Delivery time(s) and location(s) may subject Contractor to liquidated or other damages (see Section III.4.2 *Liquidated Damages*). The

Authorized User may refuse Heavy Equipment when Delivery is made outside the agreed-upon Delivery time(s) and location(s). The acceptance by the Authorized User of Delivery outside the agreed-upon Delivery time(s) and location(s), with or without objection or reservation by the Authorized User, shall not waive the right to claim damage for such breach, nor preclude the Authorized User from pursuing any remedy provided herein, including termination of the Rental, nor shall such acceptance constitute a waiver of the requirements of any obligation to be performed by Contractor.

D. Upon Delivery, Contractor shall provide a Heavy Equipment condition report to the Authorized User (see Section III.3 *Rental Service Requirements*, Paragraph C *Equipment Condition Report.* The Authorized User shall inspect the Heavy Equipment and associated materials, supplies and Consumables for the purpose of forming a judgment as to whether such delivered items are what was ordered, were properly delivered and are ready for acceptance. Such inspection shall not be construed as acceptance. If there are any apparent defects in the Heavy Equipment and associated materials, supplies and Consumables at the time of delivery, the Authorized User shall promptly notify the Contractor. Without limiting any other rights, the Authorized User may require the Contractor to repair or replace the Heavy Equipment and associated materials, supplies and Consumables, at Contractor's expense, before acceptance.

E. After Authorized User inspection, the Authorized User and Contractor shall sign a receipt certifying Delivery of the Heavy Equipment and mutual agreement with the equipment condition report (see Section III.3 *Rental Service Requirements*, Paragraph D *Standard Rental Agreement/Delivery Ticket*). Responsibility for damage to the Heavy Equipment shall pass from Contractor to the Authorized User upon completion of Delivery to the Authorized User, provided that the Contractor can produce evidence that such damage occurred while in the possession of the Authorized User. In the event damage to the Heavy Equipment is later noted and a properly signed receipt cannot be found, the Authorized User shall not be held responsible for the damage if the Contractor cannot provide evidence that such damage occurred while in the possession of the Authorized User.

F. If the Contractor is providing transportation of the Heavy Equipment, the Contractor is responsible for obtaining all highway and other special permits that may be required. The cost of such permits shall be the responsibility of the Contractor, unless the Contractor has incurred the costs specifically in relation to the individual Authorized User's Delivery.

G. The Delivery Charge shall be calculated in accordance with Section III.1.1 *Delivery Charge*.

H. The Contractor may respond to Rental Quote Requests from Authorized Users, and provide Rental and associated Delivery in counties other than those set forth in Appendix C: *Heavy Equipment Rental Contract Documents*: Number 1: *Contractor Information*. Delivery locations may also be expanded, with mutual agreement, per Section II.15 *Non-State Agencies Participation*, Section II.22 *Extension of Use* and Section II.22.1 *Extension of Use Commitment*, incorporated herein.

III.4.1 DEFAULT ON DELIVERY

If during the Contract period a Contractor has accepted a Purchase Order from an Authorized User and has agreed in writing to provide a Heavy Equipment Rental at a mutually agreed-upon timeframe, and the Heavy Equipment specified in the Rental Quote becomes unavailable or cannot be supplied for any reason (except as provided for in Appendix B §47 *Savings/Force Majeure*), substitute Heavy Equipment deemed by the Authorized User to be equal to the Heavy Equipment specified in the Rental Quote must be supplied by Contractor if requested by the Authorized User. If substitute Heavy Equipment is not available or not deemed equal to the Heavy Equipment specified in the Rental Quote, then the Contractor must supply available alternative Heavy Equipment that most closely meets the specifications in the Rental Quote. The Rental Price for substitute or alternative Heavy Equipment shall be equal to or less than the Rental Price provided in the Rental Quote.

Alternatively, the Authorized User may, at their sole discretion, cancel the order and obtain Rental from a third party. In such event the Contractor shall reimburse the Authorized User for all excess costs over the Rental Price and Delivery Charge included on the Rental Quote.

III.4.2 LIQUIDATED DAMAGES

In the event of a delay or default in the Delivery timeframe to the Authorized User previously agreed-upon by the Contractor and the Authorized User, the Authorized User shall be entitled to and may assess against the Contractor as liquidated damages and not by way of penalty, a sum calculated as follows:

Twenty-Five dollars ($25) per twenty-four (24) hour period, , per Heavy Equipment unit, to compensate for delay, and other loses, detriments and inconveniences attendant upon such delay from the end of the grace period commencing from the time Delivery was due to the Authorized User as mutually agreed-upon in writing. A grace period of one (1) twenty-four (24) hour period, commencing on and including the mutually agreed-upon date for Delivery, shall be extended to the Contractor prior to the assessment of such liquidated damages. Notice is hereby given to the Contractor that, despite the extensions of the grace period herein specified, time shall be of the essence in regard to Delivery.

Liquidated damages, if assessed, shall be deducted from the Rental Price for each Heavy Equipment unit delivered against a Purchase Order and listed on the invoice (see Section II.11 *Purchase Orders and Invoicing)*.

III.4.3 ACCEPTANCE

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, acceptance of the Heavy Equipment provided for Rental shall be when the Heavy Equipment is actually put into use after the date and time of completion of Delivery to the Authorized User.

Failure to provide notice of acceptance or rejection or a deficiency statement to the Contractor when the Heavy Equipment is actually put into use after the date and time of completion of Delivery to the Authorized User constitutes acceptance by the Authorized User.

Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User shall have the option to run testing on the Heavy Equipment prior to acceptance, such tests and data sets to be specified by Authorized User.

III.5 AUTHORIZED USER RESPONSIBILITIES/RIGHTS

The Authorized User shall have the following responsibilities and rights in regards to the Heavy Equipment Rental.

A. Delivery: An Authorized User may choose to either use their own personnel and equipment for Delivery, or a third party provider.

B. Inspection: Upon Delivery, the Authorized User shall inspect the Heavy Equipment in accordance with Section III.4 *Delivery*, Paragraph D, and sign a mutually agreed-upon equipment condition report. After Authorized User inspection and execution of the condition report, the Authorized User shall sign a receipt certifying Delivery of the Heavy Equipment and mutual agreement with the equipment condition report (see Section III.3 *Rental Service Requirements*, Paragraph D *Standard Rental Agreement/Delivery Ticket*).

C. Equipment Operators: Only employees of the Authorized User who are qualified and trained in the safe operation of the Heavy Equipment shall be permitted to operate the Heavy Equipment. The Authorized User shall provide and pay for all workers' compensation insurance and pay all payroll taxes required by law and applying to such operators.

D. Permits: The Authorized User shall be solely responsible for obtaining, maintaining and paying costs of any permits or licenses needed for the use or operation of the Heavy Equipment. This includes any OSHA required certifications or licenses associated with the Rental. The Contractor makes no representation regarding the requirement of permits for the use or operation of the Heavy Equipment.

E. Care and Operation: The Heavy Equipment may only be used and operated in a manner consistent with the OEM's operating manual. Its use must comply with all laws, ordinances, and regulations relating to the possession, use, or maintenance of the Heavy Equipment, including registration and/or licensing

requirements. The Authorized User shall not remove, alter, disfigure or cover up any numbering, lettering, or insignia displayed upon the Heavy Equipment;

F. Consumables: In accordance with Section III. 3 *Rental Service Requirements*, Paragraph F *Consumables*, the Authorized User is responsible for the cost of all Consumables used during the Rental Period, and with replenishing them as needed during the Rental Period using the proper procedures specified in the OEM's operating manual, or as directed by the Contractor. Upon return of the Heavy Equipment to the Contractor, if the fuel tank is not at full capacity it shall be refilled at the Authorized User's expense. The Authorized User reserves the right to utilize fuel pumps other than those owned by the Contractor.

G. Maintenance: In accordance with Section III. 3 *Rental Service Requirements*, Paragraph G *Maintenance*, the Authorized User shall grant access to the Heavy Equipment to the Contractor during the Rental Period for the purposes of inspecting and servicing the unit at mutually agreed-upon intervals. If previously agreed-upon, the Authorized User may perform routine maintenance on behalf of the Contractor.

