



STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES

CENTRALIZED CONTRACT FOR THE ACQUISITION OF NETWORKING HARDWARE AND SOFTWARE

New York State Contract #

Fortinet, Inc.
920 Stewart Drive
Sunnyvale, CA 94085

THIS CONTRACT for the acquisition of networking hardware and software and related services (hereinafter "Product") is made pursuant to authorities granted under New York State Finance Law, § 163, 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") whose principal place of business is the 41st Floor, Corning Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242, and _____ (hereinafter "Contractor"), with its principal place of business at _____.

1. CONTRACT SCOPE/TERM

This document (hereinafter "Contract") sets forth the terms and conditions governing the acquisition of networking hardware and software, including installation, configuration, extended warranties, maintenance and other incidental services (including, but not limited to, consulting [analysis and design] and training). Terms used in this document shall have the meanings set forth in Appendix B-1. Amendments or modifications to this Contract may only be made with mutual written agreement of the parties with the approval of the State Comptroller.

The term of this Master Contract shall be five (5) years commencing on the date of approval by the New York State Comptroller effective upon mailing by OGS (see Appendix B-1, Clause 38). The Contract may be extended for up to two additional one year periods, or until a new contract is approved by the Office of the State Comptroller, whichever is sooner. Starting with the third anniversary of the contract term, either party shall have the option to terminate this contract upon thirty (30) days notice prior to the Contract anniversary date. CANCELLATION (Item 13 Cancellation Clause) clause remains in full force and application. Upon termination of the Contract, all rights and obligations set forth herein shall survive in accordance with their terms as to procurements made or individual licenses granted to Authorized Users prior to such termination.

The maintenance Contract (i.e. those terms of the Contract issued pursuant to this document related to maintenance) will be effective for an additional period of three years, continuing upon expiration of the Contract for the Product purchased including renewal periods and includes preventive maintenance and remedial maintenance as well as moves, modification of equipment and software upgrades required to ensure the existing Product can function effectively within the Authorized User environment. The maintenance Contract does not include the purchase of new Product. This

Contract can also be used to maintain network Products of the same brand including those purchased and installed from other procurement efforts. This Contract is available for use by all Authorized Users (See: Appendix B-1, Clause 6 (Definitions), and Clause 39 (Participation in Centralized Contracts). Contractor agrees to extend the pricing, terms and conditions offered under this Contract to all entities authorized under previous laws to use centralized state contracts. Contractor further agrees to extend this Contract upon the joint approval of the Contractor and the Commissioner for joint purchasing by any department, agency or instrumentality of the United States government and/or any state including political subdivisions thereof (“other authorized entities”). In the event that this Contract is so extended, such other authorized entities shall be solely responsible for liability and performance under the Contract, and Contractor agrees to hold them solely responsible for such liability and performance.

2. MERGER OF APPENDICES/CONFLICT OF CLAUSES

This Contract shall incorporate the following appendices as if set forth herein at length. Only documents expressly enumerated below shall be deemed a part of this Contract, and references contained in those documents to additional Contractor documents not enumerated below shall be of no force and effect. Conflicts between these documents shall be resolved in the following descending order of precedence, which supercedes the order of precedence stated in Appendix B-1.

1. Appendix A Standard Clauses for NYS Contracts
2. Base Contract (This Document)
3. Appendix B-1 General Specifications (Technology Products and Services)
4. Appendix C NYS Net Price Schedule (Product Offerings and Fees for Installation, Configuration, Support & Maintenance)
5. Appendix D Consulting and Training Services & Fees (Description of Services, Course Offerings and Fees)
6. Appendix E To Be Provided By Contractor
7. Appendix F Manufacturer & Value Added Reseller/Distributor Information
8. Appendix G Contractor’s Year 2000 Warranty Compliance Statement
9. Appendix H OGS Procedures for Updating Contractor Price or Product Listings
10. Appendix I Contractor's Requirements under Executive Law, Article 15-A

3. APPENDIX B-1 - CLARIFICATIONS, MODIFICATIONS & DELETIONS

Appendix B-1 (General Specifications for Procurement Contracts) is modified for this Contract as follows:

DELETIONS/CLARIFICATIONS: The following clauses are deleted in their entirety:

7. International Bidding
8. Bid Opening
9. Bid Submission
10. Facsimile Submissions
11. Authentication of Facsimile Bids
12. Late Bids
13. Bid Contents

14. Extraneous Terms
18. Expenses Prior to Awards
20. Product References
22. Products Manufactured In Public Institutions
23. Pricing - a and c
25. Site Inspection
27. Samples-a
28. Bid Evaluation
29. Conditional Bid
30. Clarification/Revisions
31. Prompt Payment Discounts
32. Equivalent or Identical bids
33. Performance Qualifications
34. Disqualification for Past Performance
35. Quality Changes Prior To Award
36. Release of Bid Evaluation Materials
37. Timeframe for Offers
82. Source Code Escrow for Licensed Product

The following are Clarifications to Appendix B-1:

21. RECYCLED, REMANUFACTURED OR RECOVERED MATERIALS Upon the conditions specified in the bid specifications and in accordance with the laws of the State of New York, contractors are encouraged to use recycled, remanufactured or recovered materials in the manufacture of Products and packaging to the maximum extent practicable without jeopardizing the performance or intended use of the product or packaging unless such use is precluded due to health, welfare, safety requirements or in Bid Specifications. Where such use is not practical, suitable, or permitted by Bid Specifications Contractors should deliver new materials in accordance with the warranties set forth in below.

Refurbished or remanufactured components or items, [which are required to be restored to the original performance standards and functions, meeting all requirements of this document] may be accepted at the discretion of the Commissioner, or upon the conditions set forth in the Bid Specifications.

Items with recycled, recovered, refurbished, or remanufactured content must be identified in the bid or will be deemed new products.

59. TERMINATION

Add to paragraph a. For Cause:

- If the dollar volume is less than TWO HUNDRED FIFTY THOUSAND DOLLARS (\$250,000.00) per fiscal year, for two consecutive fiscal years, the contract may be terminated for cause. For purposes of this paragraph, fiscal year is defined as the first full four quarters reported after award in accordance with Paragraph 12 (Reporting / Monitoring

Contract Performance), and each of the same four quarterly periods thereafter until contract termination. Dollar volume means the same as that set out in Paragraph 12.

Add paragraph c. For Violation of Executive Order Number 127:

The State reserves the right to terminate this contract in the event it is found that the certification filed by the Contractor in accordance with New York State Executive Order Number 127, signed by Governor Pataki on June 16, 2003, was intentionally false or intentionally incomplete. Upon such finding, the State may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms in the contract.

72. SOFTWARE LICENSE GRANT - Is deleted and replaced in its entirety by the following clause.

Software offered by Contractor under this contract shall be licensed in accordance with the contractor's standard license and warranty terms which terms shall be furnished to Authorized User at time of purchase. Warranty coverage for software must start at the same time as the Product warranty period set forth in this Contract, Appendix B-1, Clause 71. Any costs associated with this requirement shall be borne by the Contractor.

75. OWNERSHIP/TITLE TO PROJECT DELIVERABLES

This contract is intended for the acquisition of "Existing Products" not "Custom Products" as those terms are defined in Appendix B-1 paragraph 75. Appendix B-1 paragraph 75(b)(ii) and 75(d) are deleted.

4. PRODUCT AND SERVICE OFFERINGS

The Products and services available under this Contract are set forth herein and specified in Appendices C and D which may be amended during the contract term to incorporate new Product or service offerings, price revisions or deleted items. This Contract is limited to sale, installation and maintenance of Product (see also 4.2 Service Offerings). Leasing is not permitted at this time. The Commissioner reserves the right to amend the Contract at any time to incorporate lease offerings. Offering updates should be submitted under the Contract as soon as possible after they are announced by Contractor in accordance with the terms of Appendix H.

GENERAL CONSIDERATIONS

A. No drug use of any type, nor consumption of alcoholic beverages by the Contractor or its personnel shall be permitted on the premises.

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

C. It is the Contractor's responsibility to maintain the equipment and materials provided for the work consistent with applicable safety and health codes.

D. The Office of General Services' interpretation of specifications shall be final and binding upon the Contractor.

E. The Office of General Services will make no allowance or concession to the Contractor for any alleged misunderstanding or deception because of quantity, quality, character, location, or other conditions.

4.1 PRODUCT

A. **Manufacturer's Product Line:** All networking hardware and software Products, peripherals and accessories offered by the Contractor in its US Commercial Price List or GSA Supply Schedule may be included under this contract. Appendix C, which lists Manufacturer's Product and NYS Net pricing, includes the Product, standard warranty, instruction manuals/documentation, shipping costs and delivery FOB destination inside storeroom door.

B. **Third Party Products:** Third party Products which are available under Contractor's standard commercial price list may be offered for sale under this contract. Contractor is prohibited from adding third party Products under this contract unless the Product is incorporated in the Contractor's commercial price list. Appendix C, which lists Manufacturer's Product and NYS Net pricing, includes the Product, standard warranty, instruction manuals/ documentation, shipping costs and delivery FOB destination inside storeroom door.

The State has and will continue to establish alternative contracts for technology Product lines, including major brands of microprocessors, client and server technology and other ancillary networking options (i.e. monitors, disk drives, software, etc.).

To the extent that the Contractor's price list includes components and/or services which overlap other State contracts, the Office of General Services reserves the right, in its sole judgment: 1) to exclude or delete overlapping items from this Contract, or 2) to include such items under this Contract if the Contractor offers such items at or below the alternative contract price. Use of this contract may be restricted at any time during the contract term by the Commissioner of General Services, in his/her sole discretion, to permit the acquisition of third party Products (including peripherals and accessories) only in conjunction with an acquisition of hardware, not separately.

C. **Instruction Manuals/Software & Documentation:** Product shall be furnished, at no extra charge, with one complete set of standard operator instruction manuals and documentation (hard copy or CD Rom) as would normally accompany such Product(s). However, in some instances, Authorized Users may wish to reduce their volume of paper when ordering multiple units, and should be able, if possible, to opt not to receive extra copies of documentation. This should be worked out between the Contractor and the Authorized User prior to order.

In addition to the software installed on the unit being delivered, software media provided with each unit must be in a format usable by the unit, without requiring any type of conversion (e.g. if unit has a CD ROM drive, software must be provided on CD ROM). Software is to be provided for: 1) hardware that requires software for setup and/or to take full advantage of all features of the Product such as, tape drives, and CD-ROM drives, and 2) operating system software purchased with the networking hardware such as Windows and DOS.

When Product is purchased, the Contractor must supply the Authorized User with all technical or other manuals, documents, plans, specifications or other materials necessary for the equipment's operation, including any additions or peripheral equipment for which there is no charge to the Authorized User. If these documents are subject to a separate cost and are not supplied at no charge with the Product, the Contractor must so advise the Authorized User. Contractor shall also ensure that the part number and rates associated with the documentation are available to the Authorized User and included in the published contract rates. Should such materials be updated or replaced, the Authorized User will be advised and, if ordered, provided with such materials within ten (10) days of their issuance. Authorized Users may purchase additional sets of technical manuals, if needed.

Contractor may also provide an additional copy of software documentation in electronic or CD-ROM format from which Authorized User shall be entitled to make copies to the extent necessary to fully enjoy the rights granted under this contract.

4.1.1 SPECIFICATIONS

During the term of the contract, the OGS may request Product specifications for particular items that have been included by the Contractor in the State Net price list. These specifications will be for the sole use of OGS and will be provided by the Contractor at no cost. Product specifications are not to be provided with the bid unless requested by OGS.

Section 4.1.1A

A. All Products Contractor provides will conform to Contractor's (Manufacturer's) published specifications and testing standards for such Products. All Products delivered shall be the then current revision of the Products ordered, and shall be at the price ordered by the Authorized User at the time of order; provided however, in the event that a newer revision of the product is made available by Contractor subsequent to Authorized User placing the order but prior to shipment, the Authorized User shall have the option of either receiving the newer revision at the Contract price established for such newer revision, or receiving the product at the revision in place at the time the product was ordered at the price offered under the Contract at the time of order, or canceling the order without penalty.

B. The Products must be commercially released products and available for customer purchase through the contractor's normal marketing channels. Experimental or unannounced equipment will not be accepted.

C. Where accessories, adjuncts or peripheral equipment are to be supplied, the Authorized User has the responsibility of providing the Contractor with sufficient specifications regarding installed, existing equipment or software to ensure that the Contractor can determine that the additions are compatible with the rest of the equipment.

D. As an option, in addition to new Product (reference Appendix B-1, item 71d.) OGS will accept and encourage Bidders to offer refurbished or remanufactured Product rates in the manufacturer's price list. Refer to Appendix B-1, item 21.

Use of Recycled Material:

New York State as a member of the council of Great Lakes Governors, supports and encourages vendors to use recycled or recovered materials in the manufacture of products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the product unless such use is precluded due to health and welfare or safety requirements or product specifications contained herein. See Recycled, Remanufactured or Recovered Materials and Appendix B-1 OGS General Specifications.

4.2 SERVICE OFFERINGS:

4.2.1 DESCRIPTION OF SERVICES

Services, including consulting, training, configuration, installation and maintenance services, may be acquired directly from Contractor under this contract at the rates specified in Appendices C and D. Unless otherwise noted in Appendix C or D, fees for these services are not included in the Product price. (See exception, below, under 3) Configuration Services.)

Consulting Services and Training under Appendix D which exceed twenty (20%) percent of the NYS Net Price for the total order price for Appendix C Product/Services cannot be acquired under this contract vehicle, but may be procured competitively using the OGS Consulting, Systems Integration and Training mini-bid process or other procurement process selected by the Authorized User. Consulting services cannot be obtained under this contract independent of a Product acquisition, and may be obtained only after an analysis selecting an appropriate vendor in accordance with the OGS Procurement Guidelines established for this contract.

