

**AGREEMENT FOR  
PAYMENT PROCESSING SERVICES**

**BY AND BETWEEN**

**NEW YORK STATE**

**OFFICE OF GENERAL SERVICES**

**AND**

**KEY MERCHANT SERVICES, LLC**

**CONTRACT NUMBER PS68914**



**Office of  
General Services**

**Procurement  
Services**

**Contents**

**1. INTRODUCTION ..... 4**

1.1 OVERVIEW ..... 4

1.2 SCOPE..... 5

1.3 EXCLUSIONS FROM SCOPE ..... 5

1.4 ESTIMATED QUANTITIES..... 6

1.5 DEFINITIONS..... 6

**2. CONTRACT INFORMATION ..... 9**

2.1 APPENDIX A ..... 9

2.2 APPENDIX B ..... 9

2.3 CONFLICT OF TERMS ..... 9

2.4 CONTRACT TERM AND EXTENSIONS ..... 10

2.5 SHORT TERM EXTENSION ..... 10

2.6 CONTRACTOR REQUIREMENTS..... 10

**3. TERMS AND CONDITIONS..... 11**

3.1 POINT OF SALE (POS) TERMINALS ..... 11

3.2 PRICE ..... 11

3.3 PRICELIST UPDATES ..... 11

3.3.1 EXCEPTIONS ..... 12

3.3.2 PRICELIST FORMAT ..... 13

3.3.3 CONTRACTOR’S SUBMISSION OF CONTRACT UPDATES ..... 13

3.3.4 MAXIMUM PRICE INCREASE ..... 13

3.3.5 COVER LETTERS ..... 13

3.4 PRICE STRUCTURE ..... 13

3.5 ORDERING ..... 14

3.6 PRODUCT RETURNS AND EXCHANGES..... 14

3.7 APPENDIX B AMENDMENTS ..... 14

3.8 PAYMENT REFERENCE NUMBER..... 20

3.9 EQUIPMENT WARRANTY..... 20

3.10 PAYMENT GATEWAY SERVICES ..... 20

3.11 PAYMENT GATEWAY INTEGRATION SERVICES ..... 20

3.12 TESTING ..... 21

3.13 DEVICE USER OR CUSTOMER NOTIFICATION..... 21

3.14 PROCESSING AND SETTLEMENT ..... 21

3.15 FUNDS AVAILABILITY..... 22

3.16 FRAUD PREVENTION..... 22

3.17 DATA SECURITY ..... 22

3.18 IMPLEMENTATION PLAN..... 23

3.19 REPORTING..... 23

3.19.1 ONLINE PORTAL ..... 23

3.19.2 COMPLIANCE REPORTING ..... 24

3.19.3 AD HOC REPORTING..... 24

3.19.4 SUMMARY REPORTS FOR OGS EVTA..... 24

3.20 CUSTOMER PAYMENT CONFIRMATION ..... 26

3.21 MAINTENANCE AND TROUBLESHOOTING ..... 26

3.22 TRAINING ..... 26

3.23 USER MANUALS AND SYSTEM DOCUMENTATION ..... 27

3.24 INTERNAL CONTROL PLAN ..... 27

3.25 METHOD OF PAYMENT OF CONTRACTOR FEES..... 27

3.26 CHARGEBACKS, REFUNDS & ADJUSTMENTS PROCEDURES..... 27

3.27 CONTRACTOR CONFORMANCE WITH LOCAL, STATE AND FEDERAL LAWS GOVERNING AUTHORIZED USER ..... 27

3.28 SERVICE INTERRUPTION(S) OR FAILURES..... 28

3.29 SUBMISSION OF DRAFT CAPTURES..... 28

3.30 PROCESSING TIME REQUIREMENTS..... 28

3.31 RESPONSIBILITY FOR SUBCONTRACTORS ..... 28

3.32	AUTHORIZED RESELLER.....	29
3.33	NON-STATE AGENCIES PARTICIPATION IN CENTRALIZED CONTRACTS .....	29
3.34	CONTRACT ADMINISTRATION.....	29
3.35	NEW ACCOUNTS.....	30
3.36	CREDIT EVALUATIONS .....	30
3.37	INVOICING AND PAYMENT.....	30
3.38	RIGHT TO AUDIT FEES .....	30
3.39	CONTRACT COMPLIANCE MEETINGS.....	31
3.40	TRANSITION PLAN.....	31
3.41	NYS STATEWIDE FINANCIAL SYSTEM (SFS).....	31
3.42	ACCESSIBILITY OF WEB-BASED INFORMATION AND APPLICATIONS POLICY .....	31
3.43	AMERICANS WITH DISABILITIES ACT (ADA).....	32
3.44	INSURANCE .....	32
3.45	RECORDS RETENTION/DATA OWNERSHIP.....	32
3.46	INFORMATION SECURITY BREACH AND NOTIFICATION ACT.....	32
3.47	CONTRACTOR REQUIREMENTS AND PROCEDURES FOR PARTICIPATION BY NEW YORK CERTIFIED MINORITY-AND WOMEN-OWNED BUSINESS ENTERPRISES AND EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND WOMEN .....	33
3.48	PARTICIPATION OPPORTUNITIES FOR NEW YORK STATE CERTIFIED SERVICE-DISABLED VETERAN OWNED BUSINESSES .....	35
3.49	OVERLAPPING CONTRACT PRODUCTS .....	35
3.50	“OGS OR LESS” GUIDELINES .....	35
3.51	NYS VENDOR RESPONSIBILITY .....	35
3.52	NYS TAX LAW SECTION 5-A .....	36
3.53	PROCUREMENT INSTRUCTIONS FOR AUTHORIZED USERS .....	36
3.55	PERIODIC RECRUITMENT .....	37
<b>4.</b>	<b>GENERAL PROVISIONS.....</b>	<b>38</b>
4.1	NOTICES.....	38
4.2	CAPTIONS.....	38
4.3	SEVERABILITY .....	38
4.4	COUNTERPARTS.....	38
4.5	ENTIRE AGREEMENT.....	38
	<b>CONTRACT SIGNATURE PAGE .....</b>	<b>39</b>

APPENDICES

- Appendix A – Standard Clauses for NYS Contracts (October 2019)
- Appendix B – General Specifications (April 2016)

ATTACHMENTS

- Attachment 1 – Contract Pricelist
- Attachment 2 – Insurance Requirements
- Attachment 3 – Program Plan Application

**THIS CENTRALIZED CONTRACT** (hereinafter “Contract” or “Agreement”) for the acquisition of Payment Processing Services is made between the People of the State of New York, acting by and through the Commissioner of the Office of General Services (hereinafter “State” or “OGS”) with offices at the 36th Floor, Corning Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242, and Key Merchant Services, LLC (hereinafter “Contractor”), with offices at 127 Public Square, Cleveland, Ohio 44114. The foregoing are collectively referred to herein as the “Parties”.

**WHEREAS**, OGS issued Request for Proposals #23111 (the “RFP”) for Payment Processing Services in order to establish one or more statewide, centralized Contracts, which will be available for use by any Authorized User, as that term is defined in State Finance Law § 163(1)(k), across the State of New York, including but not limited to: New York State agencies; public authorities; political subdivisions such as cities, towns, and villages; school districts; the State University of New York (SUNY); The City University of New York (CUNY); and certain other associations, entities and non-profit organizations designated as Authorized Users under State Finance Law § 163(1)(k); and

**WHEREAS**, OGS issued the RFP in its capacity as the designated Statewide Electronic Value Transfer Administrator (“EVTA”) under State Finance Law § 4-a. The EVTA is responsible for establishing, facilitating and overseeing statewide policies for the acceptance and collection of payments including Credit/Charge Cards, Debit Cards, electronic funds transfers, and the effective and efficient implementation, operation and administration of such payment programs; and

**WHEREAS**, in accordance with the RFP, competitive awards were made to up to the top five (5) responsive and responsible bidders who offered the best value based on the evaluation criteria as set forth in RFP Section 5, *Method of Award*; and

**WHEREAS**, Contractor submitted a bid in response to the RFP; and

**WHEREAS**, OGS evaluated Contractor’s bid and determined that Contractor satisfied all of the RFP requirements and that Contractor was one of the top five (5) responsive and responsible bidders who offered the best value based on the evaluation criteria set forth in the RFP; and

**WHEREAS**, Contractor agrees to the terms and conditions set forth in this Contract, which shall be referenced as Contract # PS68914.

**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:

## **1. INTRODUCTION**

### **1.1 Overview**

This Contract is awarded and executed by the New York State Office of General Services (OGS), a New York State agency authorized by law to issue Centralized Contracts for use by New York State Agencies and other Authorized Users, as that term is defined by State Finance Law § 163(1)(k). This Contract is awarded under RFP #23111 for Payment Processing Services. The Contracts resulting from the RFP are multiple-award, statewide, Centralized Contracts. When making purchases from the Contracts resulting from the RFP, Authorized Users shall procure products and services that best meet their form, function, and utility requirements. Authorized Users are encouraged to obtain quotes from all eligible Contractors prior to making a purchase. Pursuant to State Finance Law § 163(10)(c), at the time of purchase, Authorized Users shall base their selection among multiple Contracts upon which is the most practical and economical alternative that is in the best interests of the State.

The Authorized Users represent diverse sizes, revenue collection streams and technical capabilities and therefore, will have varying needs depending on their individual payment processing programs. The specific needs and requirements of each Authorized User, along with any relevant details of the applicable payment processing program, will be identified in a request for quote issued by the Authorized User under the Centralized Contracts resulting from the RFP. Contractors will have the opportunity to respond to each request for quote based on the Authorized User’s

specific needs. However, there is no obligation for an awarded Contractor to respond to an Authorized User's request for quote.

## 1.2 Scope

This Contract is based on an Interchange Pass Through pricing model, i.e., all interchange fees and assessments will be passed on directly from the Contractor to the Authorized User. Contractor will charge a per transaction fee to be added to the interchange fees and assessments that are passed on directly to the Authorized User. This pricing model is also known as "Interchange Plus" pricing.

The scope of this Contract includes:

1. Payment Processing Services (including the provision of hardware and software as necessary), for the following payment types:
  - a. the four nationally recognized Credit Card Networks (Visa, MasterCard, Discover and American Express\*\*), as well as any other card network as required by the Authorized User;
  - b. Debit Cards;
  - c. ACH/Electronic Check payments;
  - d. Convenience Fee, Surcharge or Service Fee transactions;
  - e. Contactless Payments and Virtual Cards.
2. Payment Processing Services for the following types of Point of Sales (POS) Terminals and payment channels:
  - a. In-person (standalone POS Terminal and PC based applications);
  - b. Online payments (i.e., internet-based applications and payments);
  - c. Mobile payments (card readers that connect to a tablet or smart phone, Wireless Point of Sales (WPOS), Mobile POS (MPOS) and Tablet POS); and
  - d. IVR (over-the-phone) payments.
3. The following related services as they pertain to the Payment Processing Services required under the Contract:
  - a. secure depositing, funding and reconciliation of payments;
  - b. reporting;
  - c. training;
  - d. customer service;
  - e. payment gateway services, including connectivity, integration and interfacing services, as necessary to ensure compatibility with various third-party payment gateways utilized by Authorized Users; and
  - f. maintenance for all applicable hardware and software.

As the payment processing industry changes and evolves over time, the State reserves the right to allow additional products or services within the general scope of this Contract award to be added to the Contract(s), with the agreement of the Contractor and upon approval by OGS, via Contract amendment or Pricelist update, as applicable.