H. Routine Service. In accordance with Section III. 3 *Rental Service Requirements*, Paragraph H *Routine Service*, the Authorized User shall perform daily inspections and routine service (e.g., grease components prior to use, add diesel exhaust fluid, change oil) required to keep the Heavy Equipment in good repair and running order. Exterior washing, cleaning and decontamination (e.g., if used in a hazardous waste operation) of the Heavy Equipment, prior to return, shall be the responsibility of the Authorized User.

I. Minor Repair: In accordance with Section III. 3 *Rental Service Requirements*, Paragraph I *Repair*, Subparagraph 1, the Authorized User may perform minor repairs, (i.e., repairs that do not require special training and are completed in less than one (1) hour), with prior authorization from the Contractor.

J. Equipment Damage or Loss after Delivery: The Authorized User assumes all risks of loss or physical damage to the Heavy Equipment caused by theft, accident or vandalism during the Rental Period, and agrees to return it to the Contractor in the condition specified in the mutually agreed-upon equipment condition report, with the exception of normal wear and tear as defined by the OEM. The Authorized User is responsible for tire damage or excessive wear or damage to the machine (e.g., broken glass, lights or gauges and bent sheet metal, fenders, handrails). Determination of which party is at fault for the damage or loss shall be mutually agreed between the parties, and the burden of proof is with the Contractor.

1. In the event of an accident and/or vandalism, the Authorized User shall inspect and appraise damage, or arrange for such services, prior to any repairs. The Authorized User shall be responsible for filing all reports that are necessary and forwarding the reports to the Contractor.

2. The Authorized User can either request that the Contractor make any repairs or, with mutual agreement of the Contractor, elect to use one of its own in-house repair shops.

3. If the Heavy Equipment is deemed a total loss or the cost of the necessary repairs exceed the Heavy Equipment value, the Contractor shall be reimbursed for the residual value of the Heavy Equipment's value based either on the average of the wholesale and retail price as listed in the current monthly edition of a mutually agreed-upon industry used equipment guide, or other method that is mutually-agreed upon by the Contractor and the Authorized User. This payment shall serve as full satisfaction of any and all Authorized User liabilities under the Contract. The Authorized User's liability to pay the Daily, Weekly or Monthly Rental Price ceases at the same time that the Heavy Equipment becomes unusable. The Authorized User shall pay the Contractor the accrued Rental cost, on a prorated basis, for the Rental Period during which the accident or vandalism occurred. Upon payment of residual value, the Contractor shall provide the Authorized User with the title or certificate of ownership and transfer ownership of said Heavy Equipment to the Authorized User. The Authorized User then has the right to salvage or otherwise dispose of such Heavy Equipment.

4. In the event of theft, if the Heavy Equipment is not recovered within thirty (30) days, the Heavy Equipment is to be declared a total loss. The Contractor shall be reimbursed for the residual value of the Heavy Equipment based on the average of the wholesale and retail price as listed in the current

monthly edition of a mutually agreed-upon industry used equipment guide. This payment shall serve as full satisfaction of any and all Authorized User liabilities under the Contract. The Authorized User's liability to pay the Daily, Weekly or Monthly Rental Price ceases at the same time that notification of the theft is reported to the Contractor. The Authorized User shall pay the Contractor the accrued Rental cost, on a prorated basis, for the Rental Period during which the theft occurred. Upon payment of residual value, the Contractor shall provide the Authorized User with the title or certificate of ownership and transfer ownership of said Heavy Equipment to the Authorized User. The Authorized User then retains ownership of the Heavy Equipment if it is later recovered.

K. Insurance and Insurance Certificate: Insurance that covers the Heavy Equipment rented by the Authorized User, effective for the full Rental Period, shall be provided as set forth below.

1. State Agencies. At the start of the Contract term, and upon renewal of the insurance policy, the OGS Bureau of Risk & Insurance Management shall issue a Certificate of Insurance that specifies the blanket physical damage coverage provided for all Rentals, other than vehicles, by Authorized Users that are State Agencies covered by the State's self-retention policy. Such coverage shall be for physical damage only, with a one million ($1,000,000) limit per item, and a five million ($5,000,000) general aggregate for the year.

   A separate Certificate of Insurance shall be issued to the Contractor, prior to commencement of the Rental Period, by the OGS Bureau of Risk & Insurance Management for each Rental of Heavy Equipment that is a vehicle (i.e., has a license plate affixed to it and may be operated on a roadway). Such coverage shall be for physical damage only, and have a $400,000 limit per loss.

2. Other Entities. All Authorized Users that are not covered by the State's self-retention policy shall obtain insurance for any Heavy Equipment Rental in an amount satisfactory to the Contractor. A copy of the insurance certificate, or other satisfactory proof of insurance, shall be provided to the Contractor prior to the commencement of the Rental Period. At the Authorized User's discretion, insurance coverage for the Rental Period may be obtained from the Contractor.

L. Option to Renew: If the Authorized User is not in material default upon the expiration of the Rental Period, the Authorized User shall be given priority to renew or extend the Rental Period, if the Heavy Equipment has not been previously scheduled for Rental by a third party.

M. Moving Equipment: The Authorized User shall have the right to move Heavy Equipment at their own expense to locations different from the Delivery location, provided that the new location(s) is located in NYS. The Authorized User must have prior authorization from the Contractor to move the Heavy Equipment outside NYS boundaries. If moving the Heavy Equipment results in a different pickup location than previously agreed-upon, the only additional charges allowed to the Contractor shall be for additional mileage, if any.

N. Subletting and Assignment: The Authorized User shall not be entitled to sublet or assign any of its rights under this Contract or to any of the Heavy Equipment rented to any entity that is not an Authorized User. The Authorized User may sublet the Heavy Equipment to another Authorized User only with the prior written consent of the Contractor.

SECTION IV. GENERAL PROVISIONS

IV.1 CAPTIONS

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

IV.2 SEVERABILITY

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

IV.3 COUNTERPARTS

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

IV.4 NOTICES

All notices, demands, designations, certificates, requests, offers, consents, approvals and other instruments given pursuant to this Agreement shall be in writing and shall be validly given when mailed by registered or certified mail, or hand delivered, (i) if to the State, addressed to the State at its address set forth below, and (ii) if to Contractor, addressed to Contract Administrator at the address set forth below.

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

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

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

IV.5 ENTIRE AGREEMENT

This Contract and the referenced Appendices and Attachments constitute the entire agreement between the parties thereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and the Contract shall not be changed, modified or altered in any manner except by an instrument in writing executed by the State and the Contractor, with all necessary approvals. Authorized Users shall not have the authority to modify the terms of the Contract, except as to better terms and pricing for a particular procurement than those set forth herein. In accordance with the terms set forth in Appendix B, §27 *Modification of Contract Terms*, and §31 *Purchase Orders*, no preprinted terms or conditions on a Purchase Order issued by an Authorized User which seek to vary the terms of this Contract or impose new duties or obligations on the Contractor shall have any force and effect.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date last written below.

The parties further hereby certify that original copies of this executed and approved signature page shall be affixed to exact copies of this Agreement being executed simultaneously herewith.

CONTRACTOR

Signature: _____

Printed Name: _____

Title: _____

Date: _____

Company Name: _____

Federal ID: _____

NYS Vendor ID _____

THE PEOPLE OF THE STATE OF NEW YORK

Signature: _____

Printed Name: _____

Title: _____

Date: _____

Office of General Services

INDIVIDUAL, CORPORATION, PARTNERSHIP, OR LLC ACKNOWLEDGMENT

STATE OF }
: **Sworn Statement:**
COUNTY OF }

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

Town of_____

County of _____, State of_____; and further that:

[Check One]

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

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

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

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

_____

Signature of Notary Public

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

APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

PLEASE RETAIN THIS DOCUMENT
FOR FUTURE REFERENCE.

January 2014

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STANDARD CLAUSES FOR NYS CONTRACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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 Bidder/Contractor setting forth the total legal obligation between the parties as determined by applicable rules of law, and which most typically include the following classifications of public procurements:

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 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, enhancements or New Licensed Software Releases, and any deliverables due under a technical support/maintenance or service contract (e.g., patches, fixes, PTFs, 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. NEW LICENSED SOFTWARE RELEASES (Licensed Software Revisions) Any commercially released revisions to the licensed version of Licensed Software as may be generally offered and available to Authorized Users who are current on technical support/maintenance. New Licensed Software Releases involve a substantial revision of functionality from a previously released version of the Licensed Software. Updates are provided when available, and Contractor is under no obligation to develop any future Product or functionality.

u. OGS The New York State Office of General Services.