4.2.2 CONSULTING SERVICES

Consulting Services may include the qualified, professional ability of the Contractor to offer analysis, recommendations, or design expertise to the Authorized User relating to networking hardware and software. Said expertise must include a current knowledge of the technology marketplace, related networking issues and trends, and may include the ability to:

- A. Analyze existing technological environment, including hardware, software, and live operations and transaction volumes.
- B. Design and develop new systems, add-ons or modifications to existing networking systems, including single platform computer systems and distributed systems.
- C. Develop functional and/or design specifications, technical writing and documentation.

Note: Any Contractor who assists an Authorized User with the preparation of specifications that will become a part of any solicitation document used by the Authorized User to solicit "best and final" offers among contractors, may not be eligible to bid on that project pursuant to NY State Finance Law § 163-a. This generally prohibits any vendor who prepares and furnishes a specification to an Authorized User (by means of consulting services under any contract or under the OGS Consulting, Systems Integration & Training Contract) from subsequently bidding on the acquisition as a prime or subcontractor.

4.2.3 TRAINING SERVICES

"*Training Services*" may include Contractor's ability to furnish pre-packaged training Products, and/or develop or customize training programs as requested, including Live Training, Computer

Based/Multi-Media Training which encompasses Internet-Delivered Training, and/or Video Based Training. Computer Based and Video Based Training are training delivery methods that provide alternatives and/or supplements to instructor-led classroom training. Both allow the students to advance at their own speed and to review as needed.

4.2.4 CONFIGURATION SERVICES

Configuration Services are an option and may include, but are not limited to, the following:

- A. System Set Up - Set time and date
- B. Board-Level Enhancements - Memory upgrades; I/O Boards; etc.
- C. System Integration(configure VLANs, input routing information)
- D. Customized Configurations
- E. Hardware And Software Management (including hardware and software asset tracking and tagging if requested)

Contractor may provide configuration services, including installation of third party software or ancillary options, in order that Authorized Users shall be able to take delivery of completed systems. Unless Contractor separately enumerates a fee for basic configuration services, it shall be presumed that the pricing set forth in Appendix C includes basic software configuration for software which is acquired from Contractor under this Contract. Where third party Product is not acquired under the Contract but from alternative contract vehicles, Contractor may charge Authorized Users, in addition to the hardware price, the additional configuration fee(s) as set forth in Appendix D for configuration of non-contract third party software. Contractor shall be required to coordinate with other contract holders for delivery of such Products and shall comply with all proprietary or copyright restrictions while such Products are in their possession.

4.2.5 MAINTENANCE GENERAL PROVISIONS

A. The Contractor shall advise Authorized Users of the maintenance options which may be ordered with the Product and the costs associated with each option. Maintenance may be ordered separately at any time during the contract period and/or license term. Authorized Users will have the option of selecting a monthly/annual maintenance contract or maintenance on a time and materials basis. The Purchase Order, or equivalent, shall identify which option has been selected. The initial maintenance term and any renewal(s) thereof may survive expiration of the contract term under the separate maintenance contract.

B. Warranty will become effective subsequent to Acceptance of the Product.

C. Where Authorized User elects support and maintenance services, Contractor shall maintain the Product so as to provide Authorized User with the ability to utilize the Product without interruption, delay or significant functional downtime to the Authorized User's ongoing business operations during the maintenance term in accordance with the terms and conditions of the applicable service descriptions.

D. Maintenance shall be provided upon expiration of the warranty or under circumstances not covered by said warranty. All maintenance options shall be included in the NYS Net Price Sheets in Appendix C. Complete details of each type of maintenance option shall be provided in Appendix C.

E. Unless the agreement between the Authorized User and the Contractor specifies otherwise and so long as the malfunction is attributable to Contractor's Product, Contractor guarantees that within forty-eight (48) continuous hours of its response for any maintenance as provided above that repairs will be successfully completed and that system service will be fully restored.

F. If at any time during the warranty period or any subsequent maintenance period, service is performed on the Product by anyone other than the Contractor, without the Contractor's consent, or if the Product is removed from the premises without the Contractor's supervision and consent, then at the option of the Contractor, the warranty agreement or maintenance contract may become null and void for those items of Product affected by the prohibitions. The Contractor shall notify the OGS Procurement Services Group of any such cancellation. OGS reserves the right to review the validity of such cancellation with the Contractor and Authorized User and take appropriate action.

G. The Contractor shall not be obligated to repair damage caused by fire or other casualty (except that caused by the Contractor), willful or grossly negligent operation or handling of the Product by the Authorized User's employees. Properly trained Authorized Users personnel may make software changes to Authorized Users' configuration without the Contractor's prior written consent. Should the Contractor's consent be required, it shall not be unreasonably withheld. The Authorized User shall be responsible for updating of all records associated with the modifications.

H. If preventive maintenance (PM) is recommended by the manufacturer, (PM) shall be performed during the Authorized User's working hours at a time acceptable to the Authorized User.

I. Authorized Users will pay monthly in arrears for any services utilized for maintenance, service, and parts in accordance with the Contractor's established rates. Prepaid Annual Maintenance will be available only with an additional 5% or greater discount. Rates are to be adjusted monthly in arrears by Contractor for increases and decreases in the quantity of the Product.

J. Authorized Users shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon 30 days written notice to Contractor prior to the end of the term.

K. Nothing in this Contract shall be construed to prevent Authorized Users from acquiring peripheral equipment from a Third Party. In the event Authorized Users acquire such equipment, Contractor shall be obligated to cooperate with the Third Party, as necessary, in the performance of each party's maintenance obligations.

4.2.6 REMOTE ADMINISTRATION/MAINTENANCE

Appendix E must include a description of any Remote Administration and/or Maintenance Service arrangements if provided with the Product. The description must include the frequency of the

interrogations and the resulting data. The cost for any equipment required to perform this function and the cost of the service, must be borne by the Contractor, as part of the cost of maintenance. To ensure switch security, modems installed for remote maintenance must be one or two number dial-back modems.

4.2.7 MAINTENANCE RESPONSIBILITY

Malfunctions which cannot be immediately diagnosed and pinpointed to a certain piece of equipment or service will require the participation of the Contractor until the responsibility for the problem has been unequivocally established.

In no instance shall the failure to resolve the issue of responsibility relieve any Contractor of their obligation to restore Product operation. The Authorized User shall have the right to adjust such matters after the fact and validate charges and/or maintenance credits applicable to the provisions of the maintenance agreement. As a part of maintenance responsibilities, the Contractor shall represent the Authorized User with other involved equipment and service providers in order to identify and correct the malfunction. The specific maintenance responsibilities are described in the maintenance agreement and must include the delineation of responsibility for any charges received from other involved equipment and service providers as a result of the use of Contractor supplied Products.

4.2.8 MAINTENANCE/SERVICE SHEETS

The Contractor shall furnish the Authorized User with a maintenance service sheet for all maintenance requests. The maintenance service sheet shall include, as a minimum, the following data for each request for service:

- Date and time notified
- Date and time of arrival
- Description of malfunction reported
- Diagnosis of failure and work performed
- Date and time failure was corrected
- Charges for the service, if applicable
- Name of person performing the service

The maintenance service report must be supplied upon completion of maintenance whenever it is performed on the system.

4.2.9 FAILURE TO COMPLY

The Contractor must maintain the installed equipment at a level equal to the terms and conditions as specified in the documentation established by the Contractor for the maintenance option. If the Contractor fails to do so, the Authorized User reserves the right to terminate the maintenance contract without any penalty whatsoever after a thirty day written notice to said Contractor.

4.3.0 PERFORMANCE CREDITS

If the Contractor fails to maintain the Product within the times specified by the maintenance agreements between the Contractor and the Authorized User, it is understood and the Contractor hereby agrees that the amount of 1/30th of the monthly maintenance value, up to the monthly value of the maintenance service, shall be deducted from the monies due the Contractor, for maintenance,

for each intervening calendar day any work remains incomplete, as a performance credit. The Contractor shall not be liable if failure to perform arises out of causes beyond its control and without the fault or negligence of the Contractor (Acts of God, the public enemy, fires, floods, strikes, freight embargoes, regulated telephone company delays, etc.). Authorized Users have the right to sign a maintenance agreement that increases the Performance Credit as stated, but the Performance Credit can't be eliminated through negotiation.

5. CONTRACT ADMINISTRATION

A. **Contract Administrator** Contractor must provide a dedicated Contract Administrator to support the updating and management of the Contract on a timely basis. Information regarding the Administrator shall be set forth in Appendix F.

B. **“Toll Free” Number** Contractor must provide a toll free telephone number for order tracking/delivery schedule information, Contract administration issues, as well as other questions by Authorized Users related to the day to day operation and use of the Contract including Product support. The toll free number must be available Monday through Friday on State business days between the hours of 8 a.m. to 5 p.m., Eastern Time. The number shall be set forth in Appendix F.

Contractor may additionally offer an online e-mail or Internet site for order tracking/delivery schedule information for those customers who have electronic access.

C. **Sales & Support Staff** Contractor must provide service, sales and support staff to service Authorized Users geographically located at multiple purchasing locations throughout New York State. Contractor shall insure that sufficient resources are available directly, or through Alternate Channel Participation in accordance with Section 8, to insure maximum service capability throughout the State. OGS reserves the right to require Contractor to add additional Resellers to this Contract to insure that Authorized Users receive adequate coverage and service.

6. PRODUCT ORDERING

NOTE: Any additional or extraneous terms placed on the order shall be subject to the restrictions set forth in Appendix B-1, Clause 40. Orders shall be placed in accordance with Appendix B-1, Clause 44. Orders which reference the New York State Contract number shall be deemed to be placed under and to incorporate the terms and conditions of this Contract by reference. There is no standard pre-approved Order Form for this contract.

Written or electronic orders shall separately itemize requests for hardware, software, documentation and services. Products ordered shall be deemed to reference Contractor's most recently released Product at time of delivery, unless an earlier version is specifically requested in writing by Authorized User and Contractor is willing to provide such Product. The Purchase Order shall indicate the person authorized to take delivery of the Product. Authorized Users shall confirm pricing, supported hardware platforms availability with Contractor prior to placement of orders. All pricing calculations shall be made in accordance with, or better than, the terms of the Contract.

Orders placed under this Contract will additionally be governed by purchasing procedures included in the “Contract Award Notification”.

7. PRODUCT SHIPPING/DELIVERY/ACCEPTANCE

This section and Appendix B-1 shall govern delivery and acceptance of orders placed under this Contract, in particular Clauses 45 through 48, 51, and Clause 74. Product orders may be canceled by a notice in writing at any time prior to delivery of the Product or services without claim for lost profit or other damages

7.1 DELIVERY

The following is substituted for the text of Item 45, Appendix B-1.

A. Delivery must be made as ordered to the address specified on the Purchase Order and in accordance with the terms of the Contract. Unless otherwise specified in the Bid Specifications, delivery shall be made (i) within thirty calendar days after receipt of a Purchase Order by the Contractor or (ii) delivery, installation and programming of the Product shall be completed according to a schedule expressed in number of calendar days which is mutually acceptable to both parties and set forth in the Purchase Order or otherwise in writing accepted by both parties. The decision of the Commissioner as to compliance with delivery terms shall be final. The burden of proof for delay in receipt of Purchase Order shall rest with the Contractor. In all instances of a potential or actual delay in delivery, the Contractor shall immediately notify the Commissioner and the Authorized User, and confirm in writing the explanation of the delay, and take appropriate action to avoid any subsequent late deliveries. Any extension of the time for delivery must be requested in writing by the Contractor and approved in writing by the Commissioner or the Authorized User. Failure to meet such time schedule may be grounds for cancellation of the order or, in the Commissioner's discretion, the Contract.

B. If the Contractor fails to timely deliver or install the Product within thirty calendar days or in accordance with the mutually agreed upon schedule between the Authorized User and the Contractor, it is understood and the Contractor hereby agrees that the amount of one half of one (0.5) percent of the purchase order value per day, up to the value of the purchase order for Product and service, shall be deducted from the monies due the Contractor for each intervening calendar day beyond the scheduled delivery date, as a performance credit. The Authorized User may waive all or part of the performance credit in its discretion. The Contractor shall not be liable if failure to perform arises out of causes beyond its control and without the fault or negligence of the Contractor (Acts of God, the public enemy, fires, floods, strikes, freight embargoes, regulated telephone company delays, etc.).

7.2 EQUIPMENT AND/OR SOFTWARE - DROPSHIP ONLY

In the event that an Authorized User requests the purchase of Product and does not require installation by the Contractor, the STANDARDS OF PERFORMANCE/ACCEPTANCE set forth in Section 7.3 and Item 74, Appendix B-1 apply unless the Authorized User and Contractor mutually agree to a shorter or longer acceptance period. The Contractor delivers such Product under manufacturer's warranty on an FOB destination basis and issues an invoice to the Authorized User. Upon receipt of the Product, the Authorized User may, at its sole discretion, authorize payment immediately or after the acceptance period.

7.3 STANDARD OF PERFORMANCE/ACCEPTANCE

The following is substituted for the text of Item 74, Appendix B-1.

A. Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User(s) shall have thirty calendar days from the date of delivery to accept Product unless the Contractor is responsible for installation, in which case the thirty calendar day period shall run from completion of installation. Failure to provide notice of acceptance or rejection by the end of the period provided for under this clause constitutes acceptance by the Authorized User(s) as of the expiration of that period. The License Term shall be extended by the time periods allowed for testing and acceptance.

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

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

D. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to fees paid to Contractor, if any, or any liability for costs incurred at the direction or recommendation of Contractor.

E. Notwithstanding the above, a minimum standard of performance and/or acceptance period shall be applicable to all purchases of Product and Service hereunder. Authorized Users will be encouraged to expand the following minimum standard of performance and acceptance period based on their specific requirements. Changes to the minimum standard of performance and/or acceptance period must be set out in the purchase order or otherwise in writing acknowledged by the parties and accepted by the Contractor. The standard of performance requires that, upon completion of the installation, all Products furnished by the Contractor will be subject to a minimum one (1) full business day operational test to determine the reliability of the Product. After the operational test, the Contractor must certify in writing to the Authorized User that the Product is installed and ready for performance testing. The notification shall include model and serial number nomenclature of all Products that are installed and ready for testing.

