







# Contract Award Notification Update

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## Subject: Contract Expiration

**DATE:** January 10, 2019      **AWARD #:** [NEG-22419](#)      **GROUP #:** 79008

**AWARD DESCRIPTION:** Electronic Value Transfer (EVT) (Key Merchant Services, LLC)

**CONTRACT PERIOD:** August 3, 2012 – August 2, 2019

**CONTACT:** Marybeth Buhrmaster | 518-486-2002 | [Marybeth.Buhrmaster@ogs.ny.gov](mailto:Marybeth.Buhrmaster@ogs.ny.gov)

**CONTRACT NO.:** PS65792      **CONTRACTOR:** Key Merchant Services LLC (Elavon)

Please be advised that the current contract for Electronic Value Transfer (credit card/debit card/electronic check) is due to expire August 2, 2019. OGS is currently working on a new contract and does not anticipate a lapse at this time

Authorized User may issue purchase orders pursuant to this Contract at any time until August 2, 2019. However, no purchase order or contractual document issued against this Contract shall exceed a term of one year from the date of issuance, but such term may survive expiration of the Contract, the terms and conditions of which will apply throughout the extended term.

Authorized Users of the current contract are encouraged to be mindful of the upcoming contract expiration date before entering into any new or continued service agreement(s) (i.e.; maintenance, hardware/software upgrades, payment gateway modifications, etc.). OGS is committed to ensuring the current services are supported in the new award.

Questions or concerns regarding this matter may be directed to the OGS Electronic Value Transfer Administrator (EVTA) at [OGS.sm.PS\\_SW\\_EVTA](mailto:OGS.sm.PS_SW_EVTA) [OGS.sm.PS\\_SW\\_EVTA@ogs.ny.gov](mailto:OGS.sm.PS_SW_EVTA@ogs.ny.gov).



# Contract Award Notification Update

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**Subject:** Utilizing Electronic Check Services (ECS) and Automated Clearing House (ACH) Processing Services

**DATE:** May 21, 2018      **AWARD #:** [NEG 22419](#)      **GROUP #:** 79008

**AWARD DESCRIPTION:** Electronic Value Transfer (EVT) (Key Merchant Services, LLC)

**CONTRACT PERIOD:** August 3, 2012 – August 2, 2019

**CONTACT:** Beverly Moore | 518-486-2143 | [OGS.sm.PS\\_SW-EVTA@ogs.ny.gov](mailto:OGS.sm.PS_SW-EVTA@ogs.ny.gov)

**CONTRACT NO.:** PS65792      **CONTRACTOR:** Key Merchant Services, LLC

Appendix F (EVTA-2 Work Order Form) for Key Merchant Services, LLC has been updated to include the following:

- Page 3, Step 4 the reference to the contract end date has been updated to 8/02/2019
- Page 4, the website link to the EVTA Guidelines has been updated to:  
<https://www.ogs.ny.gov/BU/PC/EVT/default.asp>

Authorized Users should refer to the OGS website to access the latest Contract information:

All documentation may be obtained on the landing page of the OGS website:  
<http://www.ogs.ny.gov/purchase/snt/awardnotes/7900822419can.HTM>

All other terms and conditions remain the same.



# Contract Award Notification Update

**Subject:** Utilizing Electronic Check Services (ECS) and Automated Clearing House (ACH) Processing Services

**DATE:** August 9, 2017      **AWARD #:** [NEG 22419](#)      **GROUP #:** 79008

**AWARD DESCRIPTION:** Electronic Value Transfer (EVT) (Key Merchant Services, LLC)

**CONTRACT PERIOD:** August 3, 2012 – August 2, 2019

**CONTACT:** Beverly Moore | 518-486-2143 | [OGS.sm.PS\\_SW-EVTA@ogs.ny.gov](mailto:OGS.sm.PS_SW-EVTA@ogs.ny.gov)

**CONTRACT NO.:** PS65792      **CONTRACTOR:** Key Merchant Services, LLC

## **INSTRUCTIONS FOR EXISTING EVT USERS WHO PLAN TO ADD ELECTRONIC CHECK SERVICES**

Any STATE Authorized User of this contract, that presently has an approved Program Plan Application EVTA-1 and plans to utilize the Electronic Check Service (ECS) and Automated Clearing House (ACH) Processing Services, **MUST** submit a new EVTA-1 form and new EVTA-2 (Work Order Form). The EVTA-1 and EVTA 2 forms shall be submitted to the EVT Administrator at: [OGS.sm.PS\\_SW-EVTA@ogs.ny.gov](mailto:OGS.sm.PS_SW-EVTA@ogs.ny.gov) The EVTA-1 and EVTA-2 forms will be reviewed by OGS and then forwarded to the NYS Division of Budget for review and approval. No action adding the ECS and ACH services shall be taken by a STATE Authorized User until receiving OGS notification of approved EVTA-1 and EVTA-2 forms.

Any NON-STATE Authorized User of this contract, that presently has an approved Program Plan Application EVTA-1 and plans to utilize the Electronic Check Service (ECS) and Automated Clearing House (ACH) Processing Services, **MUST** complete a new EVTA-1 form. The EVTA-1 shall be submitted to the EVT Administrator at: [OGS.sm.PS\\_SW-EVTA@ogs.ny.gov](mailto:OGS.sm.PS_SW-EVTA@ogs.ny.gov) The EVTA-1 will be reviewed by OGS for completion. No action adding the ECS and ACH services shall be taken by a Non-State Authorized User until receiving a written response from OGS.

## **INSTRUCTIONS FOR NEW APPLICANTS OF THE EVT AWARD**

Please refer to the "How to Use & Frequently Asked Questions" document on the OGS landing page for this Award.

All documentation may be obtained on the landing page of the OGS website:  
<http://www.ogs.ny.gov/purchase/snt/awardnotes/7900822419can.HTM>

All other terms and conditions remain the same.





# Contract Award Notification Update

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## Subject: Contract Document Updates

**DATE:** December 15, 2016      **AWARD #:** [NEG 22419](#)      **GROUP #:** 79008

**AWARD DESCRIPTION:** Electronic Value Transfer (EVT) (Key Merchant Services, LLC)

**CONTRACT PERIOD:** August 3, 2012 – August 2, 2017

**CONTACT:** Beverly Moore | 518-486-2143 | [Beverly.moore@ogs.ny.gov](mailto:Beverly.moore@ogs.ny.gov)

**CONTRACT NO.:** PS65792      **CONTRACTOR:** Key Merchant Services, LLC

The following documents have been updated for the above referenced contract.

- Appendix A (Standard Clauses for New York State Contracts)
- Appendix C (Contractor's M/WBE Requirements)
- Appendix D (Rate Schedules)
- Appendix F (EVTA-2 Work Order Form)
- Appendix I (Governmental/Public Institution Service Fees)
- Appendix J (Convenience Fees)
- Appendix L (Third Party Gateway Services)
- Appendix O (Converge Services)
- Additional Services Addendum

Authorized Users should refer to the OGS website to access the latest Contract information:

<http://www.ogs.ny.gov/purchase/snt/awardnotes/7900822419can.HTM>

All other terms and conditions remain the same.



# Contract Award Notification Update

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## Subject: Updated EVT Administrator and EVTA-1 form

**DATE:** March 17, 2016      **AWARD #:** [NEG-22419](#)      **GROUP #:** 79008

**AWARD DESCRIPTION:** Electronic Value Transfer (EVT)

**CONTRACT PERIOD:** August 03, 2012 - August 02, 2017

**CONTACT:** Beverly Moore | 518-486-2143 | [PS\\_SW\\_EVTA@ogs.ny.gov](mailto:PS_SW_EVTA@ogs.ny.gov)

**CONTRACT NO.:** PS65792      **CONTRACTOR:** Key Merchant Services, LLC

Please note that the Electronic Value Transfer Administrator (EVTA) is now Beverly Moore.

The EVTA - 1 form - Program Plan Application, has been updated to reflect the following changes and is available online at: [http://www.ogs.ny.gov/purchase/snt/awardnotes/7900822419form1\\_EVTA.xlsx](http://www.ogs.ny.gov/purchase/snt/awardnotes/7900822419form1_EVTA.xlsx)

- Part 1, A: Contact information at bottom of form has been updated to reflect:
  - the new EVTA's phone number
  - a direct link to the EVT contract landing page
  - department name change from NYS Pro to Procurement Services
- Part 1, E-G: Fiscal Year dates have been updated from outdated to current
- Part 2, A-C: Fiscal Year dates have been updated from outdated to current

All other terms and conditions remain the same.



# Contract Award Notification Update

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## Subject: Update to Appendix D, Rate Schedules

**DATE:** September 2, 2015                      **AWARD #:** [NEG-22419](#)                      **GROUP #:** 79008

**AWARD DESCRIPTION:** Electronic Value Transfer (Key Merchant Services LLC)

**CONTRACT PERIOD:** August 3, 2012 through August 2, 2017

**CONTACT:** Michelle St. Jock | 518-474-3922 | [Michelle.StJock@ogs.ny.gov](mailto:Michelle.StJock@ogs.ny.gov)

**CONTRACT NO.:** PS65792                      **CONTRACTOR:** Key Merchant Services LLC

Please note the Appendix D, Rate Schedules document has been updated and includes an updated equipment listing. The most recent version of the Appendix D, Rate Schedules document is available on the OGS contract web site at [http://www.ogs.ny.gov/purchase/prices/7900822419AppendixD\\_EVTA.pdf](http://www.ogs.ny.gov/purchase/prices/7900822419AppendixD_EVTA.pdf) .

All other terms and conditions remain the same.

New York State Office Of General Services  
New York State Procurement  
Corning Tower Building  
Empire State Plaza  
Albany, New York 12242  
<http://www.ogs.ny.gov>

## PURCHASING MEMORANDUM

### CONTRACT AWARD NOTIFICATION UPDATE

**AWARD NUMBER:** [NEG-22419](#)

**DATE:** July 18, 2013

**GROUP:** 79008 Electronic Value Transfer  
(Key Merchant Services LLC)

**PLEASE ADDRESS INQUIRIES TO:**

**STATE AGENCIES & CONTRACTORS**

Sheila Long  
Contract Management Specialist  
Electronic Value Transfer Administrator (EVTA)  
518. 474.0293  
[PS\\_SW\\_EVTA@ogs.ny.gov](mailto:PS_SW_EVTA@ogs.ny.gov)

**OTHER AUTHORIZED USERS**

Customer Services  
518. 474.6717  
[customer.services@ogs.ny.gov](mailto:customer.services@ogs.ny.gov)

**CONTRACT PERIOD:** August 3, 2012-August 2, 2017

**CONTRACTOR/** Key Merchant Services LLC  
**CONTRACT NO:** PS65792

**SUBJECT:** Contract Status Updates

**ALL STATE AGENCIES AND OTHERS AUTHORIZED TO USE STATE CONTRACTS:**

Please note the contract inquiry information has been revised. The Department of Taxation and Finance no longer has the Administrative oversight of the program. Approved by the Governor's office, the EVTA function has been transferred to the Office of General Services.

All state and non-state entities may contact the EVTA directly via email to: [PS\\_SW\\_EVTA@ogs.ny.gov](mailto:PS_SW_EVTA@ogs.ny.gov)

**Key Bank/Elavon Invoices:**

The invoice and backup merchant statement when compared to the NY Statewide Financial System (SFS) remit to information may not match. **Key Merchant Services has confirmed the data in SFS is correct.** The payments are to be remitted to Elavon whose vendor ID is 1100012481 to be routed to a Minneapolis lock box address. Complete address is specified on the Key Bank invoice.

The contractor had been having difficulty reconciling payment advices to invoices. Please indicate MID number(s) in the Payee Reference section of the payment advice.

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New York State Office Of General Services  
Procurement Services Group  
Corning Tower Building  
Empire State Plaza  
Albany, New York 12242  
<http://www.ogs.ny.gov>

## PURCHASING MEMORANDUM

### CONTRACT AWARD NOTIFICATION UPDATE

**AWARD NUMBER:** [NEG-22419](#)

**DATE:** September 6, 2012

**GROUP:** 79008 - Bank Card Services - Electronic  
Value Transfer

**PLEASE ADDRESS INQUIRIES TO:**  
**STATE AGENCIES & CONTRACTORS**

Nicholas C. Jacobia  
Purchasing Officer I  
(518) 473-4651  
[nicholas.jacobia@ogs.ny.gov](mailto:nicholas.jacobia@ogs.ny.gov)

**CONTRACT PERIOD:** August 3, 2012  
through  
August 2, 2017

**OTHER AUTHORIZED USERS**

Customer Services  
(518) 474-6717  
[customer.services@ogs.ny.gov](mailto:customer.services@ogs.ny.gov)

**CONTRACTOR(S)/** Key Merchant Services, LLC  
**CONTRACT NO(S):** PS65792

**SUBJECT:** Electronic Value Transfer (EVT) Contract #PS65792 - Informational Session  
Key Merchant Services, LLC (KMS) -

**TO ALL STATE AGENCIES AND OTHERS AUTHORIZED TO USE STATE CONTRACTS:**

An informational session will be held on September 12<sup>th</sup>, 2012, from 10 a.m. to 11 a.m. at the Empire State Plaza in Albany. This session will provide general information on the new KMS EVT contract, as well as requirements for transition to this contract. This event is open to all authorized users of this contract. Pre-registration is required for this event and, based on volume of registrants, may be limited to 1 attendee per agency.

Please contact Chris Curtis, EVTA coordinator at: [EVTA@tax.ny.gov](mailto:EVTA@tax.ny.gov) to sign up. Below is the planned agenda for the meeting.

**Session Agenda**

1. Contract overview
  - a. General information
  - b. Fee structure
2. Converting from prior contract to KMS
  - a. Deadline for conversion (12/31/12) and what is necessary
  - b. Required paperwork and changes from prior paperwork requirements
  - c. Obtaining new equipment
  - d. How to handle existing rental equipment
3. Open question and answer period

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

## CONTRACT AWARD NOTIFICATION

<b>Title</b>	<b>: Group 79008 Electronic Value Transfer (EVT)</b> <b>(Key Merchant Services, LLC)</b> <b>Classification Code(s): 15, 84</b>
<b>Award Number</b>	<b>: <a href="#">NEG-22419</a></b>
<b>Contract Period</b>	<b>: August 3, 2012 to August 2, 2017</b>
<b>Bid Opening Date</b>	<b>: October 6, 2011</b>
<b>Date of Issue</b>	<b>: August 3, 2012</b>
<b>Specification Reference</b>	<b>: As Incorporated In RFP 22419</b>
<b>Contractor Information</b>	<b>: Appears on Page 2 of this Award</b>

### Address Inquiries To:

State Agencies & Vendors	Political Subdivisions & Others
Name Nicholas C. Jacobia Title Purchasing Officer Phone 518-473-4651 Fax 518-486-6867 E-mail <a href="mailto:nicholas.jacobia@ogs.ny.gov">nicholas.jacobia@ogs.ny.gov</a>	Procurement Services Group Customer Services Phone 518-474-6717 Fax 518-474-2437 E-mail <a href="mailto:customer.services@ogs.ny.gov">customer.services@ogs.ny.gov</a>

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

### Description

This is a comprehensive contract for the acquisition of Electronic Value Transfer (EVT) services and interfaces to support these services.

This includes: Financial Services Processing (Authorization, capture, settlement and reporting of transaction data), including transaction interfaces, of the following electronic payments methods:

1. The four nationally recognized Credit/Charge Cards (MasterCard, Visa, Discover and American Express<sup>[1]</sup> branded cards);
2. On-line and Off-line Debit Cards;
3. Voice Data Capture (IVR);
4. Address Verification;
5. International Processing; and
6. Reprogramming of Point Of Sale (POS) terminals.

[1] For American Express branded cards, the State has negotiated a standard Discount Rate and reporting/settlement processing terms and conditions directly with American Express (contract PS65669). The Contractor will, however, be responsible for Authorization, capture, and in certain cases reporting.

Authorized Users are advised to review the associated contract for additional terms and conditions.

<u>CONTRACT #</u>	<u>CONTRACTOR &amp; ADDRESS</u>	<u>FED.IDENT.# / NYS VENDOR#</u>
OGS01- PS65792-	Key Merchant Services, LLC One Concourse Parkway Suite 300 Atlanta, GA 30328	58-2359974 1100012481

For the current list of Contractor contact information for this Award, please see the Contractor Information page located on the OGS website at: <http://www.ogs.ny.gov/purchase/snt/awardnotes/7900822419can.HTM> .

Cash Discount, If Shown, Should be Given Special Attention.  
**INVOICES MUST BE SENT DIRECTLY TO THE ORDERING AGENCY FOR PAYMENT.**  
 (See "Contract Payments" and "Electronic Payments" in this document.)

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

**SMALL, MINORITY AND WOMEN-OWNED BUSINESSES:**

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

**RECYCLED, REMANUFACTURED AND ENERGY EFFICIENT PRODUCTS:**

The Procurement Services Group supports and encourages the purchase of recycled, remanufactured, energy efficient and "energy star" products. If one of the following codes appears as a suffix in the Award Number or is noted under the individual Contract Number(s) in this Contract Award Notification, please look at the individual awarded items for more information on products meeting the suffix description.

RS,RP,RA	Recycled
RM	Remanufactured
SW	Solid Waste Impact
EE	Energy Efficient
E*	EPA Energy Star
ES	Environmentally Sensitive

**NOTE TO AUTHORIZED USERS:**

When placing purchase orders under the contract(s), the authorized user should be familiar with and follow the terms and conditions governing its use which usually appears at the end of this document. The authorized user is accountable and responsible for compliance with the requirements of public procurement processes. The authorized user must periodically sample the results of its procurements to determine its compliance. In sampling its procurements, an authorized user should test for reasonableness of results to ensure that such results can withstand public scrutiny.

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, particularly when using OGS multiple award contracts for the same or similar product(s)/service(s), which should include:

- a statement of need and associated requirements,
- a summary of the contract alternatives considered for the purchase,
- the reason(s) supporting the resulting purchase (e.g., show the basis for the selection among multiple contracts at the time of purchase was the most practical and economical alternative and was in the best interests of the State).

**PROCUREMENT INSTRUCTIONS:**

For procurement instructions for this Award, please see the Contract Guidelines page located on the OGS website at: <http://www.ogs.ny.gov/purchase/snt/awardnotes/7900822419can.HTM>.

**NON-STATE AGENCIES PARTICIPATION IN CENTRALIZED CONTRACTS:**

New York State political subdivisions and others authorized by New York State law may participate in 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 "Participation in Centralized Contracts" in Appendix B, OGS General Specifications. For purchase orders issued by the Port Authority of New York and New Jersey (or any other authorized entity that may have delivery locations adjacent to New York State), the terms of the "Price" clause shall be modified to include delivery to locations adjacent to New York State.