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 the responsive and responsible Bidder(s).

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

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. VIRUS Any computer code, whether or not written or conceived by Contractor, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Product manufacturer.

BID SUBMISSION

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

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

6. EXTRANEOUS TERMS Bids must conform to the terms set forth in the Solicitation. Extraneous terms or material deviations (including additional, inconsistent, conflicting or alternative terms) may render the Bid non-responsive and may result in rejection of the Bid.

Extraneous 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.

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

a. Each proposed extraneous term (addition, deletion, counter-offer, deviation, or modification) must be specifically enumerated in a writing which is not part of a pre-printed form;

b. The writing must identify the particular Solicitation requirement (if any) that Bidder rejects or proposes to modify by inclusion of the extraneous term; and

c. The Bidder shall enumerate the proposed addition, deletion, counter-offer, deviation, or modification from the Solicitation, and the reasons therefor.

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

7. CONFIDENTIAL/TRADE SECRET MATERIALS

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

b. COMMISSIONER OR AUTHORIZED USER Contractor warrants, covenants and represents that any confidential information obtained by Contractor, its agents, 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.

8. 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 attached to the Solicitation and may also be obtained by visiting 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 (i.e., fringe benefits and any cash or non-cash compensation which are not wages, as defined by law) that equal or exceed the applicable prevailing wage rate(s) for the location where the work is to be performed. Bidders may not submit Bids based upon hourly wage rates and supplements below the applicable prevailing wage rates as established by the New York State Department of Labor. Bids that fail to comply with this requirement will be disqualified.

b. WAGE RATE PAYMENTS/CHANGES DURING CONTRACT TERM The wages to be paid under any resulting Contract shall not be less than the prevailing rate of wages and supplements as set forth by law. It is required that the Contractor keep

informed of all changes in the prevailing wage rates during the Contract term that apply to the classes of individuals supplied by the Contractor on any projects resulting from this Contract, subject to the provisions of the Labor Law. Contractor is solely liable for and must pay such required prevailing wage adjustments during the Contract term for its employees as required by law and is responsible for ensuring any Subcontractors utilized on the Contract also comply with the prevailing wage provisions of the New York State Labor Law.

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

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

ii. Payroll Records Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. For public works contracts over $25,000 where the Contractor maintains no regular place of business in 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.

9. 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.

10. EXPENSES PRIOR TO CONTRACT EXECUTION The Commissioner and any Authorized User(s) 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.

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

12. 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.

13. 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.

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

15. 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(s) indicated in the Solicitation.

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

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

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

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

g. Specific price decreases:

(i) GSA Changes: Where 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 to its customers generally or to similarly situated government customers during the Contract term; or

(iii) Special Offers/Promotions Generally: Where Contractor generally offers more advantageous special price promotions or special discount pricing to other customers during the Contract term for a similar quantity, and the maximum price or discount associated with such offer or promotion is better than the discount or net 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(s) from any Authorized User without being in conflict with, or having any obligation to comply on a global basis with, the terms of this clause.

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

16. DRAWINGS

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

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

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

17. 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.

18. 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.

19. SAMPLES

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

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

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

c. Conformance with Samples Submission of a sample (whether or not such sample is tested by, or for, the Commissioner) and approval thereof shall not relieve the Contractor from full compliance with all terms and conditions, performance related and otherwise, specified in the Solicitation. If in the judgment of the Commissioner the sample or Product submitted is not in accordance with the specifications or testing requirements prescribed in the Solicitation, the Commissioner may reject the Bid. If an award has been made, the Commissioner may cancel the Contract at the expense of the Contractor.

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

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

BID EVALUATION

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

21. 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.

22. 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.

23. TIMEFRAME FOR OFFERS The Commissioner reserves the right to make awards within sixty days after the date of the Bid opening or such other period of time as set forth in the Solicitation, during which period, Bids must remain firm and cannot be withdrawn. Where an award is not made within the sixty day period or other time specified as set forth in the Solicitation, the Bids shall remain firm until such later time as either a Contract is awarded or the Bidder delivers to the Commissioner written notice of the withdrawal of its Bid.

TERMS & CONDITIONS

24. 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 Bidder(s) upon the Commissioner's mailing or electronic communication to the address on the Bid/Contract of: (i) the final Contract Award Notice; (ii) a fully executed Contract; or (iii) a Purchase Order authorized by the Commissioner.

25. 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.

26. 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 save the State, its officers, agents and employees harmless from any liability that may be or is imposed by the non-State Agency Authorized User's or Contractor's failure to perform in accordance with its obligations under the Contract.

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

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

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

Other than where such terms are more advantageous for the Authorized User(s) than those set forth in the Contract, no alteration or modification of the terms of the Contract, including substitution of Product, shall be valid or binding against Authorized User(s) unless authorized by the Commissioner or specified in the Contract Award Notification. No such alteration or modification shall be made by unilaterally affixing such terms to Product upon delivery (including, but not limited to, attachment or inclusion of standard pre-printed order forms, product literature, "shrink wrap" terms accompanying software upon delivery, or other documents) or by incorporating such terms onto order forms, Purchase Orders or other documents forwarded by the Contractor for payment, notwithstanding Authorized User's subsequent acceptance of Product, or that Authorized User has subsequently processed such document for approval or payment.

28. 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 thirty 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.

29. 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.

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

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

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

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

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.

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

33. 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.

34. 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 personnel authorized to accept delivery on behalf of the Authorized User. Any losses resulting from the Contractor's failure to deliver Product to authorized personnel shall be borne exclusively by the Contractor.

35. TITLE AND RISK OF LOSS Notwithstanding the form of shipment, title or other property interest, risk of loss shall not pass from the Contractor to the Authorized User until the Products have been received, inspected and accepted by the receiving entity. Acceptance shall occur within a reasonable time or in accordance with such other defined acceptance period as may be specified in the 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.

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

37. 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.

38. 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.

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

of other Contractors. The Contractor shall clean up and remove all debris and rubbish from its work as required or directed. Upon completion of the work, the building and surrounding area of work shall be left clean and in a neat, unobstructed condition, and everything in satisfactory repair and order.

40. 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.

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

42. ASSIGNMENT In accordance with Section 138 of the State Finance Law, the Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the Contract or its right, title or interest therein, or its power to execute such Contract to any other person, company, firm or corporation in performance of the Contract without the prior written consent of the Commissioner or Authorized User (as applicable); provided, however, any consent shall not be unreasonably withheld, conditioned, delayed or denied. Notwithstanding the foregoing, the State shall not hinder, prevent or affect assignment of money by a Contractor for the benefit of its creditors. Prior to a consent to assignment of monies becoming effective, the Contractor shall file a written notice of such monies 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.

43. 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.

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

45. SUSPENSION OF WORK The Commissioner, in his/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.

46. TERMINATION

a. For Cause For a material breach that remains uncured for more than thirty (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, at the Contractor's expense. 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 sixty (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.

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

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

48. <u>CONTRACT INVOICING</u>

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

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

Contractor to provide the information to the State Comptroller or to any Authorized User of the Contract.

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

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

49. DEFAULT – AUTHORIZED USER

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

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

d. Insufficient basis If the Contractor's basis for declaring a breach is insufficient, the Contractor's declaration of breach and failure to 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.

50. PROMPT PAYMENTS

a. State Agencies Upon acceptance of Product or as otherwise provided by Contract, Contractor may invoice for payment. The required payment date shall be thirty (30) calendar days, excluding legal holidays, from the receipt of a proper invoice, as determined in accordance with State Finance Law 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 thirty (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.

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

a. Cover/Substitute Performance In the event of Contractor's material, uncured breach, the Commissioner may, with or without issuing a formal Solicitation: (i) purchase from other sources; or (ii) if the Commissioner is unsuccessful after making reasonable attempts, under the circumstances then-existing, to timely obtain acceptable replacement Product of equal or comparable quality, the Commissioner 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. The Commissioner agrees that Authorized Users shall accept allocated performance or deliveries during a period where Contractor is making good faith efforts to cure a material breach.