F. At a minimum, performance testing shall include full functional use of the Product (one hundred (100%) percent of Section 4.1.1 Specifications) throughout the acceptance period as mutually agreed to by the parties or by default for the thirty day acceptance period specified above in subdivision (A) where no different acceptance period is agreed to by the parties. In the purchase order or other writing acknowledged by the parties, the Authorized User and the Contractor may choose to rely on the one full business day operational test, waive the acceptance period, and upon receipt and operational testing of the Product, the Authorized User may authorize payment. Otherwise, the Authorized User shall authorize payment upon successful completion of the acceptance period.

7.4 PERFORMANCE PERIOD FAILURE

A. In the event that the Product (including any special or optional features ordered and installed), software or programming has not achieved the standard of performance based upon the operational test and the applicable acceptance period, the Contractor will be deemed to have failed the acceptance test. In such case:

1. One half of one (0.5) percent of the purchase order value per day, up to the value of the purchase order for Product and service, shall be deducted from the monies due the Contractor for each intervening calendar day any work remains unacceptable, as a performance credit. The Authorized User may waive all or part of the performance credit in its discretion. The Contractor shall not be liable if failure to perform arises out of causes beyond its control and without the fault or negligence of the Contractor (Acts of God, the public enemy, fires, floods, strikes, freight embargoes, regulated telephone company delays, etc.); And,

2. The Authorized User may terminate the test and require the Contractor to provide a replacement for each item of equipment or the software, which failed to achieve the required standard of performance, at no cost to the Authorized User, and allow for new test and acceptance periods. Or,

3. Find the Contractor in default. If the Contractor is found in default, the Contractor shall remove the system/software or equipment at no cost to the Authorized User. Allowance may be made only for delays that are beyond the control of the Contractor.

7.5 REPLACEMENTS

A. If the Authorized User elects the option of acquiring replacement equipment and/or software, a new performance period will commence upon notification in writing to the Authorized User that the Contractor has installed all equipment and/or software subject to replacement. The notification shall contain, as a minimum, the model and serial number nomenclature of the new Product, cross-referenced to that of the Product replaced.

B. The Contractor shall bear the cost of transportation, installation, and delivery whenever Product is subject to replacement, unless the replacement was due to the fault or negligence of the Authorized User.

8. USE OF ALTERNATE CHANNEL PARTICIPATION (RE-SELLERS/ DISTRIBUTORS)

OGS agrees to permit Contractor to utilize approved, designated Resellers including Value Added Resellers (VARs) and/or distributors and dealers (“Reseller[s]”), to participate as alternate distribution sources for Contractor. Resellers may be added at any time during the Contract term at the discretion of the Contractor provided that they comply with all of the conditions of participation set forth in paragraph B, below, with no set minimum or maximum number of Resellers who may be used. Such participation is subject to the following conditions:

A. Designation of Reseller(s): Contractor shall specify whether orders must be placed directly with Contractor, or may be placed directly with designated Reseller(s). If Reseller(s) are designated to fulfill orders under this Contract, Contractor must provide OGS, in advance, with all necessary ordering, billing addresses and federal identification numbers in the format provided in Appendix F.

B. Conditions of Reseller(s) participation is subject to the following conditions:

(1) Reseller(s) must be approved in advance by OGS as a condition of eligibility.

(2) OGS reserves the right to rescind any such participation or request that Contractor name additional Resellers, in the best interests of the State, at the State’s sole discretion, at any time.

(3) Contractor shall have the right to qualify Reseller(s) and their participation as fulfillment agents under this Contract by Product line, contracting program (e.g. government/educational sales), geographic region, size/sales volume, technical training or other criteria (“qualifying criteria”), provided that:

i) such qualifying criteria is uniformly applied to all potential Resellers based upon Contractor’s established, neutrally applied commercial/governmental/ educational program criteria, and not to a particular procurement;

ii) all general categories of qualifying criteria must be disclosed by the Contractor to OGS, in advance, at the beginning of the Contract term;

iii) shall be compliant with State and Federal laws;

iv) those qualifying criteria met by the Reseller must be identified on the form provided in Appendix F at the time that Reseller approval is requested under this paragraph 8; and

v) immediate advance notice is provided to OGS in the event that a change in Reseller’s status occurs during the Contract term. Contractor shall not be required to add any Reseller(s) who do not meet Contractor’s qualifying criteria, as defined below, or where the addition of the Reseller(s) would violate any state or federal law or regulation.

All Resellers who have been approved in accordance with the foregoing paragraph shall be eligible to quote pricing for procurements under this contract which meet their qualifying criteria. Except as otherwise set forth in the qualifying criteria contained in Appendix F, Contractor warrants and represents that it shall not, directly or indirectly, by agreement, communication or any other means, otherwise restrict any Reseller's participation or ability to quote pricing for a project.

(4) Contractor's pricing in Appendices C and D constitutes a ceiling price which shall be the maximum price payable by Authorized Users under the Contract for Product or services. Resellers may not charge more than the ceiling rates set forth by Contractor in Appendices C and D, but may offer Authorized Users lower pricing than the ceiling pricing set forth therein.

(5) Where the proposed Resellers also holds an approved E-RATE contract as referenced in Clause #1 of this agreement, and the rate offered by Reseller under this Contract is lower than the rate offered under the E-RATE contract, Resellers must agree to extend and match the lower rates offered under this Contract to the E-RATE purchasers in order to be approved for participation under this contract.

(6) As a further condition of participation, where Resellers wish to maintain a web-site page for Products/Services to be offered under the NYS Contract, Contractor must furnish a link to Resellers home page from the Contractor's NYS Contract home page, and Resellers must meet the following requirements at all times during the contract term:

(a) Resellers may only list such Products and Services for which ceiling prices are listed on the Contractor's home page; and

(b) Resellers' pricing must be at or lower than the ceiling rates listed at Contractor's home page; and

(c) Resellers must individually meet and comply with the requirements of Clause 11, paragraphs A, C (such notice to be provided to both Contractor and OGS), D, E (first paragraph only), G and H.

C. Applicability of Contract Terms/Responsibility for Reporting & Performance: OGS shall execute a single Contract with the Contractor, and Resellers may only participate as a subcontractor or agent of the Contractor. Contractor shall be fully liable for Resellers' performance and compliance with all Contract terms and conditions.

Although OGS will not be entering into separately executed contractual agreements with the designated Resellers, Authorized Users may place orders with and issue payments directly to the Resellers in accordance with this Section 8. Product ordered directly from Resellers is subject to all terms and conditions of this Contract. Resellers may only offer those Products and Services approved by the State for sale under the Contract.

Product (including services) purchased through Resellers must be included and reported by Contractor in the required Quarterly Reports to OGS, and where applicable, in the Third Party Manufacturers reports required in accordance with the provisions of Section 12 (below). In addition

to inclusion of Resellers volume in the Contractor's quarterly reporting obligation to OGS, at the request of Authorized User, Resellers shall provide Authorized User with quarterly reports of the individual Authorized User's Contract activity with Reseller.

9. PAYMENTS/PRICING

Contractor must offer a ceiling rate for each Product or service type/category, which shall be set forth in Appendices C and D.

9.1 FOR PRODUCTS: The discounts offered for a specific Product category must be uniform for all Products within that category. Contractor may, however quote a different discount percentage for different Product categories. For example, Bridge discounts may have a different structure than Routers. However, all Bridges within a Product category must have the same discount.

9.2 FOR SERVICES: It is expected that, where services can be furnished by multiple sources (e.g. Contractor and/or Resellers), each source may offer different rates for the same service. Rates offered by each multiple source cannot exceed Contractor's ceiling rate for that type/category. The parties may, upon mutual agreement expressed in the Purchase Order, agree to more advantageous payment or financing schedules.

A. Payments - Shall be made in accordance with applicable prompt payment laws of the state and/or political subdivisions. Refer to Appendix B-1, Clauses 61-63.

B. NYS Discounted Price - Products or services offered under this Contract are offered at or below the ceiling price set forth in Appendices C & D in effect at the time of order placement. Appendix C pricing includes all applicable documentation, media, shipping and handling charges. (Hereinafter "NYS Discounted Price".)

Unless expressly set forth to the contrary in Appendix D, rates set forth for services shall be deemed inclusive of travel, meals and lodging, wherever applicable. Where travel, meals and lodging are specified in Appendix D over and above the quoted rates, reimbursement to Contractor for such costs shall be subject to the then-current ceiling rates specified by the New York State Comptroller for State employees classified as "management confidential", which terms and rates are subject to periodic revision.

C. GSA Benchmarked Pricing - Where the NYS Discounted Price is based upon Contractor's approved GSA Supply Schedule:

(1) The State is entitled to all associated discounts enumerated in the GSA Supply Schedule (including, but not limited to, discounts for additional sites or volume discounts), as well as any other pricing or discount terms as are expressly enumerated in this Master Agreement, when calculating the NYS Discounted Price; and

(2) The GSA pricing set forth in Appendices C and D incorporates an additional sum known as the "Industrial Funding Fee", currently set by the GSA Administrator at 1% as of January, 1999. This amount is included in the prices set forth in Appendices C and D but is returnable quarterly by the Contractor to GSA, making the net pricing offered by Contractor under GSA actually 1% lower than the total order price calculated in accordance with Appendices C and D. Therefore, the "NYS

Discounted Price” shall be calculated as set forth in this section, including all applicable discounts, and then further reduced by 1% to reflect the Industrial Funding Fee percentage.

(3) **Industrial Funding Fee** GSA pricing incorporates a sum referred to as the “GSA Industrial Funding Fee”. OGS reserves the right to require either that: the IFF is remitted directly to OGS, or the state contract prices be reduced, by an amount equivalent to the IFF. If the latter, the NYS Net Price shall be calculated by reducing the published GSA price, after the discounts, if any, set forth in paragraph (1), above, downward by the amount of the Industrial Funding Fee, currently set at 1%. Therefore, the “NYS Net Price” shall be calculated by multiplying 0.99 times the GSA price.

D. **Changes in Product Offerings/Pricing -**

(1) *Adding New Products or Services Within Existing Price Structure* Where future offerings of Products or service become commercially available during the Contract term and are commercially offered within the established pricing categories and discount structures set forth in Appendix C or D, the Contract may be amended to include such offerings in accordance with the “Auto Add” procedures set forth in Appendix H.

(2) *Adding New Products or Services Using Different Price/Discount Structure* Where future Products or service offerings become commercially available during the Contract term and are not commercially offered within the established pricing categories and discount structures set forth in Appendix C or D, the Contract may be amended to include such offerings in accordance with the “Regular Add” procedures set forth in Appendix H, which require the approval of OGS and the Office of the State Comptroller in advance of such Product being incorporated into the contract offerings.

(3) *Existing Products - Price Changes* For approved Product or Service offerings under the Contract, Contractor may change the pricing set forth under this Contract as follows:

a) Price Decreases shall take effect automatically during the contract term where:

i) *List Price/Reseller Cost/GSA Pricing, as Applicable, is Reduced.* Contractor lowers its pricing for Product and/or services to its customers, resellers, or GSA as applicable during the contract term. In such case the Contractor shall lower Contract pricing in accordance with the established pricing structure as outlined in Appendix C or D, as applicable; Or

ii) *Special Offers/Promotions.* See Appendix B-1, Clause 43. Contractor offers any customer generally during the term of the Contract other more advantageous special promotions or special discount pricing, in which case the maximum discount associated with such offer or promotion, if greater than the discount otherwise available under this Contract (“Contract discount”), shall, for transactions on the same terms or for the life of such special offer or promotion, be used in lieu of the Contract discount in the calculation of the NYS Price.

iii) *Special Offers/Promotions to Authorized Users Under/Outside of Contract.* Contractor may offer Authorized Users, under either the Contract or any other contracting vehicle, competitive pricing which is lower than the rates set forth herein at any time during the Contract term and such

lower rates shall not be applied as a global price reduction under the Contract pursuant to the foregoing paragraph (ii).

b) Price increases shall be effective as to orders placed after:

i) the date on which such increase becomes effective under the appropriate benchmark the GSA Schedule or under other appropriate benchmark, generally US Commercial Price List, Or

ii) thirty days after the date on which OGS and the NYS Comptroller have received and approved the amended pricing; whichever is later. In no event can a price increase be posted to the Contractor's Internet site until after the effective date.

Additionally, where the pricing submitted for services are not benchmarked to an approved GSA Supply Schedule, Contractor may request an increase in the pricing contained in Appendices C or D provided that Contractor certifies in writing that the price change for services applies to all U.S. customers using the same benchmark. Such adjustment shall not exceed the lesser of five (5%) percent or the percent increase in the latest copy of the "National Consumer Price Index for All Urban Consumers (CPI-U)", as published by the U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. 20212. Contractor has the sole responsibility to submit to OGS a service rate adjustment request thirty (30) days prior to the effective date of the price increase, providing a copy of the index and other supporting documentation necessary to support the request. In the event that this index ceases to be published, the referent index shall be as issued by the U.S. Department of Labor in its place. In no case shall the percentage increase result in a NYS Price which exceeds Contractor's commercial price list.

E. Trade-Ins - Authorized Users may trade-in equipment when making purchases from this Contract. Trade-in's must be negotiated between the Authorized User and the Contractor as there is no mandatory trade-in policy established for this contract. Contractor is prohibited from imposing any mandatory requirements or restrictions on Product disposal (e.g., prohibiting cross-brand trade-ins), other than generic environmental safety concerns. Users are obligated to actively seek current fair market value when trading equipment and must keep accurate records in the file verifying the process. For State Agencies, it may be necessary to provide this documentation to the Office of the State Comptroller.