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

**EXTENSION OF USE:**

Any contract resulting from this bid solicitation 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 any resultant contract if such State normally allows participation by such entities. New York State reserves the right to negotiate additional discounts based on any increased volume generated by such extensions.

**NEW YORK STATE VENDOR RESPONSIBILITY QUESTIONNAIRE FOR-PROFIT BUSINESS ENTITY:**

Contractor is encouraged to maintain up-to-date Questionnaire during the life of the contract and is also required to ensure this Questionnaire reflects any substantive issues that may have occurred from the time the Contract was initially awarded.

**CONTRACT BILLINGS AND PAYMENTS:**

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

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

b. Payment of Contract purchases made by an Authorized User when the State Comptroller is responsible for issuing such payment. The Authorized User and Contractor agree that payments for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payments shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller website at [www.osc.state.ny.us](http://www.osc.state.ny.us), by e-mail at [epunit@osc.state.ny.us](mailto:epunit@osc.state.ny.us), or by telephone at 518-486-1255. 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.

**PSG's DISPUTE RESOLUTION POLICY:**

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

**HOW TO USE THIS CONTRACT:**

Step 1: Read this Contract Award Notice, and Appendix H of the Contract “Merchant Operating Guide”, as modified in Section II.12 of the Contract, to become familiar with EVT. All Authorized Users that implement an EVT Program must follow the Merchant Operating Guide, as modified in Section II.12 of the Contract.

Step 2: Complete Form EVTA-1, Program Plan Application: After an Authorized User has made a policy determination to implement an EVT Program, the first step is to complete Form EVTA-1, Program Plan Application. The steps for completing and submitting this form as well as a downloadable version of the form are available at the EVTA Web site (<http://www.tax.ny.gov/evta>).

State agencies (defined in Section II.1 of the Contract) must receive EVTA and Division of Budget approval to accept electronic payment under the EVT Contract. Form EVTA-1 must be completed and submitted to the EVTA to receive such approval. Part 3 of Form EVTA-1 will be returned to the Agency indicating that their plan has been approved. A copy of Part 3 of Form EVTA-1 indicating the plan has been approved must be provided to the Contractor to acquire services under this contract.

Non-state agency Authorized Users must complete certain sections of Form EVTA-1 and submit it to the EVTA. This is required for administrative purposes only - the EVTA and Division of Budget will not be approving these applications. Part 3 of Form EVTA-1 will be returned to nonstate agency Authorized Users indicating that their plan has been received. A copy of Part 3 of Form EVTA-1 indicating that the plan has been received must be provided to the Contractor to acquire services under this contract. An approved Form EVTA-1 **does not** allow the Authorized User to begin implementation of their proposed EVTA plan. A Form EVTA-2 must be completed and approved first.

Step 3: Complete Form EVTA-2, Work Order Form:

The next step is for the Authorized User to contact the Contractor to provide technical project details and any unique administrative terms and conditions required by the Authorized User. After project costs have been determined, the Authorized User will file Form EVTA-2. **Form EVTA-2, Work Order Form** <http://www.tax.ny.gov/evta> a document issued by an Authorized User, which provides all the EVT technical project details, project costs and any unique administrative terms and conditions required by an Authorized User.

If the State agency is requesting Direct Debit or Monthly Net Settlement, Section 2(e)(1), the Agency must follow the steps outlined below in submitting their EVT program to EVTA:

1. Cover memorandum to the EVTA.
2. Enclosed with the memorandum should be:
  - a. A copy of Part 3 of Form EVTA-1, Program Plan Application indicating Program Plan Approval by the EVTA and Division of Budget (DOB). Note: EVTA will assist agencies in obtaining DOB approval and/or will obtain DOB approval for the agency.
  - b. A completed EVTA- 2, Work Order Form.
  - c. Completed Purchase Requisition
3. EVTA will stamp the approval box on Form EVTA-2, Work Order Form and return to the agency.
4. The agency can then send the Form EVTA-2 Work Order Form to the Contractor and commence services.

**Non-State Agency Authorized Users:**

Upon completion of the Form EVTA-2 with the Contractor, non-state agency Authorized Users may proceed to set up a funding source, issue an order to the Contractor and begin implementation of services.

**State Agency Authorized Users:**

For State Agency Authorized Users the EVTA shall review and approve Form EVTA-2 prior to commencement of the Services. State Agencies will process a purchase requisition. **Any Form EVTA-2, Work Order, regardless of whether completed by a State agency or a Non-state agency, that incorporates unique terms or conditions not provided for in the Agreement shall be reviewed and approved in writing by Contractor prior to its commencement of the Services. The Agency can then send the form to the Contractor.**

**Contractor’s Authorization to Implement Services**

The Contractor shall not provide any billable Services under this Agreement to State Agency Authorized Users unless the Authorized User has produced an executed copy of Part 3 of Form EVTA-1, Program Plan and a completed and approved copy of Form EVTA-2, Work Order. The Part 3 of Form EVTA-1 is deemed executed if it is signed or stamped by both the EVTA and the Division of the Budget. The Form EVTA-2 is deemed executed if it is signed or stamped by both the EVTA. The State reserves the right to modify these forms, at its discretion, throughout the term of the Agreement without prejudice to Contractor.

**ELECTRONIC VALUE TRANSFER FREQUENTLY ASKED QUESTIONS (FAQS):****1. Question: What is EVT?**

*Answer:* **Electronic Value Transfer** - Any transfer of funds which is initiated by the use of an electronic value transfer device. To New York State agencies and other authorized users of the EVT contract it means the ability to accept credit/charge cards and debit cards as payment for products, services, fines, fees or taxes.

**2. Question: What is the EVTA?**

*Answer:* **Electronic Value Transfer Administrator**, designated by the EVT legislation enacted in 1998 as the New York State Department of Taxation and Finance. The EVTA is responsible for:

- Establishing policies and direction for state agencies regarding EVT,
- Evaluating the costs and benefits associated with various electronic commerce solutions,
- Overseeing the efficient implementation of state agency programs.

**3. Question: How are EVT services made available to State and local agencies?**

*Answer:* **EVT Services** are provided by Financial Service Providers (FSPs) through contracts available from the NYS Office of General Services. There are two contracts for this program. The principle contract is with Key Merchant Services, LLC who handles all payments transactions. The remaining contract is with American Express (AMEX) for the purposes of paying monthly AMEX transaction fees.

**4. Question: Who can use the EVT contracts?**

*Answer:* **Authorized Users** of the EVT contracts fall into three (3) categories:

- a) State Agencies authorized pursuant to NYS Finance Law, § 4-a, to accept electronic payments, including any department, board, bureau, division, commission, committee, council, office of the State, or other governmental entity with statewide jurisdiction.
- b) Any local government authorized to accept electronic payments pursuant to New York General Municipal Law, Article 2, §5.
- c) Any other entities, authorized pursuant to NYS Finance Law, § 163, to utilize NYS centralized service contracts.

NOTE: Entities other than State agencies should review their local laws to ensure there are no barriers to their accepting credit card and other forms of EVT payments.

**5. Question: Which Credit/Charge Cards will be accepted under this contract?**

*Answer:* The four major credit/charge cards will be accepted: **MasterCard, VISA, Discover and American Express**. Authorized Users may make their own determinations as to whether to accept all four or a smaller subset of the credit cards available. However, Authorized Users are encouraged to accept all cards if possible.

**6. Question: How does an agency establish a program to accept credit cards?**

*Answer:* After an agency has made a policy determination at the highest levels to implement an EVT program, the first step is to designate a properly authorized person to contact the EVTA and complete an EVT Program Plan Application. The EVT Program Application is available on the EVTA website at: <http://www.tax.ny.gov/evta/> or contact the EVTA at 518-485-0441. They will assist you with all of the requirements, procedures and forms necessary to set up an EVT program within your agency.

**7. Question: What is a Debit Card?**

*Answer:* A **Debit Card** is an electronic payment card that can be processed either on-line similar to an ATM card or off-line like a credit/charge card. On-Line Debit Card transactions are processed through the ATM networks and require entry of a PIN (Personal Identification Number) by the cardholder. This authorizes funds to be directly debited from the Device Users account. Off-Line Debit Card transactions are processed through the credit/charge card networks with funds being debited from the cardholder's account within a few days.

**8. Question: What is Interchange Pass Through Pricing?**

*Answer:* The Contractor passes the actual Interchange Fees to the Authorized user (merchant) in addition to a flat Authorization Fee per transaction. The Interchange Fees include all Visa, MasterCard, Discover and debit network authorization and Interchange fees, assessments, dues and other fees and charges that are passed to NYS at cost.

**REPORTING**

The Contractor will provide Authorized Users with electronic monthly statements. Daily reports will be available to Authorized Users via the Contractor's website: merchantconnect.com. Daily reports will include a transaction detail report for Credit/Charge Card, Off-Line Debit Card, and On-line Debit Card.

Fraud Reporting – When Contractor identifies suspicious transactions, it investigates the circumstances surrounding the transactions using the information on hand and, if warranted, will attempt to contact the Authorized User via phone. The Contractor will follow up with written correspondence as necessary.

Semi Annual Reports will be provided to OGS within 30 days of the close of the semi-annual period (June 30<sup>th</sup> & December 31<sup>st</sup>).

Ad hoc Reports – Other reports are also available from Merchantconnect.com, including: transaction summary reports, payment type summary reports, administration security reports, audit summary reports, security summary reports and user listing reports.

**FUNDS AVAILABILITY**

All funds related to electronic payment transactions, including but not limited to credit/charge cards, on-line and off-line debit cards, and similar transactions of the FSP or its prospective subcontractor(s) must be processed for the Authorized User by the Next Business Day. A business day is Monday through Friday, excluding New York State or Federal holidays. The funds must be transferred to the individual accounts designated by each Authorized User.

**TRAINING**

New York State specific training will be available, covering implementation training and on-going training. Standard training and standard on-going training will be available to all Authorized Users at no cost.

**A. Implementation Training**

Authorized Users, at each location, will get initial training via phone from KMS tele-training center at no charge, plus free follow-up training via tele-training via a Location-initiated request inbound to the KMS center. Onsite training at locations is available upon mutually agreeable time/date with KMS Representative. KMS provides merchant training services to new and existing merchants purchasing equipment or adding terminal services via telephone. These services consist of:

1. Verification of equipment receipt;
2. Verification of deployment kit materials (cords, cables, training collateral);
3. Merchant training on services (Visa, MasterCard, etc.);
4. Terminal Downloads on existing equipment (reprogramming);
5. Terminal Downloads for adding additional services;
6. Terminal training on basic functions such as sales, credits, voids, forces, reports, and settlement;
7. Installing and training on PC Products; and
8. Training on reporting services/websites.

The Contractor will provide each Authorized User with electronic access to the necessary user manuals and system documentation related to Financial Services Processing and Transaction Interfaces at no additional cost. Implementation training will be made available to each Authorized User within fourteen (14) business days of delivery of all Equipment ordered by an Authorized User for Financial Services Processing.

**B. Standard On-going Training**

Standard On-going Training is a repeat of Implementation Training provided to Authorized Users if they expand the scope of an existing payment program by accepting additional types of transactions, utilizing additional payment channels, or accepting transactions at additional physical locations.

**HELP DESK SERVICES AND SUPPORT**

The Help Desk Services will be twenty-four (24) hours per day, seven (7) days per week, including holidays, in order to address all Authorized User customer assistance needs and technical issues for submitting electronic payment transactions, including assistance with Transaction Interfaces. The Authorized User assistance line(s) will be toll free and provide direct assistance, intake service with follow-up resolution and requests for escalated assistance. Additionally, the Contractor will maintain and provide each

Authorized User with a list of the names and business phone numbers of the customer assistance staff (e.g., Contract Manager, Technical Assistant, Customer Assistant) to be available during normal business hours. The Contractor will provide the following services: Credit/Charge Card transaction Authorization, verification and inquiry services for Contractor provided Transaction Interfaces and all other customer assistance services.

**MARKETING**

The Contractor will provide each Authorized User with Welcome Kits at no charge, including but not limited to: Quick Reference Guides, Operating Procedures, Listing of support phone numbers and Decals.

**USER DOCUMENTATION**

The Contractor will provide Authorized User with User Documentation necessary for processing Credit / Charge Cards and On-line and Off-line Debit Cards including but not limited to formatting requirements, record layouts, applicable edits and validations. Training and user guides will be provided by Contractor to Authorized User via PDF and CD ROM.

**EXHIBIT A**

**CONTRACT PS65792**

**AGREEMENT**

**by and between**

**NEW YORK STATE**

**OFFICE OF GENERAL SERVICES**

**and**

**KEY MERCHANT SERVICES, LLC**

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**STATE OF NEW YORK**  
**OFFICE OF GENERAL SERVICES**

**AGREEMENT #PS65792**

CENTRALIZED CONTRACT FOR THE ACQUISITION OF  
ELECTRONIC VALUE TRANSFER (EVT)

THIS AGREEMENT made this 3<sup>rd</sup> day of August, 2012, by and between the People of the State of New York, acting by and through the **Commissioner of the Office of General Services** (OGS), whose office is on the 41<sup>st</sup> Floor, Tower Building, Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242 (hereinafter referred to as the "State" or "OGS") and Key Merchant Services, LLC having its principal place of business at One Concourse Parkway, Suite 300, Atlanta GA 30328, (hereinafter referred to as the "Contractor"), a joint venture between Key Bank, N.A., a federally chartered bank ("Member"), and Elavon, Inc., a financial services processor. OGS and the Contractor are collectively referred to as the "Parties."

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

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

WHEREAS, PSG has identified a need for an Electronic Value Transfer Program for Financial Services Processing, including hardware, to enable State Agencies, political subdivisions and others authorized by law to accept the four nationally recognized credit cards (Visa, MasterCard, American Express and Discover) as well as Debit Cards, which program is described and which needs are in Request for Proposal No. 22419 and were specified and advertised, on September 9, 2011 in the New York State Contract Reporter, as required by New York State Economic Development Law, and

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

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

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

## SECTION I. OVERVIEW

### I.1 CONTRACT SCOPE

This Contract and Appendices thereto sets forth the terms and conditions for the provision of Financial Services Processing, Payment Gateway Services, Transaction Interfaces and related services as follows:

Financial Services Processing (FSP). The Contractor must support the processing (Authorization, capture, settlement and reporting of transaction data) of the following electronic payments methods:

The four nationally recognized Credit/Charge Cards (MasterCard, Visa, Discover and American Express<sup>[1]</sup> branded cards); and

1. On-line and Off-line Debit Cards;
2. Voice Data Capture (IVR);
3. Address Verification;
4. International Processing; and
5. Reprogramming of Point Of Sale (POS) terminals.

<sup>[1]</sup> For American Express branded cards, the State has negotiated a standard Discount Rate and reporting/settlement processing terms and conditions directly with American Express. The Contractor will, however, be responsible for Authorization, capture and in certain cases reporting.

The Contractor shall allow any combination of payment applications by Authorized User (e.g. some or all Credit / Charge cards, Debit Cards) and the Authorized User may use one or more Merchant IDs to distinguish transaction types (e.g. used to differentiate various applications within an Authorized User's agency) and to manage funds.

Payment Gateway Services. The Contractor must provide connectivity and interfaces that will enable Authorized Users to access various Payment Gateway Services.

1. Contractor shall provide Internet Processing Solutions to include:

A secure on-line payment service to process credit card transactions via a computer connected to the Internet, and

A PC based Web browser, via a connection to the Internet that allows retail, mail order / telephone order, and Internet processing merchants to authorize and settle transactions.

Contractor shall provide connectivity and interfaces to third party Payment Gateway Services as listed in Appendix L.

Transaction Interfaces (Real-time and Batch Authorizations). The Contractor must provide the following with respect to Transaction Interfaces:

1. Hardware and related supplies (e.g., point-of-sale terminals);  
Hosted website; and  
Maintenance.

Related Services. The Contractor must provide the following related services:

1. Training (implementation and on-going);  
Help Desk Services; and

Marketing materials.

## I.2 TERM

The Contract will commence on the date of the OGS Contract Award Notification document sent to the Contractor, after execution and approval of the Agreement by the Office of the State Comptroller. The Contract will be in effect for five (5) years with an option to renew the contract for a single five (5) year term. The State may further extend this Contract for up to one (1) additional year or until a new contract is entered into, upon mutual written consent of the State and the Contractor. To be effective and binding, all renewals and extensions must be approved by the Office of the State Comptroller. Authorized User may issue purchase orders pursuant to this Contract at any time during the term of the Contract. Authorized User renewals must be in writing and shall not automatically renew. In the event that an Authorized User processes a transaction after termination or expiration of the Agreement, then the terms of this Agreement shall govern such transaction processing.

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

## I.3 EVT PROGRAM ELIGIBLE PARTICIPANTS

New York State agencies and non-state agencies (such as departments, public authorities, political subdivisions and other entities authorized by statute to utilize OGS contracts) are permitted to use this Contract. Before a State Agency may utilize this Contract, the State Agency must obtain approval of a Program Plan Application from the Electronic Value Transfer Administrator (EVTA) and the Division of the Budget (DOB). The Program Plan Application is referred to as the EVTA-1. Any subsequent use of the Contract must be in accordance with that State Agency's approved plan and with the statewide EVT policies and guidelines.

Non-State Agency Authorized Users are not required to receive approval by the EVTA and DOB in order to utilize the Contract; however, Non-State Agency Authorized Users are required to file the completed EVTA-1 with the EVTA.

Authorized Users are not mandated to use this Contract.

## SECTION II. ADMINISTRATIVE

### II.1 DEFINITIONS

Terms used in this Contract shall be defined in accordance with Appendix B (Part 1, §5 Definitions). In addition, the following definitions shall apply. These definitions are not intended to supersede the definitions used by the Association(s).

A. **Acceptance Testing** - the process to verify the connectivity and transfer of data elements between an Authorized User's certified payment device and Contractor's system.

**Assessment Fee** - fees imposed by the credit/charge card Associations that are passed through to the Authorized User.

**Association** - means the credit card associations known as Visa U.S.A., Inc., Visa International, Inc., MasterCard International Incorporated, American Express, Discover, and any successor organizations or associations of same. For purposes of this Contract, Association shall also mean any debit network, and any successor organization or association of same, which is applicable hereunder.

**Association Rules** - rules, regulations, releases, interpretations, and other requirements imposed and adopted by any Association.

**Authorization** - process by which an Authorized User electronically accesses the Contractor's system to obtain verification by an issuing or responsible third-party of a Credit/Charge Card, On-line or Off-Line Debit Card transaction.

**Authorization Fee** - fees charged by the Contractor to Authorized User to obtain an authorization.

**Automated Clearing House (ACH) Network** – a nationwide electronic funds transfer system governed by the ACH Operating Rules and Guidelines, which processes electronically originated credit and debit transfers for participating financial institutions.

**Chargeback** - a credit provided by a credit/charge Card issuer to the Device User in the amount (or portion of the amount) of a disputed Credit/Charge Card, or disputed Debit Card transaction.