\*\*The awarded Contractor(s) shall provide for the front-end authorization of American Express cards, although use of a separate NYS OGS centralized contract with American Express is required to for Authorized Users to receive back end settlement from this card issuing entity. For more information, refer to Contract PS65669, available at: <https://www.ogs.ny.gov/purchase/snt/awardnotes/7900822265can.HTM>

## 1.3 Exclusions from Scope

The provision of any hardware, software or services not directly related to the provision of the Payment Processing Services as described in this Contract, is excluded from the scope of this Contract. Full POS systems (which may include inventory management, scheduling, payroll, etc.) are excluded from the scope of this Contract and will not be available for purchase by Authorized Users under this Contract. These types of full POS systems may be found under other OGS Centralized Contracts, such as the OGS Information Technology Umbrella Contracts – Distributor Based (Group 73600-Award 22876) and/or Manufacturer Based (Group 73600-Award 22802).

## 1.4 Estimated Quantities

This Contract is an estimated quantity Contract. No specific quantities are represented or guaranteed, and the State provides no guarantee of volume or individual Authorized User participation. The Contractor must furnish all quantities ordered, at or below the Contract prices. The actual value of the Contract is indeterminate and will depend upon the number of other Contracts awarded, the competitiveness of the pricing offered under this Contract, and the actual demand of Authorized Users. See "Estimated/Specific Quantity Contracts" and "Participation in Centralized Contracts" in Appendix B - General Specifications.

The Authorized Users eligible to use this Contract represent diverse sizes, revenue collection streams and technical capabilities and therefore, will have varying needs depending on their individual payment processing programs.

Numerous factors could cause the actual quantities of products and services purchased under this Contract to vary substantially from the estimates provided in the RFP. Such factors include, but are not limited to, the following:

1. All Contracts awarded under the RFP are non-exclusive Contracts;
2. There is no guarantee of usage of services or quantities to be purchased, nor is there any guarantee that demand will continue in any manner consistent with previous purchases;
3. The individual value of each Contract is indeterminate and will depend upon actual Authorized User demand and actual services rendered during the Contract period;
4. The State reserves the right to terminate any Contract for cause or convenience prior to the end of the term pursuant to the terms and conditions of the Contract;
5. Contract pricing that is lower than anticipated could result in a higher quantity of purchases by Authorized Users than anticipated; or
6. Contract pricing that is higher than anticipated could result in a lower quantity of purchases by Authorized Users than anticipated.

Contractor acknowledges the foregoing and agrees that actual good faith purchasing volumes during the term of this Contract could vary substantially from the estimates provided in the RFP.

## 1.5 Definitions

Capitalized Terms used in this document shall be defined in accordance with Appendix B, § 2, *Definitions* or as below:

**Acceptance Testing** – the Contractor's process to verify the connectivity and transfer of data elements between an Authorized User's certified Point of Sales (POS) Terminal and the Payment Gateway Services provided by the Contractor or subcontractor.

**Authorization** – process by which an Authorized User electronically or via telephone accesses the Contractor's system to obtain verification by an issuing or responsible third-party of a Credit/Charge Card, online or offline Debit Card transaction.

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

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

**Authorized User Agreement** – the Purchase Order and/or such other documents memorializing the Contractor's obligations with respect to a given transaction resulting from a request for quote by an Authorized User.

**Automated Clearing House (ACH)** – is an electronic network for credit and debit financial transactions which universally connects financial institutions by moving money and information directly from one bank account to another. The ACH network allows users to easily make payments through a secure and efficient electronic payment system.

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

**Card Association** – shall refer to a network or group (Association) of card-issuing banks or organizations and banks that process payment cards known as Visa, MasterCard, American Express, and Discover, and any successor organizations or associations of same, as well as any other card network as required by the Authorized User. For purposes of this Contract, Card Association shall also mean any debit or electronic network for credit and debit financial transactions, and any successor organization or association of same, which is applicable hereunder.

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

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

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

**Convenience Fee or Surcharge or Service Fee** – a payment mechanism by which, at the direction of the Authorized User, the fees associated with the Authorized User's acceptance of the Credit/Charge Cards are paid by the Device User or Customer in the form of an additional fee, as a percentage of the dollar amount of the transaction. A Convenience Fee or Surcharge or Service Fee shall be assessed in accordance with Card Association Rules.

**Credit/Charge Card** – MasterCard, Visa, Discover and American Express branded cards, as well as any other card network as required by the Authorized User, or such other new or emerging cards (e.g., Virtual 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 or Customer which is processed either by entry of a PIN (Online Debit Card) or processed like a Credit/Charge card (Offline Debit Card).

**Device User or Customer** – a customer entering into a transaction for goods or services with an Authorized User who uses a Point of Sales (POS) Terminal to make a payment in connection with such transaction.

**Electronic Check** (or e-Check) – is a form of digital payment that serves the same function as a physical check.

**Electronic Draft Capture (EDC)** – A system in which the transaction data is captured at the merchant location for processing and storage.

**Electronic Value Transfer Administrator (EVTA)** – the New York State Office of General Services.

**Interchange Fee** – a fee imposed by a Card Association that is passed through to the Authorized User.

**Interchange Pass Through Pricing (Interchange Plus Pricing)** – A pricing model whereby all interchange fees and assessments will be passed on directly from the Contractor to the Authorized User. Contractor will charge a per transaction fee to be added to the interchange fees and assessments that are passed on directly to the Authorized User. This pricing model is also known as "Interchange Plus" pricing.

**Member** – The bank or financial institution utilized to process payments, which is a required signatory to the Contract.

**Merchant** – the Authorized User.

**Merchant Category Codes (MCCs)** – numbers that classify businesses by what they sell or the service they provide. These four-digit codes are assigned by the payment card organizations (Visa, MasterCard, Discover and American Express as well as any other card network as required by the Authorized User.)

**Merchant Identification Number (MID)** – a unique Merchant ID Number (MID) that identifies an Authorized User (merchant) to the processor and the banking institution which authorizes transactions, and subsequently deposits the funds.

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

**National Automated Clearing House Association (NACHA)** – the organization that establishes the standards and rules followed by financial institutions for transferring payments through the ACH Network. NACHA is the overseer of the ACH Network.

**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.

**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. This includes all entities permitted to participate in centralized Contracts per Appendix B § 25(b), *Non-State Agency Authorized Users* and § 25(c), *Voluntary Extension*.

**NYS Holidays** – refers to the legal holidays for State employees in the classified service of the executive branch, as more particularly specified on the website of the NYS Department of Civil Service. This includes the following: New Year’s Day; Martin Luther King Day; Washington’s Birthday (observed); Memorial Day; Independence Day; Labor Day; Columbus Day; Veteran’s Day; Thanksgiving Day; and Christmas Day.

**NYS Vendor ID** – is a unique ten-character identifier issued by the NYS Office of the State Comptroller (OSC) when the vendor is registered on the Vendor File System.

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

**Payment Card Industry PIN Entry Device Standard (PCI PED)** – the Payment Card Industry PIN Entry Device standard (or its successor) as set forth by the Payment Card Industry Security Standards Council, with more information available at: <https://www.pcisecuritystandards.org>.

**Payment Gateway Services** – Services that facilitate the transfer of information (e.g., a payment transaction) between a payment portal (e.g., website, mobile phone or interactive voice response service) and the Payment Processor or bank to ensure that the information passes securely (e.g., process, verify, encrypt) between the customer and the Authorized User.

**Payment Processing Services** – All services within the scope of this Contract as set forth in Section 1.2, *Scope*, including but not limited to: the processing of payments made via the four nationally recognized Credit Card Networks (Visa, MasterCard, Discover and American Express\*\*), as well as any other card network as required by the Authorized User, Debit Cards, ACH/Electronic Check payments, Convenience Fee, Surcharge or Service Fee transactions, Contactless Payments and Virtual Cards; the provision of hardware, software and services necessary for the acceptance of in-person, online, mobile and IVR payments, and related services including secure depositing, funding and reconciliation of payments, reporting, training, customer service and marketing, Payment Gateway Services including integration services, and maintenance for all applicable hardware and software.

**Payment Processor (or Processor)** – The sponsoring bank or financial institution that processes Credit/Charge and Debit Card payments on behalf of the Authorized User (Merchant) and allows the Authorized User to accept Credit/Charge Card and/or ACH payments from the card issuing bank within an association.

**Payment Programs** – any payment collection program which is authorized by law to be collected by any Authorized User by means of currency, a Credit/Charge Card, Debit Card or other future forms of electronic payment processing. These payment programs may include, but are not limited to: fines, fees, rates, charges, taxes, interest, penalties, special assessments, revenue, financial obligations, civil penalties, rents, interest owed to local governments, or other amounts.



**Payment Reference Number** – An electronic alpha-numeric unique identifier field to be used by the Authorized User in identifying, referencing, funding, balancing and/or settling each transaction.

**Point of Sales (POS) Terminal** - A hardware device (including, but not limited to, Ingenico 220, VeriFone Vx520, Ingenico ICT250, VeriFone VX570IP, Ingenico iWL250an), payment device, or data capture device that can be used for processing card payments at Authorized User locations.

**Process/Processing** – shall include but not be limited to Authorization, capture, batch, settlement, and reporting.

**Processing Fee** – a fee charged by the Contractor to an Authorized User for Payment Processing Services.

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

**Program Plan Application** – a document that is to be completed by each State Agency for the purpose of receiving approval for its agency plan from the EVTA and Division of the Budget. The State reserves the right to update the Program Plan Application form during the term of the Contract without a formal contract amendment.

**Request for Proposal (RFP)** – Request for Proposal #23111 for Payment Processing Services, issued by the New York State Office of General Services.

**SDVOB** – shall refer to a NYS-certified Service-Disabled Veteran-Owned Business.

**Surcharge or Convenience Fee or Service Fee** – a payment mechanism by which, at the direction of the Authorized User, the fees associated with the Authorized User’s acceptance of the Credit/Charge Cards are paid by the Device User or Customer in the form of an additional fee, as a percentage of the dollar amount of the transaction. A Convenience Fee or Surcharge or Service Fee shall be assessed in accordance with Card Association Rules.

**Work Order** – a document which includes technical project details, project costs, development timeframes and any unique administrative terms and conditions required by an Authorized User. For a State Agency Authorized User, OGS shall review and approve the Work Order form in writing prior to commencement of the Services.

## **2. CONTRACT INFORMATION**

### **2.1 Appendix A**

Appendix A, Standard Clauses for New York State Contracts, dated October 2019, attached hereto, is hereby incorporated in and expressly made a part of this Contract.

### **2.2 Appendix B**

Appendix B, General Specifications, dated April 2016, attached hereto, is hereby incorporated in and expressly made a part of this Contract, as revised herein by Section 3.7, *Appendix B Amendments*.

### **2.3 Conflict of Terms**

This Contract is comprised of the following documents. Conflicts among these documents shall be resolved in the following order of precedence:

1. Appendix A, Standard Clauses for New York State Contracts (October 2019)
2. This Contract (this document)
3. Appendix B, General Specifications (April 2016)
4. Attachment 1 – Contract Pricelist
5. Attachment 2 – Insurance Requirements
6. Attachment 3 – Program Plan Application

## 2.4 Contract Term and Extensions

The Contract term shall be for ten years. The Contract shall commence after all necessary approvals and shall become effective upon mailing or electronic communication of the final executed documents to the Contractor (see Appendix B, *Contract Creation/Execution*). Purchase orders or contractual documents issued against this Contract may survive up to one year from the date expiration of the Contract, the terms and conditions of which will apply throughout the extended term.

All OGS Centralized Contracts resulting from the RFP shall have a co-terminus end date, including those Contracts awarded during any subsequent periodic recruitment. At the State's option, the Contract may be extended for five (5) years, in increments as deemed to be in the best interest of the State. Whether the optional extensions are exercised is at the sole discretion of the State. Any Contract extension will be under the same terms and conditions, subject to any additional applicable statutory and policy requirements. Any extensions provided under this section shall apply in addition to any rights set forth in Appendix B, *Contract Term – Extension*.