10. DISTRIBUTION OF CONTRACTOR PRICE LIST

It shall be the Contractor's responsibility to distribute hard copies of the terms and conditions of the Contract, including price lists, to Authorized Users upon request. Contractor must also furnish OGS with additional copies of the price lists (paper copy or diskette, at OGS's discretion) in order that OGS can make them available to fulfill requests made pursuant to the New York State Freedom of Information Law.

11. INTERNET ACCESS TO CONTRACT & PRICING INFORMATION

It is the intention of the parties to facilitate access by Authorized Users to contract offering and pricing information primarily electronically via the Internet. To that end, OGS's web site shall host and update the Contract terms and conditions throughout the Contract term. The Contractor is required to host the complete Contract, ceiling pricing and Product offerings at Contractor's Internet

site, at Contractor's sole expense, including all subsequent changes in the Contract offerings (adds, deletes, price revisions) throughout the Contract term. Contractor may not password protect or otherwise restrict access to the site. This Contract, and Contractor's NYS Contract page, or pages required by this agreement, constitute public documents under the laws of the State of New York and Contractor cannot restrict access (e.g., through use of restrictive technology or passwords) to the contract terms and conditions, or data, or records, and or information required to be maintained by the Contractor for the State.

Data Mining - Prohibited use of data and information collected by Contractor at Contractor's NYS Contract page, or pages. If, in addition to the data, or records, and or information required by this contract to be maintained by Contractor for the State, Contractor also electronically stores, collects or maintains other data, or records, or information, acquired by Contractor during access to the Contractor's NYS Contract page, or pages, (maintained by Contractor at Contractor's web sites), such *other* acquired data or records, and or information, shall only be used internally by Contractor for the purpose of implementing or marketing the State contract, and shall not be disseminated to third parties or used for other marketing purpose.

A. Warranty - Contractor warrants and represents that contract and related information will be accurately and completely posted, maintained and displayed in an objective and timely manner which renders it clearly distinguishable from other, non-contract offerings at Contractor's web site. Contractor may only post Product or Service offerings, including Product SKU's and part numbers, at the OGS centralized contract web page which have been approved for sale under the Contract. Contractor shall indemnify the Authorized Users for damages resulting from errors or inaccuracies in such information, or from any failure to maintain or timely post contract information in accordance with this paragraph.

B. Price Data Retention & Audit - The parties anticipate that certain price data may fluctuate during the Contract term, and that new pricing will be posted in a timely manner. When no longer current, historical pricing information must be archived and retained for a twelve month period by the Contractor, at Contractor's place of business at its sole cost and expense. Archived data must be retained in a manner which renders it electronically accessible on-line by the Comptroller, OGS and/or Authorized Users for the purpose of auditing payments under the Contract. While the Contractor is not required to maintain this information as live data at Contractor's web site, it may choose to do so or may permit access by remote log-on to a dedicated PC, or any other similar means.

At the end of each twelve month period, the Contractor shall either electronically archive the information in a manner which allows the Comptroller, OGS and/or Authorized Users to continue to access the information; or electronically transmit the information to the requestor. This does not relieve the Contractor from any audit requirements imposed by Appendix A, Clause 10, nor does it shorten the retention periods for information stated therein. In addition, annual audits of the information posted at Contractor's web site may be conducted by OSC, or by an independent auditor at Contractor's expense. The independent auditor shall be selected by:

(1) Contractor forwarding three proposed firms acceptable to Contractor to the Comptroller and/or OGS, And

(2) the State making the final selection of the auditor used from that pool.

C. Site Changes - Contractor must provide OGS with written notice of any change in URL or other information needed to access the site and/or maintain the link. Contractor hereby consents to a link to the Contractor's site from the OGS site in order to facilitate access to Contract information. The establishment of the link is provided solely for convenience in carrying out the business operations of the State. OGS has the right to terminate or remove a link at any time, in its sole discretion and without advance notice, or to deny a future request for link. OGS will provide Contractor with subsequent notice of link termination or removal.

D. Responsibility for Content - Contractor is solely responsible for administration, content, intellectual property rights and all materials at Contractor's web site including Contractor's NYS Contract page, or pages. Contractor is solely responsible for its actions and those of its agents, employees, or assigns, and agrees that neither it, its agents, employees, or assigns has any authority to act or speak on behalf of the State or OGS.

Contractor's NYS Contract page, or pages, must list each and every Product and Service which has been approved for sale under this NYS Contract, whether such Product/Service is furnished directly by Contractor or in combination with or solely by approved Resellers, and must provide the contract ceiling prices set forth in Appendices C and D for each such Product/Service. Contractor may also provide "links" from the Contractor's NYS Contract pages to the web sites of Resellers participating under the contract.

Where Products and services are offered from multiple sources (Contractor and/or one or more Resellers), Contractor's NYS Contract page or pages should first list category of service, and second all multiple sources approved to provide that service under the contract. The State reserves the right, at any time during the Contract term, in the alternative to require the Contractor to host all pricing information at its site (including Reseller(s) pricing), or to require, as a condition of continued Reseller participation, Reseller to have an operational on-line Configurator if applicable at Resellers' site in accordance with the requirements of paragraph F, below.

On-line Price Configurator - It is optional for the Contractor to offer an operational on-line Configurator at the contract web site at the start of the Contract term and thereafter throughout the Contract term. If offered, Configurator shall meet the following requirements: the Configurator must incorporate the pricing for all Product and Service offering approved under Appendices C and D; the on-line Configurator may only configure options, Products, and pricing data for Products and services which have been approved for sale under the NYS Contract.

Directions and assistance in using the Configurator and web site in general must be available at entry. This Configurator must enable Authorized Users to:

- (1) view the options available for the type of Product(s) or service(s) requested;
- (2) fully configure a system or to search and find Products under the approved contract list.

Information about payment, shipping, delivery and special pricing should be available. Users should have the option of printing their "shopping cart" choices; and for those users, who are positioned to do so, an option for on-line secure ordering should also be available

G. On-Line Ordering - Contractor may offer electronic ordering capability to Authorized Users in order to facilitate the transaction electronically.

H. Access By Non-Electronic Means - Notwithstanding the foregoing, where an Authorized User does not have the capability to access contract information electronically, it shall be the Contractor's responsibility to configure the transaction in accordance with the above, and to configure and print out the configured transaction screen and furnish by means of FAX or hardcopy the configured transaction summary to the Authorized User upon request.

I. The State of New York has adopted the W3C Web Content Accessibility Guidelines. Contractor agrees to comply with Office for Technology Policy 99-3 <<http://www.oft/policy/99-3.htm>>, Universal Accessibility for NYS Web Sites (Supplement to 96-13 <<http://www.oft/policy/96-13.htm>>), dated, September 30, 1999.

12. REPORTING/MONITORING CONTRACT PERFORMANCE

A. Quarterly Usage & Performance Reports - Contractor shall provide OGS with verified quarterly reports showing the dollar volume of any and all sales under this Contract for the prior three month period. Said report shall include all participation by all Authorized Users, including state and non-state governmental entities, and others authorized by law. In the event that a Contractor utilizes alternate channel participants (e.g., Value Added Resellers, distributors, or dealers) to fulfill orders under this contract, it is the responsibility of Contractor to include all contract revenues from these participants in the quarterly report. Factory installed hardware options involving third party components do not have to be reported separately.

Such reports shall be compiled and delivered by Contractor, to the Procurement Services Group of the Office of General Services on the 38th floor of the building address first listed above by close of business as follows:

Calendar Quarter Ending:	Report Due:
March 31	April 30
June 30	July 31
September 30	October 31
December 31	January 31

The Industrial Funding Fee payable to the New York State Office of General Services Finance office will also be due on the same schedule. Reports and Industrial Funding Fee payments shall be delivered within thirty (60) days of the close of the quarterly period. If the contract period begins or ends in a fractional portion of a reporting period only the actual contract sales for this fractional period should be reported in that semiannual report. Similarly the Industrial Funding Fee payable to the New York State Office of General Services Finance office will only be due for the actual contract sales reported in that reporting period. The amount of the Industrial Funding Fee payment shall match the contract sales contained in the semi-annual report based on the percentage

established by the GSA. This percentage is currently set at 1% In the event that a Contractor utilizes resellers, it is the responsibility of Contractor to include all Contract revenues from these participants in the semi-annual report. Where third party Product is offered and delivered under this Contract, Contractor shall be required to separately report such sales volume on a semi-annual basis to the State.

The State shall have the right to verify said report and Industrial Funding Fee payments and to take any action(s) necessary to enforce its rights under this paragraph, including but not limited to the right to stop payments until such reports or payments are received, audit Contractor's applicable Contract books, to substitute, in its sole judgment, a good faith estimate of Contract usage upon failure of Contractor to deliver said report as required where pricing is based upon aggregate volume, or to terminate the Contract for cause or seek other judicial relief. In the event the contractor fails to submit reports the Industrial Funding Fee will become due based on the state's good faith estimate of sales.

A failure to report in accordance with this paragraph 12 A is a material breach with in the meaning of Appendix B-1 (64.) REMEDIES FOR BREACH.

B. Electronic Reporting of Contract Purchases - At such time as such facilities become available for use, without special cost or technology development by the Contractor, for this Contract only, Contractor shall be required to provide its quarterly usage reports to OGS electronically in accordance with OGS's mapping instructions at no additional cost to OGS.

C. Electronic Reporting of Product Update - At such time as such facilities become available for use without special cost or technology development by the Contractor for this Contract only, Contractor shall be required to provide updates to OGS in accordance with OGS's mapping instructions at no additional cost to OGS.

13. CANCELLATION

In addition to the cancellation rights stated in Appendix B-1, any order placed under this Contract may be canceled for convenience at any time by the Authorized User upon thirty (30) days written notice without penalty or other early termination charges due.

In the event that an order is canceled either for cause or for convenience, Contractor shall be entitled to payment for services rendered and materials provided prior to the termination, and subject to offsets, if any, for claims by Authorized User against the Contractor. In no event shall any Authorized Users be liable for lost profits, incidental, consequential or special damages based upon the exercise of OGS or Authorized User's cancellation rights.

14. ENTIRE AGREEMENT

This Contract and the referenced appendices constitute the entire agreement between the parties thereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and these contracts shall not be changed, modified or altered in any manner except by an instrument in writing executed by authorized representatives of both parties hereto. Such parties include Contractor, the Commissioner of OGS, the Attorney General, and the Comptroller on behalf of the State of New

York. Authorized Users shall not have the authority to modify the terms of the Contract, except as to acceptance of better terms and pricing for a particular procurement than that set forth under the Contract.

15. 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 OGS, addressed to OGS at its address set forth above, and

ii) if to Contractor, addressed to Contractor at its address set forth above. 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.

16. 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.

17. 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.

18. DISPUTE RESOLUTION POLICY

It is the policy of the Office of General Services Procurement Services Group (PSG) to provide vendors with an opportunity to administratively resolve disputes, complaints or inquiries related to PSG bid solicitations or contract awards. PSG encourages vendors to seek resolution of disputes through consultation with PSG staff. All such matters will be accorded impartial and timely consideration. Interested parties may also file formal written disputes. A copy of PSG's Dispute Resolution Procedures for Vendors may be obtained by contacting the person shown on the front of this Invitation for Bids or through the OGS website (www.ogs.state.ny.us). Click on "For Government - Contracts and Purchasing," then "Seller Information," then " Dispute Resolution Procedures for Vendors."

IN WITNESS WHEREOF, the parties therefore hereby execute their mutual agreement to the terms of this contract, bearing New York Comptroller's Contract Number _____ *(to be filled in upon final approval of the agreement by the New York State Comptroller)*. This agreement constitutes a binding contract between the parties as of the day and year indicated below that approval of the New York State Comptroller was received. The parties further hereby agree that, where Vendor is asked to execute three original copies of this signature page along with a complete original copy of the contract, the approved signature page(s) will be affixed by the State, upon final approval by the NYS Comptroller, to additional copies of this contract which conform exactly to the complete original copy as submitted by Vendor and executed simultaneously therewith. The contractor further certifies that all information provided to the entity with respect to Executive Order Number 127 is complete, true and accurate. For information regarding Executive Order 127 requirements can be found at: <http://www.ogs.state.ny.us/legal/ExeOrder127/overview.asp>

<p>VENDOR</p> <p>By: _____</p> <p>Name:</p> <p>Title:</p> <p>Vendor Firm Name:</p> <p>Federal Tax Identification #:</p>	<p>THE PEOPLE OF THE STATE OF NEW YORK New York State Office of General Service Procurement Services Group</p> <p>By: _____</p> <p>Name:</p> <p>Title:</p>
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APPROVED AS TO FORM
ELLIOT SPITZER
New York State Attorney General

APPROVED
H. CARL MC CALL
New York State Comptroller

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CORPORATE, PARTNERSHIP OR INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____ }
 : **SS.:**
COUNTY OF _____ }

On the ____ day of _____ in the year 200 __ , before me personally appeared: _____, known to me to be the person who executed the foregoing instrument, who, being duly sworn by me did depose and say that _he resides at _____, Town of _____, County of _____, State of _____; and further that:

[Check One]

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

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

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

Notary Public

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BIDDER IS REQUIRED TO SIGN BOTH SECTIONS ON THIS PAGE

**NONDISCRIMINATION IN EMPLOYMENT IN NORTHERN IRELAND:
MACBRIDE FAIR EMPLOYMENT PRINCIPLES**

In accordance with Chapter 807 of the Laws of 1992 the bidder, by submission of this bid, certifies that it or any individual or legal entity in which the bidder holds a 10% or greater ownership interest, or any individual or legal entity that holds a 10% or greater ownership interest in the bidder, either: (answer yes or no to one or both of the following, as applicable),

(1) have business operations in Northern Ireland,

Yes ___ or No ___

if yes:

(2) shall take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the MacBride Fair Employment Principles relating to nondiscrimination in employment and freedom of workplace opportunity regarding such operations in Northern Ireland, and shall permit independent monitoring of their compliance with such Principles.