**Commercially Reasonable Efforts**– means the efforts that a prudent party that desires to complete a transaction or other action would use in similar circumstances to ensure that a transaction, action or other result occurs as expeditiously as possible without the necessity of assuming any material obligations or incurring any material fees, expenses, or costs other than those fees, expenses and costs which the party has contractually agreed to expend.

**Contactless Payments** – Payments made using cards or other objects containing chips that can be read by Point of Sale (POS) devices by proximity of the card/object to the POS device without actual physical contact.

**Convenience Fee** - a payment mechanism by which, at the direction of an Authorized User, a Device User pays to a service provider (e.g., Internet or Interactive Voice Response service provider) a fee for the added convenience of the service to the Device User. The amount of the Convenience Fee and the method by which it may be collected shall be set forth in an Authorized User's Implementation Plan.

**Credit/Charge Cards** - MasterCard, Visa, Discover and American Express branded cards or such other new or emerging cards as may become available and included under the Contract during the Contract term.

**Debit Cards** - an electronic payment card tied to a bank account of a Device User which is processed either by entry of a PIN (On-Line Debit Card) or processed like a credit/charge card (Off-Line Debit Card).

**Device User** - a person entering into a transaction for goods or services with an Authorized User who uses an Electronic Value Transfer Device to make a payment in connection with such transaction.

**Discount Rate** – a term used by American Express to designate the percentage of the transaction value charged by American Express to process the transaction.

**Electronic Value Transfer** - a transfer of funds, which is initiated directly or indirectly by electronic means.

**Electronic Value Transfer Administrator (EVTA)** - the New York State Department of Taxation and Finance.

**Electronic Value Transfer Device** – a credit card, debit card, charge card, or other electronic value transfer mechanism.

**End to End Encryption Device** – Device which provides protection of data by encrypting at data receipt and decrypting at data destination.

**EVTA-1, Program Plan Application** – a document that is to be completed by each State Agency for the purpose of receiving approval from the EVTA and Division of the Budget for its EVTA agency plan. A Non-State Agency is required to file the form with the EVTA; however, approval of the EVTA and DOB is not required.

**EVTA-2, Work Order Form** – a document issued by an Authorized User which provides all the EVT technical project details, project costs, development timeframes and any unique administrative terms and conditions required by an Authorized User. Unique terms or conditions added by the Authorized User are limited as set forth in Appendix B, §40. For a State Agency Authorized User, the EVTA shall review and approve the EVTA-2, Work Order Form in writing prior to commencement of the Services.

**Financial Services Processing (FSP)** - processing of the four nationally recognized Credit/Charge Cards (MasterCard, Visa, Discover and American Express branded cards), On-Line and Off-Line Debit Cards, and other future forms of electronic payments.

**Interchange Fee** – a fee imposed by a credit/charge card Association that is passed through to the Authorized User.

**Interchange Pass Through Pricing** – The Contractor passes the actual Interchange Fees to the Authorized User (merchant) in addition to a flat Authorization Fee per transaction. The Interchange Fees include all Visa, MasterCard, Discover and debit network authorization and Interchange fees, assessments, dues and other fees and charges that are passed to New York State at cost.

**Member** – the financial institution which is the member of the Credit Card and Debit Card associations. The Member is a signatory to the Contract and is not a subcontractor.

**Net Depositing or Net Billing** - the depositing of funds by Contractor into an Authorized User's account in an amount reflecting the total face value of the Authorized User's transactions less funds owed to Contractor (prohibited for use with State Agency accounts unless authorized and approved on the EVTA-2 form).

**Next Business Day** – The day following a business day, which is Monday through Friday, excluding New York State or Federal holidays

**Non-State Agencies** – political subdivisions and other entities authorized by law to make purchases from New York State centralized contracts other than those entities that qualify as State Agencies.

**Payment Gateway Services** – On-line services that automate payment transaction (e.g. process, verify, encrypt transactions through secure Internet connections) for the Authorized User.

**Payment Programs** - any payment collection program which is authorized by law to be collected by means of currency, a credit card/charge card, debit card or other electronic value transfer device. For State Agencies these payment programs include, for example: fines, fees, rates, charges, taxes, interest, penalties, special assessments, revenue, financial obligations or other amounts. For local governments these payment programs additionally include, for example: civil penalties, rents, special assessments, or interest owed to local governments.

**PCI DSS (Payment Card Industry Data Security Standards)** - the Payment Card Industry Data Security Standard as set forth by the Payment Card Industry Security Standards Council, with more information available at <https://www.pcisecuritystandards.org/index>.

**PCI PED (Payment Card Industry PIN Entry Device standard)** – -- the Payment Card Industry PIN Entry Device standard as set forth by the Payment Card Industry Security Standards Council, with more information available at [https://www.pcisecuritystandards.org/security\\_standards/ped/index.shtml](https://www.pcisecuritystandards.org/security_standards/ped/index.shtml).

**Preauthorized Payments** - a transaction where a Device User authorizes an Authorized User to make one or more future charges to such Device User's Credit/Charge Card account or to initiate Off-line Debit Card transactions at a future date.

**Process/Processing** - when referring to MasterCard, Visa, and Discover, transactions shall include authorization, capture, settlement and reporting; when referring to American Express, shall mean only authorization, capture and in certain cases reporting.

**Processing Fee** - a fee charged by the Contractor to an Authorized User for Financial Services Processing (including Interchange Pass Through Fees and fees identified in Appendix D, Rate Schedules).

**Recurring Payments** – an arrangement in which a Device User agrees to allow an Authorized User to bill against a specific account at predetermined time intervals for predetermined amount using Credit/Charge Cards, and Off-Line Debit Card transactions.

**Service Items** – The services provided by the Contractor to Authorized Users pursuant to this Contract.

**Short Term Investment Pool (STIP)** – the State investment pool rate used in calculating payment credits for failures of the Contractor to meet certain minimum performance standards.

**State Agency or State Agencies** - shall have the same meaning as AGENCY OR AGENCIES in Appendix B, Section 5 Definitions.

**Transaction Interfaces** – hardware (e.g., point-of-sale devices) to be supplied by the Contractor to support FSP processing.

## II.2. ENTIRETY OF AGREEMENT / ORDER OF PRECEDENCE

The Contractor agrees to perform this Contract and to furnish the services and equipment in connection therewith in accordance with all the conditions, covenants, and representations set forth in the following documents. Only documents expressly enumerated below shall be deemed a part of this Contract, and references contained in those documents to additional Contractor documents not enumerated below shall be of no force and effect.

This Contract and the referenced appendices constitute the entire agreement between the parties thereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and the Contract shall not be changed, modified or altered in any manner except by an instrument in writing executed by both parties hereto, with the approval of the Attorney General and the Comptroller for the State of New York.

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

A. Appendix A – Standard Clauses for NYS Contracts

Base Contract – This Agreement exclusive of all other Appendices

Appendix B – OGS General Specifications

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

Appendix D – Rate Schedules

Appendix E – EVTA-1 Application Status Form

Appendix F – EVTA-2 Work Order Form

Appendix G – Payment Device Processing Agreement (“PDPA”)

Appendix H – Merchant Operating Guide (“MOG”)

Appendix I – Government/Public Institution Service Fees (Schedule I to PDPA)

Appendix J – Convenience Fees (Schedule J to PDPA)

Appendix K – Contractor Non-Disclosure Agreement

Appendix L– Third Party Gateway Services

Appendix M – Merchant Connect Terms of Use

Appendix N – Contract Update Form

### II.3 CONTRACTOR CONFORMANCE WITH LOCAL, STATE AND FEDERAL LAWS GOVERNING AUTHORIZED USER

When required by an Authorized User, the Contractor must agree to conform to all local, state and federal statutes and regulations governing that Authorized User, any of the programs which it implements, and its contractors to the extent they do not conflict with the Association Rules. This may include, but is not limited to, Authorized User requiring the Contractor to consent to an examination by independent auditors as a service organization in accordance with the American Institute of Certified Public Accountants Statement of Auditing Standards No. 70 (SAS 70) “Reports on the Processing of Transactions by Service Organizations”, Service Organization Control (SOC) reports, or any other successor standard or report.

Further, upon the request of OGS or the EVTA, Contractor shall provide a copy of its SAS 70 report, or any successor standard or report, for review and assessment. OGS will work with the EVTA on establishing an appropriate review and sharing of the SAS 70 or SOC reports for users of the Contract.

### II.4 SUBCONTRACTORS

The Contractor shall not subcontract FSP services for: Credit/Charge Card processing (MasterCard, Visa, Discover and American Express branded cards) and Debit Card processing (On-Line, Off-Line, and Batch).

Subcontractors may be used in providing non-FSP services (e.g. transaction interface hardware, gateway services, communication services, etc.)

The Contractor will be considered the "prime" Contractor and shall be fully responsible for all performance of the Contract, including work performed by subcontractors. The EVTA and OGS reserve the right to require the Contractor to provide evidence of the subcontractor’s financial stability (e.g., financial statements) and technical qualifications (e.g., resumes, references, and qualifications) at any time during the Contract term, and reserve the right to withdraw prior approval of a subcontractor in the best interest of the State or for cause, or upon a finding of non-responsibility.

### II.5 WORKING WITH CONTRACTORS

Contractor shall work with Authorized User(s) and their contractor(s), if applicable, to develop and maintain interfaces between such entities and the Contractor for completing EVT transactions, reporting, and reconciliation requirements.

### II.6 ABILITY TO CONDUCT CREDIT CHECKS

Contractor shall not conduct credit evaluations on State Agencies.

Contractor may conduct credit evaluations for Non-State Agencies and deny services to Non-State Agencies that do not meet the Contractor’s standard commercial risk qualifications.

### II.7 CONTRACTOR MEETINGS

The Contractor, the EVTA and OGS shall meet within 14 calendar days of Contract start date to develop a mutually agreed upon timetable for the implementation of Authorized Users’ Payment Programs.

The Contractor, the EVTA and OGS shall meet annually, or more frequently as required, for the following purposes:

A. Review quality of services provided,

Identify and resolve problems which impede planned progress,

Coordinate the efforts of all concerned so that the Contract progresses properly,

Maintain a sound working relationship between the Contractor and the Authorized User and a mutual understanding of the Contract, and

Maintain sound working procedures.

It is the intent that disputes between the Contractor and the Authorized User and/or the State of New York will be resolved as a result of these periodic meetings. However, if an amicable solution cannot be reached regarding any problems, the State and the Contractor reserve their respective rights to exercise any and all options under the Contract which may include termination of the Contract or the Authorized User's participation hereunder.

## II.8 DISPUTE RESOLUTION POLICY

Authorized User may, at their option, choose to utilize the following dispute resolution process. This process is not intended to supersede or diminish the remedies for Contractor's failure to meet specific standards listed in Section V. Performance Standards & Payment Credits. This process is presented as a 'Best Practice' for resolving disputes which are not covered in the Performance Standards & Payment Credits.

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

A. First Level: In the event of any dispute arising between the Contractor and an Authorized User regarding services provided pursuant to this Contract, the complaining party shall notify the other and shall make a good faith effort to resolve the dispute within thirty (30) days and shall adhere to the precedence of application of contract documents set forth above.

Second Level: In the event that a dispute cannot be satisfactorily resolved by good faith efforts at the First level, then either party may, upon satisfaction of conditions set forth herein, refer the entire matter to the PSG purchasing officer responsible for administration of the Contract for a determination. Conditions precedent to referral of a dispute to the Second and Third Levels of this dispute resolution procedure are: (i) any such referral must be made, if at all, within thirty (30) days of the time that notice of the dispute was first given by the complaining party to the other, and (ii) no duty or obligation arising hereunder which is the subject of a dispute, specifically including but not limited to any and all service obligations and any and all payment obligations arising hereunder may be refused, deferred, declined, withheld, delayed or diminished during the pendency of this dispute resolution process. The Procurement Services Group (PSG) will make a determination on the dispute within ten (10) business days of receipt of the matter from the complaining party and will notify both parties of its determination simultaneously. The determination of the PSG shall be final and binding upon the parties and Authorized Users unless within ten (10) business days of receipt thereof, either party gives written notice of appeal to the Commissioner of General Services and provides therewith all matter pertinent to the dispute.

Third Level: In the event that a party is unsatisfied with the resolution of a dispute at the First and Second Levels, that party may, within ten (10) business days of receipt of the Second Level determination, refer

the entire matter, in writing, to the Commissioner of General Services as a final appeal. The appealing party must provide, with its notice of appeal, all documents pertinent to the appeal, including a written description of the facts and circumstances giving rise to the dispute; the reason why that party is aggrieved and copy of this dispute resolution procedure. The Commissioner of General Services or a designated representative thereof shall render a decision resolving the dispute within thirty (30) days of receipt of all necessary and pertinent information. The decision of the Commissioner of General Services shall be final and binding upon both parties except that neither party shall be precluded from pursuing any legal remedy it may have. The decision of the Commissioner of General Services may be admitted as evidence of administrative determinations of fact in any legal proceeding pertaining to a dispute arising under this Contract.

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

**Note:** These dispute resolution procedures shall not apply to the chargeback process.

## II.9 KEY PERSONNEL

Contractor shall not replace identified key personnel without written notification to OGS Procurement Services Group (PSG) at the address listed in this Contract. Any replacement personnel shall have substantially equal or greater qualifications and experience than the individual replaced.

## II.10 AMENDMENTS TO APPENDIX B

The Parties agree that Appendix B, setting forth the General Specifications for Centralized Contracts, is amended as follows:

- A. Clause 4 (Conflict of Terms) This provision is replaced in its entirety by Section II.2 of the Contract.
- B. Clause 14(b) (Commissioner or Authorized User) is amended to add to the end of the first sentence "except as required to perform the services or as required by the Payment Networks."
- C. Clause 25 (Drawings) Deleted.
- D. Clause 26 (Site Inspection) is clarified as follows: No site inspection is required for contract award. However, Contractor may be required to do a site inspection of the Authorized User facilities before quoting a price for complete services. In such case Contractor will be required to comply with the requirements of this clause. Said site inspection shall be at Contractor's own expense.
- E. Clause 28(c) (Enhanced Samples) Deleted.
- F. Clause 28(d) (Conformance with Sample(s)) Deleted
- G. Clause 34 (Performance and Responsibility Qualifications) is amended to add to the last sentence "pursuant to Appendix B §60."
- H. Clause 38 (Contract Creation/Execution) This provision is replaced by Section I.2 of the Contract.
- I. Clause 39(d) (Responsibility for Performance) is amended to add "Except as otherwise provided in Appendix B §74, Contractor's liability for failure to perform under this section is subject to the limitation of liability provided in Appendix B § 76."
- J. Clause 40 (Modification of Contract Terms) is amended to add to the first paragraph, "Notwithstanding the foregoing, Authorized Users recognize that the Payment Networks Regulations are periodically updated and, as a result Contractor will periodically update its Merchant Operating Guide ("MOG"). Contractor may amend or modify the Merchant Operating Guide upon written notice

to the Authorized Users. Contractor will inform the Authorized Users of such a change in a periodic statement or other written notice, and such change will become effective not less than thirty (30) days following the issuance of notice unless an Authorized User objects in writing within such thirty (30) day period.”

- K. Clause 44(Purchase Orders) Delete the last paragraph and add the following: “Contractor will have the ability to approve the EVTA-2 Work Order forms prior to the issuance of a Purchase Order by the Authorized User. Any additional terms in a Purchase Order must be agreed upon by Contractor in writing.
- L. Clause 45 (Product Delivery) This provision applies to Transaction Interfaces and Service Items only. Add to the last sentence “pursuant to Appendix B §60.”
- M. Clause 46 (Weekend & Holiday Delivery) This provision applies to Transaction Interfaces and Service Items only.
- N. Clause 47 (Shipping/Receipt of Product) This provision applies to Transaction Interfaces and Service Items only.
- O. Clause 49 (Re-weighing Product) Deleted.
- P. Clause 52 (Installation) This provision applies to Transaction Interfaces and Service Items only.
- Q. Clause 53 (Repaired or Replaced Product) This provision applies to Transaction Interfaces and Service Items only. Repaired or replaced products are warranted only for the remainder of the initial warranty term.
- R. Clause 55 (Employees/Subcontractors/Agents) is amended to add the sentence, "All those performing under this Contract must meet or exceed the qualifications set forth in the Association Rules."
- S. Clause 56 (Assignment) Deleted.
- T. Clause 60 (Termination) is amended to incorporate the following language:
  - a. Delete “at the Contractor’s expense.”
  - d. Add to the last sentence “pursuant to Appendix B §60.a.”Add the following:
  - e. In the event the Commissioner rejects a proposed assignment in accordance with Appendix A section 2, the Parties agree that either the Contractor or the State may terminate the Contract. The party seeking termination shall provide written notification invoking this termination right and such termination shall take effect no sooner than 60 days after written notification is provided. If the Contract is terminated pursuant to this subdivision, the Authorized User shall remain liable for all accrued but unpaid charges incurred through the date of the termination. Contractor shall use due diligence and provide any outstanding deliverables and continue service until the date of the termination.
  - f. In the event that this Contract is terminated, and on the effective date of the termination the Contractor has rendered a portion of the Services for which it has not been paid, Contractor will invoice for such Services and the invoices will be paid. Upon receipt of written notice terminating the Contract in accordance herewith, the Contractor shall immediately discontinue all Services affected (unless the notice directs otherwise) upon the effective date of such termination set forth in such notice. This section shall not limit any of Authorized User’s rights of set-off or withholding under this Contract.

Clause 61 (Savings/Force Majeure) is clarified to include the following: “Contractor is not liable for interruptions in service due to the failure of telecommunications or other equipment which is not in Contractor’s control.” Additionally, the following is added to the first paragraph: “The Commissioner shall provide the Contractor with written notice of any force majeure occurrence as soon as the delay is known.” Add to section (c) “pursuant to Appendix B §60.b.”

Clause 62 (Contract Billings) is deleted and replaced with the following language:

#### CONTRACT BILLINGS AND PAYMENTS

a. Billings. Contractor and the dealers/distributors/resellers designated by the Contractor, if any, shall provide complete and accurate billing invoices to each Authorized User in order to receive payment. Billing invoices submitted to an Authorized User must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer. Submission of an invoice and payment thereof shall not preclude the Commissioner from requesting reimbursement or demanding a price adjustment in any case where the Product delivered is found to deviate from the terms and conditions of the Contract or where the billing was inaccurate. Notwithstanding the foregoing, an Authorized User may select any method of payment set forth in Section VI.2 of the Contract, as approved in the EVTA-2 form.

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

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

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

d. See also Section 5 of the Payment Device Processing Agreement.

Clause 63 (Default – Authorized User) is amended to add the following to the end of section (c), “Such 10 day notice requirement shall not apply to Contractor’s immediate termination rights provided in section 12(b)(ii) of the Payment Device Processing Agreement, attached hereto as Appendix G.”