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

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.

52. 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.

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

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

54. 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.

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

56. 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.

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

58. 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 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 (1) 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 independent software vendor (ISV), 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 ISV or other third-party manufacturers for warranty repair or replacement of ISV or other third-party manufacturer's Product.

Where Contractor, ISV 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 Licensed Software acquired under the Contract by the Authorized User does not contain any known Viruses. Contractor is not responsible for Viruses introduced at Licensee'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 industry standards. The Authorized User must notify Contractor of any services warranty deficiencies within ninety calendar days from performance of the services that gave rise to the warranty claim.

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 Contactor 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.

59. LEGAL COMPLIANCE Contractor represents and warrants that it shall secure all notices and comply with all applicable laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any renewals thereof, Contractor must establish to the satisfaction of the Commissioner that it meets or exceeds all requirements of the 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.

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

The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit, or other suit 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 in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters.

61. INDEMNIFICATION RELATING TO INFRINGEMENT The Contractor will also defend, indemnify and hold the Authorized Users harmless from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs in any action for infringement of a patent, copyright, trademark, trade secret or other proprietary right provided: (a) such claim arises solely out of the Products as supplied by the Contractor,

and not out of any modification to the Products made by the Authorized User or by someone other than Contractor at the direction of the Authorized User without Contractor's approval, and (b) Authorized User gives Contractor prompt written notice of any such action, claim suit or threat of suit alleging infringement.

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

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

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

In the event that an action at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the Product under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the 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 seek to secure a continuance to permit the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the Authorized User may have. This constitutes the Authorized User's sole and exclusive remedy for patent infringement, or for infringement of any other third party proprietary right.

62. 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.

63. 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: **http://nyspro.ogs.ny.gov/content/dispute-resolution-procedures**. OGS reserves the right to change the procedures set forth in the Dispute Resolution Procedures without seeking a Contract amendment.

THE FOLLOWING CLAUSES PERTAIN TO TECHNOLOGY & NEGOTIATED CONTRACTS

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

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

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

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

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

- Processing Capacity - 10 copies per Site

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

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

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

Maintenance shall include, at a minimum, (i) the provision of Error Corrections, updates, enhancements, revisions, fixes, upgrades and New Licensed Software Releases to Licensee, and (ii) help desk assistance with locally accessible "800" or toll free, local telephone service, or alternatively on-line help desk accessibility. Contractor shall maintain the 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 technical support/maintenance term.

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

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

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

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

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

h. Confidentiality Restrictions The Product is a trade secret, copyrighted and proprietary product. Licensee and its employees will keep the Product strictly confidential, and Licensee will not disclose or otherwise distribute or reproduce any Product to anyone other than as authorized under the terms of Contract. Licensee will not remove or destroy any proprietary markings of Contractor.

i. Restricted Use by Licensee Except as expressly authorized by the Terms of License, Licensee shall not: (i) copy the Product; (ii) cause or permit reverse compilation or reverse assembly of all or any portion of the Product; or (iii) export the Licensed Software in violation of any U.S. Department of Commerce export administration regulations.

65. <u>PRODUCT ACCEPTANCE</u> Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, an Authorized User shall have thirty (30) days from the date of delivery to accept hardware Products and sixty (60) days from the date of delivery to accept all other Product. Where the Contractor is responsible for installation, acceptance shall be from completion of installation. Title or other property interest and risk of loss shall not pass from Contractor to the Authorized User until the Products have

been accepted. Failure to provide notice of acceptance or rejection or a deficiency statement to the Contractor by the end of the period provided for under this clause constitutes acceptance by the Authorized User as of the expiration of that period. The license term shall be extended by the time periods allowed for trial use, testing and acceptance unless the Commissioner or Authorized User agrees to accept the Product at completion of trial use.

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

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

If the Authorized User elects to provide a deficiency statement specifying how the Product fails to meet the specifications within the testing period, Contractor shall have thirty (30) days to correct the deficiency, and the Authorized User shall have an additional sixty (60) days to evaluate the Product as provided herein. If the Product does not meet the specifications at the end of the extended testing period, Authorized User, upon prior written notice to Contractor, may then reject the Product and return all defective Product to Contractor, and Contractor shall refund any monies paid by the Authorized User to Contractor therefor. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to the amounts set forth in the Limitation of Liability clause for any liability for costs incurred at the direction or recommendation of Contractor. When Product is not accepted, it must be removed by the Contractor from the premises of the Authorized User within ten calendar days of notification of non-acceptance by the Authorized User. Rejected items not removed by the Contractor within the ten calendar day period shall be regarded as abandoned by the Contractor and the Authorized User shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse the Authorized User for any costs incurred in storage or effecting removal or disposition after the ten calendar day period.

66. <u>AUDIT OF LICENSED PRODUCT USAGE</u> Contractor shall have the right to periodically audit, no more than annually, at Contractor's expense, use of licensed Product at any Site where a copy of the Product resides provided that: (i) Contractor gives Licensee at least thirty (30) days advance written notice, (ii) such audit is conducted during such party's normal business hours, (iii) the audit is conducted by an independent auditor chosen on mutual agreement of the parties. Contractor shall recommend a minimum of three (3) auditing/accounting firms from which the Licensee will select one (1). In no case shall the Business Software Alliance (BSA), Software Publishers Association (SPA), Software and Industry Information Association (SIIA) or Federation Against Software Theft (FAST) be used directly or indirectly to conduct audits, or be recommended by Contractor; (iv) Contractor and Licensee are each entitled to designate a representative who shall be entitled to participate, and who shall mutually agree on audit format, and simultaneously review all information obtained by the audit. Such representatives also shall be entitled to copies of all reports, data or information obtained from the audit; and (v) if the audit shows that such party is not in compliance, Licensee shall be required to purchase additional licenses or capacities necessary to bring it into compliance and shall pay for the unlicensed capacity at the 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.

67. <u>OWNERSHIP/TITLE TO PROJECT DELIVERABLES</u>

a. Definitions

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

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

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

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

(i) Existing Products:

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

2. Software - Title and ownership to Existing Software Products delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other independent software vendor proprietary owner ("Existing Licensed Product"), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with Contractor or the proprietary owner of other independent software vendor(s) (ISV). Effective upon acceptance, such Product shall be licensed to Authorized User in accordance with the Contractor or ISV owner's standard license agreement, provided, however, that such standard license, must, at a minimum: (a) grant Authorized User a non-exclusive, perpetual license to use, execute, reproduce, display, perform, adapt (unless Contractor advises Authorized User as part of Contractor's proposal that adaptation will violate existing agreements

or statutes and Contractor demonstrates such to the Authorized User's satisfaction) and distribute Existing Licensed Product to the Authorized User up to the license capacity stated in the Purchase Order or work order with all license rights necessary to fully effect the general business 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 ISV's owner's standard license agreement, the Contractor shall be responsible for obtaining these rights at its sole cost and expense. The Authorized User shall reproduce all copyright notices and any other legend of ownership on any copies authorized under this 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 Product(s), whether preliminary, final or otherwise, including all trademark and copyrights. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction and marketing by or through Contractor, its agents, employees, or Subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under a Purchase Order, project definition or work order in the course of Contractor's business. Authorized User may, by providing written notice thereof to the Contractor, elect in the alternative to take a non-exclusive perpetual license to Custom Products in lieu of Authorized User taking exclusive ownership and title to such Products. In such case, Licensee on behalf of all Authorized Users shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purpose(s) as stated in paragraph (b)(i)(2), above.

c. Transfers or Assignments to a Third Party Financing Agent It is understood and agreed by the parties that a condition precedent to the consummation of the 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 Product(s), the sale or other transfer shall be at fair market value determined at the time of such sale or other transfer, and must be pursuant to a separate written agreement in a form acceptable to the Authorized User which complies with the terms of this clause.