Yes ___ or No ___

√

(Contractor's Signature)

(Name of Business)

NON-COLLUSIVE BIDDING CERTIFICATION

By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of his knowledge and belief:

(1) The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;

(2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and

(3) No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

√

(Contractor's Signature)

(Name of Business)

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ALL BIDDERS MUST COMPLETE THE QUESTIONS BELOW BY FILLING IN THE BLANKS TO THE RIGHT OF THE QUESTIONS.		
1. Place of manufacture of product(s) bid: (Please indicate "Yes" or "No" for either A, B or C):		
A. All NYS Manufacture? OR B. All Manufactured Outside NYS? OR C. Manufactured In NYS and Outside NYS? Primary location of manufacture (city, state) _____	Yes _____	No _____
2. Are you a New York State resident business? Primary Business location (city, state) _____	Yes _____	No _____
3. Total number of people employed by your firm:	_____	
4. Total number of people employed by your firm in New York State:	_____	
5. Is your company independently owned and operated?	Yes _____	No _____
6. Is your firm at least 51% owned and controlled by women, or 51% owned and controlled by minority group members (i.e. Black, Hispanic, Asian, Pacific Islander American Indian, Alaskan Native). If yes, have you been certified or registered? List certification or registration authority: _____	Yes _____	No _____
7. Do any of the products bid herein incorporate Recycled materials?	Yes _____	No _____
8. Do any of the products bid herein contain remanufactured components?	Yes _____	No _____
9. Are any of the products bid herein Energy Star Compliant?	Yes _____	No _____
If the answer to 7, 8 or 9 are "Yes", what equipment? (i.e. monitors, printers, PC's etc.) _____ _____		
VENDOR RESPONSIBILITY		
10. Within the past five years has your firm, any affiliate, any predecessor company or entity, owner, director, officer, partner or proprietor been the subject of:	(Check any that apply. If "yes", describe using additional pages.)	
a. an indictment, judgment, conviction, or a grant of immunity, including pending actions, for any business-related conduct constituting a crime under local, state or federal law?	Yes _____	No _____
b. a federal, state, or local government suspension or debarment, rejection of any bid or disapproval of any proposed subcontract, including pending actions, for lack of responsibility, denial or revocation of pre-qualification or a voluntary exclusion agreement?	Yes _____	No _____
c. any federal or state determination of a violation of any public works law or regulation, or labor law or regulation, or any OSHA violation deemed "serious or willful"?	Yes _____	No _____
d. a consent order with NYS Department of Environmental Conservation, or a federal or state enforcement determination involving a construction-related violation of federal or state environmental laws?	Yes _____	No _____
e. a finding of non-responsibility by an agency or authority due to the intentional provision of false or incomplete information required by Executive Order 127?	Yes _____	No _____

Executive Order 127 requirements can be found at: http://www.ogs.state.ny.us/legal/ExeOrder127/overview.asp			
If yes to any of above, please provide details regarding the finding.			
ENTITY MAKING FINDING:			
YEAR OF FINDING:			
BASIS OF FINDING: (If space to the right is not enough please provide additional sheet with this proposal.)	_____		

Bidder Disclosure of Contacts

This form shall be completed and submitted with your bid/proposal or offer in accordance with Executive Order Number 127 (EO 127). Failure to complete and submit this form shall result in a determination of non-responsiveness and disqualification of the bid, proposal or offer. If at the time of submission of this form, the specific name of a person authorized to attempt to influence a decision on your behalf is unknown, you agree to provide the specific person's information when it is available. You also agree to update this information during the negotiation or evaluation process of this procurement, and throughout the term of any contract awarded to your company pursuant to this bid/proposal or offer.

Is this an initial filing in accordance with Section II, paragraph 1 of EO 127 or an updated filing in accordance with Section II, paragraph 2 of EO 127?:

Initial filing

Updated filing

The following person or organization was retained, employed or designated by or on behalf of the Bidder to attempt to influence the procurement process:	
Name:	_____
Address:	_____ _____
Telephone Number:	_____
Place of Principal Employment:	_____
Occupation:	_____
Does the above named person or organization have a financial interest in the procurement?:	
Yes <input type="checkbox"/>	No <input type="checkbox"/>

Provide the foregoing information for each person or organization retained, employed or designated by or on behalf of the Bidder to attempt to influence the procurement process.

AUTHORIZED USERS

NYS Laws Extend Use of State Centralized Contracts for Purchases by Non-State Agencies

Table One

These groups are eligible to purchase through Centralized Contracts
for Commodities, Services and Technology issued by
OGS Procurement Services Group

- Any officer, board or agency of a political subdivision, or of a district therein (counties, cities, towns, villages, public school districts) -- Section 163 of the State Finance Law and Sections 100 and 104 of the General Municipal Law.
- Volunteer fire companies -- Sections 100 and 104 of the General Municipal Law.
- Boards of Cooperative Educational Services -- Section 100 of the General Municipal Law.
- Institutions for instruction of the deaf and the blind -- Section 163 of the State Finance Law and Section 4201 of the Education Law.
- Non-profit public television corporations -- Section 236 of the Education Law.
- Voluntary ambulance services -- Sections 100 and 104 of the General Municipal Law.
- Non-profit public radio corporations -- Section 236 of the Education Law.
- Any public authority or public benefit corporation of the State -- Section 163 of the State Finance Law.
- Non-public, non-profit elementary and secondary schools -- Section 109-a of the General Municipal Law.
- Certain public associations -- New York State Association of Counties, Association of Towns of the State of New York, New York State Conference of Mayors and other Municipal Officials, New York State School Boards Association, Inc., the New York Planning Federation and Association of Fire Districts of the State of New York -- Section 109-a of the General Municipal Law.
- Public library, association library, library system, cooperative library system, the New York Library Association and the New York State Association of Library Boards (or any other library except those operated by for profit entities) -- Sections 163 of the State Finance Law and Section 109-a of the General Municipal Law.

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AUTHORIZED USERS

Table Two

These groups are eligible to purchase ONLY through
Centralized Contracts for Commodities issued by OGS Procurement Services Group

Note: Contracts for Services and Technology issued by OGS Procurement Services Group may be available to these groups through voluntary extension by the Contractor.

- Non-profit independent colleges and universities -- Section 6404 of the Education Law.
- Certain non-profit museums, historical societies, zoological gardens, botanical gardens, arboreta, and aquariums -- Section 258-a of the Education Law.
- Certain not-for-profit corporations that receive federal funds for provision of transportation services -- Section 31-a of the Transportation Law.
- The Interstate Environmental Commission -- Section 163 of the State Finance Law.
- Charitable non-profit agencies for the blind and other severely disabled -- Section 163 of the State Finance Law.
- Non-profit, non-public hospitals, residential health care or mental hygiene facilities -- Section 163 of the State Finance Law.
- Non-profit cemetery corporations -- Section 1509 of the Not-for-Profit Corporation Law.
- Non-profit county, town or other agricultural societies and youth fairs or expositions held by county extension service associations -- Chapter 741 of the Laws of 1985 and as amended by Chapter 90 of the Laws of 1992.
- Certain charitable organizations -- Chapter 741 of the Laws of 1985 and as amended through Chapter 134 of the Laws of 1994.

Acknowledged, Agreed and Accepted

By _____
Name:

Bidder is asked to execute this Authorized Users Contract. In signing, Bidder indicates that it has read the listing of authorized users set forth herein and voluntarily agrees and accepts that entities listed in Tables 1 and 2 may participate in and make purchases as provided for in the IFB and the resulting contract awards.

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APPENDIX A
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GENERAL

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19. MacBride Fair Employment Principles
20. Omnibus Procurement Act of 1992
21. Reciprocity and Sanctions Provisions

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

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

2. NON-ASSIGNMENT CLAUSE. In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent, in writing, of the State and any attempts to assign the contract without the State's written consent are null and void. The Contractor may, however, assign its right to receive payment without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

3. COMPTROLLER'S APPROVAL. In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$15,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed \$30,000 (State Finance Law Section 163.6.a).

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

5. NON-DISCRIMINATION REQUIREMENTS. In accordance with Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against

any employee or applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. WAGE AND HOURS PROVISIONS. If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law.

7. NON-COLLUSIVE BIDDING CERTIFICATION.

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

8. INTERNATIONAL BOYCOTT PROHIBITION.

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

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

10. RECORDS. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person

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

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.

(a) **FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER.** All invoices or New York State standard vouchers submitted for payment for the sale of goods or services or the lease of real or personal property to a New York State agency must include the payee's identification number, i.e., the seller's or lessor's identification number. The number is either the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. Failure to include this number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or New York State standard voucher, must give the reason or reasons why the payee does not have such number or numbers.

(b) **PRIVACY NOTIFICATION.** (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law.

(2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in New York State's Central Accounting System by the Director of Accounting Operations, Office

of the State Comptroller, AESOB, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.

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

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

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

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

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and

improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State; or (iii) banking services, insurance policies or the sale of securities. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Governor's Office of Minority and Women's Business Development pertaining hereto.

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

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

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

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

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

18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this contract

award will be in accordance with, but not limited to, the specifications and provisions of State Finance Law §165. (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

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

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

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

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

NYS Department of Economic Development
Division for Small Business
30 South Pearl St. -- 7th Floor
Albany, New York 12245
Telephone: 518-292-5220

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

NYS Department of Economic Development
Division of Minority and Women's Business
Development
30 South Pearl St. -- 2nd Floor

Albany, New York 12245
<http://www.empire.state.ny.us>

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

- (a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;
- (b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;
- (c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and
- (d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

21. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of June 19, 2001, the list of discriminatory jurisdictions subject to this provision includes the states of Alaska, Hawaii, Louisiana, Montana, South Carolina, West Virginia, and Wyoming, and the Canadian Province of Quebec. Contact the NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

APPENDIX B-1

GENERAL SPECIFICATIONS

(Technology Products and Services)

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GENERAL

1. **APPLICABILITY** The terms and conditions set forth in this Appendix B-1 are expressly incorporated in and applicable to all procurements and resulting procurement contracts let by the Office of General Services Procurement Services Group, or let by any other Issuing Entity where incorporated by reference in its Bid Documents. Appendix B-1 shall govern such procurements or contracts unless expressly modified or amended by the terms of a Bid Specification, or a negotiated Contract/Clarification document, if any. Captions are intended as descriptive and are not intended to limit or otherwise restrict the terms and conditions set forth herein.

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

3. **APPENDIX A** The terms of Appendix A (*Standard Clauses for New York State Contracts*) are expressly incorporated herein.

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

5. **CONFLICT OF TERMS** Conflicts between procurement or Contract documents shall be resolved in the following order of precedence:

- a. Appendix A (*Standard Clauses for NYS Contracts*)
- b. **Contract/Clarification Documents**
Writing(s) setting forth the final agreements, clarifications, terms, statement of work and/or modifications between the Bid Documents and Contractor's Bid or Mini-bid.
- c. **Mini-Bid Project Definition** (If any)
- d. **Bid Documents** (Other than Appendix A)
 - i. Bid Specifications prepared by the Issuing Entity
 - ii. Appendix B-1 (*General Specifications*)
- e. **Contractor's Bid or Mini-Bid Proposal**

6. **DEFINITIONS** Terms used in this Appendix B-1 shall have the following meanings:

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

ATTORNEY GENERAL Attorney General of the State of New York.

AUTHORIZED USER(S) Agencies, or any other entity authorized by the laws of the State of New York to participate

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

BID OR BID PROPOSAL An offer or proposal submitted by a Bidder to furnish a described product or a solution or means of achieving a practical end, at a stated price for the stated Contract term.

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

BID DOCUMENTS Writings setting forth the scope, terms, conditions and technical specifications for a procurement of Product. Such writings typically include, but are not limited to: Invitation for Bids (IFB), Request for Quotation (RFQ), Request for Proposals (RFP), addenda or amendments thereto, and terms and conditions which are incorporated by reference, e.g. Appendix A (*Standard Clauses for NYS Contracts*), Appendix B-1, (*General Specifications*). Where these General Specifications are incorporated in negotiated contracts which have not been competitively bid, the term "Bid Documents" shall be deemed to refer to the terms and conditions set forth in the negotiated contract.

BID SOLICITATION The notice or advertisement of an intent to purchase a specified Product by or on behalf of Authorized User(s).

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

CERTIFICATES OF PARTICIPATION (COPS) Certificates issued pursuant to Article 5-A of the State Finance Law which represent the right to receive a proportionate share in lease, installment or other periodic payments to be made by any state department, agency or the City University of New York.

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

COMPROLLER Comptroller of the State of New York.

CONTRACT The writing(s) which contain the agreement of the Commissioner and the Bidder/Contractor setting forth the total legal obligation between the parties as determined by

applicable rules of law, and which most typically include the following classifications of public procurements:

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUING ENTITY The Office of General Services or the Authorized User who issues the Bid Documents for a procurement.

LATE BID For purposes of bid openings held and conducted by OGS, a bid not received in such place as may be designated in the Bid Specifications or in the OGS Mailroom located in the Empire State Plaza, Albany, New York 12242, at or before the date and time established in the Bid Specifications for the bid opening. For purposes of bid openings held and conducted by Issuing Entities other than OGS, the term late bid is defined as a bid not received in the location established in the Bid Specifications at or before the date and time specified for the bid opening.

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

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

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

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

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

LOGICAL PARTITION A subset of the processing power within a machine which has been divided through hardware and/or software means (i.e., *Processor Resources/System Manager* [PR/SM]) so as to limit the total processing power

which is accessible by an operating system image by individual Authorized Users or individual software products.

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

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

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

OBJECT CODE The machine executable code that can be directly executed by a computer's central processing unit(s).

OGS The New York State Office of General Services

PHYSICAL PARTITION A subset of the processing power within a central electronic complex which has been derived through hardware means so as to limit the total processing power accessible by an operating system image by individual users or individual Products.