In addition, add the following language:

(e) The Contractor may suspend or terminate the Authorized User's EVTA-2 Work Order on the following grounds:

i. If an Authorized User fails to perform any of its material obligations under the terms and conditions of this Contract or upon any failure to follow the New York State Card Acceptance Guide, or any Association Rules during the term of this Contract, after twenty (20) business days written notice to the State, the EVTA and the subject Authorized User, providing an opportunity to cure, then the Contractor shall have the right to immediately suspend or terminate Services to said Authorized User with and for cause upon written notice to the State, the EVTA and the subject Authorized User.

ii. If an Authorized User engages in or is reasonably believed by Contractor to be engaged in fraudulent activities related to the Services hereunder or otherwise, or if an Association requires for whatever reason, Contractor may either suspend or terminate the Services of the subject Authorized User as is reasonable and necessary under the circumstances. Contractor will provide a faxed notification within twenty-four (24) hours of its action to the State and EVTA. Contractor will review the circumstances of the suspension or termination with the State and EVTA within five (5) business days of the termination (unless a longer period is required by the Association) and consider in good faith a reinstatement of the subject Authorized User's Services.

iii. Any transaction that is accepted by Contractor or by a designated depository after the effective date of suspension or termination shall be processed and the funds shall be credited to the Authorized User's account. Contractor is prohibited from charging processing fees for any transactions accepted after the effective date of the suspension or termination; provided that if the Services have been reinstated, or the Authorized User continues to process Transactions after expiration of the Agreement, then Contractor may charge the fees set forth in this Agreement. Suspension or termination of this Authorized User's EVTA-2 Work Order shall not affect the State's or an Authorized User's obligations which have accrued prior to suspension or termination or which relate to any transactions hereunder prior to termination, including but not limited to Chargebacks even if such Chargebacks come in after suspension or termination. In the event of termination, all Equipment rented from the Contractor and all supplies not purchased must be returned immediately to Contractor.

See also section 12 of the Payment Device Processing Agreement, attached hereto as Appendix G.

Clause 64 (Interest on Late Payments) Paragraph (c) is amended to replace "Section 18 of the State Finance Law" with "Section V of the Contract."

Clause 65 (Remedies for Breach) Paragraph (b) is amended to add "Any amounts withheld will be directly related to the services not received."

Paragraph (d) is amended to add, at the beginning "Subject to the terms of Appendix B Section 76 and Section V of the Contract,"

Clause 69 (Security) is amended to add "which have been provided to Contractor in the EVTA-2."

Clause 72(b) (Title and Ownership Warranty) is amended to change "transferred" to "sold."

Clause 74 (Indemnification) is amended to add to the end "or their willful misconduct."

Clause 75 (Indemnification Relating to Third Party Rights) In the first sentence, delete "gross." In the last paragraph, add "attempt to" before "secure."

Clause 76 (Limitation of Liability) is amended to delete (a) and replace it with the following:

Contractor's liability for any claim, loss or liability arising out of, or connected with the Products and services provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an

amount equal to the last 12 months of fees paid by the Authorized Users or (ii) one million dollars (\$1,000,000), whichever is greater.

Paragraph (c) is amended to add “exemplary or punitive” after “special.”

Clauses 78-86 These sections are inapplicable.

## II.11 AMENDMENTS TO APPENDIX C, CONTRACTOR’S EXECUTIVE LAW, ARTICLE 15-A (M/WBE) REQUIREMENTS

The following provision is added to Appendix C, Contractor’s Executive Law, Article 15-A (M/WBE) Requirements:

For purposes of this procurement, OGS has determined that this Contract either does not offer any opportunities for participation by MWBEs or that there are insufficient MWBEs to establish a participation goal for certified Minority-owned Business Enterprises or for certified Women-owned Business Enterprises.

## II.12. AMENDMENTS TO APPENDIX H, MERCHANT OPERATING GUIDE

The Parties agree that Appendix H, the Merchant Operating Guide (“MOG”), is amended with respect to all State Agency Authorized Users and to any Non-State Agency Authorized Users that have not entered into separate agreements with Contractor as follows:

### A. Add the following to the beginning of Chapter 1:

“In the event that any of the terms and conditions contained in this MOG are found to conflict with any of the terms or conditions contained in the Contract entered into between the State of New York and Key Merchant Services, LLC pursuant to RFP #22419 for Electronic Value Transfer Services (the “Contract”), the terms and/or conditions of the Contract shall prevail. The provisions herein are intended to be in addition to the terms of the Contract.”

“Additionally, the Parties recognize that, unless an Authorized User enters into a separate written agreement with Contractor for the services, the following services will not be used by the Authorized User and the terms pertaining thereto will not apply: Electronic Gift Cards (EGC); Electronic Benefits Transfer (EBT); Electronic Check Services (ECS); Dynamic Currency Conversion (DCC); Hospitality Services; Petroleum Services, and Processing Services in Canada.”

“Further, all references to debits for monthly fees or deduction of fees from an Authorized User’s DDA shall state that such amounts will be debited or deducted ‘if applicable.’”

Chapter 2 (Processing Credit Transactions and Returns and Exchanges) These sections are revised for State Agency Authorized Users, and instead of issuing a Credit Transaction Receipt, the State Agency Authorized Users will follow the refund method identified in Section III.18 of the Contract.

Chapter 15 (Store and Forward Transactions). In *Changes to Store and Forward Application; Termination*, delete the last sentence. In *Warranties and Limitation of Liability*, paragraph (c), add to the beginning of the second sentence, “Subject to the availability of lawful appropriations.” Delete the last two sentences and replace them with the following:

“Further, neither Servicer nor Member is liable to Merchant in the event the Transaction Data is not stored within the POS device for any reason, unless due to the fault of Servicer or Member. Subject to the availability of lawful appropriations and consistent with Section 8 of the New York State Court of Claims Act, the State shall hold Contractor harmless from and indemnify it for any final judgment of a court of competent jurisdiction to the extent attributable to the negligence of the State or of its officers or employees when acting within the course and scope of their employment.”

## II.13. AMENDMENTS TO APPENDIX M, MERCHANT CONNECT TERMS OF USE

The Parties agree that Appendix M, the Merchant Connect Terms of Use, is amended with respect to all State Agency Authorized Users and to any Non-State Agency Authorized Users that have not entered into separate agreements with Contractor as follows:

A. In the first paragraph, change “www.elavon/acquiring (“Site”)” to “www.merchantconnect.com (“Site”).”

B. In *Scope of Terms*, replace the paragraph as follows:

“These Terms apply to your use of this Site and the products, materials and/or services provided to you on or through the Site by Elavon, Inc. a Georgia corporation (hereafter “Elavon”, “We” or “Us”). Additional or different terms of use may apply in connection with separate Elavon products, materials or services (“Other Terms”). These Other Terms are incorporated into and made a part of these Terms and Conditions by reference. In the event Other Terms conflict with these Terms, the Other Terms shall control with respect to the subject matter to which such Other Terms apply. In the event that Other Terms or these Terms conflict with any terms contained in the Contract entered into between the State of New York and Key Merchant Services pursuant to RFP #22419 for Electronic Value Transfer Services (the “Contract”), the terms of the Contract shall control.”

In *Restrictions on Use of Materials*, second sentence, add “or your official government use consistent with the Contract.”

In *Disclaimers*, replace the section as follows:

“THE SERVICES AND MATERIALS ON THIS SITE ARE PROVIDED WITHOUT ANY EXPRESS OR IMPLIED WARRANTIES (OTHER THAN STATED IN THE CONTRACT). WE DISCLAIM THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.”

In *Limitation of Liability*, delete the last sentence.

In *Indemnity*, replace the section as follows:

“You agree to be responsible for your use of the site that is not in conformance with these Terms and Conditions, the Contract, the Payment Network Regulations, or applicable law.”

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

Delete the *Governing Law* and *Injunctive Relief* sections.

In *Miscellaneous*, replace the first sentence of the third paragraph as follows:

“Contractor may amend or modify the Terms of Service upon written or electronic notice to the Authorized Users. Contractor will inform the Authorized Users of such a change in a periodic statement or via message on the Site, and such change will become effective not less than thirty (30) days following the issuance of notice unless an Authorized User objects in writing within such thirty (30) day period. Contractor agrees that no such amendments or modifications will be made to the Governing Law or Injunctive Relief sections.”

## SECTION III. CONTRACTOR RESPONSIBILITIES

The Contractor’s responsibilities under this Contract shall include the following:

### III.1 GENERAL RESPONSIBILITIES

A. Upon receipt of an executed Form EVTA-1, the Contractor and State Agency Authorized User can begin to discuss an EVT Program. Upon receipt of a completed and approved Form EVTA-2 from a State Agency Authorized User, the Contractor may begin to provide billable Services to that Authorized User.

Contractor will comply with all local, state and federal laws applicable to its provision of the Services. Contractor will also agree to an examination of its books and records pertinent to its provision of the Services hereunder in accordance with the provisions of paragraph 10 of Appendix A, attached hereto.

Contractor will create files meeting an Authorized User's reasonable requirements for content (including, but not limited to, payee identification information, payment amount and the date and time of and settlement of these payments), transmission frequency and delivery method.

Contractor will provide assistance to the Authorized User and their Device Users regarding researching payment exception / non-reconciliation conditions and other areas reasonably required by the Authorized Users.

The Contractor will support the processing of the following electronic payment methods:

1. MasterCard, Visa, Discover and American Express branded Credit/Charge Cards; and On-line and Off-Line Debit Cards.

### III.2 CREDIT/CHARGE AND OFF-LINE DEBIT CARD PROCESSING

A. The Contractor will process MasterCard, Visa, Discover and American Express branded Credit/Charge Cards and Off-Line Debit Cards bearing MasterCard and Visa logos and other Credit/Charge Cards and Off-Line Debit Cards which may be added to this Contract upon mutual written agreement of the State and the Contractor. Processing, when referring to MasterCard, Visa, and Discover Credit/Charge and Off-Line Debit Card transactions, shall include Authorization (including voice Authorization), data capture, settlement, and reporting; when referring to American Express transactions, processing shall mean only Authorization (excluding voice Authorization) and data capture and, as specifically requested by an Authorized User, reporting. The Contractor must provide for both on-line and off-line (i.e., batch) processing of Authorization requests and must provide for toll-free voice Authorization twenty-four (24) hours per day, seven (7) days per week. Contractor will support the processing of recurring payments at predetermined intervals for amounts agreed upon by the Device User and the Authorized User; provided, however, that the Authorized User is responsible to submit the transaction and relevant data to Contractor for each recurring payment at the predetermined interval as Contractor does not store the information and recreate the transaction.

The Contractor will provide the following connectivity options as certified by Contractor for Authorized Users, or their vendors or agents, to interface with the Contractor, as well as other certified connectivity options that may be added upon mutual written agreement of the State and the Contractor:

1. Internet processing via a secure SSL gateway;  
VSAT (Satellite);  
Dedicated IP connectivity (either TCP/IP or UDP);  
High speed connectivity up to 28.8 kbps using toll-free numbers;  
Router encryption over the Internet;  
Frame relay connections;  
Leased lines;

Secure FTP processing; and

Asynchronous dial

All telecommunication costs associated with an Authorized User's transactions transmitted through these connectivity options shall be borne by Authorized User.

Contractor Response Times shall not exceed the following (response time is measured from the time Contractor receives a transaction authorization request to the time Contractor provides an authorization response, excluding the time dependent upon third parties or third party delays):

<b>Line Type</b>	<b>Normal Period</b> (any time other than peak)	<b>Peak Period</b> (9a.m. to 9 p.m. Eastern Time)
Dial-Up Phone Line	2 – 4 seconds	2 – 4 seconds
Dedicated Internet Protocol	2 – 4 seconds	2 – 4 seconds
Wireless Transmission	2 – 4 seconds	2 – 4 seconds

For Certifying and Maintaining Interfaces, the Contractor will process Credit/Charge Cards and Off-Line Debit Card transactions initiated through the following channels maintained by Authorized Users, their vendors or agents, as well as other channels that may be added upon mutual written agreement of the State and the Contractor, all of which must first be certified to Contractor's network:

1. Equipment not obtained by Authorized Users through this Agreement,
  - Interactive Voice Response (IVR) systems,
  - Voice (communication with a voice center operator)
  - Electronic cash register,
  - Point of sale terminal,
  - Virtual Terminal,
  - Shopping cart
  - Personal computer, and
  - Mainframe computer.
  - New York State Intranet (NYeNet) or New York State localities' Intranets.

### III.3 ON-LINE DEBIT CARD PROCESSING

The Contractor will provide processing Services, including on-line Authorization, settlement, and reporting, for On-Line Debit Cards through the Associations as agreed to by the State and the Contractor.

The Contractor will process On-Line Debit Card transactions initiated through the following channels maintained by Authorized Users, their vendors or agents, all of which must be certified to Contractor's network, as well as other channels that may be added upon mutual written agreement of the State and the Contractor:

- A. Equipment obtained by Authorized Users through this Agreement;
  - PC-based applications equipped to accept cardholder PIN numbers;
  - Self-Service Terminals equipped to accept cardholder PIN numbers; and
  - Other devices capable of processing On-Line Debit Cards in a pinless/cardless environment if pre-approved by Contractor.

### III.4 ADDITIONAL SERVICES

A. The Contractor shall offer IVR and/or touch-tone phone services (voice authorization) enabling Authorized Users to process Credit/Charge Cards and Off-Line Debit Cards without requiring manual follow-up with paper transaction documentation. These IVR and/or touch-tone phone services (voice authorization) shall be available through toll-free numbers, twenty four (24) hours per day, seven-(7) days per week.

The Contractor shall offer address verification services enabling Authorized Users to reduce the incidence of fraudulent Credit/Charge Card and Off-Line Debit Card transactions. This service shall be available for all Credit/Charge Card and Off-Line Debit Card transactions processed by Authorized Users hereunder, including but not limited to point-of-sale, IVR and Internet transactions. Address verification shall check the zip code provided by a Device User against the address on file with the MasterCard and VISA issuing bank and Discover processing systems.

The Contractor shall provide credit card verification value 2 (CVV2) services, for all Credit/Charge Cards, enabling Authorized Users to reduce the incidence of fraudulent Credit/Charge Card transactions.

The Contractor shall process transactions resulting from the use in the United States of a Credit/Charge Card issued by an international financial institution.

### III.5 FUNDS AVAILABILITY

All funds related to electronic payment transactions, including but not limited to credit/charge cards, on-line and off-line debit cards, and similar transactions of the FSP or its prospective subcontractor(s) must be processed for the Authorized User by the Next Business Day. A business day is Monday through Friday, excluding New York State or Federal holidays. The funds must be transferred to the individual accounts designated by each Authorized User.

### III.6 DECLINED AND ZERO AMOUNT TRANSACTIONS

Authorized Users will not be assessed charges on declined transactions for Interchange or Assessment fees. However, Authorized Users may be charged Interchange fees by the Associations for declined or zero amount transactions.

### III.7.EQUIPMENT, WARRANTY AND MAINTENANCE

The Contractor or its subcontractor shall provide the Equipment identified in this Contract and required by Authorized Users to process Credit/Charge Card and On-line and Off-Line Debit Card transactions. The following table identifies the Equipment to be provided:

Equipment	Type	Attributes
Point-of-Sale Terminals	Type I	Stand-alone POS Terminal, with integrated printer <ul style="list-style-type: none"><li>• Configured to process Credit/Charge Cards and Off-Line Debit Cards</li><li>• Stand-alone (e.g., supports items below as peripherals)</li><li>• Integrated PIN pad for On-line Debit Card processing</li></ul>
	Type II	Hand Held POS Terminal, with integrated printer <ul style="list-style-type: none"><li>• Integrated PIN pads for On-line Debit Card processing</li><li>• Configured to process Credit/Charge Cards and Off-Line Debit Cards</li><li>• Designed to be integrated with other devices</li></ul>

Equipment	Type	Attributes
	Type III	Wireless POS Terminal, with integrated printer <ul style="list-style-type: none"> <li>• Integrated PIN pad for On-line Debit Card processing</li> <li>• Configured to process Credit/Charge Cards and Off-Line Debit Cards</li> </ul>

If Equipment is rented by an Authorized User, Contractor will replace any and all defective equipment overnight via next day air, with equivalent equipment for features, functions, capabilities and compatibility, during the life of the rental. Defective equipment that is purchased will be replaced for one year from the date of purchase. Contractor will provide a call, install and phone training to the location for the life of the equipment, while being processed under this Contract. Overnight delivery for the next a.m. delivery must be ordered from Contractor before 3 p.m. EST, otherwise delivery will occur the following day a.m.

Supplies such as charge slips, signs, imprinters, printer supplies or other supplies are not available under this Contract.

### III.8 TRAINING

The Contractor shall develop and implement a New York State specific training program covering implementation training and on-going training, or may use its current training program. Implementation training and standard on-going training will be available to all Authorized Users at no cost.

#### A. Implementation Training

Authorized Users, at each location, will get initial training via phone from KMS tele-training center at no charge, plus free follow-up training via tele-training via a Location-initiated request inbound to the KMS center. Onsite training at locations is available upon mutually agreeable time/date with KMS Representative.

KMS provides merchant training services to new and existing merchants purchasing equipment or adding terminal services via telephone. These services consist of:

1. Verification of equipment receipt;

Verification of deployment kit materials (cords, cables, training collateral);

Merchant training on services (Visa, MasterCard, etc.);

Terminal Downloads on existing equipment (reprogramming);

Terminal Downloads for adding additional services;

Terminal training on basic functions such as sales, credits, voids, forces, reports, and settlement;

Installing and training on PC Products; and

Training on reporting services/websites;

The Contractor will provide each Authorized User with electronic access to the necessary user manuals and system documentation related to Financial Services Processing and Transaction Interfaces at no additional cost.

Implementation training will be made available to each Authorized User within fourteen (14) business days of delivery of all Equipment ordered by an Authorized User for Financial Services Processing.

#### Standard On-going Training

Standard On-going Training is a repeat of Implementation Training provided to Authorized Users if they expand the scope of an existing payment program by accepting additional types of transactions, utilizing additional payment channels, or accepting transactions at additional physical locations.

### III.9 GATEWAY ACCESS

The Contractor shall provide a Payment Card Industry (PCI) compliant single gateway access point for processing payment Authorizations and settlements to include back office payment management, settlement management and reporting.

### III.10 HELP DESK SERVICES AND SUPPORT

The Contractor must provide Help Desk Services for Authorized User based on a twenty-four (24) hours per day, seven (7) days per week basis, including holidays, in order to address all Authorized User customer assistance needs and technical issues for submitting electronic payment transactions, including assistance with Transaction Interfaces. The Authorized User assistance line(s) must be a toll free number(s) which provide direct assistance, intake service with follow-up resolution and requests for escalated assistance. Additionally, the Contractor must maintain and provide each Authorized User with a list of the names and business phone numbers of the customer assistance staff (e.g., Contract Manager, Technical Assistant, Customer Assistant) to be available during normal business hours.