The Contract term provided for in this section shall extend 6 months beyond its termination date only for Authorized Users whose Contracts are required to be registered with the Office of the New York City Comptroller. During the 6-month period the definition of Authorized User shall be deemed to refer only to Authorized Users whose Contracts are required to be registered with the Office of the New York City Comptroller. This extension is in addition to any other extensions available under the Contract. The extension provided for in this paragraph shall be upon the then-existing terms and conditions; provided, however, during such extension an Authorized User, as defined in this paragraph, may agree to amend such terms and conditions solely to comply with changes in statutory requirements (e.g. changes in minimum, prevailing or living wages, or regulated services).

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.

## 2.5 Short Term Extension

This section shall apply in addition to any rights set forth in Appendix B, *Contract Term – Extension*. In the event a replacement Contract has not been issued, any Contract let and awarded hereunder by the State may be extended unilaterally by the State for an additional period of up to 30 calendar days upon notice to the Contractor with the same terms and conditions as the original Contract and any approved modifications. With the concurrence of the Contractor, the extension may be for a period of up to 90 calendar days in lieu of 30 calendar days. However, this extension automatically terminates should a replacement Contract be issued in the interim.

## 2.6 Contractor Requirements

1. Throughout the term of the Contract, the Contractor must be and remain either: (1) a payment processor that is sponsored by a bank or financial institution ("sponsoring bank"), (2) a bank or financial institution, (3) an established joint venture between a payment processor and a bank or financial institution, or (4) any legal entity that is wholly owned by a payment processor, a bank or financial institution, or (5) an established joint venture between a payment processor and a bank or financial institution.
2. The Contractor and/or any subcontractors or partners responsible for the processing of payments under the Contract must comply with all applicable Payment Card Industry Data Security Standards ("PCI-DSS") throughout the term of the Contract.
3. The Contractor, the sponsoring bank, or the bank or financial institution that is otherwise utilized by the Contractor for processing payments must be and remain a member of the National Automated Clearing House Association ("NACHA") and shall comply with all applicable NACHA Operating Rules throughout the term of the Contract. Upon Request, Contractor must provide supporting documentation of NACHA membership.
4. The Contractor and any subcontractors or partners performing work under the Contract must comply with all applicable Card Association Rules and regulations (Visa, MasterCard, etc.) throughout the term of the

Contract and shall remain authorized by the appropriate Card Associations, networks and other necessary organizations to provide the Payment Processing Services described herein.

5. The Contractor agrees that all POS Terminals to be provided under the Contract will be certified to the Contractor by the manufacturer, in accordance with all applicable rules and regulations, for Payment Processing Services.

### **3. TERMS AND CONDITIONS**

#### **3.1 Point of Sale (POS) Terminals**

During the term of the Contract, Authorized Users may require the Contractor to provide any or all of the following types of Point of Sales (POS) Terminals (hardware or software), as specified by the Authorized User. The Contractor may provide for the purchase and/or lease of all POS Terminals (hardware or software), including support (i.e., maintenance, repair, training, etc.), service upgrades, and other services within the scope of the RFP and this resulting Contract including, but not limited to:

1. wireless POS (WPOS)
2. mobile POS (MPOS)
3. tablet POS
4. terminal POS
5. internet/intranet applications
6. self-service kiosks
7. card swipe/e-check terminals
8. EMV (Europay, Mastercard and Visa) capable terminals
9. point-to-point encryption
10. terminals equipped with signature capture and/or PIN pads
11. integrated check readers
12. Contactless Payment readers

As applicable, the Contractor shall provide equipment instruction manuals, equipment warranty information, and window/counter displays that show card brand acceptance for leased and/or purchased equipment. Contractor shall have a solution to protect hardware from theft subject to the satisfaction of the Authorized User. Leased hardware pricing shall include all maintenance, repairs, support, and supplies (receipt paper, toner, ink, etc.).

All POS Terminals and peripheral hardware provided by the Contractor shall be PCI PED approved.

#### **3.2 Price**

Price shall include all customs, duties and charges and be net, F.O.B. destination any point in New York State for orders, as designated by the ordering agency, including delivery. Standard shipping costs are to be prepaid by Contractor and, when determining the NYS net price, shall not be separately added to the Authorized User's invoice.

For declined and zero amount transactions, Contractor may only charge the applicable Interchange Pass Through Fees (if any) but may not charge any other transaction fees.

The State will have one standardized format for all Contract pricelists. Contractor's pricing is identified on Attachment 1 – Contract Pricelist.

All rates listed on Attachment 1 – Contract Pricelist are maximum not-to-exceed rates. Contractors may offer lower pricing to Authorized Users in response to any request for quote at any time. Authorized Users may also negotiate better pricing with Contractors at any time during the Contract period.

#### **3.3 Pricelist Updates**

Contractor may update its Contract pricelist (Attachment 1 – Contract Pricelist) to reflect Contractor price changes and/or the addition/deletion of products or services on an annual basis and subject to approval by OGS. OGS will provide deadlines for submission after Contracts are awarded.

The Contractor shall provide OGS with one electronic copy of the updated pricing. No price updates will be granted to any Contractor who has outstanding Reports of Contract usage, proof of insurance, or any other documentation that is required under the Contract(s), until such outstanding items are resolved.

Contractor shall be permitted to reduce their pricing any time during the Contract term.

New Products may be added or other updates may be made to the Contract Pricelist between the first anniversary date of the first Contract award and thirty (30) days thereafter, and annually thereafter. The Contractor will be required to demonstrate that any new Products meet the scope as defined in Section 1.2, *Scope*, and that the pricing is reasonable. "Reasonable" prices may be determined by reviewing prices offered to other clients, prices on any previously awarded Contract, pricing offered by other Contractors, Contracts with other state or government entities, or such other information as determined by OGS.

All approved pricelist updates shall apply prospectively upon approval by OGS. Total price increases for pricelist updates in a single year of the Contract shall not exceed the escalation cap as set forth in the Maximum Price Increase subdivision below.

### 3.3.1 Exceptions

The prices for the following Products cannot be increased during the initial five (5) years of the term of the Contract:

#### A. Contractor Payment Processing Fees

1. Account Setup Fee (per account)
2. Credit Card Processing Fee (per transaction)
3. ACH Credit Processing Fee (per transaction)
4. ACH Debit Processing Fee (per transaction)
5. Fedwire (per transaction)
6. Convenience Fee or Surcharge or Service Fee (percentage of dollar value of transaction)
7. Chargebacks (per occurrence)
8. Voice Authorization (per transaction)
9. Address Verification (AVS) (per transaction)
10. Foreign Network Authorization (per transaction)
11. Terminal Reprogramming (per unit)

#### B. Contractor's Proprietary Payment Gateway Service Fees

1. Setup (per account)
2. Monthly fee (per MID per month)
3. Transaction Fee (per transaction)
4. Tokenization Fee (per token)
5. PCI Compliance Fee (per MID per month)
6. Maintenance Fee (per MID per month)

#### C. Authorized Reseller for Third-Party Gateway Service Fees

1. Setup (per account)
2. Monthly fee (per MID per month)
3. Transaction Fee (per transaction)
4. Tokenization Fee (per token)
5. PCI Compliance Fee (per MID per month)
6. Maintenance Fee (per MID per month)

Price escalation requests for these items may be made by the Contractor between the fifth-year anniversary of the Contract and thirty (30) days thereafter, however, the price increase(s) will be subject to OGS review and approval and the Contractor shall comply with the Maximum Price Increase subdivision below.

### 3.3.2 Pricelist Format

Contractor is required to submit Contract pricelist updates electronically in an unprotected Microsoft Excel (2016 or lower version) spreadsheet either on USB flash drive or via e-mail to the OGS Procurement Services Contract administrator. The pricelist shall be dated and the format shall be consistent with the format of the Contractor's approved Contract pricelist. The pricelist shall separately include and identify (e.g., by use of separate worksheets or by using highlighting, italics, bold and/or color fonts):

- Price increases;
- Price decreases;
- Products being added; and
- Products being deleted.

### 3.3.3 Contractor's Submission of Contract Updates

In connection with any Contract pricelist update, OGS reserves the right to:

- Request additional information;
- Reject Contract updates;
- Remove Products from Contracts;
- Remove Products from Contract updates; and
- Request additional discounts for new or existing Products.

### 3.3.4 Maximum Price Increase

In a single year of the Contract, the maximum price increase for each individual Product on Contract shall not exceed the percent increase in the latest available National Consumer Price Index - All Urban Consumers (CPI-U), Not Seasonally Adjusted, Northeast Region, All Items (Series Id: CUUR0100SA0); as published by the U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. 20212. CPI-U data may be obtained at [www.bls.gov](http://www.bls.gov).

The following example illustrates the computation of percent change:

CPI for current period	230.000
Less CPI for previous period	225.000
Equals index point change	5.000
Divided by previous period CPI	225.000
Equals	0.022
Result multiplied by 100	<u>0.022 x 100</u>
Equals percent change	2.2

The "CPI for current period" shall be the index in effect at the time the Contract pricelist update request is received; "CPI for previous period" shall be the index in effect when the Contract pricelist was last updated. Increases are not cumulative. Price increases are limited to the prior year prices only.

This price escalation cap does not apply to Visa, Mastercard, Discover, American Express, as well as any other card network as required by the Authorized User, and debit network authorization and Interchange fees, assessments, dues and other Card Association fees and charges which are passed through to Authorized Users at cost, and provided with verification of such costs at time of increase.

### 3.3.5 Cover Letters

All Contract pricelist updates shall be accompanied by a cover letter describing the nature and purpose of the update (e.g., update requested by Authorized User to add Products, rate escalation, to add/delete Products, etc., subject to any applicable caps).

## 3.4 Price Structure

If, during the Contract Term, the Contractor is unable or unwilling to meet contractual requirements in whole or in part based on the price structure of the Contract, it shall immediately notify the Office of General Services, Procurement Services in writing. Such notification shall not relieve the Contractor of its responsibilities under the Contract. The State may, but is not required to, consider an equitable adjustment in the Contract terms and/or pricing in the circumstances outlined in Appendix B, *Savings/Force Majeure*, as revised in Section 3.7, *Appendix B Amendments*.

Should the Commissioner in his or her sole discretion determine during the Contract Term that (i) the Contract price structure is unworkable, detrimental, or injurious to the State, or (ii) the Contract price structure results in prices which are unreasonable, excessive, or not truly reflective of current market conditions, and no adjustment in the Contract terms and/or pricing is mutually agreeable, the State may terminate the Contract upon 10 business days written notice mailed to the Contractor.

### **3.5 Ordering**

Authorized User may issue purchase orders pursuant to this Contract at any time during the term of the Contract. 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.

Purchase Orders shall be made in accordance with the terms set forth in Appendix B, *Purchase Orders*, as revised in Section 3.7, *Appendix B Amendments*. Authorized Users may submit orders over the phone, and, if available, may submit orders electronically via web-based ordering, e-mail, or facsimile at any time. Orders submitted shall be deemed received by Contractor on the date submitted.

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

### **3.6 Product Returns and Exchanges**

In addition to the provisions of Appendix B, *Title and Risk of Loss*, *Product Substitution*, and *Rejected Product* as revised in Section 3.7, *Appendix B Amendments*, Products returned or exchanged due to quality problems, duplicated shipments, outdated Product, incorrect Product shipped, Contractor errors otherwise not specified, or Products returned or exchanged due to Authorized User errors, shall be replaced with specified Products or the Authorized User shall be credited or refunded for the full purchase price.

Products shall be replaced within 10 business days of written notification to the Contractor of the Authorized User's intent to return or exchange the Product. Contractor can charge only a restocking fee for Product returned or exchanged due to Authorized User error that is determined not to be suitable for resale; the restocking fee cannot exceed the net price of the returned or exchanged Product.