PROCUREMENT RECORD Documentation by the Issuing Entity of the decisions made and approach taken during the procurement process.

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

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

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

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

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

REQUEST FOR QUOTATION (RFQ) A type of Bid Document which can be used when a formal bid opening is

not required (e.g. discretionary, sole source, single source or emergency purchases).

RESPONSIBLE BIDDER A Bidder that is determined to have skill, judgment and integrity, and that is found to be competent, reliable, experienced and qualified financially, as determined by the Commissioner.

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

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

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

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

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

STATE State of New York

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

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

BID SUBMISSION

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

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

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

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

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

“BID ENCLOSED (bold print, all capitals)

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

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

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

10. **FACSIMILE SUBMISSIONS** Unless specifically prohibited by the terms of the Bid Specifications, facsimile bids may be SUBMITTED AT THE SOLE OPTION AND RISK OF THE BIDDER. Only the FAX number(s) indicated in the Bid Specifications may be used. Access to the facsimile machine(s) is on a “first come, first serve” basis, and the Commissioner bears no liability or responsibility and makes no guarantee whatsoever with respect to the Bidder's access to such equipment at any specific time. Bidders are solely responsible for submission and receipt of the entire facsimile bid by the Issuing Entity prior to bid opening and must include on the first page of the transmission the total number of pages transmitted in the facsimile, including the cover page. Incomplete, ambiguous or unreadable transmissions in whole or in part may be rejected at the sole

discretion of the Commissioner. Facsimile bids are fully governed by all conditions outlined in the Bid Documents and must be submitted on forms or in the format required in the Bid Specifications, including the executed signature page and acknowledgment.

11. **AUTHENTICATION OF FACSIMILE BIDS** The act of submitting a bid by facsimile transmission, including an executed signature page, shall be deemed a confirming act by Bidder which authenticates the signing of the bid.

12. **LATE BIDS** Any bid received at the specified location after the time specified will be considered a late bid. A late bid shall not be considered for award unless i) no timely bids meeting the requirements of the Bid Documents are received or, ii) in the case of a multiple award, an insufficient number of timely bids were received to satisfy the multiple award; and acceptance of the late bid is in the best interests of the Issuing Entity. Delays in United States mail deliveries or any other means of transmittal, including couriers or agents of the Issuing Entity, shall not excuse late bid submissions.

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

14. **EXTRANEIOUS TERMS** Bids must conform to the terms set forth in the Bid Documents, as extraneous terms or material deviations (including additional, inconsistent, conflicting or alternative terms) may render the bid non-responsive and may result in rejection. Only those extraneous terms which meet all the following requirements will be considered as having been submitted as part of the Bid:

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

Extraneous term(s) submitted on standard, pre-printed forms (including but not limited to: product literature, order forms, license agreements, contracts or other documents), whether or not deemed “material”, which are attached or referenced with submissions and which do not meet the above requirements will not be considered part of the bid or resulting Contract, but rather will be deemed to have been included for informational or promotional purposes only. Acceptance and/or processing of the Bid shall not constitute such written acceptance of Extraneous Term(s) or a waiver of the State's rights set forth above.

15. RECORD DISCLOSURE/CONFIDENTIALITY OF PROPRIETARY RECORDS

Contractor may preserve proprietary rights as to other confidential or business process information in accordance with procedures established under NYS Public Officers Law, § 89, provided that: (i) Contractor shall inform the Authorized User **upon** submission of its bid, in writing, that such records are going to be furnished, are proprietary and are not to be disclosed; and (ii) said records shall be sufficiently identified; and (iii) Contractor shall state the reasons why the information should be exempted from disclosure; and (iv) designation of said records as exempt from disclosure is reasonable and accepted by the Authorized User. Acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures.

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

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

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

ii. Building Services *Labor Law* Article 9 applies to contracts for building service work over \$1,500 with a public agency, which 1) involve the care or maintenance of an existing building, or 2) involve the transportation of office furniture or equipment to or from such building, or 3) involve the transportation and delivery of fossil fuel to such building, and 4) the principal purpose of which is to furnish services through use of building service employees.

b. Prevailing Wage Rate Applicable to Bid Submissions

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

c. Wage Rate Payments / Changes During Contract Term

The wages to be paid under any resulting Contract shall not be less than the prevailing rate of wages and supplements as set forth by law. It is required that the Contractor keep informed of all changes in the Prevailing Wage Rates during the Contract term that apply to the classes of individuals supplied by the Contractor on any projects

which result from this Contract which are subject to the provisions of the *Labor Law*. Contractor is solely liable for and must pay such required prevailing wage adjustments during the Contract term as required by law.

d. Public Posting & Certified Payroll Records In compliance with Article 8, Section 220 of the *Labor Law*, as amended by Chapter 565 of the Laws of 1997:

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

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

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

Contractors and sub-contractors on public works projects must submit monthly payroll transcripts to the issuing entity which has prepared or directs the preparation of the plans and specifications for a public works project, as set forth in the Bid Specifications. For mini-bid solicitations, the payroll records must be submitted to the entity preparing the agency mini-bid project specification. For “agency specific” bids, the payroll records should be submitted to the entity issuing the purchase order. For all other OGS centralized contracts, such records should be submitted to the individual agency issuing the purchase order(s) for the work. Upon mutual agreement of the Contractor and the issuing entity, the form of submission may be submitted in a specified disk format acceptable to the Department of Labor provided: 1) the Contractor/subcontractor retains the original records; and, (2) an original signed letter by a duly authorized individual of the Contractor or subcontractor attesting to the truth and accuracy of the records accompanies the disk. **This provision does not apply to building services contracts.**

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

e. Day’s Labor - Defined for Article 8, Public Works (For Purposes of Article 8 of the Labor Law)

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

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

17. TAXES

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

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

c. Purchases by Authorized Users other than the State of New York may be subject to such taxes, and in those instances the tax should be computed based on the Contract price and added to the invoice submitted to such entity for payment.

18. EXPENSES PRIOR TO CONTRACT EXECUTION

The Issuing Entity is not liable for any costs incurred by a Bidder in the preparation and production of a bid or for any work performed prior to Contract execution.

19. ADVERTISING BID RESULTS A Bidder in submitting a bid agrees not to use the results therefrom as a part of any commercial advertising without the prior written approval of the Commissioner.

20. PRODUCT REFERENCES

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

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

21. RECYCLED OR RECOVERED MATERIALS

Upon the conditions specified in the Bid Specifications and in accordance with the laws of the State of New York, Contractors are encouraged to use recycled or recovered materials in the manufacture of Products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the Product or packaging unless such use is precluded due to health, welfare, safety requirements or in the Bid Specifications. Where such use is

not practical, suitable, or permitted by the Bid Specifications, Contractor shall deliver new materials in accordance with the “Warranties” set forth below.

Refurbished or remanufactured components or items may only be accepted at the discretion of the Commissioner, or upon the conditions set forth in the Bid Specifications.

Items with recycled, recovered, refurbished or remanufactured content must be identified in the bid or will be deemed new Product.

22. PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS

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

23. PRICING

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

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

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

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

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

24. DRAWINGS

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

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

drawings and diagrams shall be delivered to the Authorized User's representative.

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

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

26. PROCUREMENT CARD NYS and American Express (AMEX) have entered into an agreement for AMEX to provide the State with purchasing card services. The AMEX Corporate Purchasing Card enables Authorized Users to make authorized purchases directly from a Contractor without processing the Purchase Orders or Purchase Authorizations currently required. Purchasing Cards are issued to selected employees authorized to purchase for the agency and having direct contact with Contractors. Cardholders can make purchases directly from any Contractor that accepts the AMEX Corporate Purchasing Card.

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

27. SAMPLES

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

b. Bidder Supplied Samples The Commissioner reserves the right to request from the Bidder/Contractor a representative sample(s) of the Product offered at any time prior to or after award of a Contract. Unless otherwise instructed, samples shall be furnished within the time specified in the request. Untimely submission of a sample may constitute grounds for rejection of bid or cancellation of the Contract. Samples must be submitted free of charge and

be accompanied by the Bidder's name and address, any descriptive literature relating to the Product and a statement indicating how and where the sample is to be returned. Where applicable, samples must be properly labeled with the appropriate bid or NYS contract reference.

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

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

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

e. Testing All samples are subject to tests in the manner and place designated by the Commissioner, either prior to or after Contract award. Unless otherwise stated in the Bid Specifications, Bidder Samples consumed or rendered useless by testing will not be returned to the Bidder.

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

BID EVALUATION

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

29. CONDITIONAL BID Unless the Bid Specifications provides otherwise, a bid is not rendered non-responsive if the Bidder specifies that the award will be accepted only on all or

a specified group of items or Product included in the specification. It is understood that nothing herein shall be deemed to change or alter the method of award contained in the Bid Documents.

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

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

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

33. PERFORMANCE QUALIFICATIONS The Commissioner reserves the right to investigate or inspect at any time whether or not the Product, qualifications or facilities offered by the Bidder/Contractor meet the requirements set forth in the Contract. Contractor shall at all times during the Contract term remain responsible and responsive. A Bidder/Contractor must be prepared, if requested by the Commissioner, to present evidence of experience, ability and financial standing, as well as a statement as to plant, machinery and capacity of the manufacturer for the production, distribution and servicing of the Product offered/bid. If the Commissioner determines that the conditions and terms of the Bid Documents or Contract are not complied with, or that items or Product proposed to be furnished do not meet the specified requirements, or that the qualifications, financial standing or facilities are not satisfactory, or that performance is untimely, the Commissioner may reject such bid or terminate the Contract. Nothing in the foregoing shall mean or imply that it is obligatory upon the Commissioner to make an investigation either before or after award of a Contract, but should such investigation be made, it in no way relieves the Bidder/Contractor from fulfilling all requirements and conditions of the Contract.

34. DISQUALIFICATION FOR PAST PERFORMANCE Bidder may be disqualified from receiving awards if Bidder, or anyone in Bidder's employment, has previously failed to perform satisfactorily in connection with public bidding or contracts.

35. QUANTITY CHANGES PRIOR TO AWARD The Commissioner reserves the right, at any time prior to the award of a specific quantity contract, to alter in good faith the quantities listed in the Bid Specifications to conform with requirements. In the event such right is exercised, the lowest

responsible Bidder meeting specifications will be advised of the revised requirements and afforded an opportunity to extend or reduce its bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its bid price may result in the rejection of its bid and the award of such contract to the lowest responsible Bidder who accepts the revised requirements.

36. RELEASE OF BID EVALUATION MATERIALS Requests concerning the evaluation of bids may be submitted under the *Freedom of Information Law*. Information, other than the Bid Tabulation, shall be released as required by law after Contract award. Written requests should be directed to the Commissioner.

37. TIMEFRAME FOR OFFERS The Commissioner reserves the right to make awards within sixty (60) days after the date of the bid opening, during which period, bids must remain firm and cannot be withdrawn. If, however, an award is not made within the sixty (60) day period, bids shall remain firm until such later time as either a Contract is awarded or the Bidder delivers to the Commissioner written notice of the withdrawal of its bid. Any bid which expressly states therein that acceptance must be made within a shorter specified time, may at the sole discretion of the Commissioner, be accepted or rejected.

TERMS & CONDITIONS

38. CONTRACT CREATION / EXECUTION Except for contracts governed by Article 11-B of the *State Finance Law*, upon receipt of all required approvals a Contract shall be deemed executed and created upon the Commissioner's mailing or electronic communication to the address on the bid of: i) a Letter of Acceptance; ii) a fully executed Contract; or iii) a Purchase Order authorized by the Commissioner.

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

a. Agencies All State Agencies may utilize and purchase under any state centralized contract let by the Office of General Services Procurement Services Group, unless the Bid Specifications limit purchases to specific State Agencies.

b. Non-State Agency Authorized Users Authorized Users other than state agencies are permitted to make purchases through state centralized contracts where permitted by law, the Contract or the OGS Commissioner.

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

d. Responsibility for Performance Participation in New York State centralized contracts by Authorized Users is permitted upon the following conditions: a) the responsibility with regard to performance of any contractual obligation,

covenant, condition or term thereunder by any Authorized User other than State Agencies shall be borne and is expressly assumed by such Authorized User and not by the State; b) a breach of the Contract by any particular Authorized User shall neither constitute nor be deemed a breach of the Contract as a whole which shall remain in full force and effect, and shall not affect the validity of the Contract nor the obligations of the Contractor thereunder respecting non-breaching Authorized Users, whether State or otherwise; c) for a breach by an Authorized User other than a State Agency, the State specifically and expressly disclaims any and all liability for such breach; and d) each non-state agency Authorized User and Contractor guarantee to save the State, its officers, agents and employees harmless from any liability that may be or is imposed by their failure to perform in accordance with its obligations under the Contract.

40. MODIFICATION OF CONTRACT TERMS The terms and conditions set forth in the Contract govern all transactions by Authorized User(s) under this Contract. The Contract may only be modified or amended upon mutual written agreement of the Commissioner and Contractor. For individual orders, however, the Contractor may offer Authorized User(s) more advantageous pricing, payment, or other terms and conditions than those set forth in the Contract. In such event, Contractor shall furnish a copy of such better offer to the Commissioner upon request.

Other than where terms are more advantageous for the Authorized User(s) than those set forth in the Contract, no alteration or modification of the terms of the Contract, including substitution of Product, shall be valid or binding against Authorized User(s) unless authorized by the Commissioner or specified in the *Contract Award Notification*. Contractor may not unilaterally modify the terms of the Contract by affixing additional terms to Product upon delivery (e.g., attachment or inclusion of standard pre-printed order forms, product literature, "shrink wrap" terms accompanying or affixed to Product) or by incorporating such terms onto Contractor's order or fiscal forms or other documents forwarded by the Contractor for payment. Acceptance of Product or processing of such documentation on forms furnished by the Contractor for approval or payment does not constitute acceptance of the proposed modification to terms and conditions.