The Contractor shall provide the following services: Credit/Charge Card transaction Authorization, verification and inquiry services for Contractor provided Transaction Interfaces and all other customer assistance services.

The Contractor shall employ escalation or other oversight procedures to ensure that Authorized User inquiries are addressed in a timely manner. The Contractor will provide sufficient telephone lines and help desk staff to ensure that calls are answered by an employee of Contractor or its Subcontractor during the applicable hours outlined above for the help desk service in question.

For inquiries not resolved on the telephone call, Contractor shall use its best efforts to resolve within twenty-four (24) hours. If the Contractor is unable to resolve within twenty-four (24) hours, Contractor shall maintain daily communication with Authorized User until inquiry is resolved.

The Contractor will provide Authorized Users with contact names and business phone numbers of supervisory personnel and assigned team members available during normal business hours.

### III.11 MARKETING

The Contractor will provide each Authorized User with Welcome Kits at no charge, including but not limited to: Quick Reference Guides, Operating Procedures, Listing of support phone numbers and Decals.

### III.12 USER DOCUMENTATION

The Contractor shall provide Authorized User with User Documentation necessary for processing Credit / Charge Cards and On-line and Off-line Debit Cards including but not limited to formatting requirements, record layouts, applicable edits and validations.

Training and user guides shall be provided by Contractor to Authorized User via PDF and CD ROM.

### III.13 CONVENIENCE FEE RULES

The Contractor acknowledges that an Authorized User may, when permitted under the Association Rules, impose a Convenience Fee on a Device User, resulting in the submission to Contractor of two transactions, one for the transaction amount and one for the Convenience Fee amount.

### III.14 AUTHORIZED USER UNIQUE FIELD

The Contractor must support a 20-character, alphanumeric unique field to be utilized by Authorized Users in verifying and processing electronic payments for both automated and manual transactions, at the option of the Authorized User. The alphanumeric field will be unique for each transaction. This field must be included on any reports displaying individual electronic payment transactions, and shall be electronically transmitted by the Authorized User with each transaction. The Contractor will support the Authorized User unique field for Credit/Charge Card, Off-Line Debit Card, and On-Line Debit Card. The Contractor will provide Hardware to enable Authorized Users to enter the Authorized User unique field into transaction records. This number must be stored on the Contractor's system and available to Authorized Users in a manner that will support identification, balancing and reconciliation.

### III.15 IMPLEMENTATION PLANS

As Authorized User implements electronic payment processing systems utilizing Financial Services Processing and Transaction Interfaces, the Contractor must agree to work with each Authorized User to develop mutually agreed upon Implementation Plans which specify all Financial Services Processing rates, Transaction Interface deliverables and rates, the timetable for deliverables, acceptance testing criteria and procedures and training for new and enhanced applications. If an Authorized User requires processing procedures that are not supported by Credit/Charge Card, Off-line & On-line Debit Card, Association or governing body rules or guidelines, the Contractor must work with the Authorized User to seek approval from such Association or governing body for such procedures, and upon approval, agree to process electronic payments under such alternative procedures. The Contractor must also provide Implementation Plans, with estimated timeframes, for start up and conversion of new and/or existing applications.

- A. Contractor shall work with each Authorized User and/or their existing contractors to set up a plan for initial and continuing training, consultation, and installation of Transaction Interfaces as required by the individual Authorized User's needs and timeframes.

The Contractor shall work with the Authorized User in seeking approval from Associations and governing bodies for alternative procedures, and if approved, to process electronic payments under such alternative procedures.

### III.16 ACCEPTANCE TESTING

- A. The Contractor will engage in Acceptance Testing with each Authorized User and their vendors or agents.

- 1. Contractor shall maintain a full testing system and test lab that works in tandem with Contractors full production system; and

Contractor shall provide test cards for each card brand and debit network to the Authorized User when testing and certification is performed.

Acceptance Testing will be performed for the following devices and applications, and such other devices that may be added to the Agreement upon mutual written consent of the State and the Contractor, all of which must be certified to the Contractor's system:

- 1. Equipment obtained by Authorized Users through this Contract;

Equipment not obtained by Authorized Users through this Contract;

Interactive Voice Response (IVR) systems;

Internet applications (including directly from payment servers maintained by an Authorized User, their vendors or agents, or indirectly through Internet payment gateways);

PC-based applications;

Mainframe processing systems;

Self-Service Terminals; and

The New York State Intranet (NYeNet) or New York State localities' Intranets.

Acceptance Testing will be performed for the following types of transactions, and other types of transactions that may be added to the Agreement upon mutual written consent of the State and the Contractor:

1. Credit/Charge Cards, and

Off-line and On-line Debit Cards.

If the Contractor is more than five (5) business days late with meeting any part of the Transaction Interfaces deliverable schedule set forth in the Authorized User's Implementation Plan or Work Order, then the Authorized User may withhold any payment related to the Transaction Interface due until the deliverable has been met. More than one incidence of any deliverable not being met in accordance with the agreed Implementation Plan or Work Order schedule may result in a complete withholding of all further payments related to the item not delivered until Acceptance by the Authorized User, without incurring any charge or penalty against the Authorized User for late payments. Alternatively, more than one incidence of failure to meet the Implementation Plan or Work Order schedule may, at the sole option of the Authorized User, result in the termination of the Implementation Plan or Work Order for cause in accordance with Appendix B § 60(a). The Authorized User will then only be liable for actual work or interfaces received and retained pursuant to the Implementation Plan or Work Order up to the date of the notice of termination.

### III.17 CERTIFYING AND MAINTAINING INTERFACES

All Equipment offered by Contractor under the Contract will be certified by the Contractor without cost to the Authorized User.

### III.18 CHARGEBACKS, REFUNDS, AND ADJUSTMENTS

The Contractor may not use deduction net-billing for Authorized Users that are State Agencies for Chargebacks, Chargeback fees, refunds, and adjustments, unless authorized and approved by the EVTA on the EVTA-2 form prior to service commencement. State Agencies not receiving prior approval by the EVTA-2 form for Chargebacks and adjustments will receive Chargebacks, Chargeback fees, refunds and adjustments based on electronic invoices submitted to them by the Contractor. Post-draft capture refunds to Device Users will be made through each State Agency Authorized User's normal refund process (e.g., State Agency will provide the Device User with a credit voucher indicating the Device User will be receiving a refund check issued by the Office of the State Comptroller of the State of New York). The State Agency must follow Association Rules with respect to disclosure of the refund policy on the Transaction Receipt.

The State and Authorized Users acknowledge that because Contractor will not have a record of credits issued by the State or Authorized Users to Device Users via a paper check, Contractor shall not be responsible for the issuance of a credit to a Device User if a transaction is subject to a Chargeback, even if the Device User has received a paper check from the State Comptroller's office. The State or Authorized User, as applicable, shall repay Contractor for any such Chargebacks, even if it results in double recovery for the Device User, and the State or Authorized User will be solely responsible for seeking repayment from the Device User.

The Contractor may be able to net bill Authorized Users that are not State Agencies for Chargebacks and adjustments and to utilize the standard refunding process.

Chargeback timeframes vary by the Payment Card company and the Authorized User must check the Payment Card Company Operating Regulations for the timeframes by reason code.

Authorized User must retain legible copies of all Sales and Credit drafts or any other transaction for a period of:

- A. Eighteen (18) months from the date of each transaction for MasterCard and Visa; or
- Five (5) years for MasterCard and Visa Healthcare; or
- Two (2) years for Discover and American Express.

Contractor shall provide a Chargeback notification form to the Authorized User for all disputes adjusted to the Authorized User. Authorized Users shall have fourteen (14) days to respond to the Chargeback notification. Authorized Users shall have twenty (20) calendar days to respond to a Chargeback Debit notification for Visa, MasterCard and Discover disputes.

### III.19 REPORTING

The Contractor shall be responsible for providing the following reports to Authorized User, the EVTA and OGS, as indicated, and for ensuring that each Authorized User is only provided the information specific to that Authorized User in the format and timeframe required. OGS and the EVTA shall receive reports including all Authorized Users under this Contract.

#### A. **Transaction Reports and Inquiries (OGS, EVTA, and Authorized User)**

The Contractor or its Subcontractor will provide Authorized Users with electronic monthly statements. Daily reports will be available to Authorized Users via the Contractor's website, merchantconnect.com.

#### **Fraud Reports (OGS, EVTA and Authorized User)**

When Contractor identifies suspicious transactions, it investigates the circumstances surrounding the transactions using the information on hand and, if warranted, will attempt to contact the Authorized User via telephone. Contractor will follow-up with written correspondence as necessary. The Contractor shall also:

1. Conduct a duplicate transaction screening on every Interchange file before submitting for settlement; and

Perform monitoring of the transaction activity against Authorized User's business to enable more readily identifiable unusual activity.

#### **Summary Reports for Control Agencies**

Monthly reports summarizing processing activity of transactions settled by Contractor and submitted by each state agency and non-state agency Authorized User and a summary total of the processing activity for all State Agency and Non-State Agency Authorized Users are available using the data elements from Contractor's systems. This information will be available from Contractor's website, merchantconnect.com.

#### **Semi-Annual Reporting (OGS)**

1. The Contractor must provide Semi-Annual Sales reports to OGS, for use by OGS, OSC, and DTF for purposes of supporting program monitoring and contract administration. OGS will download all of the information required in this section from Contractor's website, merchantconnect.com.

Reports shall be delivered within thirty (30) days of the close of the semi-annual period. Semi-annual periods will end on December 31<sup>st</sup> and June 30<sup>th</sup>. If the contract period begins or ends in a fractional portion of a reporting period only the actual contract sales for this fractional period should be

reported in that semi-annual report. This report will include, but is not limited to, transaction fees, card type, and other fees paid. OGS reserves the right to require reports with detailed data other than transaction fees, card type and fees paid.

Contractor shall electronically provide the State with verified semi-annual reports in the format required by the State showing the dollar volume of any and all sales under this Contract for the prior six-month period. Said report shall include a break out of participation by individual Authorized Users, including State Agency and Non-State Agency governmental entities and others authorized by law. In the event that a Contractor utilizes subcontractors, it is the responsibility of Contractor to include all Contract revenues from these participants in the semi-annual report. Where third party Product is offered and delivered under this Contract, Contractor shall be required to separately report such sales volume on a semi-annual basis to the State.

The State shall have the right to verify said report and to take any action(s) necessary to enforce its rights under this paragraph. These rights include, but are not limited to:

- the right to stop payments until such reports are received;
- the right to audit Contractor's applicable Contract books (pursuant to Appendix A §10);
- the right to substitute, in its sole judgment, a good faith estimate of Contract usage upon failure of Contractor to deliver said report as required, where pricing is based upon aggregate volume, and
- the right to terminate the Contract for cause (pursuant to Appendix B §60(a)) or seek other judicial relief.

#### **Ad-hoc Reports**

Other reports available to OGS, EVTA and Authorized Users via merchantconnect.com include:

1. Transaction Summary Reports,
- Payment Type Summary Reports,
- Administrator Security Reports,
- Audit Summary Reports,
- Security Summary Reports, and
- User Listing Reports

### **III.20 BUSINESS CONTINUITY/DISASTER RECOVERY**

The Contractor has in place a comprehensive Business Continuity/Disaster Recovery Plan (Plan) to provide alternative processing arrangements for all services in the event of a short-term business interruption and/or long-term loss of processing capacity at the Contractor's processing site. OGS reserves the right to review a copy of the Plan should it be deemed necessary, provided that the State executes a confidentiality agreement pertaining to the Plan.

The Plan incorporates all alternate facilities, equipment, telecommunications lines, staff or other resources required to ensure continuity of services required pursuant to this Contract, which are interrupted for any length of time by a disaster or other unforeseen event. The Plan must encompass all recovery activities, from the initial event interrupting operations, through transitions of operations to alternate site(s) and restoration of the original operating site and include a flow chart of the disaster recovery mechanism. The Plan must address how the Security and Confidentiality requirements are maintained during the relocation of operations to an alternate site(s), at the alternate sites(s) and during restoration of the original operating site(s).

Contractor affirms that the Plan includes the following:

A. Multiple sites are operational at all times and the distribution is across all systems, providing real time full redundancy;

Systems reside in geographically diverse Data Centers with each Data Center having the ability to handle 100% of peak volume with a single data center down;

Settlement backup systems are functional at all times and are put into production status anytime scheduled or routine maintenance is being performed on production systems.

To the extent the Contractor updates the Business Continuity/Disaster Recovery Plan as required to reflect technological, system or other changes, the Contractor must provide OGS or its designee with updated information (subject to a confidentiality agreement), as appropriate or requested. The Contractor shall thoroughly test its disaster recovery plan at a minimum on a quarterly basis.

### III.21 SECURITY AND INTERNAL CONTROL PLANS

The Contractor has in place a comprehensive Security Plan and Internal Control Plan, which will ensure the anonymity of Device User information and that access to such information is controlled and restricted to authorized personnel only, including procedures to secure point of sale terminals, transactions on the Internet, transaction receipts and sales reports under Contractor's control.

### III.22. SECURITY & CONFIDENTIALITY

The Contractor and its Subcontractors are responsible for the security of the transaction data and processing procedures for its systems and systems within Contractor's control and for compliance with all applicable state laws pertaining to the security of transaction data in connection with the provision of Services hereunder; provided, however, that neither Contractor or its Subcontractors will be responsible for any security breaches or non-compliance with Federal or State law or terms of this Contract which results from any act or omission of the Authorized User or a third party unrelated to the negligence of Contractor.

The Contractor is also responsible for compliance with all applicable state and federal laws pertaining to the security of data, including the New York State Personal Privacy Law, (See Public Officers Law, Article 6-A). Additionally, the Contractor must adhere to the security and confidentiality procedures of Authorized User and implement procedures sufficient to enforce such privacy for all services provided under the Contract. To that end, the Contractor's employees may be required to sign agreements to adhere to such laws, rules and/or procedures. The Contractor must store any electronic payment processing data in an encrypted data format sufficient to preserve such security.

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

Except as directed by a court of competent jurisdiction or as necessary to comply with applicable New York State or Federal law(s) or regulation(s) or the Payment Network Regulations, to the extent consistent with applicable law, and with the written consent of the Device User, where applicable, no data records or other information may be otherwise used, released or sold to any third party by the Contractor. The Contractor is further prohibited from releasing data records or other information to its joint venture, partners, employees, agents or subcontractors, either during the term of the Contract or in perpetuity thereafter, unless such party is directly processing the data or providing a service that requires access to the data. Where such party is directly processing the data or providing a service that requires access to the data, the Contractor shall be responsible for ensuring such party's compliance with the provisions of this paragraph. The Contractor shall be responsible for

assuring that any agreement between the Contractor and any of its joint venture, partners, officers, agents, employees or subcontractors contains a provision that strictly conforms to these provisions.

**If the Authorized User is the New York State Department of Taxation and Finance, the following additional provisions apply:**

A. State Tax Information

1. The treatment by Contractor of confidential State tax information shall be governed by the secrecy provisions of the Tax Law and with all Department rules, policies and procedures implementing such provisions (see, currently, Tax Law sections 202, 211.8, 295, 314, 437, 487, 514, 528, 697(e), 994, 1023(b), 1146, 1165, 1250, 1312(a), 1332(a), 1342, 1418, 1467, 1518, 1555, 1825 and 3038). Thus, except in accordance with proper judicial order or as otherwise provided by law, Contractor shall not divulge or make known in any manner the contents or any particulars set forth or disclosed in any return or report required under or pursuant to the authority of the Tax Law. Computer files and their contents are covered by the same secrecy provisions as are physical documents.
  - a) Information about Department operations, including, without limitation, automated tax system information, shall be treated as if covered by the secrecy provisions of the Tax Law. Accordingly, unauthorized disclosure of such information shall be prohibited.
    - b) For purposes of the above provision, "automated tax system information" includes, but is not limited to, functional, technical and detailed systems design; systems architecture; automated analysis techniques; systems analysis and development methodology; audit selection methodologies; and information regarding proprietary products such as software packages; provided, that "automated tax system information" shall in no event include existing products.

Contractor acknowledges and agrees that only those persons with a need to know confidential Department information for purposes of performing their job responsibilities for the Services shall be afforded access thereto.

The Department reserves the right to periodically audit/inspect Contractor's operations and procedures with respect to Contractor's work under the contract to determine whether Contractor is in compliance with the confidentiality requirements applicable to confidential Department information, as prescribed by this section of the contract. Subject to reasonable Contractor security procedures, the Department may perform such inspections in accordance with Appendix A §10. The conduct and frequency of inspections/audits will be designed to minimize disruption to Contractor's work under the contract. In addition, when audit staff is on site for another purpose, if violations of security are observed, the Department reserves the right to require corrective action. Remedial action, as specified by the Department, shall be required in cases where Contractor is found to be noncompliant with such requirements.

Federal Tax Information

1. Contractor shall abide by the requirements set forth in Internal Revenue Code sections 6103, 7213, 7213A and 7431, and regulations promulgated thereunder, with respect to confidential Federal return and return information in its possession or the possession of the Department. For purposes of this section of the contract, the terms Federal "return" and "return information" shall have the meanings prescribed by the above referenced Internal Revenue Code sections and regulations.

Pursuant to requirements set forth in IRS Publication 1075, "Tax Information Security Guidelines for Federal, State and Local Agencies", Contractor shall comply with the following, with respect to Federal tax information:

Performance.

In performance of the contract, the Contractor agrees to comply with and assume responsibility for compliance by his or her employees with the following requirements:

- (i) all work will be done under the supervision of the Contractor or Contractor's employees;
- (ii) any return or return information made available in any format shall be used only for the purpose of carrying out the provisions of this Contract. Information contained in such material will be treated as confidential and will not be divulged or made known in any manner to any person except as may be necessary in the performance of the contract;
- (iii) all returns and return information will be accounted for upon receipt and properly stored before, during, and after processing. In addition, all related output will be given the same level of protection as required for the source material;
- (iv) the Contractor certifies that the confidential Federal return and return information processed during the performance of the contract will be completely purged from all data storage components of his or her computer facility, and no output will be retained by the Contractor at the time the work is completed. If immediate purging of all data storage components is not possible, the Contractor certifies that any confidential Federal return and return information remaining in any storage component will be safeguarded to prevent unauthorized disclosures;
- (v) any spoilage or any intermediate hard copy printout that may result during the processing of confidential Federal return and return information will be given to the Department or its designee. When this is not possible, the Contractor will be responsible for the destruction of the spoilage or any intermediate hard copy printouts, and will provide the Department or its designee with a statement containing the date of destruction, description of material destroyed, and the method used;
- (vi) all computer systems processing, storing, or transmitting of Federal tax information must meet ISO STD 15408, called Common Criteria-functional (Protection Profile) and assurance (EAL). To meet functional and assurance requirements, the operating security features of the system must have the following minimum requirements: a security policy, accountability, assurance, and documentation. All security features must be available and activated to protect against unauthorized use of and access to Federal tax information;
- (vii) no work involving confidential Federal return or return information furnished under the contract will be subcontracted without prior written approval of the IRS, which approval the parties will seek when and if the Department decides to participate under this Agreement;
- (viii) the Contractor will maintain a list of employees authorized access. Such list will be provided to the Department and, upon request, to the IRS reviewing office;
- (ix) The Department will have the right to terminate its EVTA-2 Work Order under the contract if the Contractor fails to provide the safeguards described above pursuant to Appendix B §60.