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

### **3.7 Appendix B Amendments**

1. **Appendix B, § 26, *Modification of Contract Terms*, is hereby deleted and replaced with the following:**

26. Modification of Contract Terms

1. The terms and conditions set forth in the Contract shall govern all transactions by Authorized Users under this Contract. The Contract may be modified or amended only upon mutual written agreement of the Commissioner and Contractor. Notwithstanding the foregoing, Authorized Users recognize that the Card Organization Rules are periodically updated, and as a result, Contractor may periodically require Authorized Users to agree to updated terms and conditions.

## 2. Additional or Alternative Terms and Conditions in an Authorized User Agreement

A Contractor can propose additional or alternative terms and conditions for a specific Authorized User transaction only in the Contractor's response to an Authorized User quote. A Contractor cannot require an Authorized User to agree to additional or alternative terms and conditions as a condition to the Contractor submitting a response to an Authorized User quote.

Additional or alternative terms and conditions may, in the discretion of the Authorized User, be allowed as part of a Contractor's response to an Authorized User quote and incorporated into the Authorized User Agreement provided that all of the following conditions are met:

- a. The Contractor identifies where such additional or alternative terms and conditions may be found in Contractor's response to the Authorized User quote; and
  - b. The Authorized User determines that the inclusion of such additional or alternative terms and conditions results in a transaction which is, on an overall basis, more favorable to the Authorized User than if the transaction did not include such additional or alternative terms and conditions; and
  - c. The Authorized User accepts such additional or alternative terms and conditions.
3. Notwithstanding subparagraph 2 above, no additional or alternative term or condition shall be valid or binding on the Authorized User to the extent that such additional or alternative term or condition is less favorable to the Authorized User than, or conflicts with, any of the following provisions: All provisions of Appendix A (Standard Clauses for New York State Contracts), Appendix B Sections 43 (Termination), 56 (Indemnification), 57 (Indemnification Relating to Infringement, as revised by Section 3.7, *Appendix B Amendments*), and 58 (Limitation of Liability, as revised by Section 3.7, *Appendix B Amendments*), Section 3.31 of the Contract, Responsibility for Subcontractors, the Contract Insurance Requirements identified in Attachment 2 – Insurance Requirements, and the Not-to-Exceed Pricing on the Contract identified in Attachment 1 – Contract Pricelist.
4. No additional or alternative terms and conditions may be incorporated by the Contractor into an Authorized User Agreement by unilaterally affixing them to the 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 and conditions 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.
5. Nothing herein shall be deemed to prohibit a Contractor from offering an Authorized User better and more advantageous pricing and terms and conditions during the term of an Authorized User Agreement.

## 2. **Appendix B, § 30, *Purchase Orders*, is hereby deleted and replaced with the following:**

### 30. Purchase Orders

1. Unless otherwise authorized in writing by the Commissioner, no Product is to be delivered or furnished by Contractor until transmittal of an official Purchase Order from the Authorized User. Unless terminated or cancelled pursuant to the authority vested in the Commissioner, Purchase Orders shall be effective and binding upon the Contractor (i) in the case of formal written Purchase Orders, when placed in the mail prior to the termination of the Contract and addressed to the Contractor at the address for receipt of orders set forth in the Contract or in the Contract Award Notification or (ii) in the case of electronic Purchase Orders or Purchasing Card purchases, when electronically transmitted to the Contractor prior to the termination of the Contract. Contractor will have the ability to approve the 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.
2. All Purchase Orders issued pursuant to a Contract let by the Commissioner must be identified with the appropriate Contract number and, if necessary, required State approvals. As deemed necessary, the Authorized User may confirm pricing and other Product information with the Contractor prior to placement of the Purchase Order. The State reserves the right to require any other information from the Contractor which

the State deems necessary in order to complete any Purchase Order placed under the Contract. Unless otherwise specified, all Purchase Orders against Centralized Contracts will be placed by Authorized Users directly with the Contractor and any discrepancy between the terms stated on the Contractor's order form, confirmation or acknowledgment, and the Contract terms shall be resolved in favor of the terms most favorable to the Authorized User. Should an Authorized User add written terms and conditions to the Purchase Order that conflict with the terms and conditions of the Contract, the Contractor has the option of rejecting the Purchase Order within ten 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.

3. If, with respect to an Agency Specific Contract let by the Commissioner, a Purchase Order is not received by the Contractor within two weeks after the issuance of a Contract Award Notification, it is the responsibility of the Contractor to request in writing that the appropriate Authorized User forward a Purchase Order. If, hereafter, a Purchase Order is not received within a reasonable period of time, the Contractor shall promptly notify in writing the appropriate purchasing officer in OGS. Failure to timely notify such officer may, in the discretion of the OGS Commissioner and without cost to the State, result in the cancellation of such requirement by the OGS Commissioner with a corresponding reduction in the Contract quantity and price.
  4. Notwithstanding the foregoing, Contractor will have the ability to approve the requirements of the Purchase Order prior to issuance of such Purchase Order by the Authorized User. Any additional terms in a Purchase Order must be agreed upon by Contractor in writing.
3. **Appendix B, § 31, *Product Delivery*, is hereby deleted and replaced with the following:**
31. Product Delivery
    1. Delivery must be made as ordered to the address specified on the Purchase Order and in accordance with the terms of the Contract. Delivery shall be made within 30 calendar days after receipt of a Purchase Order by the Contractor, unless otherwise agreed to by the Authorized User and the Contractor. The decision of the Commissioner as to compliance with delivery terms shall be final. The burden of proof for delay in receipt of a Purchase Order shall rest with the Contractor. In all instances of a potential or actual delay in delivery, the Contractor shall immediately notify the Commissioner and the Authorized User, and confirm in writing the explanation of the delay, and take appropriate action to avoid any subsequent late deliveries. Any extension of time for delivery must be requested in writing by the Contractor and approved in writing by the Authorized User. If compliance with the delivery time schedule is a material term of the Contract, failure to meet such delivery time schedule may be grounds for cancellation of the order or, in the Commissioner's discretion, the Contract pursuant to the terms of Appendix B, Section 43, *Termination*.
4. **Appendix B, § 36, *Rejected Product*, is hereby deleted and replaced with the following:**
36. Rejected Product
    1. 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 or other period of time as agreed to by the Authorized User and Contractor. Upon notification of rejection, risk of loss of rejected or nonconforming Product shall remain with Contractor. Rejected items not removed by the Contractor within ten calendar days of notification or other period of time as agreed to by the Authorized User and Contractor 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.
5. **Appendix B, § 38, *Repaired or Replaced Products, Parts, or Components*, is hereby deleted and replaced with the following:**
38. Repaired or Replaced Products, Parts, or Components
    1. Where the Contractor is required to repair, replace or substitute Product or parts or components of the Product under the Contract, the repaired, replaced or substituted Products shall be subject to all terms and



conditions for new parts and components set forth in the Contract including warranties, as set forth in the Warranties clause herein, unless otherwise agreed by the Authorized User. Replaced or repaired Product or parts and components of such Product shall be new and shall, if available, be replaced by the original manufacturer's component or part. Remanufactured parts or components meeting new Product standards may be permitted by the Commissioner or Authorized User. Before installation, all proposed substitutes for the original manufacturers' installed parts or components must be approved by the Authorized User. The part or component shall be equal to or of better quality than the original part or component being replaced.

6. **Appendix B, § 40, *Assignment*, is hereby deleted.**

7. **Appendix B, § 44, *Savings/Force Majeure*, is hereby deleted and replaced with the following:**

44. Savings/Force Majeure

1. A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled and is not due to the negligence or willful misconduct of the affected party. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, terrorism, strikes, fires, explosions, actions of the elements, floods, or other similar causes beyond the control of the Contractor or the Commissioner in the performance of the Contract where non-performance, by exercise of reasonable diligence, cannot be prevented.
2. The affected party shall provide the other party with written notice of any force majeure occurrence as soon as the delay is known and provide the other party with a written contingency plan to address the force majeure occurrence, including, but not limited to, specificity on quantities of materials, tooling, people, and other resources that will need to be redirected to another facility and the process of redirecting them. Furthermore, the affected party shall use its commercially reasonable efforts to resume proper performance within an appropriate period of time. Notwithstanding the foregoing, if the force majeure condition continues beyond 30 days, the parties to the Contract shall jointly decide on an appropriate course of action that will permit fulfillment of the parties' objectives under the Contract.
4. The Contractor agrees that in the event of a delay or failure of performance by the Contractor under the Contract due to a force majeure occurrence:
  - a. The Commissioner may purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the Contract quantities without penalty or liability to the State, or
  - b. The Contractor will provide Authorized Users with access to Products first in order to fulfill orders placed before the force majeure event occurred. The Commissioner agrees that Authorized Users shall accept allocated performance or deliveries during the occurrence of the force majeure event.
4. 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. For the avoidance of doubt, Contractor is not liable for interruptions in service due to the failure of telecommunications or other equipment which is not in Contractor's control.
5. Notwithstanding the above, at the discretion of the Commissioner where the delay or failure will significantly impair the value of the Contract to the State or to Authorized Users, the Commissioner may terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.
6. In addition, the Commissioner reserves the right, in his or her sole discretion, to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (i) the volatility is due to causes outside the control of Contractor; (ii) the volatility affects the marketplace or industry, not just the particular Contract source of

supply; (iii) the effect on pricing or availability of supply is substantial; and (iv) the volatility so affects Contractor's performance that continued performance of the Contract would result in a substantial loss to the Contractor. In the event of a dispute between the Contractor and the Commissioner, such dispute shall be resolved in accordance with the OGS Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from performing in accordance with the Contract as changed.

**8. Appendix B, § 48, Remedies for Breach, is hereby deleted and replaced with the following:**

48. Remedies for Breach

1. Unless otherwise specified by the Authorized User in a Mini-Bid or Purchase Order, in the event that Contractor fails to observe or perform any term or condition of the Contract and such failure remains uncured after 15 calendar days following written notice by the Commissioner or an Authorized User, the Commissioner or an Authorized User may exercise all rights and remedies available at law or in equity. Notwithstanding the foregoing, if such failure is of a nature that it cannot be cured completely within 15 calendar days and Contractor shall have commenced its cure of such failure within such period and shall thereafter diligently prosecute all steps necessary to cure such failure, such 15-day period may, in the sole discretion of the Commissioner or the Authorized User, be extended for a reasonable period in no event to exceed 60 calendar days. It is understood and agreed that the rights and remedies available to the Commissioner and Authorized Users in the event of breach shall include but not be limited to the following:
  - a. **Cover/Substitute Performance** In the event of Contractor's material, uncured breach, the Commissioner or Authorized User may, with or without issuing a formal Solicitation: (i) purchase from other sources; or (ii) if the Commissioner or Authorized User is unsuccessful after making reasonable attempts, under the circumstances then existing, to timely obtain acceptable replacement Product of equal or comparable quality, the Commissioner or Authorized User may acquire acceptable replacement Product of lesser or greater quality. Such purchases may be deducted from the Contract quantity without penalty or liability to the State.
  - b. **Withhold Payment** In any case where a reasonable question of material, uncured non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Authorized User. Any amounts withheld will be directly related to the services not received.
  - c. **Bankruptcy** In the event that the Contractor files, or there is filed against Contractor, a petition under the U.S. Bankruptcy Code during the term of this Centralized Contract, Authorized Users may, at their discretion, make application to exercise their right to set-off against monies due the debtor or, under the doctrine of recoupment, be credited the amounts owed by the Contractor arising out of the same transactions.
  - d. **Reimbursement of Costs Incurred** The Contractor agrees to reimburse the Authorized User promptly for any and all additional costs and expenses incurred for acquiring acceptable replacement Product. Should the cost of cover be less than the Contract price, the Contractor shall have no claim to the difference. The Contractor covenants and agrees that in the event suit is successfully prosecuted for any default on the part of the Contractor, all costs and expenses, including reasonable attorney's fees, shall be paid by the Contractor. Where the Contractor fails to timely deliver pursuant to the guaranteed delivery terms of the Contract, the ordering Authorized User may obtain replacement Product temporarily and the cost of the replacement Product shall be deducted from the Contract quantity without penalty or liability to the State.
  - e. **Deduction/Credit** Sums due as a result of these remedies may be deducted or offset by the Authorized User from payments due, or to become due, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the Authorized User the amount of such claim or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, damages, etc., that arise from the administration of the Contract.