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

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

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

70. CHANGES TO PRODUCT OR SERVICE OFFERINGS

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

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

The provisions of this subdivision (a) shall not apply or eliminate Contractor's obligations where withdrawn support is being provided by an independent Subcontractor. In the event that such Subcontractor ceases to provide service, Contractor shall be responsible for subcontracting such service, subject to State approval, to an alternate Subcontractor.

b. Product or Service Re-Bundling In the event that Contractor is the Product manufacturer and publicly announces to all U.S. customers ("date of notice") that a Product or maintenance or technical support offering is being re-bundled in a different manner from the structure or licensing model of the prior U.S. commercial offering, Contractor shall be required to: (i) notify the State and each Authorized User in writing

of the intended change; (ii) continue to provide Product or withdrawn support upon the same terms and conditions as previously offered on the then-current NYS Contract for the greater of: (a) the best terms offered by Contractor to any other customer, or (b) not less than twelve (12) months from the date of notice; and (iii) shall submit the proposed rebundling change to the Commissioner for approval prior to its becoming effective for the remainder of the Contract term. The provisions of this section do not apply if the Contractor is not the Product manufacturer.

71. NO HARDSTOP/PASSIVE LICENSE MONITORING

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

72. SOURCE CODE ESCROW FOR LICENSED PRODUCT

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

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

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Appendix C:

Heavy Equipment Rental Contract Documents:

Number 1: ***Contractor Information***

Number 2: ***Report of Contract Usage***

Number 3: ***Insurance Requirements***

Number 4: ***Contract Modification Procedure***

Number 5: ***Contract Price List***

Number 6: ***Rental Quote Forms***

Appendix C: Number 1: *Contractor Information*

Contract # / MWBE/SB	Contractor & Address	Centralized Contract Contact	Federal ID NYS Vendor ID
NYS Contract: PC12345 WBE	Business Name Street Address City, State, ZIP	Name: Title: Phone: Toll Free: Fax: Email:	**Federal ID** 00-0000000 **NYS Vendor ID** 1000001234
Business Hours: M-F, 8AM-5PM			

ADDITIONAL CONTACTS
(Sales Questions, Emergencies After Business Hours, and Contact Person for Rental Quote Requests)

Sales Questions and contact for Rental Quote Requests:	**Emergencies After Business Hours**
Name: Title: Phone: Toll Free: Fax: Email:	Name: Title: Phone: Toll Free: Fax: Email:

PAYMENT/ORDERING INFORMATION

Does Contractor offer Electronic Access Ordering (EDI)?	
Does Contractor offer Prompt Payment Discounts?	

RENTAL AREA

The Contractor shall offer Heavy Equipment for Rental in the following NYS Counties. For a list of equipment types offered, please see the "Equipment" list on the Contractor Award Notification page located on the OGS website at: http://www.ogs.ny.gov/purchase/spg/awards/7200722935can.HTM.

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

Group 72007-22935, Heavy Equipment Rental

Appendix C: Number 2: *Report of Contract Usage*

DO NOT ADD, REMOVE OR REARRANGE ANY COLUMNS OR ROWS.

Enter Contractor information below.

Contract Group & Award Number:	**Group 72007, Award 22935**
Contract Number:	
Contract Sales Period:	
Contractor Company Name:	
Contact Name:	
Contact E-Mail:	
Contact Phone Number:	

Report of Contract Usage - Rental Data

DO NOT ADD, REMOVE OR REARRAGE ANY COLUMNS OR

	Contract Number	Rental Quote Request Number (if applicable)	Contractor Order Number	Authorized User Purchase Order Number	Rental Order Date	Rental Period	Authorized User Entity Name	Region/ Facility/ Location Name (if applicable)	Indicate "State" or "Non-State" Entity (see "State Agency" tab)	Rental Location (County)
Ex:	PC12345	12345	1234	7891011	6/15/2015	06/22/15 to 06/28/15	NYS Department of Transportation	DOT Region 5 Buffalo	State	Erie

GROUP 72007-22935 Heavy Equipment Rental

ROWS.

Equipment Type	Equipment Description (e.g., Model Year, Make, Model, Model Code)	Type of Rental Period (Daily, Weekly, Monthly)	Daily, Weekly or Monthly Rental Price	Number of Rental Periods	Total Daily, Weekly or Monthly Rental Price	Total Loading/ Unloading Charge	Total Transportation Charge	Total Price for Consumables	Total Other Charges	Total Rental Price
Front End Loader	2014 Caterpillar 930G	Daily	$270.00	2	$540.00	$25.00	$52.00	$34.00	$0.00	$651.00
					$0.00					$0.00
					$0.00					$0.00
					$0.00					$0

Appendix C: Number 3: *Insurance Requirements*

(Revised April 5, 2017)

The prospective awardee shall be required to procure, at its sole cost and expense, all insurance required by this Attachment.

The prospective awardee shall be required to provide proof of compliance with the requirements of this Attachment, as follows:

- Proof of Workers' Compensation and Disability Benefits Insurance should be provided at the time of Bid submission;
- Proof of all other insurance shall be provided in accordance with Section B below;
- After award, the Contractor shall be required to provide proof of all insurance after renewal or upon request according to the timelines set forth in Section A.13 below.

Contractors shall be required to procure, at their sole cost and expense, and shall maintain in force at all times during the term of any Contract resulting from this Solicitation, policies of insurance as required by this Attachment. All insurance required by this Attachment shall be written by companies that have an A.M. Best Company rating of "A-," Class "VII" or better. In addition, companies writing insurance intended to comply with the requirements of this Attachment should be licensed or authorized by the New York State Department of Financial Services to issue insurance in the State of New York. OGS may, in its sole discretion, accept policies of insurance written by a non-authorized carrier or carriers when certificates and/or other policy documents are accompanied by a completed Excess Lines Association of New York (ELANY) affidavit or other documents demonstrating the company's strong financial rating. If, during the term of a policy, the carrier's A.M. Best rating falls below "A-," Class "VII," the insurance must be replaced, on or before the renewal date of the policy, with insurance that meets the requirements above.

The prospective awardee/Contractor shall deliver to OGS evidence of the insurance required by this Solicitation and any Contract resulting from this Solicitation in a form satisfactory to OGS. Policies must be written in accordance with the requirements of the paragraphs below, as applicable. While acceptance of insurance documentation shall not be unreasonably withheld, conditioned or delayed, acceptance and/or approval by OGS does not, and shall not be construed to, relieve the prospective awardee/Contractor of any obligations, responsibilities or liabilities under this Solicitation or any Contract resulting from this Solicitation.

The Contractor shall not take any action, or omit to take any action that would suspend or invalidate any of the required coverages during the term of the Contract.

A. General Conditions Applicable to Insurance. All policies of insurance required by this Solicitation or any Contract resulting from this Solicitation shall comply with the following requirements:

1. ***Coverage Types and Policy Limits*.** The types of coverage and policy limits required from the prospective awardee/Contractor are specified in Paragraph B *Insurance Requirements* below.
2. ***Policy Forms***. Except as otherwise specifically provided herein, or agreed to in the Contract resulting from this Solicitation, all policies of insurance required by this Attachment shall be written on an occurrence basis.
3. ***Certificates of Insurance/Notices***. The prospective awardee/Contractor shall provide OGS with a Certificate or Certificates of Insurance, in a form satisfactory to OGS as detailed below, and pursuant to the timelines set forth in Section B below. Certificates shall reference the Solicitation or award number and shall name The New York State Office of General Services, Procurement Services, 38th Floor, Corning Tower, Empire State Plaza, Albany, New York 12242 as the certificate holder.

Certificates of Insurance shall:

- Be in the form acceptable to OGS and in accordance with the New York State Insurance Law (e.g., an ACORD certificate);

- Disclose any deductible, self-insured retention, aggregate limit or exclusion to the policy that materially changes the coverage required by this Solicitation or any Contract resulting from this Solicitation;
- Refer to this Solicitation and any Contract resulting from this Solicitation by award number;
- Be signed by an authorized representative of the referenced insurance carriers; and
- Contain the following language in the Description of Operations / Locations / Vehicles section: Additional insured protection afforded is on a primary and non-contributory basis. A waiver of subrogation is granted in favor of the additional insureds.

Only original documents (certificates of insurance and any endorsements and other attachments) or electronic versions of the same that can be directly traced back to the insurer, agent or broker via e-mail distribution or similar means will be accepted.