**Criminal/Civil Sanctions:**

- (i) Each officer or employee of any person to whom returns or return information is or may be disclosed will be notified in writing by such person that returns or return information disclosed to such officer or employee can be used only for a purpose and to the extent authorized herein, and that further disclosure of any such returns or return information for a purpose or to an extent unauthorized herein constitutes a felony punishable upon conviction by a fine of as much as \$5,000 or imprisonment for as long as 5 years, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized further disclosure of returns or return information may also result in

an award of civil damages against the officer or employee in an amount not less than \$1,000 with respect to each instance of unauthorized disclosure. These penalties are prescribed by IRC Sections 7213 and 7431 and set forth at 26 CFR 301.6103(n)-1.

- (ii) Each officer or employee of any person to whom returns or return information is or may be disclosed shall be notified in writing by such person that any return or return information made available in any format shall be used only for the purpose of carrying out the provisions of this Contract. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of the contract. Inspection by or disclosure to anyone without an official need to know constitutes a criminal misdemeanor punishable upon conviction by a fine of as much as \$1,000 or imprisonment for as long as one year, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized inspection or disclosure of returns or return information may also result in an award of civil damages against the officer or employee (United States for federal employees) in an amount equal to the sum of the greater of \$1,000 for each act of unauthorized inspection or disclosure with respect to which such defendant is found liable, or the sum of the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure plus in the case of a willful inspection or disclosure which is the result of gross negligence, punitive damages, plus the costs of the action. These penalties are prescribed by IRC Sections 7213A and 7431.
- (iii) Additionally, it is incumbent upon the Contractor to inform its officers and employees of the penalties for improper disclosure imposed by the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, 5 U.S.C. 552a(i)(1), which is made applicable to contractors by 5 U.S.C. 552a(m)(1), provides that any officer or employee of a contractor, who by virtue of his/her employment or official position, has possession of or access to agency records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established thereunder, and who knowing that disclosure of the specific material is prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

#### Inspection:

The IRS shall have the right to inspect Contractor's operations and procedures with respect to any work under the contract to determine whether Contractor is in compliance with the safeguards set forth above. On the basis of such inspection, specific measures may be required in cases where the Contractor is found to be noncompliant with contract safeguards.

#### Secrecy Agreements

By entering into this Contract, Contractor agrees to have its employees, agents and subcontractors performing services execute an agreed-upon nondisclosure agreement required by DTF and/or IRS.

Breach by the Contractor of any of these provisions may, at the sole discretion of the Authorized User, be grounds for termination of its agreement with the Contractor pursuant to Appendix B §60.a, or at the sole discretion of OGS, be grounds for termination of the Contract.

### III.23 PERFORMANCE BONDS

There is no Performance bond or other security requirements for this Contract.

## IV. AUTHORIZED USER RESPONSIBILITIES

#### IV.1. GENERAL

- A. Each Authorized User agrees to be bound by the terms and conditions of this Contract and the operating regulations and rules of the Associations, to the extent permitted under both state law and the terms of this Contract. Contractor believes that an Authorized User's compliance with this Contract constitutes substantial compliance with the operating rules and regulations of all applicable Associations as of the signing of this Contract, unless modified by State law.

The State acknowledges that it has entered into a centralized agreement with American Express to accept any cards bearing the marks of American Express.

The Authorized User will use best efforts to adequately display the card issuer service marks and promotional materials supplied by the Contractor. The Authorized User shall cease to use or display such service marks immediately upon notice from the Contractor or upon termination of this Agreement.

#### IV.2. ACCEPTANCE OF CREDIT/CHARGE CARDS AND OFF-LINE DEBIT CARDS

The Authorized User agrees to:

- A. Accept any Credit/Charge Card or Off-Line Debit Card properly tendered, without imposing any special conditions unless mutually agreed upon by the Contractor and Authorized User;

Assess no special charge, other than Convenience Fees, to a Device User in connection with any Credit/Charge Card or Off-Line Debit Card transaction;

Not post signs indicating that it will refuse to honor Credit/Charge Card or Off-Line Debit Card transactions below or above a specified amount;

Not engage in acceptance practices or procedures that discriminate against, discourage or favor the offered use of any particular Credit/Charge Card or Off-Line Debit Card accepted;

Not require Device Users to provide personal information or any form of identification as a condition for honoring and accepting a Credit/Charge Card or Off-Line Debit Card, except to the extent required by this Contract or the rules and regulations of the Associations. This requirement shall not prohibit the Authorized User from obtaining personal information if the Authorized User would do so for similar transactions not involving a Credit/Charge Card or Off-Line Debit Card;

Check each Credit/Charge Card or Off-Line Debit Card used during a face-to-face transaction for validity in accordance with the terms of this Contract. The Authorized User will not honor a Credit/Charge Card or Off-Line Debit Card that appears to be invalid or has expired;

Retain copies of all paper and electronic sales slips and credit slips and pertinent transaction data elements submitted to Contractor for a period of two years from submission, or such longer period of time as may be required by the operating rules or regulations of the subject Association, by law, or by Contractor as specifically requested in writing in individual cases; and

The State and/or Authorized Users agree to satisfy directly with the Device User any claim or complaint from the Device User or any third party arising in connection with their transactions.

#### IV.3 AUTHORIZATION - ALL TRANSACTION TYPES

- A. The Authorized Users shall be responsible for obtaining Authorization in advance for each Credit/Charge Card or Off-Line Debit Card transaction. The Authorization number provided by the Contractor (or issuer) shall be retained and noted by the Authorized Users. If Authorization is declined, the State/Authorized Users shall not complete the card transaction.

The Authorized Users acknowledge that Authorization (i) indicates only the availability of credit or cash funds; (ii) does not warrant that the person presenting the card is the rightful Device User; and (iii) is not an unconditional promise or guarantee by Contractor that any card transaction will not be rejected, returned or subject to Chargeback.

#### IV.4. PRESENTATION OF CARD TRANSACTIONS

All Credit/Charge Card and Off-Line and On-Line Debit Card transactions must be reviewed and submitted to Contractor in accordance with this Contract, the Payment Device Processing Agreement, attached hereto as Appendix G, the Merchant Operating Guide, attached hereto as Appendix H and any applicable Schedules.

#### IV.5. REPRESENTATIONS AND WARRANTIES REGARDING CARD TRANSACTIONS

The Authorized User represents and warrants as to each card transaction submitted by the Authorized User under this Agreement that:

- A. each sales transaction delivered hereunder will represent a bona fide sale to a Device User by Authorized User for the amount shown on the sales slip as the total sale and constitutes the binding obligation of the Device User, free from any claim, demand, defense, setoff or other adverse claim whatsoever;
- B. each sales slip or other evidence of indebtedness will accurately describe the goods and services which have been sold and delivered to the Device User or in accordance with his instructions;

Authorized User will fulfill completely all of its obligations to the Device User and will resolve any dispute or complaint directly with the Device User;

the Authorized User complied with the requirements of Appendix H, the Merchant Operating Guide, and this Contract to confirm that the signature on the sales slip is that of the Device User; and

the sales transaction shall have been consummated and the sales slip prepared in full compliance with the provisions of Appendix H, the Merchant Operating Guide, and this Contract. In the event that any of the foregoing warranties or representations are breached, the affected sales slips or other indebtedness may be refused, or prior acceptance revoked and charged back to the Authorized User. Furthermore, if Authorized User submits hereunder a sales transaction that is not the result of a sale of goods or services, such sales transaction may be refused or charged back.

### SECTION V. PERFORMANCE STANDARDS AND PAYMENT CREDITS

Notwithstanding Credit/Charge Card or Off-line & On-line Debit Card Association or governing body rules, the performance standards & payment credit provisions set forth below shall apply to the Contractor. The Contractor agrees to comply with the applicable performance standards as set forth below throughout the Contract term. In the event that the Contractor fails to adhere to or comply with the performance standards stated below, the Authorized User shall, at their discretion be entitled to a credit against payment due the Contractor for a sum calculated as set forth below (“payment credit”). These remedies are in addition to and do not restrict other remedies that are available under law or the Contract. However, the Authorized User shall not be entitled to a credit to the extent that the failure to meet the performance standard arises from causes beyond the Contractor’s control and without the fault or negligence of the Contractor (See Appendix B, clause 61).

PERFORMANCE STANDARDS	PAYMENT CREDITS
<b>Financial Services Processing:</b> Contractor will accurately capture, report and settle all electronic	

PERFORMANCE STANDARDS	PAYMENT CREDITS
<p>transactions in a timely manner. The Contractor shall provide all services so as to achieve 98.5% error-free and timely processing.</p>	
<p>1 <b><u>Service Interruption(s) or Failure(s)</u></b>  The Contractor shall maintain redundant back-up systems, including disaster recovery facilities, in order to facilitate uninterrupted services, exclusive of planned maintenance downtime. Planned maintenance downtime must be done pursuant to a maintenance program known to the Authorized User, in advance.</p> <p>In the event of a temporary interruption(s), partial loss or complete failure to provide service, Contractor shall use all Commercially Reasonable Efforts to restore the system to full operation.</p> <p>Any temporary interruption(s), partial loss or complete failure to provide FSP services (“incident”) during the preceding month shall be reported in detail, per incident, to the Authorized User and the EVTA. Such report shall include the date, time of incident, duration of incident, and type of service loss for each incident.</p> <p><b><u>Service Interruption(s) or Failure(s)</u></b>  (Continued)</p>	<p><b><u>Payment Credit:</u></b>  If the cumulative duration of all incidents (defined here in A1) in a calendar day exceed five (5) hours per day, then the Authorized User shall be entitled to payment credit(s) to cover its loss of use of funds. In the event of an interruption or failure in FSP, Contractor shall provide a payment credit for the <b>Lost Float</b>, calculated as follows:</p> <p style="text-align: center;"><b>LOST FLOAT</b> = [(Funds * STIP) / 365] * days</p> <p><b>FUNDS</b> = Funds shall be defined as the estimated funds which would have been received by Authorized User during the period(s) of outage had service been continuous.</p> <p>The ‘estimated funds’ shall be calculated as follows:</p> <ul style="list-style-type: none"> <li>i. determine the average daily balance for Authorized Users’ transactions processed during the previous month (if less than one year of historical data available), or the average daily balance for transactions processed during same month in the previous year (if more than one year of historical data available);</li> <li>ii. multiply the average daily balance by the number of calendar days in which the minimum performance standard was not met.</li> </ul> <p><b>STIP</b> = Shall be defined as the effective rate of State’s Short Term Investment Pool on first day Contractor failed to meet the minimum performance standard.</p> <p><b>DAYS</b> = Shall be defined as the total number of Authorized User’s normal business days in which the minimum performance standard was not met.</p>

PERFORMANCE STANDARDS	PAYMENT CREDITS
<p>2 <b><u>Failure to Submit Draft Captures Timely</u></b>  Contractor must submit authorized transactions for draft capture within the time frame required by the applicable card Association to receive the lowest rate for the type of transaction.</p>	<p><b><u>Payment Credit:</u></b>  Where a draft capture is not submitted timely by Contractor, resulting in a higher Interchange Pass Through Fee being charged for the transaction, the Contractor shall provide a payment credit to the Authorized User for the difference between the Interchange Pass Through Fee charged and that which would have been charged had the draft capture been submitted timely. The Contractor shall not be entitled to a credit where the rate actually charged is lower than the Interchange Pass Through Fee which would have been charged had the draft capture been submitted timely and the amount of the Interchange Pass Through Fee that was charged.</p>
<p>3 <b><u>Failure to Meet Processing Time/Requirements</u></b>  Contractor must initiate transactions to credit funds to depository accounts designated by Authorized User within the agreed upon time frames set forth in the Contract and the EVTA-2 form.</p>	<p><b><u>Payment Credit:</u></b>  Where transactions are not initiated to credit funds to designated accounts within the minimum performance standard, for reasons other than service interruptions or failures, the Authorized User shall be entitled to the funds in question in addition to payment credit(s). Contractor shall provide a payment credit for the <b>Lost Float</b>, calculated per #1 above, however, “<i>Funds</i>” and “<i>Days</i>” shall be defined as:</p> <p><b>FUNDS</b> = Funds which the Contractor failed to process, or processed in an untimely manner.</p> <p><b>DAYS</b> = Total number of twenty-four hour periods in which the minimum performance standard was not met, starting from the date and time on which the funds should have been deposited (i.e., settlement posted within two days, posted after 3pm on day two) and continuing for each 24 hour period thereafter until the date and time of credit to depository account.</p>

PERFORMANCE STANDARDS	PAYMENT CREDITS
<p>4 <b><u>Security and Confidentiality</u></b>  The Contractor and its subcontractors are responsible for the security of the transaction data and processing procedures for its systems and systems within Contractor’s control and for compliance with all applicable Federal and state laws pertaining to the security of transaction data in connection with the provision of Services hereunder; provided, however, that neither Contractor nor its Subcontractors will be responsible for any security breaches or non-compliance with State law or terms of this Contract which results from any act or omission of Authorized User or a third party unrelated to the negligence of Contractor.</p>	<p><b><u>Payment Credit:</u></b>  In the event Contractor suffers a data incident, Contractor will follow all applicable Payment Network Regulations with respect to such data incident, including providing the required reporting and forensic audits to the Payment Networks. In the event Contractor suffers a data incident and private information is disclosed, Contractor will comply with N.Y. Gen. Bus. Law. § 899-aa(3), as applicable. In addition, Contractor shall provide reimbursement to all affected Authorized Users for any amounts required by the Payment Networks as a result of failure to meet the standard, subject to Appendix B §76(a).</p> <p>A payment credit of \$2,500 for each violation of the unauthorized access; with corrective time frames specified by the Authorized User for each violation which, if not adhered to would result in subsequent payment credits. For clarification, the payment credit will only be awarded once for unauthorized access of Contractor’s systems attributable to the same cause or event. Where the same issue occurs multiple times and all unauthorized access is attributable to the same cause or event, such shall be treated as a single failure. Moreover, the payment credit will be awarded once per event, either to the affected Authorized User or, if multiple Authorized Users are affected, then to the State.</p>

## SECTION VI. CONTRACT FEES AND PAYMENTS

### VI.1. CONTRACT FEES

Contract fees shall be based on Interchange Pass through Pricing as defined in this Contract. Appendix D, Rate Schedules, delineate the fees for services that can be charged under this Agreement. These fees may include, but are not limited to:

- A. Interchange Pass Through Pricing Fees
- Equipment and Maintenance Fees

### VI.2. METHOD OF PAYMENT OF CONTRACT FEES

The Contractor must offer Authorized User the ability to pay FSP and Transaction Interface fees, and any other fees identified in Appendix D through any of these methods or a combination thereof, as provided and approved in the EVTA-2: (a) Invoicing the Authorized User; (b) Passing through the fees to the Device User (i.e. Convenience Fees); (c) Deduction Net-Billing or (d) Direct ACH Debit.

The Contractor must accept Automated Clearing House (ACH) network payments from State Agencies in accordance with the Guidelines and Rules posted on the Office of the State Comptroller's website <http://www.osc.state.ny.us/epay/guide.htm>

A. **Invoicing** - payment of the FSP fees upon presentation of an invoice on a monthly basis by the Contractor to the Authorized User using a separate payment or appropriation [Example: Device User pays \$20, Contractor remits \$20 to Authorized User and bills the FSP fees separately to the Authorized User]; or

**Convenience Fees to the Device User** - The Contractor shall not be entitled to impose on Device Users any additional convenience fee other than as provided in this paragraph. [Example: Device User owes \$20 for the underlying obligation, the Convenience Fees are added, Device User is billed \$20 plus Convenience Fee.] Refer to the Statutory Notice Requirements for State Agencies: section below. The Contractor shall not impose Convenience Fees on Device Users unless expressly directed by an Authorized User; or

**Deduction Net-Billing** by the Contractor - deducting FSP fees from the amount of the underlying obligation. [Example: Device User pays \$20, Contractor retains FSP fees and remits balance to Authorized User]; or

**Direct ACH Debit** – payment of FSP fees under which the Contractor initiates an ACH transaction to debit an account specified by the Authorized User [Example: Device User pays \$20, Contractor remits \$20 to Authorized User and initiates ACH Debit transaction in the amount of the associated FSP fees.]

An Authorized User may pay the FSP fees using any payment option that is now or hereafter permitted by law. State Agencies are currently authorized under New York State Finance Law § 4-a subdivisions (3) and (4) to use payment options (A) and (B), except where a State Agency has specific authorizing legislation to accept a different payment option. Local Governments are currently authorized under New York State General Municipal Law § 5, to use any of the payment options.

**Statutory Notice Requirements:** In accordance with NY State Finance Law, §4-a(3) - State agency collection of payments: "...notwithstanding any law to the contrary, may include provisions for Surcharges which shall not be state money, to pay for transaction costs of the financing agency, device issuers, or processor associated with the electronic value transfer. **The state shall notify the device user of the amount or percentage of the Surcharge.**"

### VI.3. INVOICING

Unless otherwise agreed upon in the EVTA-2 form, all fees for Financial Processing Services and Transaction Interfaces must be separately invoiced on a monthly basis to each participating Authorized User. Note: see Appendix B, clauses 62 (as amended) and 64. Unless otherwise agreed upon as set forth above, fees may not be deducted from settlement proceeds for Authorized Users using the Contract.

### VI.4. CONTRACTOR'S AUTHORIZATION TO IMPLEMENT SERVICES

The Contractor shall not provide any billable Services under this Agreement to State Agency Authorized Users unless the Authorized User has produced an executed copy of Form EVTA-1 (Appendix E), Application Status Form and a completed and approved copy of the EVTA-2 (Appendix F), Work Order Form. The EVTA-1 form is deemed executed if it is signed or stamped by the EVTA and approved by the Division of the Budget. Contractor does not approve the EVTA-1 and its terms do not govern Contractor's obligations under the Contract, but it is provided to Contractor as notification of an Authorized User's approval.

Non-State Agency Authorized Users may use the EVTA-2 form or other work order agreements agreed upon with the Contractor. The EVTA does not review or approve the work orders of Non-State Agency Authorized

Users. The State reserves the right to modify the EVTA-1 and EVTA-2 forms without the approval of the Department of Law or the Office of the State Comptroller, at its discretion, throughout the term of the Contract, upon agreement with the Contractor.