**9. Appendix B, § 57, Indemnification Relating to Infringement, is hereby deleted and replaced with the following:**

## 57. Indemnification Relating to Infringement

1. The Contractor shall also defend, indemnify and hold the Authorized Users harmless from all suits, actions, proceedings, claims, losses, damages, and costs of every name and description (including reasonable attorney fees), relating to a claim of infringement of a patent, copyright, trademark, trade secret or other proprietary right provided such claim arises solely out of the Products as supplied by the Contractor, and not out of any modification to the Products made by the Authorized User or by someone other than Contractor at the direction of the Authorized User without Contractor's approval; provided, however, that the Contractor shall not be obligated to indemnify an Authorized User for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, negligence or willful misconduct of the Authorized User.
2. The Authorized User shall give Contractor: (i) prompt written notice of any action, claim or threat of suit alleging infringement, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.
3. If usage of a Product shall be enjoined for any reason or if Contractor believes that it may be enjoined, Contractor shall have the right, at its own expense and sole discretion to take action in the following order of precedence: (i) to procure for the Authorized User the right to continue usage (ii) to modify the service or Product so that usage becomes non-infringing, and is of at least equal quality and performance; or (iii) to replace such Product or parts thereof, as applicable, with non-infringing Product of at least equal quality and performance. If the above remedies are not available, the parties shall terminate the Contract, in whole or in part as necessary and applicable, provided that the Authorized User is given a refund for any amounts paid for the period during which usage was not feasible.
4. In the event that an action or proceeding at law or in equity is commenced against the Authorized User arising out of a claim that the Authorized User's use of the Product under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Authorized User and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the Authorized User and attempt to secure a continuance to permit the State and the Authorized User to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and Authorized User may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters. This constitutes the Authorized User's sole and exclusive remedy for infringement of a patent, copyright, trademark, trade secret, or other proprietary right.

**10. Appendix B, § 58, Limitation of Liability, is hereby deleted and replaced with the following:**

## 58. Limitation of Liability

1. Except as otherwise set forth in the Indemnification clause and the Indemnification Relating to Infringement clause, the limit of liability shall be as follows:
  - a. Contractor's liability for any claim, loss or liability arising out of, or connected with the Products provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in: (i) an amount equal to two (2) times the charges specified in the Purchase Order for the Products forming the basis of the Authorized User's claim or (ii) five hundred thousand dollars (\$500,000), whichever is greater.
  - b. The Authorized User may retain such monies from any amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted against the Authorized User unless Contractor at the time of the presentation of claim shall demonstrate to the Authorized User's satisfaction that sufficient monies are set aside by the Contractor in the form of a bond or through insurance coverage to cover associated damages and other costs.

- c. Notwithstanding the above, neither the Contractor nor the Authorized User shall be liable for any consequential, indirect, special, exemplary or punitive 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.

**3.8 Payment Reference Number**

Upon request by the Authorized User, the Contractor must provide the Authorized User with an alpha-numeric field that can be used by the Authorized User as a Payment Reference Number for each transaction. The Payment Reference Number field shall be a minimum of 20 characters and shall have the capability to be displayed on any reports and invoices displaying electronic payment transactions. The Payment Reference Number may be electronically transmitted by the Authorized User with each transaction. This field may be used for identification, reference, balancing, reconciliation or other purposes as determined by the Authorized User.

**3.9 Equipment Warranty**

In addition to the standard warranty required in Appendix B, §54, *Warranties*, Contractor may offer extended warranties for POS Terminals and peripheral devices purchased under the Contract as well as POS Terminals and peripheral devices purchased outside of the Contract.

**3.10 Payment Gateway Services**

The Contractor shall have connectivity and interfacing capabilities that will enable Authorized Users to acquire third-party Payment Gateway Services or to work with various third-party Payment Gateway Service providers that are already in use by Authorized Users.

If Contractor is an authorized Reseller of any third-party Payment Gateway Services provider (e.g. Authorize.net, PayPal, etc.), Contractor may include the applicable fees for use of such third-party Payment Gateway Services on Attachment 1 – Contract Pricelist for inclusion on the Contract, subject to approval by OGS.

Fees not included on Attachment 1 – Contract Pricelist cannot be charged to the Authorized User.

Other third-party Payment Gateway Service providers for which Contractor is not an authorized Reseller, but that Contractor is capable of working with and processing payments from will be listed for informational purposes only on the OGS website, for Authorized Users’ consideration when making purchasing decisions from the Contract(s). Any fees charged for using a third-party Payment Gateway Service provider for which the Contractor is not an authorized Reseller must be charged to the Authorized User by the third-party Payment Gateway Service provider outside the scope of this Contract.

**3.11 Payment Gateway Integration Services**

Contractor shall have the capability to work with Authorized Users, who may choose to utilize varying payment gateways, to integrate, interface or connect the Authorized User’s systems with the applicable payment gateways for use with the Contractor’s Payment Processing Services. Contractor’s hourly rates for the following titles are included in Attachment 1 – Contract Pricelist. The rates identified in Attachment 1 – Contract Pricelist are Not-to-Exceed rates to be used when responding to an Authorized User’s request for quote for the applicable Payment Gateway Integration Services.

<b>Integration Services Titles</b>	
1. Project Manager	<ul style="list-style-type: none"> <li>• Oversees projects comprised of multiple deliverables and/or phases.</li> <li>• Delegates and coordinates tasks.</li> <li>• Coordinates project status, meetings, scope changes, issues.</li> </ul>
2. Programmer	<ul style="list-style-type: none"> <li>• Provides analysis, design, programming, and testing and implementation.</li> <li>• Provides maintenance support, enhancement and development work.</li> </ul>

	<ul style="list-style-type: none"> <li>Provides Authorized User technical documentation.</li> </ul>
3. Specialist	<ul style="list-style-type: none"> <li>Provides developmental and technical support beyond that of a Programmer (e.g., security, fraud, etc.).</li> </ul>
4. Tester	<ul style="list-style-type: none"> <li>Understands the Authorized User's view of applications and technology and is able to ensure the software meets the customers' quality standards.</li> <li>Ensures all functional requirements have been met.</li> <li>Creates test data, test conditions, and executes testing to ensure all errors are identified and corrected before release.</li> <li>Identifies defects and issues timely; suggests solutions; and assists with the resolution of problems.</li> <li>Develops and maintains technical documentation for Authorized User use.</li> </ul>

### 3.12 Testing

The Contractor shall provide to each Authorized User, at no additional cost, testing of all card-based payment types through each of the POS terminals or data capture/transfer devices provided under the Contract. Upon request, the Contractor shall describe to the Authorized User their methodology and procedures for testing acceptance of card and non-card payments through each of the required payment devices, including a description of the testing environment and data.

### 3.13 Device User or Customer Notification

The Contractor acknowledges that an Authorized User may, when permitted under the Association Rules, impose a Convenience Fee or Surcharge or Service Fee on a Device User or Customer. Where a Convenience Fee or Surcharge or Service Fee is to be passed through to the Device User or Customer when making payment to a State Agency, New York State Finance Law §4-a, subdivisions (3) and (4) require the Device User or Customer to be notified of the amount of the Surcharge or Convenience Fee or Service Fee prior to the completion of a transaction, and that the Convenience Fee or Surcharge or Service Fee be processed as a separate transaction, resulting in the submission to Contractor of two transactions, one for the transaction amount and one for the Convenience Fee or Surcharge or Service Fee amount. For Internet and IVR applications, the required notice shall be provided to the Device User or Customer during the session or call and the Device User or Customer shall 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 or Customers of any Surcharge or Convenience Fee or Service Fee and agrees to support separate transactions for the transaction amount and the Surcharge or Convenience Fee or Service Fee amount, in accordance with New York State Finance Law §4-a.

### 3.14 Processing and Settlement

The Contractor shall adhere to industry standard timeframes for processing, settling, and data capturing for all transactions, and shall adhere to industry standard timeframes for processing and receiving authorizations by device type. Transaction authorization and verification shall be available on a twenty-four (24) hours per day, seven (7) days per week basis, three-hundred sixty-five (365) days per year, including holidays.

Upon Authorized User request, Contractor shall also provide to the Authorized User:

- Information for authorized and declined transactions, including a listing of the declination codes;
- Individual or aggregated transfers to one or more accounts;
- A close-out procedure identifying whether POS Terminals are manually closed, automatically batch closed at a predetermined time, or both;
- Whether settlement amounts for Credit/Charge Cards are listed separately on the bank statement, or as a lump sum;
- Information explaining how the Contractor reconciles transactions;
- Contractor's mechanisms for transmitting reconciling transactions to summary reports; and

7. Information the Authorized User will receive upon presentation of an electronic payment (i.e., same day, online, individual device number, batch level, and individual transactions by the Payment Reference Number).

### **3.15 Funds Availability**

All funds received from electronic payment transactions including, but not limited to, Credit/Charge Cards, online and offline Debit Cards, and similar transactions shall be made available to the Authorized User by the Next Business Day if the account is with the Contractor, otherwise funds shall be made available to the Authorized User within 48 hours. A business day is Monday through Friday, excluding New York State or federal holidays. Funds are required the next business day following settlement. The funds shall be transferred to the individual accounts designated by each Authorized User.

### **3.16 Fraud Prevention**

The Contractor is responsible for establishing and maintaining methods and procedures used to detect and prevent fraud, theft, and detection of unauthorized attempts, and reporting fraudulent payments including conditions under which the Authorized User may deviate from Card Association Rules governing non-discrimination of card acceptance. Data about fraud prevention (e.g. CVV2 and AVS codes) should be provided in reports in accordance with Section 3.19, *Reporting*, below. The Contractor's fraud protection procedures shall include at a minimum, cardholder name, address, and card security code verification.

### **3.17 Data Security**

The Contractor shall have a security protocol in place during the Contract term that will be utilized to ensure the anonymity of Authorized User information and that access to such information is controlled and restricted to authorized personnel only, as well as procedures to secure point-of-sale terminals, transactions on the Internet, transaction receipts and sale reports. Upon request from an Authorized User or OGS, Contractor shall submit any of the following:

- a. Contractor's pre-employment verification procedures, employment agency screening and security awareness training for employees and subcontractors.
- b. A list and description of relevant security software, including data encryption.
- c. Administrative rules relative to security of data.

The Contractor, and its subcontractors, are responsible for Authorized Users' security needs, the security of the transaction data and processing procedures, 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. In addition to other remedies available under law, Contractor shall reimburse and issue payment credit to all affected Authorized Users for any expenses incurred as a result of failure to comply with all applicable federal and state laws pertaining to the security of transaction data. The imposition of the payment credit fee and requests for reimbursements are at the State's discretion.

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 shall 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, at the discretion of each Authorized User. The Contractor shall 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 52. Individually identifiable material and information relating to Device User or Customer, 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, subcontractors, without the prior written approval of the Authorized User and, where applicable, the Device User or Customer.