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

42. ESTIMATED / SPECIFIC QUANTITY CONTRACTS Estimated quantity contracts are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Contract term. No guarantee of any estimated quantity(s) is implied or given. Unless otherwise set forth in the Bid Specifications, contracts for services and technology are completely voluntary as to use, and therefore no quantities are guaranteed.

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

20% more or less (rounded to the next highest whole number) than the specific quantities called for in the Contract. Notwithstanding the foregoing, the Commissioner may purchase greater or lesser percentages of Contract quantities should the Commissioner and Contractor so agree. Such agreement may include an equitable price adjustment.

43. BEST PRICING OFFER During the Contract term, if substantially the same or a smaller quantity of a Product is sold by the Contractor outside of this Contract vehicle upon the same or similar terms and conditions as that of this Contract at a lower price, the price under this Contract, at the discretion of the Commissioner, shall be immediately reduced to the lower price.

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

All Purchase Orders issued pursuant to contracts let by the Commissioner must bear the appropriate contract number and, if necessary, required State approvals. Unless otherwise specified, all Purchase Orders against centralized contracts will be placed by Authorized Users directly with the Contractor and shall be deemed to incorporate the terms and conditions set forth in this Contract by reference. 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.

The Purchase Order shall indicate the address for delivery of the Product. Authorized User shall confirm pricing, supported hardware platforms and model availability with Contractor prior to placement of orders. Contractor's order form shall, at a minimum, contain the NYS Product reference number, license type, price, and must separately itemize quantities for software, documentation, and services. The State reserves the right to require any other information from the Contractor which the State deems necessary in order to verify any Purchase Order placed under the Contract.

If, with respect to an agency specific contract let by the OGS Commissioner, a Purchase Order is not received within two weeks after the issuance of a Contract Award Notification, it is the responsibility of the Contractor to request in writing that the appropriate Authorized User forward a Purchase Order. If, thereafter, a Purchase Order is not received within a reasonable period of time, the Contractor shall promptly notify 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 canceling of such requirement by the OGS Commissioner with, at the OGS Commissioner's discretion, a corresponding reduction in the Contract quantity and price.

45. PRODUCT DELIVERY Delivery must be made as ordered to the address specified on the Purchase Order and in accordance with the terms of the Contract. Unless otherwise

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

46. WEEKEND AND HOLIDAY DELIVERIES Unless otherwise specified in the Bid Specifications or by an Authorized User, deliveries will not be scheduled for Saturdays, Sundays or legal holidays observed by the State of New York except of Product for daily consumption or where an emergency exists or the delivery is a replacement or is late, in which event the convenience of the Authorized User shall govern.

47. SHIPPING / RECEIPT OF PRODUCT

a. Packaging Tangible Product shall be securely and properly packed for shipment, storage and stocking in appropriate, clearly labeled shipping containers and according to accepted commercial practice, without extra charge for packing materials, cases or other types of containers. The container shall become and remain the property of the receiving entity.

b. Shipping Charges Unless otherwise stated in the Bid Specifications, all deliveries shall be deemed to be FOB destination to the delivery address specified on the Purchase Order. Even where the specifications permit Product to be purchased at a price FOB shipping point plus transportation charges, it is understood not to relieve the Contractor from responsibility for safe and proper delivery. Contractor shall be responsible for insuring that the Bill of Lading states "charges prepaid" for all shipments.

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

48. RISK OF LOSS Notwithstanding the form of shipment, risk of loss shall not pass from the Contractor to the Authorized User until the Products have been received, inspected and accepted by the receiving entity. Acceptance shall occur within the acceptance period specified in this Appendix B-1, or such other period of time mutually agreed to by Authorized User and Contractor. Mere acknowledgment by Authorized User personnel of the delivery or receipt of goods (e.g. signed bill of lading) shall not be deemed or construed as acceptance of the Products. Any delivery of Product which is substandard or does not comply with the Contract terms, may be rejected or accepted on an adjusted price basis, as determined by the Commissioner.

49. (RESERVED)

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

51. REJECTED PRODUCT When Product is rejected, it must be removed by the Contractor from the premises of the receiving entity within ten calendar days of notification of rejection by Authorized User. Upon rejection notification, risk of loss of rejected or non-conforming Product shall remain with Contractor. Rejected items not removed by the Contractor within ten calendar days of notification shall be regarded as abandoned by the Contractor, and the Authorized User shall have the right to dispose of the items 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.

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

53. REPAIRED OR REPLACED PARTS / COMPONENTS Where the Contractor is required to repair, replace or substitute parts components 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. Replaced or repaired components, or parts 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. All proposed substitutes for the original manufacturer's installed parts or components must be approved by the Authorized User before installation. The part or component shall be equal to or of better quality than the original part or component being replaced.

54. ON-SITE STORAGE Materials, equipment or supplies may be stored at the Authorized User's site at the Contractor's sole risk and only with the approval of the Authorized User.

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

56. ASSIGNMENT / SUBCONTRACTORS Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the Contract or its right, title or interest therein, or its power to execute such Contract to any other person, company, firm or corporation in performance of the Contract, other than the assignment of the right to receive money due, without the prior written consent of the Issuing Entity. Prior to an assignment of the right to receive money becoming effective, Contractor shall file a written notice of such assignment simultaneously with the NYS Comptroller, the Commissioner, and participating Authorized User(s).

The Commissioner reserves the right to reject any proposed subcontractor, assignee or supplier for bona fide business reasons, which may include, but are not limited to: that the proposed transferee is on the Department of Labor's list of companies with which New York State cannot do business; the Commissioner determines that the company is not qualified; unsatisfactory contract performance or service has been previously provided; or attempts were not made to solicit minority and women's business enterprises (M/WBE) bidders for the subcontract.

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

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

such time as the Commissioner issues a formal written notice authorizing a resumption of work.

59. TERMINATION

a. For Cause: The Contract or Purchase Order may be terminated by the Commissioner or Authorized User at the Contractor's expense where Contractor becomes unable or incapable of performing the work, or meeting any requirements or qualifications set forth in the Contract, or for non-performance, or upon a determination that Contractor is non-responsible. In such event, the Commissioner or Authorized User may complete the work in any manner as it may deem advisable and pursue available legal or equitable remedies for breach.

b. For Convenience: This Contract may be terminated at any time by the State for convenience upon sixty (60) days written notice without penalty or other early termination charges due. Such termination shall not affect the validity of Purchase Orders placed prior to termination. Such termination of the Contract shall not affect any project or Purchase Order which has been issued under the Contract prior to the date of such termination.

60. SAVINGS / FORCE MAJEURE The Contractor shall not be responsible for delay resulting from its failure to perform if neither the fault nor negligence of the Contractor, its officers, employees or agents contributed to such delay and the delay is due directly to acts of God, wars, acts of public enemies, strikes, fires or floods, or other similar cause beyond the control of the Contractor, or for any of the foregoing which affect subcontractors or suppliers and no alternate source of supply is available to the Contractor. In such event, Contractor shall notify the Commissioner, by certified or registered mail, of the delay or potential delay and the cause(s) thereof either (a) within ten (10) calendar days after the cause which creates or will create the delay first arose if the Contractor could reasonably foresee that a delay could occur by reason thereof, or (b) if delay is not reasonably foreseeable, within five (5) calendar days after the date the Contractor first had reason to believe a delay could result. The foregoing shall constitute the Contractor's sole remedy or excuse with respect to such delay. In the event performance is suspended or delayed, in whole or in part, by reason of any of the aforesaid causes or occurrences and proper notification is given the Commissioner, any performance so suspended or delayed shall be performed by the Contractor at no increased cost, promptly after such disabilities have ceased to exist unless it is determined in the sole discretion of the Commissioner that the delay will significantly impair the value of the Contract to the State or to Authorized Users, whereupon the Commissioner may:

a. Accept allocated performance or deliveries from the Contractor. The Contractor, however, hereby agrees to grant preferential treatment to State Agencies with respect to Product subjected to allocation; and/or

b. Purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the Contract quantity; or

c. Terminate the Contract or the portion thereof which is subject to delivery delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.

In addition, the Commissioner reserves the right, in his/her sole discretion, to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (1) the volatility is due to causes outside the control of Contractor; (2) the volatility affects the marketplace or industry, not just the particular contract source of supply; (3) the effect on pricing or availability of supply is substantial; and (4) the volatility so affects Contractor's performance that continued performance of the Contract would result in a substantial loss.

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

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

62. DEFAULT - AUTHORIZED USER An Authorized User's breach shall not be deemed a breach of the centralized Contract. In the event a participating Authorized User fails to make payment to the Contractor for Products delivered, accepted and properly invoiced, within 60 days of such delivery and acceptance, the Contractor may, upon 10 days advance written notice to both the Commissioner and the Authorized User's purchasing official, suspend additional shipments of Product or provision of services to such entity until such time as reasonable arrangements have been made and assurances given by such entity for current and future Contract payments.

Notwithstanding the foregoing, the Contractor shall, at least 10 days prior to declaring a breach of contract by any Authorized User, by certified or registered mail, notify both the Commissioner and the purchasing official of the breaching Authorized User of the specific facts, circumstances and grounds upon which a breach will be declared. It is understood, however, that if the Contractor's basis for declaring a breach is insufficient, the Contractor's declaration of breach and failure to service an Authorized User shall constitute a breach of its Contract and the State or Authorized User may thereafter utilize any remedy available at law or equity.

63. INTEREST ON LATE PAYMENTS

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

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

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

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

a. Cover / Substitute Performance In the event of Contractor's material breach, the Commissioner may, with or without formally bidding same:

- i. Purchase from other sources; or
- ii. If, after making reasonable attempts, under the circumstances then existing, to timely obtain acceptable service or acquire replacement product of equal or comparable quality, the Commissioner is unsuccessful, the Commissioner may acquire acceptable replacement product or service of lesser or greater quality.

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

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

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

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

d. Deduction / Credit Sums due as a result of these remedies may be deducted or offset by the State or 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 State or Authorized User the amount of such claim or portion of the claim still outstanding, on demand. The Commissioner reserves the right to determine the disposition of any rebates, settlements, restitution, liquidated damages, etc., which arise from the administration of the Contract.

e. **Fee Refund** In the event that a Purchase Order is cancelled for breach, Authorized User shall be entitled to a refund of any fees paid by Authorized User for usage or services prospectively from the date of breach.

65. **ASSIGNMENT OF CLAIM** Contractor hereby assigns to the State any and all its claims for overcharges associated with this Contract which may arise under the antitrust laws of the United States, 15 U.S.C. Section 1, et seq. and the antitrust laws of the State of New York, G.B.L. Section 340, et seq.

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

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

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

68. **SECURITY / CONFIDENTIALITY** Contractor warrants, covenants and represents that it will comply fully with all security procedures of the State and any Authorized User(s) in performance of the Contract.

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

Contractor further agrees to take appropriate steps as to its personnel, agents, officers and any subcontractors regarding the obligations arising under this clause to insure such confidentiality.

69. **COOPERATION WITH THIRD PARTIES** The Contractor shall be responsible for fully cooperating with any third party, including but not limited to subcontractors of the Authorized User, relating to delivery of product or coordination of services.

70. **CONTRACT TERM - RENEWAL** In addition to any stated renewal periods in the Contract, any contract or unit portion thereof let by the Commissioner may be extended by the Commissioner for an additional period(s) of up to one year (cumulatively) with the written concurrence of the Contractor.

71. **WARRANTIES & GUARANTEES** Where Contractor or Product manufacturer/developer generally offers additional or more advantageous warranties than set forth below, Contractor shall offer or pass through any such warranties to Authorized Users. Contractor hereby warrants and represents:

a. **Product Performance** Products delivered pursuant to this Contract conform to the specifications, performance standards and documentation, and the documentation fully describes the proper procedure for using the Products.

b. **Title and Ownership Warranty** Full ownership, clear title free of all liens, and/or that Contractor has obtained on behalf of Authorized User perpetual license rights to use the Product for the purposes of this Bid or individual Purchase Order. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor fully indemnifies the State and Authorized User for any loss, damages or actions arising from a breach of said warranty without limitation. Authorized User may require Contractor to furnish appropriate written documentation establishing the above rights and interests as a condition of payment. Authorized User's request or failure to request such documentation shall not relieve Contractor of liability under this warranty.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE WARRANTIES SET FORTH IN THE CONTRACT ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. Misuse, accident, unsuitable physical or operating environment, modification or operation inconsistent with standard industry practice, or failure caused by a product for which Contractor is not responsible may void the warranties.

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

a. License Scope Licensee is granted a non-exclusive, perpetual license to use, execute, reproduce, display, perform, or merge the Product within its business enterprise in the United States up to the maximum licensed capacity stated on the Purchase Order. Product may be accessed, used, executed, reproduced, displayed or performed up to the capacity

measured by the applicable licensing unit stated on the Purchase Order (i.e., payroll size, number of employees, CPU, MIPS, MSU, concurrent user, workstation). Licensee shall have the right to use and distribute modifications or customizations of the Product to and for use by any Authorized Users otherwise licensed to use the Product, provided that any modifications, however extensive, shall not diminish Licensor's proprietary title or interest. No license, right or interest in any trademark, trade name, or service mark is granted hereunder.

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

c. Licensed Documentation If commercially available, Licensee shall have the option to require the Contractor to deliver, at Contractor's expense: a) one (1) hard copy and one (1) master electronic copy of the Documentation in diskette or CD-ROM format; or b) hard copies of the Product Documentation by type of license in the following amounts, unless otherwise mutually agreed:

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

Software media must be in a format specified by the Authorized User, without requiring any type of conversion (e.g., if unit has a 3½" disk drive, software must be provided on 3½" diskettes).

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

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

Maintenance shall include, at a minimum, (1) the provision of error corrections, updates, revisions, fixes, upgrade and new releases to Licensee, and (2) Help Desk assistance with locally accessible "800" or toll free, local telephone service, or alternatively on-line Help Desk accessibility. Contractor shall maintain the Products so as to provide Licensee with the ability to utilize the Products in accordance with the Product documentation without significant functional downtime to its ongoing business operations during the maintenance term.