OGS generally requires Contractors to submit only certificates of insurance and additional insured endorsements, although OGS reserves the right to request other proof of insurance. Contractors should refrain from submitting entire insurance policies, unless specifically requested by OGS. If an entire insurance policy is submitted but not requested, OGS shall not be obligated to review and shall not be chargeable with knowledge of its contents. In addition, submission of an entire insurance policy not requested by OGS does not constitute proof of compliance with the insurance requirements and does not discharge Contractors from submitting the requested insurance documentation.

4. ***Primary Coverage.*** All liability insurance policies shall provide that the required coverage shall be primary and non-contributory to other insurance available to the People of the State of New York, the New York State Office of General Services, any entity authorized by law or regulation to use the Contract and their officers, agents, and employees. Any other insurance maintained by the People of the State of New York, the New York State Office of General Services, any entity authorized by law or regulation to use the Contract and their officers, agents, and employees shall be excess of and shall not contribute with the prospective awardee/Contractor's insurance.

5. ***Breach for Lack of Proof of Coverage.*** The failure to comply with the requirements of this Attachment at any time during the term of the Contract shall be considered a breach of the terms of the Contract and shall allow the People of the State of New York, the New York State Office of General Services, any entity authorized by law or regulation to use the Contract and their officers, agents, and employees to avail themselves of all remedies available under the Contract or at law or in equity.

6. ***Self-Insured Retention/Deductibles.*** Certificates of Insurance must indicate the applicable deductibles/self-insured retentions for each listed policy. Deductibles or self-insured retentions above $100,000.00 are subject to approval from OGS. Such approval shall not be unreasonably withheld, conditioned or delayed. The Contractor shall be solely responsible for all claim expenses and loss payments within the deductibles or self-insured retentions. If the Contractor is providing the required insurance through self-insurance, evidence of the financial capacity to support the self-insurance program along with a description of that program, including, but not limited to, information regarding the use of a third-party administrator shall be provided upon request.

7. ***Subcontractors.*** Prior to the commencement of any work by a Subcontractor, the Contractor shall require such Subcontractor to procure policies of insurance as required by this Attachment and maintain the same in force during the term of any work performed by that Subcontractor.

8. ***Waiver of Subrogation***. For all liability policies and the workers' compensation insurance required below, the prospective awardee/Contractor shall cause to be included in its policies insuring against loss, damage or destruction by fire or other insured casualty a waiver of the insurer's right of subrogation against The People of the State of New York, the New York State Office of General Services, any entity authorized by law or regulation to use the Contract and their officers, agents, and employees, or, if such waiver is unobtainable (i) an express agreement that such policy shall not be invalidated if the Contractor waives or has waived before the casualty, the right of recovery against The People of te State of New York, the New York State Office of General Services, any entity authorized by law or regulation to use the Contract and their officers, agents, and employees or (ii) any other form of permission for the release of The People of the State of New York, the New York State Office of General Services, any entity authorized by law or regulation to use the Contract and their officers, agents, and employees. A Waiver of Subrogation Endorsement shall be provided upon request. A blanket Waiver of Subrogation Endorsement evidencing such coverage is also acceptable.

9. ***Additional Insured.*** The Contractor shall cause to be included in each of the liability policies required below, ISO form CG 20 10 11 85 (or a form or forms that provide equivalent coverage, such as the combination of CG 20 10 04 13 and CG 20 37 04 13) and form CA 20 48 10 13 (or a form or forms that provide equivalent coverage), naming as additional insureds: The People of the State of New York, the New York State Office of General Services, any entity authorized by law or regulation to use the Contract and their officers, agents, and employees. An Additional Insured Endorsement evidencing such coverage shall be provided to OGS pursuant to the timelines set forth in Section B

below. A blanket Additional Insured Endorsement evidencing such coverage is also acceptable. For Contractors who are self-insured, the Contractor shall be obligated to defend and indemnify the above-named additional insureds with respect to Commercial General Liability and Business Automobile Liability, in the same manner that the Contractor would have been required to pursuant to this Attachment had the Contractor obtained such insurance policies.

10. ***Excess/Umbrella Liability Policies.*** Required insurance coverage limits may be provided through a combination of primary and excess/umbrella liability policies. If coverage limits are provided through excess/umbrella liability policies, then a Schedule of underlying insurance listing policy information for all underlying insurance policies (insurer, policy number, policy term, coverage and limits of insurance), including proof that the excess/umbrella insurance follows form must be provided upon request.

11. ***Notice of Cancellation or Non-Renewal.*** Policies shall be written so as to include the requirements for notice of cancellation or non-renewal in accordance with the New York State Insurance Law. Within five (5) business days of receipt of any notice of cancellation or non-renewal of insurance, the Contractor shall provide OGS with a copy of any such notice received from an insurer together with proof of replacement coverage that complies with the insurance requirements of this Solicitation and any Contract resulting from this Solicitation.

12. ***Policy Renewal/Expiration*** Upon policy renewal/expiration, evidence of renewal or replacement of coverage that complies with the insurance requirements set forth in this Solicitation and any Contract resulting from this Solicitation shall be delivered to OGS. If, at any time during the term of any Contract resulting from this Solicitation, the coverage provisions and limits of the policies required herein do not meet the provisions and limits set forth in this Solicitation or any Contract resulting from this Solicitation, or proof thereof is not provided to OGS, the Contractor shall immediately cease work. The Contractor shall not resume work until authorized to do so by OGS.

13. ***Deadlines for Providing Insurance Documents after Renewal or Upon Request.*** As set forth herein, certain insurance documents must be provided to the OGS Procurement Services contact identified in the Contract Award Notice after renewal or upon request. This requirement means that the Contractor shall provide the applicable insurance document to OGS as soon as possible but in no event later than the following time periods:

    - For certificates of insurance: 5 business days
    - For information on self-insurance or self-retention programs: 15 calendar days
    - For other requested documentation evidencing coverage: 15 calendar days
    - For additional insured and waiver of subrogation endorsements: 30 calendar days

    Notwithstanding the foregoing, if the Contractor shall have promptly requested the insurance documents from its broker or insurer and shall have thereafter diligently taken all steps necessary to obtain such documents from its insurer and submit them to OGS, OGS shall extend the time period for a reasonable period under the circumstances, but in no event shall the extension exceed 30 calendar days.

B. Insurance Requirements

The prospective awardee/Contractor shall obtain and maintain in full force and effect, throughout the term of any Contract resulting from this Solicitation, at their own expense, the following insurance with limits not less than those described in one of the two options below and as required by the terms of any Contract resulting from this Solicitation, or as required by law, whichever is greater:

Insurance Type OPTION 1 (Commercial Liability Insurance)		Proof of Coverage is Due
Commercial General Liability	Not less than $2,000,000 each occurrence	At time of Bid submission and updated in accordance with Contract
General Aggregate	$2,000,000	
Products – Completed Operations Aggregate	$2,000,000	
Personal and Advertising Injury	$1,000,000	
Business Automobile Liability Insurance	Not less than $2,000,000 each occurrence	
Workers' Compensation		
Disability Benefits		

Insurance Type – OPTION 2 (Garage Liability Insurance)		Proof of Coverage is Due
Business Automobile Liability	Not less than $2,000,000 each occurrence	At time of Bid submission and updated in accordance with Contract
Garage Liability Insurance for garage operations	Not less than $2,000,000 each occurrence	
General Aggregate	$2,000,000	
Products – Completed Operations Aggregate	$2,000,000	
Personal and Advertising Injury	$1,000,000	
Workers' Compensation		
Disability Benefits		

1. **Commercial General Liability Insurance:** Such liability shall be written on the current edition of ISO occurrence form CG 00 01, or a substitute form providing equivalent coverage and shall cover liability arising from premises operations, independent contractors, products-completed operations, broad form property damage, personal & advertising injury, cross liability coverage, and liability assumed in a contract (including the tort liability of another assumed in a contract).

   Policy shall include bodily injury, property damage and broad form contractual liability coverage.
   - General Aggregate
   - Products – Completed Operations Aggregate
   - Personal and Advertising Injury
   - Each Occurrence

   Coverage shall include, but not be limited to, the following:
   - Premises liability;
   - Independent contractors;
   - Blanket contractual liability, including tort liability of another assumed in a contract;
   - Defense and/or indemnification obligations, including obligations assumed under the Contract;
   - Cross liability for additional insureds; and
   - Products/completed operations for a term of no less than three years (3) (may be renewed with policy annually for 3 years) commencing upon acceptance of the work, as required by the Contract.