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), and with the written consent of the Device User or Customer, 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, subcontractors either during the term of the Contract or in perpetuity thereafter, unless such party is directly processing the data or providing a service that requires access to the data. Where such party is directly processing the data or providing a service that requires access to the data, the Contractor shall be responsible for insuring such party's compliance with the provisions of this paragraph. The Contractor shall be responsible for assuring that any agreement between the Contractor and any of its joint venture, partners, officers, agents, employees, or subcontractors contains a provision that strictly conforms to these provisions.

### **3.18 Implementation Plan**

Upon request for a quote from an Authorized User, the Contractor(s) shall provide a proposed implementation plan that details the Contractor's strategy for managing the services required by the Authorized User. As Authorized Users implement Payment Processing Services, the Contractor shall work with the Authorized User to develop a mutually agreed upon implementation plan that specifies all Payment Processing Services and rates, Point of Sales (POS) Terminal deliverables and rates, the timetable for deliverables, acceptance testing criteria, and procedures and training for new and enhanced applications. If applicable, the plan shall cover how the Contractor will assist the Authorized User with any required transition of Payment Processing Services from an existing provider other than the Contractor, as necessary.

Contractor shall work with each Authorized User and/or their existing providers to set up a plan for initial and continued training, consultation, and installation of Point of Sales (POS) Terminals as required by the individual Authorized User's needs and timeframes.

As applicable, the proposed implementation plan shall cover how, if awarded the resulting order, the Contractor will assist the Authorized User who currently uses Payment Gateway Services under the previous contract #PS65792, a separate contract or a discretionary purchase, to transition to the Contractor either by converting to the Contractor's proprietary payment solution, or by using other third-party Payment Gateway Services, as chosen by the Authorized User. The Implementation Plan details are to include, at a minimum, the following:

1. Contractor's proposed process for onboarding Authorized User requesting Payment Processing Services from Contract #PS65792 and any other separate contract or agreement they may have in place for Payment Gateway Services;
2. Contractor's tracking process to assist Authorized User in ensuring there are no unintended lapses in Payment Processing Services and/or online service coverage;
3. Risk mitigation processes and procedures;
4. Communications plan for Authorized User;
5. Contractor's process for ensuring the transaction data and processing procedure remains secure during the transition process;
6. Describe any application or setup procedures that the Authorized User shall complete with either the Contractor or third parties in order to initiate transactions under a Payment Program;
7. Contractor's plan for migrating an Authorized User to new hardware/software or transitioning of Authorized User's existing hardware/software; and
8. The anticipated timeframe for startup of new and/or existing applications.

The Authorized User may require the Contractor to modify the implementation plan, as needed, to adhere to the terms and conditions of the Contract or as otherwise determined by the Authorized User. The Authorized User may also require Contractor to modify this plan at any time during the term of the Contract.

### **3.19 Reporting**

#### **3.19.1 Online Portal**

Contractor shall provide Authorized Users and OGS EVTA with access to an online reporting portal and shall be required to ensure that each Authorized User and OGS EVTA is provided only the information specific to that

Authorized User's payment program in the format and timeframe required. Authorized Users shall be able to export transaction data from the online reporting portal in a variety of file formats (e.g., .csv; .xml; .pdf; .html; .xls; and .tab; etc.) or through a daily, weekly, or monthly email sent by the Contractor's reporting system.

### 3.19.2 Compliance Reporting

For compliance reporting, the Contractor shall offer PCI compliance assistance to all Authorized Users and shall maintain all reports associated with the Contract on its own PCI compliance. Contractor shall retain any and all reports associated with the Contract in accordance with Appendix A, Section 10, *Records*.

### 3.19.3 Ad Hoc Reporting

The Contractor shall offer custom reporting as requested or required by Authorized Users (e.g., printed or online, or through secure internet applications) and OGS within 30 calendar days or a mutually agreed upon timeframe. Contractor may charge an additional fee for such custom reporting, only with the prior approval of the Authorized User or OGS. The Contractor shall offer a variety of report formats to meet the needs of an Authorized User (e.g., including additional data such as the Payment Reference Number field) or OGS as required. In the event of an error, reports shall be correctable and shall include a disclaimer to the Authorized User that the report has been corrected for audit purposes.

Upon request, the Contractor shall describe its reporting process and the types of reports it can provide for the Authorized User and OGS to track the following details:

- a. Transaction-specific details for all deposits, credit card/E-check settlements or returns, and chargeback activity.
- b. Access to historical data, i.e., data retention.
- c. Provide a summary report as well as transaction specific details for all payments made by every card type or source of payment through every payment processing channel the Authorized User utilizes.
- d. Transactions by interchange processing fees.
- e. All retrieval requests and chargebacks related to their processing, including documentation initiated by the customer and/or credit card issuer.
- f. Methods used to report fraud, theft, and all other security breaches including detection of unauthorized attempts.
- g. Reporting provided for American Express branded cards. Where applicable, it is preferred that reporting functions for these cards be provided in reports consolidated with other payment processing transactions.

### 3.19.4 Summary Reports for OGS EVTA

The OGS EVTA shall have access to an online reporting portal system provided by the Contractor. The Contractor shall make accessible through its online portal system to OGS information specific to all Authorized Users and their associated payment program(s) authorized to utilize the payment processing services under this Contract. Contractor agrees that the data from the system shall remain accessible to the EVTA for at least two (2) years after the final transaction has processed.

For the purpose of supporting program monitoring and Contract administration, the Contractor shall report to OGS throughout the Contract term:

1. Quarterly ending reports.
2. Annual reports summarizing the previous year's quarterly Contract usage.

Contractor shall maintain data that indicates if an Authorized User is a State or Non-State agency, and whether or not the account is in open or closed status: All data obtained by OGS EVTA through the Contractor's online portal shall include (as applicable), but not be limited to:

1. Authorized User Name (as submitted on the Program Plan Application form)
2. Authorized User Program Name (as submitted on the Program Plan Application form)
3. Authorized User Location (e.g., street address)
4. Authorized User Contact Information (e.g., person name, email and phone)



5. Transaction fees
6. Card type/brand
7. Equipment make and model and any third-party integrations
8. Equipment fees including leased or purchased
9. ACH fees
10. Chain Number
11. Batch Number
12. Net Total
13. Make and model Point of Sales Terminals including hardware and software being used by Authorized User
14. Payment Gateway Providers being utilized by the Authorizes User per Authorized User Payment Program
15. Routing Number
16. Absorbing or passing fee
17. Total E-Pay by Authorized User transaction volume by payment channel and payment type
18. Total E-Pay by Authorized User revenue generated
19. Total number of retrievals/chargebacks by E-Pay and by Authorized User
20. All other fees charged to the Authorized User

OGS EVTA shall be able to obtain a list of all quarterly and annual payments made by every card type or source of payment through every payment processing channel. OGS EVTA shall be able to search by MID, Authorized User Name, Authorized User Payment Program Name, Chain Number, or Payment Reference Number for reporting purposes.

OGS reserves the right to require reports and/or copies of invoices at any time during the Contract term to include detailed data including but not limited to the informational fields mentioned herein and reserves the right to require a specific format (e.g., online, electronic, hardcopy, Excel spreadsheet, email, etc.) in which the detailed data is to be submitted to the OGS EVTA. Upon OGS request, the Contractor shall provide:

1. Contractor's methods used to report fraud, theft, and all other security breaches including detection of unauthorized attempts.
2. Any other reports detailing Authorized User Contract usage.

Other reports and other information may include but not be limited to:

1. Total State vs. Non-State Contract usage and dollar volume of any all sales under this Contract.
2. State Agency and Non-State Agency annual sales volume (i.e., subtotal/grand total per AU payment program name/location, subtotal/grand total per AU Merchant ID, etc.).
3. Total State and Non-State annual sale transactions, separate and combined.
4. Equipment type (including purchased vs. leased equipment, make/model) per Authorized User payment program and/or Merchant ID.
5. Total quantities of hardware and/or software in use by Authorized User payment program name.
6. Total equipment sales (purchased and leased).
7. Authorized User current Payment Gateway Provider, (e.g., vendor name, gateway name and product name).
8. Authorized User Merchant Category Code (MCC) and total annual transaction count per MCC Code.
9. Annual hardware and software per Authorized User payment program(s) including vendor name, manufacturer name, model/virtual terminal name.
10. Annual chargeback information including total number of chargeback credits/debits and total chargeback amounts for credits/debits.

In the event that a Contractor utilizes subcontractors, it is the responsibility of Contractor to include all Contract revenues from these participants in the quarterly and annual reports. Where third-party Product is offered and delivered under this Contract, Contractor shall be required to separately report such sales volume on a quarterly and annual basis to the OGS EVTA.

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

1. the right to suspend payments until such reports are received;

2. the right to audit Contractor's applicable Contract records as specified in Appendix A – Standard Clauses for NYS Contracts, Section 10, *Records*;
3. the right to audit Contractors' reports as specified in Appendix A – Standard Clauses for NYS Contracts, Section 10, *Records*;
4. 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
5. the right to terminate the Contract for cause or seek other judicial relief.

### **3.20 Customer Payment Confirmation**

Contractor shall provide customers the following:

1. A confirmation number at the end of an approved telephone payment. If the payment is declined, provide a message that indicates the cause for the decline, if required by the Authorized User.
2. A confirmation number for an approved internet payment. If the payment is declined, provide a message that indicates the cause for the decline, if required by the Authorized User.
3. A confirmation email that is immediately sent to a customer for internet payments, indicating whether his/her payment has been approved or declined. Cardholder information and data regarding the charge shall be included in the email for receipt purposes.
4. Notification of any returned E-check for internet and POS payments.
5. A receipt for any POS transaction by email, if elected by the customer.

### **3.21 Maintenance and Troubleshooting**

The Contractor shall furnish help desk services to be made available during the entire term of the Contract to Authorized Users and OGS. The cost for these services shall be presumed to be included in the Payment Processing Service and/or Point of Sales (POS) Terminal fees. The Contractor shall provide help desk services for Authorized Users and OGS based on a twenty-four (24) hours per day, seven (7) days per week, three-hundred sixty-five (365) days per year basis, including holidays, in order to address all Authorized User and OGS assistance needs and technical issues for submitting electronic payment transactions, including assistance with Point of Sales (POS) Terminals (hardware and software). 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 shall 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.

Upon request, the Contractor shall describe the system to be used in providing Help Desk Services to Authorized Users. This description should include but not be limited to: access to the system, number of lines available and staffing levels and experience, blockage rates and not to exceed times on hold, the Credit/Charge Card transaction authorization, verification and inquiry services for Contractor provided POS Terminals and all other customer assistance services.

The Contractor shall repair or replace POS (hardware/software) within 24 hours and provide next business day on-site assistance, as needed.

### **3.22 Training**

The Contractor shall implement specific training covering initial and follow-up training for Authorized Users. Standard on-going training is any post-implementation training made available to Authorized Users for no additional fee. Any fee for providing both implementation training or ongoing training, including materials, is presumed to be included in the Payment Processing Service fees. On-site training at locations designated by the Authorized User may also be offered and shall be provided to employees designated by the Authorized User.

Upon request, the Contractor shall provide a description of the training to be provided to Authorized Users including:

1. A thorough understanding of credit card acceptance and processing as it relates to Payment Processing Services.
2. An understanding of Authorized User reports and reconciliation procedures.

3. Guidance in developing internal reports.
4. Installation and utilization of POS hardware and software to be provided by the Contractor.
5. An understanding of security requirements, refund and chargeback procedures and fraud prevention/detection.

Descriptions should include, but not be limited to, the following components: scope and length of sessions, setting (e.g., on-site, off-site, teleconferencing, video-conferencing, Internet-based), and curriculum. The Contractor shall describe any training materials that will be made available to the Authorized User.

### **3.23 User Manuals and System Documentation**

The Contractor shall provide each Authorized User with the necessary user manuals and system documentation related to Payment Processing Services, at no additional cost.