## **VI.5 FEE ESCALATION PROCESS**

Fee escalations will not be allowed at any time during the initial five (5) year term of the Contract. Fee escalation requests may be made at the time of Contract renewal, however, the fee increase(s) will be subject to OGS review and approval and the Contractor must comply with the following:

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

This fee escalation cap does not apply to Visa, MasterCard, Discover, and debit network Authorization and Interchange fees, assessments, dues and other fees and charges that are passed to New York State at cost and provided with verification of such cost at time of increase.

The auto-add method may be utilized to update the Financial Services Processing and Transaction Interfaces offered by the Contractor. See Appendix N, Contract Update Form, for procedures for updating Financial Services Processing and Transactions Interface offerings.

## **VII. GENERAL REQUIREMENTS**

This section sets forth general requirements that apply to this Contract.

### **VII.1 PAYMENT CARD INDUSTRY (PCI) DATA SECURITY STANDARDS**

Authorized User agrees to comply with and be bound by, and to cause any third party who provides Authorized User with services related to payment processing or facilitates Authorized User’s ability to accept Credit and Debit cards and who is not a party to this Contract to comply with and be bound by, the rules and regulations of Visa, MasterCard, Discover and any other card Association or network organization related to cardholder and transaction information security, including without limitation, all rules and regulations imposed by the Payment Card Industry (PCI) Security Standards Council (including without limitation the PCI Data Security Standard), Visa’s Cardholder Information Security Program, MasterCard’s Site Data Protection Program, and Payment Application Best Practices. Authorized User agrees to cooperate with a request for an audit or investigation by Contractor, Member, a card Association or network organization in connection with cardholder and transaction information security. Contractor shall have the right to periodically audit, no more than annually, at Contractor’s expense, PCI compliance of the Authorized User providing: (i) Contractor gives Authorized User 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. Without limiting the generality of the foregoing, Authorized User agrees that it will use information obtained from a cardholder in connection with a card transaction solely for the purpose of processing a transaction with that cardholder or attempting to re-present a chargeback with respect to such transaction. In the event that the Associations require an audit due to a data breach or compromise, then such audit must be completed by the Authorized User (and if the Authorized User fails to comply, the Contractor shall be permitted to conduct the audit) regardless of the qualifications imposed by this section.

### **VII.2. STATUTORY NOTICE REQUIREMENTS FOR STATE AGENCIES - DEVICE USER NOTIFICATION**

Where a Convenience Fee is to be passed through to the Device User when making payment to a State Agency, New York State Finance Law §4-a, subdivisions (3) and (4) require the Device User to be notified of the amount of the Convenience Fee prior to the completion of a transaction. For Internet and IVR applications the notice must be provided to the Device User during the session/call and the Device User must affirm agreement to accept the amount prior to committing the transaction. The Contractor agrees to support processing of transactions in such a manner that enables Authorized User to notify Device Users of any Convenience Fee and agree to support separate transactions for the transaction amount and the Convenience Fee amount.

### VII.3. ASSOCIATION RULES AND REGULATIONS

The Contractor and Member shall be responsible to comply with all rules and regulations established by the Associations, as applicable to Contractor and Member's performance hereunder. Authorized Users recognize that the Payment Networks Regulations are periodically updated and, as a result Contractor will periodically update its Merchant Operating Guide ("MOG"), attached as Appendix H. Contractor may amend or modify the Merchant Operating Guide upon written notice to the Authorized Users. Contractor will inform the Authorized Users of such a change in a periodic statement or other written notice, and such change will become effective not less than thirty (30) days following the issuance of notice unless an Authorized User objects in writing within such thirty (30) day period. Contractor believes that at the time of execution of this Contract, this Contract and all Appendices, including but not limited to the Payment Device Processing Agreement, are in substantial compliance with the relevant Association rules and regulations, unless modified by State law. The State and each Authorized User must comply with all rules and regulations established by the Associations to the extent consistent with applicable law. See Section 7(b)(i) of the Payment Device Processing Agreement.

### VII.4 RECORDS RETENTION/DATA OWNERSHIP

*This requirement is in addition to the record retention requirements set forth in Appendix A, Section 10 RECORDS*

Except as otherwise required by Federal law, all data collected, stored or otherwise utilized by the Contractor, in conjunction with the execution of the duties and responsibilities specified in the individual Authorized User's Implementation Plan, shall remain the sole property of the Authorized User. If at any time this Contract between the State and the Contractor or any order by an Authorized User is canceled, terminated or expires, the Contractor is obligated to return all such data to the specific Authorized User at no additional cost and in a medium specified by the Authorized User. All records must be maintained for a period of time of no less than six (6) years from the date of such cancellation, termination or expiration. The term "data" shall include but not be limited to billing and invoicing information, Authorized User implementation plans and associated information (only to the extent such plans do not contain proprietary information of Contractor), and transaction-related data that does not include "nonpublic personal information" as that term is defined in the Gramm-Leach-Bliley Act.

### VII.5 INSURANCE REQUIREMENTS

#### A. General Insurance

Prior to the commencement of the work to be performed by the Contractor hereunder, the Contractor shall file with The People of the State of New York, Office of General Services (hereinafter referred to as "OGS"), Certificates of Insurance evidencing compliance with all requirements contained in this Contract. Such Certificates shall be of form and substance acceptable to OGS.

Acceptance and/or approval by OGS does not and shall not be construed to relieve Contractor of any obligations, responsibilities or liabilities under the Contract.

All insurance required by the Contract shall be obtained at the sole cost and expense of the Contractor; shall be maintained with insurance carriers licensed to do business in New York State, and acceptable to

OGS ; shall be primary and non-contributing to any insurance or self insurance maintained by OGS; shall be endorsed to provide written notice be given to OGS at least thirty (30) days prior to the cancellation of such policies, which notice, evidenced by return receipt of United States Certified Mail; shall be sent to New York State OGS, Empire State Plaza, Corning Tower, 38<sup>th</sup> floor, Albany NY 12242 and shall name The People of the State of New York, its officers, agents, and employees as additional insureds thereunder (General Liability Additional Insured Endorsement shall be on Insurance Service Office's (ISO) form number **CG 20 26 11 85** or equivalent). The additional insured requirement does not apply to Workers Compensation, Disability or Cyber Liability coverage.

The Contractor shall be solely responsible for the payment of all deductibles and self insured retentions to which such policies are subject.

The Contractor shall require that any subcontractors hired, carry insurance with the same limits and provisions provided herein.

Each insurance carrier must be rated at least "A-" Class "VII" in the most recently published Best's Insurance Report. If, during the term of the policy, a carrier's rating falls below "A-" Class "VII", the insurance must be replaced no later than the renewal date of the policy with an insurer acceptable to the Department and rated at least "A-" Class "VII" in the most recently published Best's Insurance Report.

The Contractor shall cause all insurance to be in full force and effect as of the commencement date of this Contract and to remain in full force and effect throughout the term of this Contract and as further required by this Contract. 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 period of time such coverages are required to be in effect.

As soon as reasonably practicable prior to the expiration date or renewal date, the Contractor shall supply OGS updated replacement Certificates of Insurance, and amendatory endorsements.

The Contractor, throughout the term of this Contract, or as otherwise required by this Contract, shall obtain and maintain in full force and effect, the following insurance with limits not less than those described below and as required by the terms of this Contract, or as required by law, whichever is greater (limits may be provided through a combination of primary and umbrella/excess policies):

1. Commercial General Liability Insurance with a limit of not less than \$1,000,000 each occurrence. Such liability shall be written on the ISO occurrence form CG 00 01, or a substitute form providing equivalent coverages and shall cover liability arising from premises operations, independent contractors, products-completed operations, broad form property damage, personal & advertising injury, cross liability coverage, liability assumed in a contract (including the tort liability of another assumed in a contract).

Cyber Liability Policy with a limit of not less than \$1,000,000 each occurrence. Such liability must be written on ISO occurrence form EC 0010, or a substitute form providing equivalent coverage and shall cover liability arising from network security. If coverage is written on a claims-made policy, the Contractor warrants that any applicable retroactive date precedes the effective date of the Contract; and that continuous coverage will be maintained, or an extended discovery period exercised, for a period of not less than 1 year after the contract is complete.

Workers Compensation, Employers Liability, and Disability Benefits as required by New York State. If employees will be working on, near or over navigable waters, US Longshore and Harbor Workers Compensation Act endorsement must be included.

Comprehensive Business Automobile Liability Insurance with a limit of not less than \$1,000,000 each accident. Such insurance shall cover liability arising out of any automobile including owned, leased, hired and non owned automobiles.

**Waiver of Subrogation.**

Contractor shall cause to be included in each of its policies insuring against loss, damage or destruction by fire or other insured casualty excluding Cyber Liability a waiver of the insurer's right of subrogation against OGS, or, if such waiver is unobtainable (i) an express agreement that such policy shall not be invalidated if Contractor waives or has waived before the casualty, the right of recovery against OGS or (ii) any other form of permission for the release of OGS.

Certificates of Insurance are to be filed at the following address:

Office of General Service  
Procurement Services Group  
Corning Tower, 38<sup>th</sup> Floor  
Albany, NY 12242  
Attn: Kathy McAuley

**Workers' Compensation Insurance and Disability Benefits Requirements:**

Contractor has provided the following proof of insurances:

1. Proof of Compliance with Workers' Compensation Coverage Requirements:

An ACORD form is NOT acceptable proof of Workers' Compensation coverage. In order to provide proof of compliance with the requirements of the Workers' Compensation Law pertaining to Workers' Compensation coverage, a Contractor shall:

Be legally exempt from obtaining Workers' Compensation insurance coverage; or

Obtain such coverage from an insurance carrier; or

Be a Workers' Compensation Board-approved self-insured employer or participate in an authorized self-insurance plan.

Contractor shall provide one of the following forms to the Office of General Services at the time of bid submission or shortly after the opening of bids:

- a) 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](http://www.wcb.ny.gov)); (Reference applicable IFB/RFP and Group #s on the form.)

Certificate of Workers' Compensation Insurance:

- i. Form C-105.2 (9/07) if coverage is provided by the Contractor's insurance carrier, Contractor must request its carrier to send this form to the New York State Office of General Services, or
- ii. Form U-26.3 if coverage is provided by the State Insurance Fund, Contractor must request that the State Insurance Fund send this form to the New York State Office of General Services.

Form SI-12, Certificate of Workers' Compensation Self-Insurance available from the New York State Workers' Compensation Board's Self-Insurance Office.

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:**

In order to provide proof of compliance with the requirements of the Workers' Compensation Law pertaining to disability benefits, Contractor shall:

a) Be legally exempt from obtaining disability benefits coverage; or

Obtain such coverage from an insurance carrier; or

Be a Board-approved self-insured employer.

Contractor shall provide one of the following forms to the Office of General Services at the time of bid submission or shortly after the opening of bids:

a) 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](http://www.wcb.ny.gov)); (Reference applicable IFB/RFP and Group #s on the form.)

Form DB-120.1, Certificate of Disability Benefits Insurance. Contractor must request its business insurance carrier to send this form to the New York State Office of General Services; or

Form DB-155, Certificate of Disability Benefits Self-Insurance. The Contractor must call the Board's Self-Insurance Office at 518-402-0247 to obtain this form.

**ALL OF THE ABOVE REFERENCED FORMS, EXCEPT CE-200, SI-12 & DB-155 MUST NAME:**

The Office of General Services, Procurement Services Group, 38th floor, Corning Tower, Albany NY 12242 as the Entity Requesting Proof of Coverage (Entity being listed as the Certificate Holder)

## VII.6 INFORMATION SECURITY BREACH AND NOTIFICATION ACT

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

## VII.7 ENVIRONMENTAL REQUIREMENTS

### A. Diesel Emission Reduction Act of 2006:

On February 12, 2007 the Diesel Emissions Reduction Act took effect as law (the "Law"). Pursuant to new §19-0323 of the N.Y. Environmental Conservation Law ("NYECL") it is now 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. They need to be operated exclusively on ULSD by February 12, 2007. 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.

As a contract vendor the Law may be applicable to vehicles used by contract vendors "on behalf of" State agencies and public authorities. Thirty three percent (33%) of affected vehicles must have BART by December 31, 2008, sixty six percent (66%) by December 31, 2009 and one hundred percent (100%) by December 31, 2010. The Law provides a list of exempted vehicles. Regulations currently being drafted will provide further guidance as to the effects of the Law on contract vendors using heavy duty diesel vehicles on behalf of the State. The Law also permits waivers of ULSD and BART under limited circumstances at the discretion of the Commissioner of Environmental Conservation. The Law will also require reporting from State agencies and from contract vendors in affected contracts.

Therefore, Contractor 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 NYECL §19-0323, and any regulations promulgated pursuant thereto, which requires the use of BART and ULSD, unless specifically waived by NYSDEC. Qualification and application for a waiver under this Law will be the responsibility of the Contractor.

#### **Environmental Attributes and NYS Executive Order 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://www.ogs.ny.gov/EO/4/Default.asp>. The Executive Order No. 4 specification for desktop and laptop computers adopted in October 2008, for example, requires EPEAT (Electronic Product Environmental Assessment Tool) registration, and references other considerations such as trade-in, recycling and use of certain flame-retardant chemicals. 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. State entities subject to Executive Order No. 4 are further advised to utilize the EPEAT website (<http://www.epeat.net/>) and search tool to identify products that meet their needs and satisfy their obligations under the Order.

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

New York State supports and encourages vendors 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

#### **Bulk Delivery and Alternate Packaging:**

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

#### Take-Back/Recycling:

1. A State agency is reminded of its obligation to comply with the NY State Finance Law §§167 and 168 regarding surplus property redistribution before utilizing take-back, recycling, or other options for disposition of computer equipment that is still in operable condition. These provisions require donation of usable computer equipment to State Education Department (or other state agencies) prior to declaration of equipment as surplus or waste.

If an Authorized User avails itself of a Contractor's take back/recycling program, then Contractor shall provide certification of data destruction from hard drives if surrendered with the machines. Contractor shall not require an Authorized User to surrender the hard drive, as an Authorized User may wish to retain the hard drive for security purposes. Contractor shall advise the Authorized User in advance if the retention of the hard drive results in additional fees or reduction in trade-in value.

If an Authorized User avails itself of a Contractor's take back/recycling program, then Contractor shall provide a record of disposition to the Authorized User for units transferred for disposition. Contractor shall provide documentation that the units were disposed of in an environmentally sound manner in compliance with applicable local, state and federal laws.

#### VII.8. SUMMARY OF POLICY AND PROHIBITIONS ON PROCUREMENT LOBBYING LAW

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

More information on OGS's implementation of the Procurement Lobbying Law can be found at: [http://www.ogs.ny.gov/aboutOgs/regulations/defaultSFL\\_139j-k.asp](http://www.ogs.ny.gov/aboutOgs/regulations/defaultSFL_139j-k.asp)

#### VII.9. IRAN DIVESTMENT ACT

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

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

Additionally, Contractor agrees that after the list is posted on the OGS website, should it seek to renew the Contract, it will be required to certify at the time the Contract is renewed or assigned that it or its assignee is not included on the prohibited entities list, or if such subcontractors are being used, will take steps to replace them timely.

During the term of the Contract, should OGS receive information that Contractor is in violation of the above-referenced certification, OGS will offer Contractor an opportunity to respond. If Contractor fails to demonstrate that it has ceased its engagement in the investment which is in violation of the Act within 90 days after the determination of such violation, then OGS shall take such action as may be appropriate including, but not limited to, seeking compliance, recovering damages, or declaring the Contractor in default pursuant to Appendix B §60(a).

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

#### VII.10. 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, or change their Contract Administrator, by giving fifteen (15) days written or electronic notice to the other party. The parties agree to mutually designate individuals as their respective representatives for purposes of this Agreement.

The New York State Contract Administrator for this Agreement is:

New York State Contract Administrator:

Kathy McAuley  
Office of General Services PSG  
Strategic Sourcing Team  
38th floor, Corning Tower Bldg.  
Empire State Plaza  
Albany NY 12242

with a copy to:

Electronic Value Transfer Administrator:

Department of Taxation and Finance  
Building 8, Room 866  
State Campus  
Albany, New York 12227  
Facsimile Number: (518) 485-2458

The Contractor's Contract Administrator for this Agreement is:

Contractor's Contract Administrator:

Key Merchant Services/Elavon  
Attn: Mark Shapiro, Government Sales Division  
MK-GA-NOA3  
One Concourse Parkway, Suite 300  
Atlanta, GA 30328

with a copy to:

General Counsel, Elavon, Inc.  
Two Concourse Parkway, Suite 800  
Atlanta, GA 30328

All notices sent shall be effective upon actual receipt by the receiving party. The Contractor will be required to forward a copy of the official notice to an Authorized User that is associated with the subject of the notice and will forward a copy to the EVTA. Each Authorized User will provide its address and a designated contact name on the EVTA-2, Work Order Form.

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.

#### VII.11. 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.

#### VII.12. 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.

#### VII.13. COUNTERPARTS

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

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above. The parties further hereby certify that original copies of this executed and approved signature page will be affixed, upon final approval by the NYS Comptroller, to exact copies of this Agreement being executed simultaneously herewith.

KEY MERCHANT SERVICES, LLC

THE PEOPLE OF THE STATE OF NEW YORK

By: Mindy Doster

By: Donald R Greene

Name: MINDY DOSTER

Name: DONALD R GREENE

Title: Assistant Manager

Title: Director

Key Merchant Services

New York State Office of General Services

Date: 6/12/12

Date: 6/15/12

Corporate Federal ID #: 58-2359974

Vendor ID#: \_\_\_\_\_

**CORPORATE ACKNOWLEDGMENT**

STATE OF GEORGIA }  
: ss:  
COUNTY OF FULTON }

On the 12<sup>th</sup> day of June in the year 2012, before me personally came: MINDY DOSTER, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in Fulton Co., GA; that he/she/they is (are) Assistant Manager (the President or other officer or director or attorney in fact duly appointed) of Key Merchant Services, LLC, the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by authority of the board of directors of said corporation.

Sharon K. Vickery Paralegal  
**Signature and Office of Person Taking Acknowledgment**

Notary Public-Cobb Co, Ga.  
My Commission Expires 04-21-2013



Elavon, Inc., as a member of Key Merchant Services, LLC:

By: Mindy Doster

Name: MINDY DOSTER

Title: SVP

Date: 6/12/12

Corporate Federal ID #: 58-1916822

Vendor ID#: \_\_\_\_\_

**CORPORATE ACKNOWLEDGMENT**

STATE OF **GEORGIA** }  
 : ss.:  
COUNTY OF **FULTON** }

On the 12<sup>th</sup> day of June in the year 2012, before me personally came: MINDY DOSTER, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in Fulton Co., GA; that he/she/they is (are) Senior Vice President (the President or other officer or director or attorney in fact duly appointed) of Elavon, Inc., the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by authority of the board of directors of said corporation.