2. **Business Automobile Liability Insurance:** Such insurance shall cover liability arising out of any automobile used in connection with performance under the Contract, including owned, leased, hired and non-owned automobiles bearing or, under the circumstances under which they are being used, required by the Motor Vehicles Laws of the State of New York to bear, license plates.

   In the event that the Contractor does not own, lease or hire any automobiles used in connection with performance under the Contract, the Contractor does not need to obtain Business Automobile Liability Insurance, but must attest to the fact that the Contractor does not own, lease or hire any automobiles used in connection with performance under the Contract on a form provided by OGS. If, however, during the term of the Contract, the Contractor acquires, leases or hires any automobiles that will be used in connection with performance under the Contract, the Contractor must obtain Business Automobile Liability Insurance that meets all of the requirements of this section and provide proof of such coverage to OGS in accordance with the insurance requirements of any Contract resulting from this Solicitation.

   In the event that the Contractor does not own or lease any automobiles used in connection with performance under the Contract, but the Contractor does hire and/or utilize non-owned automobiles in connection with performance under the Contract, the Contractor must: (i) obtain Business Automobile Liability Insurance as required by this Solicitation or any Contract resulting from this Solicitation, except that such insurance may be limited to liability arising out of hired and/or non-owned automobiles, as applicable; and (ii) attest to the fact that the Contractor does not own or lease any automobiles used in connection with performance under the Contract, on a form provided by OGS. If, however, during the term of the Contract, the Contractor acquires or leases any automobiles that will be used in connection with performance under the Contract, the Contractor must obtain Business Automobile Liability Insurance that meets all

of the requirements of this Attachment and provide proof of such coverage to OGS in accordance with the insurance requirements of any Contract resulting from this Solicitation.

3. **Garage Liability Insurance:** Such liability shall be written on the current edition of ISO occurrence form CA 00 05, or a substitute form providing equivalent coverage, including coverage for all garage operations of the Contractor, including premises and operations; products and completed operations, and garagekeepers liability coverage with minimum limits as stated in Option 2.

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

   - Premises liability;
   - Independent contractors;
   - Blanket contractual liability, including tort liability of another assumed in a contract;
   - Defense and/or indemnification obligations, including obligation assumed under the Contract;
   - Cross liability for additional insureds; and
   - Product/completed operation for a term of no less than three years (3) (may be renewed with policy annually for 3 years) commencing upon acceptance of the work, as required by the Contract.

4. **Workers' Compensation Insurance and Disability Benefits Requirements**

   Sections 57 and 220 of the New York State Workers' Compensation Law require the heads of all municipal and state entities to ensure that businesses applying for contracts have appropriate workers' compensation and disability benefits insurance coverage. These requirements apply to both original contracts and renewals. **Failure to provide proper proof of such coverage or a legal exemption will result in a rejection of a Bid or any contract renewal. The prospective awardee/Contractor will not be awarded a Contract unless proof of workers' compensation and disability insurance is provided to OGS.** Proof of workers' compensation and disability benefits coverage, or proof of exemption must be submitted to OGS at the time of Bid submission, policy renewal, contract renewal and upon request. Proof of compliance must be submitted on one of the following forms designated by the New York State Workers' Compensation Board. **An ACORD form is not acceptable proof of New York State workers' compensation or disability benefits insurance coverage.**

   Proof of Compliance with Workers' Compensation Coverage Requirements:
   - Form CE-200*, Certificate of Attestation for New York Entities With No Employees and Certain Out of State Entities, That New York State Workers' Compensation and/or Disability Benefits Insurance Coverage is Not Required*, which is available on the Workers' Compensation Board's website (www.wcb.ny.gov);
   - Form C-105.2 (9/07), *Certificate of Workers' Compensation Insurance*, sent to OGS by the Contractor's insurance carrier upon request, or if coverage is provided by the New York State Insurance Fund, they will provide Form U-26.3 to OGS upon request from the Contractor; or
   - Form SI-12, *Certificate of Workers' Compensation Self-Insurance*, available from the New York State Workers' Compensation Board's Self-Insurance Office, or
   - Form GSI-105.2, *Certificate of Participation in Workers' Compensation Group Self-Insurance*, available from the Contractor's Group Self-Insurance Administrator.

   Proof of Compliance with Disability Benefits Coverage Requirements:
   - Form CE-200, *Certificate of Attestation for New York Entities With No Employees and Certain Out of State Entities, That New York State Workers' Compensation and/or Disability Benefits Insurance Coverage is Not Required*, which is available on the Workers' Compensation Board's website (www.wcb.ny.gov);
   - Form DB-120.1, Certificate of Disability Benefits Insurance, sent to OGS by the Contractor's insurance carrier upon request; or
   - Form DB-155, Certificate of Disability Benefits Self-Insurance, available from the New York State Workers' Compensation Board's Self-Insurance Office.

   An instruction manual clarifying the New York State Workers' Compensation Law requirements is available for download at the New York State Workers' Compensation Board's website, http://www.wcb.ny.gov. Once on the site, click on the Employers/Businesses tab and then click on Employers' Handbook.

Appendix C: Number 4: *Contract Modification Procedure*

The following guidelines are subject to change at the discretion of OGS. A Contract Amendment requires a formally executed document by mutual agreement of the Parties, to be provided by OGS Contract Administrator, after submission and approval of the Contract Modification Form.

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

a) **UPDATES**: "Updates" are changes that do not require a change to the established Centralized Contract terms and conditions. Updates may include: Centralized Contract changes and updates made in accordance with the previously approved pricing formula (e.g. discount from list price); adding new products or services within the established, previously approved pricing structure; lowering pricing of products or services already on Contract, deleting products or services available through the Centralized Contract, adding product or service that do not fall under the previously established price structure or discounts under the Contract, re-bundled products, and other updates not listed above that are deemed to be in the best interest of the State and do not result in a change to the established Centralized Contract terms and conditions. Updates must be submitted to OGS for review, and must be accompanied by a justification of reasonableness of price if the change results in a change in pricing methodology. OGS will notify Contractor in writing if approved.

b) **AMENDMENTS**: "Amendments" are 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. Requests for product changes and other requests that would require changes to the terms and conditions of the Centralized Contract would fall into the Amendments category. Contractor must provide a written justification of reasonableness of the price levels offered in the applicable Program Agreement and a statement explaining why it is in the best interest of the State to approve the requested amendment. Amendments typically require negotiation between OGS and the Contractor. OGS will work directly with the Contractor to obtain the required documentation for each requested amendment and notify Contractor in writing if approved.

(2) CONTRACTOR'S SUBMISSION OF CONTRACT MODIFICATIONS: In connection with any Contract modification, OGS reserves the right to:

- request additional information
- reject Contract modifications
- remove Products from Contract modification requests
- request additional discounts for new or existing Products

(3) PRICE LEVEL JUSTIFICATION – FORMAT: Contractor is required to submit the Product and price level information for the update in an Excel spreadsheet format electronically via e-mail (and in hard copy if requested by OGS) to the OGS Contract Administrator. The list must be dated. The Product and price level information should include and identify (e.g., by use of separate worksheets or by using italics, bold and/or color fonts):

- Price level increases
- Price level decreases
- Products being added

(4) SUPPORTING DOCUMENTATION: Each modification request must include the current contract pricing discount relevant to the Products included in the update.

(5) SUBMITTAL OF MODIFICATION REQUESTS: A Contract modification request must be accompanied by a completed Contract Modification Form. Contractor should briefly describe the nature and purpose of the update (e.g., update requested in order to reflect a recently approved GSA schedule, to restructure the price level to its customers generally, and/or for new Products which fall into a new group or category that did not exist at the time of approval of the Contract by OGS). The Contract Modification Form must contain original signatures by an individual authorized to sign on behalf of Contractor and must be notarized.

STATE OF NEW YORK
EXECUTIVE DEPARTMENT - OFFICE OF GENERAL SERVICES
Corning Tower – 38th Floor
Empire State Plaza
Albany, New York 12242

CONTRACT MODIFICATION FORM

DATE OF THIS SUBMISSION:	**DATE DOCUMENTATION EMAILED:**
CONTRACTOR NAME:_____ OGS GROUP #:_____ OGS AWARD #:_____ OGS CONTRACT #:_____	**CONTRACTOR CONTACT:** Name:_____ Phone #:_____ Email:_____
NOTE: Submission of this FORM does not constitute acceptance by the State of New York until approved by the appropriate New York State representative(s).	