### **3.24 Internal Control Plan**

The Contractor shall have an Internal Control Plan that includes checks and balances for all aspects of the services provided including internal controls for all automated and manual processes, and controls to protect against unauthorized access to personal information. Upon request, the Contractor shall provide its internal control plan to the Authorized User and/or OGS.

### **3.25 Method of Payment of Contractor Fees**

The Contractor shall offer the following payment methods for any Payment Processing Services fees charged to the Authorized User:

1. Invoicing the Authorized User;
2. Passing through fees to the Device User or Customer (i.e., Surcharge or Convenience Fee or Service Fee);
3. Deduction Net-Billing (subject to approval by DOB and EVTA for State agencies); and
4. Direct ACH Debit (subject to approval by DOB and EVTA for State agencies).

Authorized User may select a payment method from the available options listed above via the Program Plan Application (Attachment 3 – Program Plan Application). For State agencies, the selected payment method will be subject to the approval of the Division of Budget (DOB) and the EVTA.

### **3.26 Chargebacks, Refunds & Adjustments Procedures**

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 New York State Division of the Budget (DOB) and the EVTA on the Program Plan Application form prior to service commencement. State Agencies not receiving prior approval by DOB and the EVTA on the Program Plan Application form for Chargebacks and adjustments will receive Chargebacks, Chargeback fees, refunds and adjustments based on invoices submitted to them by the Contractor. Additionally, post-Electronic Draft Capture (EDC) refunds to Device Users or Customers will be made through each State Agency Authorized User's normal refund process.

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, subject to agreement by the Authorized User.

### **3.27 Contractor Conformance with Local, State and Federal Laws Governing Authorized User**

When required by an Authorized User, the Contractor shall 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 Card Association Rules. This may include, but is not limited to, EVTA 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. Upon request, Contractor shall provide the Card Association Rules to the Authorized User or OGS.

Further, upon the request of the EVTA, Contractor shall provide a copy of its reporting statement on Standards for Attestation Engagements (SSAE), Service Organization Controls (SOC), or most current regulation, on attestation services and auditing standards or any successor standard or report, for review and assessment. The Contractor will directly provide the State with an independent auditors' report, for the Contractor and any subcontractor, on transaction processing controls and supporting information technology controls. Such report will cover the design and effectiveness of controls and is commonly referred to as a SOC 1 report. Upon request, and subject to the agreement of the Authorized User, the Contractor may require the Authorized User to sign a Non-Disclosure Agreement before providing such report or information.

### **3.28 Service Interruption(s) or Failures**

Contractor will accurately capture, report, and settle all electronic transactions in a timely manner according to industry standards.

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 shall be done pursuant to a maintenance program known to the Authorized User in advance. 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. Any temporary interruption(s), partial loss or complete failure to provide Payment Processing Services ("incident") during the preceding month shall be reported in detail, per incident, to the Authorized User and to the EVTA. Such report shall include the date, time of incident, duration of incident, and type of service loss for each incident.

### **3.29 Submission of Draft Captures**

Contractor shall 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. Where a draft capture is not submitted timely, 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 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.

### **3.30 Processing Time Requirements**

Contractor shall initiate transactions to credit funds to depository accounts designated by the Authorized User within the agreed upon time frames, and in accordance with industry standards.

### **3.31 Responsibility for Subcontractors**

The Contractor will be considered the "prime" Contractor and shall be fully responsible for all performance of the Contract, including any services performed by subcontractors or products provided by subcontractors. The Contractor shall not in any way be relieved of any responsibility under the Contract by any subcontract. The Contractor shall be solely responsible to the State and to any applicable Authorized User for the acts or defaults of any subcontractors or of such subcontractors' officers, agents, and employees, each of whom shall for this purpose be deemed to be the agent or employee of the Contractor to the extent of its subcontract. OGS reserves the right to require the Contractor to provide evidence of any subcontractor's financial stability (e.g., financial statements) and technical qualifications (e.g., resumes, references, and qualifications) at any time during the Contract term, and reserves the right to withdraw prior approval of a subcontractor in the best interest of the State or for cause, or upon a finding of non-responsibility. Contractor shall inform each subcontractor fully and completely of all provisions and requirements of the Contract, and Contractor shall require that each subcontractor pass through all terms and conditions of the Contract, including but not limited to Appendix A, to any lower tier subcontractors.

### **3.32 Authorized Reseller**

If Contractor is an authorized Reseller of any third-party Payment Gateway Services provider (e.g. Authorize.net, PayPal, etc.), the applicable fees for use of such third-party Payment Gateway Services may be included on Attachment 1 – Contract Pricelist, subject to approval by OGS. Fees not included on Attachment 1 – Contract Pricelist cannot be charged to the Authorized User.

Prior to inclusion on the Contract, the third-party Payment Gateway Service must be approved by the State as a condition of eligibility under the Contract. The State also reserves the right to rescind participation by Contractor as an authorized Reseller of third-party Payment Gateway Services under the Contract, at any time and in the sole discretion of the State, based on the best interests of the State. In addition, Contractor shall have the right to terminate its status as an authorized Reseller for any third-party Payment Gateway Service provider at any time during the term of the Contract, provided that sufficient advance notice is provided to OGS and any applicable Authorized Users, such that alternative arrangements can be made.

During the term of the Contract, Contractor may request to add pricing for any additional third-party Payment Gateway Service for which Contractor is or becomes an authorized Reseller. The Contractor shall submit the necessary information, in the format requested by the State. Pricing will be reviewed for reasonableness in accordance with Section 3.3, *Pricelist Updates*.

OGS reserves the right to request additional information or documentation to verify the Contractor's status as an authorized Reseller for any applicable third-party Payment Gateway Services provider.

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

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

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

### **3.34 Contract Administration**

The Contractor shall provide a sufficient number of Customer Service employees who are knowledgeable and responsive to Authorized User needs and who can effectively service the Contract. Contractor shall also provide an Emergency Contact in the event of an emergency occurring after business hours or on weekend/holidays.

Contractor shall provide a dedicated Contract Administrator to support the updating and management of the Contract on a timely basis. Information regarding the Customer Service, Emergency Contact, and Contract Administrator shall be identified on the landing page for the Contract on the OGS website. Contractor shall notify OGS within five Business Days if its Contract Administrator, Emergency Contact, or Customer Service employees change, and provide an interim contact person until the position is filled. Changes shall be submitted electronically via e-mail to the OGS Payment Processing Services Contract Management Specialist.

Upon award of the Contract and prior to the start of any services to be provided, the Contractor shall be available for an initial services meeting, as necessary, with the EVTA and/or the individual Authorized User intending to make use of the Contract. Payment Processing Services shall not be provided to Authorized User programs without prior approval from the EVTA.

### 3.35 New Accounts

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

### 3.36 Credit Evaluations

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.

### 3.37 Invoicing and Payment

Invoicing and payment shall be made in accordance with the terms set forth in Appendix B, Contract Invoicing. Unless otherwise agreed upon (and approved by DOB, where applicable), fees may not be deducted from settlement proceeds for Authorized Users using the Contract.

The invoice shall include detailed line item information to allow Authorized Users to verify that pricing at point of receipt matches the Contract price on the original date of order. At a minimum, the following fields shall be included on each invoice:

- Contractor Name
- Contractor Billing Address
- Contractor Federal ID Number
- NYS Vendor ID Number
- Account Number
- NYS Contract Number
- Name of Authorized User indicated on the Purchase Order
- NYS Agency Unit ID (if applicable)
- Authorized User's Purchase Order Number
- Order Date
- Invoice Date
- Invoice Number
- Invoice Amount
- Product Descriptions
- Unit Price
- Quantity
- Unit of Measure
- Dates of Service (if applicable)
- Detailed transactions: authorization, processing, and any approved services fees
- Identify the number of transactions by network and the associated percentage fee
- Point of Sales Terminal (hardware/software) and/or peripheral equipment and accessories

Authorized Users reserve the right to require additional detail be included on the invoice. Cost centers or branch offices within an Authorized User may require separate invoicing as specified by each Authorized User. The Contractor's billing system shall be flexible enough to meet the needs of varying ordering systems in use by different Authorized Users. Visit the following link for further guidance for Contractors on invoicing State agencies:

<https://bsc.oqs.ny.gov/content/vendor-information>.

### 3.38 Right to Audit Fees

At any time during or after the term of the Contract, the State or the Authorized User reserves the right to audit the Interchange fees, fines or assessments passed through from the Contractor to the Authorized User, or any fees charged under the Contract, in order to ensure the proper application of such fees, fines and assessments. Contractor agrees to cooperate with any such inquiries, and to make records available as necessary, in accordance with Appendix A, Section 10, *Records*.

### **3.39 Contract Compliance Meetings**

Routine Contract meetings or conference calls, as scheduled by the Authorized User or the EVTA no more frequently than monthly, will be held with the Contractor to review issues such as recent services performed, quality of services, invoicing, or any other issue deemed appropriate by either party. The Contractor will not receive additional compensation to participate or attend these meetings.

### **3.40 Transition Plan**

Contractor is required to develop and maintain a transition plan, subject to the approval of OGS, that shall provide information on the Contractor's strategy for transitioning Authorized Users to a potential new Payment Processor either before the scheduled end of the Contract term or at the end of the Contract term. User Transition plan details are to include, at a minimum, the following:

1. Transition of Authorized User information from the existing Contractor to a new Contractor upon expiration or termination of the Contract;
2. Contractor's willingness to waive any implementation fees for pre-existing Authorized User approved payment programs;
3. Contractor's ability to transition Authorized Users from their proprietary payment solution or other Payment Gateway Provider(s) to a new Contractor's proprietary payment solution, or other compatible Payment Gateway Service that would provide the Authorized User the same ability to accept any electronic payment; and
4. The anticipated timeframe for conversion of new and/or existing applications.

As necessary, Contractor shall assist with the process of transitioning current contract users from the previous contract's Payment Processor to the new Contractor. It is anticipated that a reasonable transitional period be that of six months, or until a successful transition is complete. Transitional services include but may not be limited to new profile/account set up, assignment of Merchant IDs, and replacing equipment and testing in-house systems functionality. All quality assurance testing shall be conducted prior to the contract start date to ensure that the new system is fully functional upon the contract start date.

The Authorized User or OGS may require the Contractor to modify the transition plan, as needed, to adhere to the terms and conditions of the Contract or as otherwise determined by the Authorized User or OGS. The Authorized User or OGS may also require Contractor to modify this plan at any time during the term of the Contract.

### **3.41 NYS Statewide Financial System (SFS)**

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

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

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

The State may also be implementing additional PeopleSoft modules in the near future. Further information regarding business processes, interfaces, and file layouts currently in place may be found at: <http://www.sfs.ny.gov> and <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

### **3.42 Accessibility of Web-Based Information and Applications Policy**

Contractor is solely responsible for administration, content, intellectual property rights and all materials at Contractor's website. Contractor is solely responsible for its actions and those of its agents, employees, resellers, subcontractors or assignees, and agrees that neither Contractor nor any of the foregoing has any authority to act or speak on behalf of the State. As applicable, Contractor agrees to comply with the Office of Information Technology Services policy NYS-P08-005 Accessibility of Web-Based Information and Applications, as may be amended, the stated purpose of which is to make State Agency web-based intranet and internet information accessible for persons with disabilities. The following language is incorporated into any Contract resulting from the RFP:

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

### **3.43 Americans with Disabilities Act (ADA)**

The federal ADA bars employment discrimination and requires all levels of government to provide necessary and reasonable accommodations to qualified workers with disabilities. Contractor is required to identify any Products it offers that may be used or adapted for use by persons with visual, hearing, or any other physical disabilities. Although it is not mandatory for Contractor to have these Products in order to receive an award, it is necessary to identify any such Products offered that fall into the above category.