Sharon K. Vickery Paralegal  
**Signature and Office of Person Taking Acknowledgment**

Notary Public-Cobb Co, Ga.  
My Commission Expires 04-21-2013

APPROVED AS TO FORM  
NYS ATTORNEY GENERAL  
JUN 18 2012  
*Lorraine I. Remo*  
Lorraine I. Remo  
PRINCIPAL ATTORNEY

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

APPROVED  
DEPT. OF AUDIT & CONTROL  
AUG 03 2012  
*Charlette C. Breeyear*  
FOR THE STATE COMPTROLLER

**APPROVED  
THOMAS P. DINAPOLI  
New York State Comptroller**

APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

PLEASE RETAIN THIS DOCUMENT  
FOR FUTURE REFERENCE.

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## **STANDARD CLAUSES FOR NYS CONTRACTS**

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

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

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

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

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

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

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

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

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

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

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

**10. RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State

of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

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

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

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

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

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

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

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

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment

opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

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

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

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

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

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

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

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

**19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES.**

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

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

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

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

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

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

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

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

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

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

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

**21. RECIPROCITY AND SANCTIONS PROVISIONS.**

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

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

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

**23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.**

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

properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

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

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

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

# **APPENDIX B**

## **GENERAL SPECIFICATIONS**

Note: Amendments to this Appendix B are in Section II of the Contract.



**GENERAL**

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

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

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

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

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

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

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

**AGENCY OR AGENCIES** The State of New York, acting by or through one or more departments, boards,

commissions, offices or institutions of the State of New York.

**ATTORNEY GENERAL** Attorney General of the State of New York.

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

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

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

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

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

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

**COMPTROLLER** Comptroller of the State of New York.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**NEW PRODUCT RELEASES (Product Revisions)** Any commercially released revisions to the licensed version of a Product as may be generally offered and available to Authorized Users.

New releases involve a substantial revision of functionality from a previously released version of the Product.

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

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

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

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

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

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

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

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

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

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

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

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

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

**STATE** State of New York.

**SUBCONTRACTOR** Any individual or other legal entity, (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) who has entered into a

contract, express or implied, for the performance of a portion of a Contract with a Contractor.

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

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

### **BID SUBMISSION**

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

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

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

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

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

"**BID ENCLOSED** (bold print, all capitals)

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

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

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

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

**9. FACSIMILE SUBMISSIONS** Unless specifically prohibited by the terms of the Bid Specifications, facsimile Bids may be SUBMITTED AT THE SOLE OPTION AND RISK OF THE BIDDER. Only the FAX number(s) indicated in the Bid Specifications may be used. Access to the facsimile machine(s) is on a “first come, first serve” basis, and the Commissioner bears no liability or responsibility and makes no guarantee whatsoever with respect to the Bidder’s access to such equipment at any specific time. Bidders are solely responsible for submission and receipt of the entire facsimile Bid by the Authorized User prior to Bid opening and must include on the first page of the transmission the total number of pages transmitted in the facsimile, including the cover page. Incomplete, ambiguous or unreadable transmissions in whole or in part may be rejected at the sole discretion of the Commissioner. Facsimile Bids are fully governed by all conditions outlined in the Bid Documents and must be submitted on forms or in the format required in the Bid Specifications, including the executed signature page and acknowledgment.

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

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

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

**12. BID CONTENTS** Bids must be complete and legible. All Bids must be signed. All information required by the Bid Specifications must be supplied by the Bidder on the forms or in the format specified. No alteration, erasure or addition is to be made to the Bid Documents. Changes may be ignored by the Commissioner or may be grounds for rejection of the Bid. Changes, corrections and/or use of white-out in the Bid or Bidder’s response portion of the Bid Document must be initialed by an authorized representative of the Bidder. Bidders are cautioned to

verify their Bids before submission, as amendments to Bids or requests for withdrawal of Bids received by the Commissioner after the time specified for the Bid opening, may not be considered.

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

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

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

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

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

**14. CONFIDENTIAL/TRADE SECRET MATERIALS**

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

**b. Commissioner or Authorized User** Contractor further warrants, covenants and represents that any confidential information obtained by Contractor, its agents, Subcontractors, officers, distributors, resellers or employees in the course of

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

#### **15. RELEASE OF BID EVALUATION MATERIALS**

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

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

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

#### **a. "Public Works" and "Building Services" - Definitions**

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

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

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

#### **c. Wage Rate Payments / Changes During Contract Term**

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

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

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

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

#### **iii. Submission of Certified Payroll Transcripts for Public Works Contracts Only**

Contractors and Subcontractors on public works projects must submit monthly payroll transcripts to the Authorized User that has prepared or directs the preparation of the plans and specifications for a public works project, as set forth in the Bid Specifications. For Mini-Bid solicitations, the payroll records must be submitted to the entity preparing the agency Mini-Bid project specification. For "agency specific" Bids, the payroll records should be submitted to the entity issuing the purchase order. For all other OGS Centralized Contracts, such records should be submitted to the individual agency issuing the purchase order(s) for the work. Upon mutual agreement of the Contractor and the Authorized User, the form of submission may be submitted in a specified disk format acceptable to the Department of Labor provided: 1) the Contractor/Subcontractor retains the original records; and, (2) an original signed letter by a duly authorized individual of the Contractor or Subcontractor attesting to the truth and accuracy of the records accompanies the disk. This provision

does not apply to Article 9 of the Labor Law building services contracts.

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

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

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

#### 18. **TAXES**

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

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

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

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

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

20. **ADVERTISING RESULTS** The prior written approval of the Commissioner is required in order for results of the Bid to be used by the Contractor as part of any commercial advertising. The

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Contractor shall also obtain the prior written approval of the Commissioner relative to the Bid or Contract for press or other media releases.

#### 21. **PRODUCT REFERENCES**

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

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

#### 22. **REMANUFACTURED, RECYCLED, RECYCLABLE OR RECOVERED MATERIALS**

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

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

#### 23. **PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS**

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

#### 24. **PRICING**

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

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

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

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

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

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

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

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

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

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

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

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

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

## 25. **DRAWINGS**

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

other representations appearing on the drawings shall be considered a part of the drawing.

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

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

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

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

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

## 28. **SAMPLES**

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

b. **Bidder Supplied Samples** The Commissioner reserves the right to request from the Bidder/Contractor a representative sample(s) of the Product offered at any time prior to or after award

of a contract. Unless otherwise instructed, samples shall be furnished within the time specified in the request. Untimely submission of a sample may constitute grounds for rejection of Bid or cancellation of the Contract. Samples must be submitted free of charge and be accompanied by the Bidder's name and address, any descriptive literature relating to the Product and a statement indicating how and where the sample is to be returned. Where applicable, samples must be properly labeled with the appropriate Bid or Contract reference.

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

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

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

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

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

### **BID EVALUATION**

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

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

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

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

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

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

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

**36. QUANTITY CHANGES PRIOR TO AWARD** The Commissioner reserves the right, at any time prior to the award of a specific quantity Contract, to alter in good faith the quantities listed in the Bid Specifications. In the event such right is exercised, the lowest responsible Bidder meeting Bid Specifications will be

advised of the revised quantities and afforded an opportunity to extend or reduce its Bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its Bid price may result in the rejection of its Bid and the award of such Contract to the lowest responsible Bidder who accepts the revised qualifications.

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

### **TERMS & CONDITIONS**

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

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

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

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

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

**d. Responsibility for Performance** Participation in state Centralized Contracts by Authorized Users is permitted upon the following conditions: (i) the responsibility with regard to performance of any contractual obligation, covenant, condition or term thereunder by any Authorized User other than State Agencies shall be borne and is expressly assumed by such Authorized User and not by the State; (ii) a breach of the Contract by any particular Authorized User shall neither constitute nor be deemed a breach of

the Contract as a whole which shall remain in full force and effect, and shall not affect the validity of the Contract nor the obligations of the Contractor thereunder respecting non-breaching Authorized Users, whether State or otherwise; (iii) for a breach by an Authorized User other than a State Agency, the State specifically and expressly disclaims any and all liability for such breach; and (iv) each non-state agency Authorized User and Contractor guarantees to save the State, its officers, agents and employees harmless from any liability that may be or is imposed by their failure to perform in accordance with its obligations under the Contract.

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

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

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

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

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

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

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

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

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

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

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

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

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cancellation of such requirement by the OGS Commissioner with a corresponding reduction in the Contract quantity and price.

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

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

**47. SHIPPING/RECEIPT OF PRODUCT**

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

**b. Shipping Charges** Unless otherwise stated in the Bid Specifications, all deliveries shall be deemed to be freight on board (F.O.B.) destination tailgate delivery at the dock of the Authorized User. Unless otherwise agreed, items purchased at a price F.O.B. Shipping point plus transportation charges shall not relieve the Contractor from responsibility for safe and proper delivery notwithstanding the Authorized User's payment of transportation charges. Contractor shall be responsible for ensuring that the Bill of Lading states "charges prepaid" for all shipments.

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

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

(e.g., signed bill of lading) shall not be deemed or construed as acceptance of the Products received. Any delivery of Product that is substandard or does not comply with the Bid Specifications or Contract terms and conditions, may be rejected or accepted on an adjusted price basis, as determined by the Commissioner.

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

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

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

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

**53. REPAIRED OR REPLACED PARTS / COMPONENTS** Where the Contractor is required to repair, replace or substitute Product or parts or components of the Product under the Contract, the repaired, replaced or substituted Products shall be subject to all terms and conditions for new parts and components set forth in the Contract including Warranties, as set forth in the Additional Warranties Clause herein. Replaced or repaired Product or parts and

components of such Product shall be new and shall, if available, be replaced by the original manufacturer's component or part. Remanufactured parts or components meeting new Product standards may be permitted by the Commissioner or Authorized User. Before installation, all proposed substitutes for the original manufacturer's installed parts or components must be approved by the Authorized User. The part or component shall be equal to or of better quality than the original part or component being replaced.

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

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

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

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

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

women's business enterprises (M/WBE) Bidders as required by prior Contracts.

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

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

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

**60. TERMINATION**

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

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

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

**d. For Violation of Revised Tax Law 5a:** The Commissioner reserves the right to terminate the contract in the event it is found

that the certification filed by the Contractor in accordance with §5-a of the Tax Law is not timely filed during the term of the Contract or the certification furnished was intentionally false or intentionally incomplete. Upon such finding, the Commissioner may exercise its termination right by providing written notification to the Contractor.

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

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

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

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

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

**c.** Terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.

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

**62. CONTRACT BILLINGS** Contractor and the distributors/resellers designated by the Contractor, if any, shall provide complete and accurate billing invoices to each Authorized User in order to receive payment. Billings for Authorized Users

must contain all information required by the Contract and the State Comptroller. The State Comptroller shall render payment for Authorized User purchases, and such payment shall be made in accordance with ordinary State procedures and practices. Payment of Contract purchases made by Authorized Users, other than Agencies, shall be billed directly by Contractor on invoices/vouchers, together with complete and accurate supporting documentation as required by the Authorized User.

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

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

### **63. DEFAULT – AUTHORIZED USER**

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

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

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

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

### **64. INTEREST ON LATE PAYMENTS**

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

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

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State Comptroller is responsible for payments on any purchases made by a Non-State Agency Authorized User.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

provided in a workmanlike manner in accordance with industry standards.

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

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

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

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

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

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

In the event that an action at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the service or Product under the Contract infringes any patent, copyright or proprietary right, and Contractor is of the opinion that the allegations in such action in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract. Contractor shall in such event protect the interests of the Authorized User and secure a continuance to permit the Authorized User to appear and defend its interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the Authorized User may have. This constitutes the Authorized User's sole and exclusive remedy for patent infringement, or for infringement of any other third party proprietary right.

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

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

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

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

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

**THE FOLLOWING CLAUSES PERTAIN TO  
TECHNOLOGY & NEGOTIATED CONTRACTS**

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

**a. License Scope** Licensee is granted a non-exclusive, perpetual license to use, execute, reproduce, display, perform, or merge the

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

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

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

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

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

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

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

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

Authorized User shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon notice to Contractor. In the event that Authorized User does not initially acquire or discontinues maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product without any additional penalties or other charges, by paying Contractor the amount which would

have been due under the Contract for the period of time that such maintenance had lapsed, at then current NYS net maintenance rates.

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

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

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

**g. Archival Back-Up and Disaster Recovery** Licensee may use and copy the Product and related Documentation in connection with: i) reproducing a reasonable number of copies of the Product for archival backup and disaster recovery procedures in the event of destruction or corruption of the Product or disasters or emergencies which require Licensee to restore backup(s) or to initiate disaster recovery procedures for its platform or operating systems; ii) reproducing a reasonable number of copies of the Product and related Documentation for cold site storage. "Cold Site" storage shall be defined as a restorable back-up copy of the Product not to be installed until and after the declaration by the Licensee of a

disaster; iii) reproducing a back-up copy of the Product to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed herein. "Disaster Recovery" shall be defined as the installation and storage of Product in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development.

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

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

(i) Copy the Product;

(ii) Cause or permit reverse compilation or reverse assembly of all or any portion of the Product;

(iii) Export the Licensed Software in violation of any U.S. Department of Commerce export administration regulations.

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

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

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

If the Authorized User elects to provide a deficiency statement specifying how the Product fails to meet the specifications within the testing period, Contractor shall have thirty (30) days to correct the deficiency, and the Authorized User shall have an additional sixty (60) days to evaluate the Product as provided herein. If the Product does not meet the specifications at the end of the extended testing period, Authorized User, upon prior written notice to

Contractor, may then reject the Product and return all defective Product to Contractor, and Contractor shall refund any monies paid by the Authorized User to Contractor therefor. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to the amounts set forth in the Limitation of Liability Clause for any liability for costs incurred at the direction or recommendation of Contractor.

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

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

**a. Definitions**

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

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

(iii) For purposes of this paragraph, "Custom Products." Products, preliminary, final or otherwise, which are created or

developed by Contractor, its Subcontractors, partners, employees or agents for Authorized User under the Contract.

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

**(i) Existing Products:**

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

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

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

**c. Transfers or Assignments to a Third Party Financing Agent** It is understood and agreed by the parties that a condition precedent

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

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

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

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

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

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

**a. Product or Service Discontinuance** Where Contractor is the Product Manufacturer/Developer, and Contractor publicly announces to all U.S. customers ("date of notice") that a Product is being withdrawn from the U.S. market or that maintenance service or technical support provided by Contractor ("withdrawn support") is no longer going to be offered, Contractor shall be required to: (i) notify the Commissioner, each Licensee and each Authorized User then under contract for maintenance or technical support in writing of the intended discontinuance; and (ii) continue to offer Product or withdrawn support upon the Contract terms previously offered for

the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice; and (iii) at Authorized User's option, provided that the Authorized User is under contract for maintenance on the date of notice, either: provide the Authorized User with a Product replacement or migration path with at least equivalent functionality at no additional charge to enable Authorized User to continue use and maintenance of the Product.

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

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

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

**85. NO HARDSTOP/PASSIVE LICENSE MONITORING**

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

**86. SOURCE CODE ESCROW FOR LICENSED PRODUCT**

If Source Code or Source Code escrow is offered by either Contractor or Product manufacturer or developer to any other commercial customers, Contractor shall either: (i) provide Licensee with the Source Code for the Product; or (ii) place the

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

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

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

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

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## **APPENDIX C**

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

CONTRACTOR'S EXECUTIVE LAW, ARTICLE 15-A
(M/WBE) REQUIREMENTS

MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES
EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

I, \_\_\_\_\_, the \_\_\_\_\_ (title) of \_\_\_\_\_ (Contractor) agree that
\_\_\_\_\_ (Contractor) has adopted the following policies with respect to Contract Number
\_\_\_\_\_.

M/WBE

EEO

Contractor will make good faith efforts to achieve the
M/WBE contract participations goals set by OGS for that area in
which the State-funded project is located, by taking the following
steps:

- (1) Actively and affirmatively soliciting bids for subcontracts
from qualified State certified MBEs or WBEs, including
solicitations to MWBE contractor associations.
(2) Request a list of State-certified MWBEs from OGS and
solicit bids from them directly.
(3) Ensure that plans, specifications, request for proposals and
other documents used to secure bids will be made available
in sufficient time for review by prospective M/WBEs.
(4) Where feasible, divide the work into smaller portions to
enhanced participations by MWBEs and encourage the
formation of joint venture and other partnerships among
MWBE contractors to enhance their participation.
(5) Document and maintain records of bid solicitation, including
those to MWBEs and the results thereof.
(6) Ensure that progress payments to M/WBEs are made on a
timely basis so that undue financial hardship is avoided and
provide appropriate support, including waiving bonding and
other credit requirements where permissible, to encourage
MWBE participation.

- group members are afforded equal employment
opportunities without discrimination, and 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.
(b) Contractor shall state in all solicitation 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 disability or marital status.
(c) At the request of the contracting agency, Contractor shall request
each employment agency, labor union, or authorized
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 Contractor's obligations herein.
(d) Contractor shall comply with the provisions of the Human Rights
Law, all other State and Federal statutory and constitutional non-
discrimination provisions. Contractor and subcontractors shall
not discriminate against any employee or applicant for
employment because of race, creed (religion), color, sex, national
origin, sexual orientation, military status, age, disability,
predisposing genetic characteristic, marital status or domestic
violence victim status, and shall also follow the requirements of
the Human Rights Law with regard to non-discrimination on the
basis of prior criminal conviction and prior arrest.
(e) Contractor will include the provisions of sections (a) through (d)
of this agreement in every subcontract in such a manner that the
requirements of the subdivisions will be binding upon each
subcontractor as to work in connection with the State contract

Agreed to this \_\_\_\_\_ day of \_\_\_\_\_,
20 \_\_\_\_\_
By \_\_\_\_\_
Print: \_\_\_\_\_
Title: \_\_\_\_\_

March 2012

(a) Contractor will not discriminate against any employee or applicant
for employment because of race, creed, color, national origin, sex,
age, disability or marital status, will undertake or continue
existing programs of affirmative action to ensure that minority

**GROUP 79008-22419 Electronic Value Transfer - EVT**

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

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

**Contract No.:** \_\_\_\_\_ **Contractor.** \_\_\_\_\_

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

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

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

**CONTRACTOR**

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

Comments: \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_ (over)

Agency: \_\_\_\_\_ Prepared by: \_\_\_\_\_

Address: \_\_\_\_\_ Title: \_\_\_\_\_

\_\_\_\_\_ Date: \_\_\_\_\_

\_\_\_\_\_ Phone: \_\_\_\_\_

\_\_\_\_\_ E-mail: \_\_\_\_\_

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

OGS PROCUREMENT SERVICES GROUP  
 Customer Services, 38th Floor  
 Corning 2<sup>nd</sup> Tower - Empire State Plaza  
 Albany, New York 12242  
 \* \* \* \* \*