INSTRUCTIONS:

1. This form is to be used for all Contract modifications. The form is to be completed in full, signed and submitted to OGS for final approval. Any submission that is not complete and signed will be rejected.
2. Contractor is required to submit the Product and price level information for the update electronically via e-mail in either an Excel spreadsheet (and in hardcopy if requested by OGS) to the OGS Contract Administrator for this Contract.
3. Price level increase requests must be submitted in accordance with the Centralized Contract.
4. If more than one type of modification is being requested, each type should be submitted as a separate request.
5. The Contract modification request must be accompanied by the relevant current contract pricing discount information.

COMPLETE STATEMENTS 1 THROUGH 5 BELOW:

1. This request is for an: _____ Update _____ Amendment See Contract Modification Procedure for an explanation of these terms.	2. The intent of this submittal is to request: _____ Addition of new products or services _____ Deletion of products or services _____ Change in pricing level _____ Other Update _____ Other Amendment
3. All discounts are: _____ GSA _____ Most Favored Nation* _____ Other (provide explanation) _____ _____ _____ *Prices offered are the lowest offered to any similarly situated entity.	4. Attached documentation includes: _____ Current approved GSA (labeled "For information only") _____ Current relevant Price List (labeled "For information only") _____ Revised NYS Net Price List in same format as found in the Pricing Appendix for this Contract _____ Current copy of the "National Consumer Price Index for All Urban Consumers (CPI-U) Northeast region" (for price increases only)

5. Describe the nature and purpose of the modification. If applicable, please explain how pricing has been structured to customers, and/or identify and describe new Products which fall into a new group or category that did not exist at the time of approval of the Contract by OGS.

_____

_____

_____

_____

_____

_____

_____

The following CORPORATE ACKNOWLEDGEMENT statement must be signed by an individual authorized to sign on behalf of Contractor for the modification being requested in this Contract Modification document. The authorizing authority's signature must be notarized.

_____
Signature of Authorized Vendor Representative

INDIVIDUAL, CORPORATION, PARTNERSHIP, OR LLC ACKNOWLEDGMENT

STATE OF }
: **Sworn Statement:**
COUNTY OF }

On the ____ day of _____ in the year 20_____, before me personally appeared _____ , known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that _he reside(s) in _____and further that:

[Check One]

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

(☐ If a corporation, (☐ a partnership, ☐ a limited liability company): _he is the _____ of _____, the *corporation/ partnership/ Limited Liability Company* described in the above instrument; that, _he is authorized to execute the foregoing instrument on behalf of the *corporation/ partnership/ Limited Liability Company* for purposes set forth therein; and that, pursuant to that authority, _he executed the foregoing instrument in the name of and on behalf of said *corporation/ partnership/ Limited Liability Company* as the act and deed of said *corporation/ partnership/ Limited Liability Company*.

_____
Signature of Notary Public

Notary Public
Registration No._____ **State of:**_____

OGS APPROVAL: Approved _____ Approved as amended _____ Disapproved_____

Signature:_____ Date:_____

Printed Name:_____ Title_____

Appendix C: Number 5: *CONTRACT PRICE LIST: Canaday Sweepers Inc.*

For this Contractor, the Per Mile and Per Hour Transportation Charges listed below **will be charged** for the travel time and/or mileage, as applicable, for the return of the empty vehicle from the Authorized User's Delivery location after drop off of the Heavy Equipment, and the return of the empty vehicle back to the Authorized User's Delivery location for pickup of the Heavy Equipment from the Authorized User.

							Transportation Charges		
Equipment Type	Contractor Equip. #	Equipment Description	Daily Rental	Weekly Rental	Monthly Rental	Loading / Unloading	Per Mile	Per Hour	Flat Rate
Brooms Vehicle Mounted		Tymco Model 600	$975.00	$2,950.00	$8,800.00	$35.00	$3.50	$75.00	$75.00
Side Cast Road Sweeper		Superior Broom Model DT80CT	$250.00	$750.00	$2,250.00	$35.00	$3.50	$75.00	$75.00
Excavator, Crawler		Link Belt 250x3 (25 Ton)	$750.00	$1,850.00	$5,500.00	$30.00	$3.50	N/A	N/A
Excavator, Crawler		Link Belt 300x3 (30 Ton)	$800.00	$2,250.00	$6,400.00	$30.00	$3.50	N/A	N/A
Excavator, Crawler		Link Belt 350 LX (35 Ton)	$850.00	$2,500.00	$7,500.00	$30.00	$3.50	N/A	N/A

Appendix C: Number 6: *Rental Quote Forms*

The Contractor and Authorized Users shall use the Rental Quote Request and Rental Quote forms set forth on the following pages for requesting and providing quotes for Rental under the Contract. OGS reserves the right to amend the forms set forth in this Appendix in non-material and non-substantive ways without seeking a Contract amendment. The Rental Quote Process steps will remain the same as described in Contract Section II.10 *Procurement Method*, Paragraph C *Rental Quote Process*.

NEW YORK STATE OF OPPORTUNITY. | Office of General Services | Procurement Services

Rental Quote Request

An Authorized User must use this form to request a Rental Quote from a Contractor for Award 22935. The Contractor shall only provide a Rental under this Award when the Authorized User has submitted a Rental Quote Request and subsequently requests a Rental as the result of this Rental Quote Process.

Date:	Click here to enter text.	**Rental Quote Request #**	Click here to enter text.		
OGS Group #:	72007	**OGS Award #:**	22935	**OGS Contract #:**	Click here to enter text.
Contractor Business Name:	Click here to enter text.				
Requester Entity Name:	Click here to enter text.				
Requester Contact Name:	Click here to enter text.				
Requester Address:	Click here to enter text.				
Requester Phone:	Click here to enter text.	**Email:**	Click here to enter text.		

Heavy Equipment Rental Request Information

Rental Period Type:	☐ Daily ☐ Weekly ☐ Monthly
Rental Period Date(s)	Click here to enter text.
Delivery Location:	Click here to enter text.
Equipment Use Location:	Click here to enter text.
Equipment Type (s):	Click here to enter text.
Description of Equipment and Attachments Required (Attach additional sheets if necessary):	Click here to enter text.

NEW YORK STATE OF OPPORTUNITY. | Office of General Services | Procurement Services

Rental Quote

A Contractor must use this form to provide a Rental Quote to an Authorized User for Award 22935. The Contractor shall only provide a Rental under this Award when the Authorized User has submitted a Rental Quote Request and subsequently requests a Rental as the result of this Rental Quote Process.

If the Heavy Equipment requested for Rental not offered by your business, or is unavailable for the Rental Period requested by the Authorized User, enter "No Quote" in the Comments section below and provide an explanation.

Date:	Click here to enter text.	**Rental Quote Request #**	Click here to enter text.		
OGS Group #:	72007	**OGS Award #:**	22935	**OGS Contract #:**	Click here to enter text.
Contractor Business Name:	Click here to enter text.				
Requester Entity Name:	Click here to enter text.				
Requester Contact Name:	Click here to enter text.				
Requester Address:	Click here to enter text.				
Requester Phone:	Click here to enter text.	**Email:**	Click here to enter text.		

Heavy Equipment Rental Information

Rental Period Type:	☐ Daily ☐ Weekly ☐ Monthly
Rental Period Date(s)	Click here to enter text.
Delivery Location:	Click here to enter text.
Equipment Use Location:	Click here to enter text.
Equipment Type (s):	Click here to enter text.
Equipment Description (e.g. Contractor Equipment #, Model Year, Make, Model, Model Code; Attach additional sheets if necessary)**:**	Click here to enter text.
Daily, Weekly or Monthly Rental Price:	$ Click here. Per Day | $ Click here. Per Week | $ Click here. Per Month
Loading/Unloading Price:	$ Click here.
Transportation Charge:	$ Click here. ☐ Per Mile (XX Miles) ☐ Per Hour (XX Hours) ☐ Flat Rate
Total Rental Price for Rental Period:	$ Click here.
Comments:	Click here to enter text.