### **3.44 Insurance**

The Contractor shall maintain in force at all times during the terms of the Contract, policies of insurance pursuant to the requirements outlined in Attachment 2 – Insurance Requirements.

### **3.45 Records Retention/Data Ownership**

In addition to the provisions of Appendix A, Section 10, *Records*, except as otherwise required by federal law, all Authorized User 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 Authorized User data to the specific Authorized User and transaction-related Authorized User data that does not include "nonpublic personal information" as that term is defined in the Gramm-Leach-Bliley Act, at no additional cost and in a medium specified by the Authorized User.

### **3.46 Information Security Breach and Notification Act**

§ 208 of the State Technology Law (STL) and § 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, shall 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 shall 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 shall also notify the following New York State agencies: the Attorney General, the Office of Cyber Security & Critical Infrastructure Coordination (CSCIC) and the Consumer Protection Board (CPB). Information relative to the law and the notification process is available at: <https://its.ny.gov/eiso>.



### **3.47 Contractor Requirements and Procedures for Participation by New York Certified Minority-and Women-Owned Business Enterprises and Equal Employment Opportunities for Minority Group Members and Women**

#### **I. New York State Law**

Pursuant to New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the New York Codes, Rules and Regulations (“NYCRR”), the New York State Office of General Services (“OGS”) is required to promote opportunities for the maximum feasible participation of New York State-certified Minority- and Women-Owned Business Enterprises (“MWBES”) and the employment of minority group members and women in the performance of OGS Contracts.

#### **II. General Provisions**

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

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

- A. The provisions of Article 15-A of the Executive Law and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall apply to all Contractors, and any subcontractors, awarded a subcontract over \$25,000 for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials, or any combination of the foregoing, to be performed for, or rendered or furnished to, the contracting State agency (the “Work”) except where the Work is for the beneficial use of the Contractor.
  1. Contractor and subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, and rates of pay or other forms of compensation. This requirement does not apply to: (i) the performance of work or the provision of services or any other activity that is unrelated, separate, or distinct from the Contract; or (ii) employment outside New York State.
  2. By entering into this Contract, Contractor certifies that the text set forth in clause 12 of Appendix A, attached hereto and made a part hereof, is Contractor’s equal employment opportunity policy. In addition, Contractor agrees to comply with the Non-Discrimination Requirements set forth in clause 5 of Appendix A.
- B. Form EEO 100 - Staffing Plan  
To ensure compliance with this section, the Contractor agrees to submit, or has submitted with the Bid, a staffing plan on Form EEO 100 to OGS to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and federal occupational categories.

- C. Form EEO 101 - Workforce Utilization Reporting Form (Commodities and Services) (“Form EEO-101-Commodities and Services”)
1. The Contractor shall submit, and shall require each of its subcontractors to submit, a Form EEO-101-Commodities and Services to OGS to report the actual workforce utilized in the performance of the Contract by the specified categories listed including ethnic background, gender, and federal occupational categories. The Form EEO-101-Commodities and Services shall be submitted electronically to OGS at [EEO\\_CentCon@ogs.ny.gov](mailto:EEO_CentCon@ogs.ny.gov) on a quarterly basis during the term of the Contract by the 10th day of April, July, October, and January.
  2. Separate forms shall be completed by Contractor and any subcontractors.
  3. In limited instances, the Contractor or subcontractor may not be able to separate out the workforce utilized in the performance of the Contract from its total workforce. When a separation can be made, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided relates to the actual workforce utilized on the Contract. When the workforce to be utilized on the Contract cannot be separated out from the Contractor's or subcontractor's total workforce, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided is the Contractor's or subcontractor's total workforce during the subject time frame, not limited to work specifically performed under the Contract.
- D. Contractor shall comply with the provisions of the Human Rights Law and all other State and federal statutory and constitutional non-discrimination provisions. Contractor and subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status, or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal and conviction and prior arrest.

#### IV. Contract Goals

- A. For purposes of this procurement, OGS conducted a comprehensive search and determined that the Contract does not offer sufficient opportunities to set goals for participation by MWBEs as subcontractors, service providers, or suppliers to Contractor. Contractor is, however, encouraged to make every good faith effort to promote and assist the participation of MWBEs on this Contract for the provision of services and materials. The directory of New York State Certified MWBEs can be viewed at: <https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528>. Additionally, following Contract execution, Contractor is encouraged to contact the Division of Minority and Women's Business Development (518) 292-5250; (212) 803-2414; or (716) 846-8200 to discuss additional methods of maximizing participation by MWBEs on the Contract.
- B. Good Faith Efforts
- Pursuant to 5 NYCRR § 142.8, evidence of good faith efforts shall include, but not be limited to, the following:
1. A list of the general circulation, trade, and MWBE-oriented publications and dates of publications in which the Contractor solicited the participation of certified MWBEs as subcontractors/suppliers, copies of such solicitations, and any responses thereto.
  2. A list of the certified MWBEs appearing in the Empire State Development (“ESD”) MWBE directory that were solicited for this Contract. Provide proof of dates or copies of the solicitations and copies of the responses made by the certified MWBEs. Describe specific reasons that responding certified MWBEs were not selected.
  3. Descriptions of the Contract documents/plans/specifications made available to certified MWBEs by the Contractor when soliciting their participation and steps taken to structure the scope of work for the purpose of subcontracting with, or obtaining supplies from, certified MWBEs.
  4. A description of the negotiations between the Contractor and certified MWBEs for the purposes of complying with the MWBE goals of this Contract.
  5. Dates of any pre-bid, pre-award, or other meetings attended by Contractor, if any, scheduled by OGS with certified MWBEs whom OGS determined were capable of fulfilling the MWBE goals set in the Contract.

6. Other information deemed relevant to the request.

**V. Fraud**

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

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

**3.48 Participation Opportunities For New York State Certified Service-Disabled Veteran Owned Businesses**

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

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

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

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

ALL FORMS ARE AVAILABLE AT: <https://ogs.ny.gov/veterans>

**3.49 Overlapping Contract Products**

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

**3.50 "OGS or Less" Guidelines**

Purchases of the Products included in the Solicitation and resulting Contract are subject to the "OGS or Less" provisions of State Finance Law § 163(3)(a)(v). This means that State Agencies can purchase Products from sources other than the Contractor provided that such Products are substantially similar in form, function or utility to the Products herein and are (1) lower in price and/or (2) available under terms which are more economically efficient to the State Agency (e.g. delivery terms, warranty terms, etc.).

Agencies are reminded that they shall provide the State Contractor an opportunity to match the non-Contract savings at least two business days prior to purchase. In addition, purchases made under "OGS or Less" flexibility shall meet all requirements of law including, but not limited to, advertising in the New York State Contract Reporter, prior approval of the Office of the State Comptroller and competitive bidding of requirements exceeding the discretionary threshold. State Agencies should refer to Procurement Council Guidelines for additional information.

**3.51 NYS Vendor Responsibility**

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

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

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

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

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

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

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

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

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

### **3.53 Procurement Instructions for Authorized Users**

1. This Contract has been issued under a multiple award structure. Authorized Users should procure products and services by requesting a quote from all eligible Contractors detailing the products and services required based on the specifications and requirements of the Authorized User. The Authorized User has the discretion to allow the Contractor additional time to respond to its request for a quote. Contractors are not required to submit a response to a request from an Authorized User but should inform the Authorized User that they are not submitting a quote and provide the reason.

2. Before proceeding with their purchase, Authorized Users shall check the list of Preferred Source offerings and are reminded that they shall comply with State Finance Law, particularly §162, regarding commodities/services provided by Preferred Source suppliers (if applicable).
3. Pursuant to State Finance Law §163(10)l, at the time of purchase, Authorized Users shall base their selection among multiple Contracts upon which is the most practical and economical alternative that is in the best interests of the State.
4. Authorized User should work with the selected Contractor on an implementation plan in accordance with Section 3.18, *Implementation Plan*.
5. The awarded Contractor shall not provide any billable services under the Contract to Authorized Users unless the Authorized User has received prior approval from the EVTA at OGS. Entities seeking to implement Payment Processing Services shall obtain approval from OGS by using Attachment 3 – Program Plan Application. All State agencies and Non-State agencies are required to submit a Program Application form for each new payment program they wish to implement. Additionally, the Program Plan Application form will require the NYS Division of Budget's approval for State Agency usage. Non-State agencies are required to receive written approval of the Program Plan Application from OGS. Any subsequent use of the Contract for all Authorized Users shall be approved in accordance with the guidelines issued by OGS, and by utilizing the Contractor's Work Order form.
6. Contractor shall disclose any proposed forms, "click through", "shrink wrap" or other pass-through or licensing/subscription terms and conditions or other order information that Contractor will attach to orders or require to be completed with Authorized User purchases. Documents which contain additional terms or conditions shall receive pre-approval by the Authorized User prior to ordering Products and services. Authorized User and Contractor may agree to include additional terms and conditions subject to the requirements and limitations of Section 3.7, *Appendix B Amendments*.
7. As a condition precedent to the use of the Contract by an Authorized User, the Authorized User shall agree to the following requirements:  
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 cards online/offline Debit Cards, ACH payment services (e.g., eCheck, ACH debit, ACH credit), and other future forms of electronic payment processing services 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, bank, Payment Processor, 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.

### **3.55 Periodic Recruitment**

In accordance with the RFP, this Contract allows for periodic recruitment of additional Contractors during the term of the Contract. Recruitment periods are optional at the discretion of the State. Any additional recruitment periods will be advertised in the NYS Contract Reporter. Bids received during any periodic recruitment shall be evaluated under substantially the same terms and conditions as the original Bids. Bidders shall also be required to submit necessary documentation for any additional applicable statutory requirements in effect at the time of the new RFP.

Once awarded a Contract, a Contractor may not resubmit a Bid for future consideration for Payment Processing Services covered by the scope of the awarded Contract. In addition, if a Bid is deemed to be non-responsive during the initial RFP or any recruitment period, a bidder cannot reapply for a future Contract until the next recruitment period.

## **4. GENERAL PROVISIONS**

### **4.1 Notices**

All notices, demands, designations, certificates, requests, offers, consents, approvals and other instruments given pursuant to this Contract shall be in writing and shall be validly given when mailed by registered or certified mail, or hand delivered, (i) if to the State, addressed to the State at its address set forth below, and (ii) if to Contractor, addressed to Contract Administrator at the address set forth below. The parties may, from time to time, specify any address in the United States as its address for purpose of notices under this Contract by giving fifteen (15) days written notice to the other party. The Parties agree to mutually designate individuals as their respective representatives for purposes of this Contract. Contact information for the designated individuals will be set forth on the Contract Award Notification (CAN) and on the Contractor Information page for this Contract, which will be posted on the OGS website. 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 any Authorized User that is associated with the subject of the notice. Written notice of any alleged breach by one party to the other shall provide specific facts, circumstances and grounds upon which the breach is being declared.

### **4.2 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.

### **4.3 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.

### **4.4 Counterparts**

This Contract 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 Contract. Any signature page of any such counterpart may be attached or appended to any counterpart to complete a fully executed counterpart of this Contract and shall bind such party.

### **4.5 Entire Agreement**

This Contract and the referenced Appendices and Attachments constitute the entire agreement between the parties hereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and the Contract shall not be changed, modified or altered in any manner except by an instrument in writing executed by the State and the Contractor, with all necessary approvals. Authorized Users shall not have the authority to modify the terms of the Contract, except as to better terms and pricing for a particular procurement than those set forth herein. In accordance with the terms set forth in Appendix B, Section 26, *Modification of Contract Terms*, as revised herein, and Section 30, *Purchase Orders*, as revised herein, no alteration or modification shall be made by unilaterally including terms or conditions on a Purchase Order, order form or other document which seek to vary the terms of this Contract or impose new duties or obligations on the Contractor or Authorized User, and no such terms shall have any force and effect.