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

maintenance had lapsed, or for twelve months, whichever is less, at then-current NYS net maintenance rates.

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

f. Restricted Use By Outsourcers / Facilities Management, Service Bureaus / or Other Third Parties

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

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

g. Archival Back-Up and Disaster Recovery Licensee may use and copy the Product and related Documentation in connection with: 1) reproducing a reasonable number of copies of the Product for archival backup and disaster recovery procedures in the event of destruction or corruption of the Product or disasters or emergencies which require

Licensee to restore backup(s) or to initiate disaster recovery procedures for its platform or operating systems; 2) reproducing a reasonable number of copies of the Product and related documentation for cold site storage. "Cold Site" storage shall be defined as a restorable back-up copy of the Product not to be installed until and after the declaration by the Licensee of a disaster; 3) reproducing a back-up copy of the Product to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed under this section #73. "Disaster Recovery" shall be defined as the installation and storage of Product in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development.

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

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

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

73. PRODUCT ACCEPTANCE Unless otherwise provided by mutual agreement of the Authorized User and the Contractor, Authorized User(s) shall have sixty (60) days from the date of delivery to accept Product unless the Contractor is responsible for installation, in which case the sixty day period shall run from completion of installation. Failure to provide notice of acceptance or rejection by the end of the period provided for under this clause constitutes acceptance by the Authorized User(s) as of the expiration of that period. The License Term shall be extended by the time periods allowed for testing and acceptance.

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

In the event that the documented installation test cannot be completed successfully within the specified acceptance period, and the Contractor or Product is responsible for the delay, Authorized User shall have the option to cancel the order in whole or in part, or to extend the testing period for another sixty (60) day increment. Authorized User shall notify Contractor of acceptance upon successful completion of the documented installation test. Such cancellation shall not give rise to any cause of action against the State or Authorized User for damages, loss of profits, expenses, or other remuneration of any kind.

Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of the Authorized User's agents or employees. Said costs shall be limited to fees paid to Contractor, if any, or any liability for costs incurred at the direction or recommendation of Contractor.

74. AUDIT OF LICENSED PRODUCT USAGE

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

75. OWNERSHIP / TITLE TO PROJECT DELIVERABLES

a. Definitions

- i. "Products" - A deliverable furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), c) third party software, d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components, and e) any properties embodied therein, whether in tangible or intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, source code, object code).
- ii. "Existing Products" - Tangible Products and intangible licensed Products which exist prior to the commencement of work under the Contract. Contractor retains the burden of proving that a particular product was existing before commencement of the Project. .

- iii. "Custom Products" - Products, preliminary, final or otherwise, which are created or developed by Contractor, its subcontractors, partners, employees or agents for Authorized User under the Contract.

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

i. Existing Products:

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

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

ii. Custom Products: Effective upon creation of Custom Products, Contractor hereby conveys, assigns and transfers to Authorized User the sole and exclusive rights, title and interest in Custom Product(s), whether preliminary, final or otherwise, including all trademark and copyrights. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction and marketing by or through Contractor, its agents, employees, or subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under a project definition/work order in the course of Contractor's business.

Where a scope of work does not involve COPS or other third party financing, the Authorized User may, by providing written notice thereof to the Contractor, elect in the

alternative to take a non-exclusive perpetual license to Custom Products in lieu of Authorized User taking exclusive ownership and title to such Products. In such case, Licensee on behalf of all Authorized Users shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purpose(s) as stated in paragraph (b)(i)(2), above.

c. Transfers or Assignments to a Third Party Financing Agent

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

d. Sale or License of Custom Products Involving Tax-Exempt Financing (i.e., Certificates of Participation (COPS))

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

e. Contractor's Obligation with Regard to ISV (Third Party) Product

Where Contractor furnishes Existing Licensed Product(s) as a Project Deliverable, and sufficient rights necessary to effect the purposes of this section 76.0 are not otherwise provided in the Contractor or ISV's standard license agreement, Contractor shall be responsible for obtaining from the ISV third party proprietary owner/developer the rights set forth herein to the benefit of the Authorized User at Contractor's sole cost and expense.

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

77. MIGRATION TO CENTRALIZED CONTRACT Authorized User may obtain additional Product authorized

under this Contract, (e.g., licensed capacity upgrades, new releases, documentation, maintenance, consulting or training) whether or not Product was initially obtained independently of this Contract. The Authorized User's election to obtain additional Product shall not operate to diminish, alter or extinguish rights previously granted.

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

79. CHANGES TO PRODUCT OR SERVICE OFFERINGS

a. Product or Service Discontinuance Where Contractor is the Product Manufacturer/Developer, and Contractor publicly announces to all U.S. customers ("date of notice") that a Product is being withdrawn from the U.S. market or that maintenance service or technical support provided by Contractor ("withdrawn support") is no longer going to be offered, Contractor shall be required to: (1) notify the Commissioner, each Licensee and each Authorized User then under contract for maintenance or technical support in writing of the intended discontinuance; and (2) continue to offer Product or withdrawn support upon the Contract terms previously offered for the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice; and (3) at Authorized User's option, provided that the Authorized User is under contract for maintenance on the date of notice, either: a) provide the Authorized User with either a Product replacement or migration path with at least equivalent functionality at no additional charge, or b) provide Authorized User with the source code for Licensed Product at no additional charge to enable Authorized User to continue use and maintenance of the Product.

In the event that the Contractor is not the Product Manufacturer, Contractor shall be required to: (1) provide the notice required under (1), above, to the entities described within five (5) business days of Contractor receiving notice from the Product Manufacturer, and (2) include in such notice the period of time from the date of notice that the Product Manufacturer will continue to provide Product or withdrawn support.

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

b. Product or Service Re-Bundling* In the event that Contractor is the Product manufacturer and publicly announces to all U.S. customers ("date of notice") that a Product or maintenance or technical support offering is being re-bundled in a different manner from the structure or licensing model of the prior U.S. commercial offering, Contractor shall be required to: (1) notify the State and each Authorized User in writing of the intended change; (2) continue to provide Product or withdrawn support upon the same terms and conditions as previously offered on the then-current NYS Contract for the greater of: a) the best terms

offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice; and (3) shall submit the proposed rebundling change to the Commissioner for approval prior to its becoming effective for the remainder of the Contract term. *The provisions of this section do not apply if the Contractor is not the Product manufacturer.

80. NO HARDSTOP / PASSIVE LICENSE MONITORING

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

81. SOURCE CODE ESCROW FOR LICENSED PRODUCT

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

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

82. INDEMINIFICATION & LIMITATION OF LIABILITY

Neither party shall be liable for any delay or failure in performance beyond its control resulting from acts of God or force majeure. The parties shall use reasonable efforts to eliminate or minimize the effect of such events upon performance of their respective duties under Contract.

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

Contractor will indemnify, defend and hold the State and its Authorized Users harmless, *without limitation*, from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs which may be finally assessed against the State in any action for infringement of a United States Letter Patent with respect to the Products furnished, or of any copyright, trademark, trade secret or intellectual property right, provided that the State shall give the Contractor: (i) prompt written notice of any action, claim or threat of infringement suit, or other suit, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action at the expense of Contractor. Where a dispute or claim arises relative to a real or anticipated infringement, the State or Authorized User may require Contractor, at its sole expense, to submit such information and documentation, including formal patent attorney opinions, as the Commissioner shall require.

The Contractor shall not be obligated to indemnify that portion of a claim or dispute based upon: i) Authorized User's unauthorized modification or alteration of a Product; ii) Authorized User's use of the Product in combination with other products not furnished by Contractor; iii) Authorized User's use in other than the specified operating conditions and environment.

In addition to the foregoing, if the use of any item(s) or part(s) thereof 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 as the Authorized User's exclusive remedy to take action in the following order of precedence: (i) to procure for the State the right to continue using such item(s) or part (s) thereof, as applicable; (ii) to modify the component so that it becomes non-infringing equipment of at least equal quality and performance; or (iii) to replace said item(s) or part(s) thereof, as applicable, with non-infringing components of at least equal quality and performance, or (iv) if none of the foregoing is commercially reasonable, then provide monetary compensation to the State up to the dollar amount of the Project Award.

For all other claims against the Contractor under any individual Purchase Order where liability is not otherwise set forth in the Contract as being "without limitation", and regardless of the basis on which the claim is made, Contractor's liability under a Purchase Order **for direct damages shall be the greater of \$100,000, the dollar amount of the Contract, or two (2) times the charges rendered by the Contractor under the Contract.** Unless otherwise specifically enumerated herein or in the work order mutually agreed between the parties, neither party shall be liable to the other for special, indirect or consequential damages, including lost data or records (unless the Contractor is required to back-up the data or records as part of the work plan), even if the party has been advised of the possibility of such damages. Neither party shall be liable for lost profits, lost revenue or lost institutional operating savings.

The State and Authorized User may, in addition to other remedies available to them at law or equity and upon notice to the Contractor, retain such monies from amounts due Contractor, or may proceed against the performance and payment bond, if any, as may be necessary to satisfy any claim for damages, penalties, costs and the like asserted by or against them.

APPENDIX C

NYS Net Price Schedule

(Product Offerings and Fees for Installation, Configuration, Support &
Maintenance)

&

Required Format for Submission of Price List

To Be Provided By Contractor

Required Format for Submission of Price List

Pricing must be offered in accordance with the format as presented the instructions below.

Model Number	Product Description	NYS Net Price Per Unit	Discount Category	List Price	% of Discount From List	Inst. Per Unit	% Inst. Disc From List	NYS Net Inst. Per Unit	Manuf Standard Warranty	Maint. (add new column For each plan)
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Note: "Inst." is installation.

In addition to paper copies in this Appendix, all Contractors are required to submit initial pricing information on diskette. Details of the required spreadsheet formatting is explained in the sample below.

General

A Microsoft Excel spreadsheet is preferred. Information may be provided in a comma delimited ASCII text file as an alternative.

All Cells

- Arial 10 pitch
- Align "top"
- Sequence of part numbers should be the same as the supporting list price source documentation provided to the State based on the existing contract requirements. (Examples include: published US Price List, computerized printouts from the manufacturer's on-line price system, or any other list(s) required as part of your New York State contract terms and conditions.)

Column "A"

- Column "A" is reserved for **model/part numbers only** (no descriptive information should appear in Column "A").
- Cell "A1" must contain the heading - "Model Number".
- Column should be justified "left".

Column "B"

- Column "B" is reserved for **Product descriptive text only**.
- Cell "B-1" must contain the heading - "Product Description".
- Column is to be "left justified" and "wrap text".
- Categories and Product headings and subheadings must be in **Bold Text** in column 'B' only.
- Each cell can NOT contain more than 256 characters. If additional characters are required for the description, cells directly below that cell in column "B" should be used to complete the description.
- The use of upper and lower case letters is suggested for readability.

Column “C”

- Column “C” is reserved for **net pricing information only**.
- Cell "C1" must contain the heading - “NYS Net Price Per Unit”.
- Cells in this column must be justified right.
- All cells should be in numeric format with commas and two decimal places, and must be values, not formulas.

Other Columns

Additional columns containing information required under your contract should begin in Columns D and continue to the right (E, F, G, etc.)

Additional information you wish to provide should be placed in the columns to the right of the last column containing the required contract information.

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APPENDIX D

Consulting and Training Services & Fees

(Description of Services, Course Offerings and Fees)

To Be Provided By Contractor

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APPENDIX E

To Be Provided By Contractor

- A. Configuration Services Availability
- B. Remote Administration, Description Of Any Remote Administration And Maintenance Services)
- C. On-Line Price Configurator Availability

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APPENDIX F

Manufacturer & Value Added Reseller/Distributor Information

To Be Provided By Contractor

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APPENDIX F
Manufacturer & Value Added Reseller/Distributor Information

1. Contractor Information (for Ordering and Contract Administration Purposes)			
Company Name:			
Address:			
Federal ID #:			
Contract Administrator Name:			
Title:			
Telephone Number:			
E-mail:			
FAX:			
Contract "Toll" Free Support Number:		Guaranteed Product Delivery Timeframe:	days ARO

Value Added Reseller/Distributor Information	
Company Name:	
Address:	
Federal ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller Qualifying Criteria:	

Value Added Reseller/Distributor Information	
(2) Company Name:	
Address:	
Federal ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller Qualifying Criteria:	



APPENDIX F
Value Added Reseller/Distributor Information
[Copy additional pages if necessary]

Value Added Reseller/Distributor Information	
Company Name:	
Address:	
Federal ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller Qualifying Criteria:	

Value Added Reseller/Distributor Information	
Company Name:	
Address:	
Federal ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller Qualifying Criteria:	

Value Added Reseller/Distributor Information	
Company Name:	
Address:	
Federal ID #:	
Contract Administrator Name:	
Title:	
Telephone Number:	
E-mail:	
FAX:	
Reseller Qualifying Criteria:	

APPENDIX G

After award, the Contractor will be required to provide the following Compliance Statement for the specific Product:

VENDOR'S COMPLIANCE STATEMENT

With regards to the warranty statement contained in paragraph #3 of the NYS Standard Year 2000 Warranty, Vendor Products furnished under *[Insert Contract Reference Number]* are individually warranted as Year 2000 compliant.

*[If only part of product line is warranted,
enumerate compliant products, either: below, attached list, or by other means]*

The above are also warranted as a system to be compliant as follows: a) Vendor Products intended to perform as a package or system (e.g. exchanging date/time between two or more such products), and/or b) Vendor's Products with the designated O/S (*operating system(s)*).

Other than as set forth above, Vendor has not tested Vendor Product(s) in combination with all other third party software or hardware, and therefore makes no representations with regard to any Vendor Product's interoperability with any such non-Vendor software or hardware. Vendor shall, however, obtain a pass through from the third party manufacturer to Authorized User of third party manufacturer's standard Year 2000 warranty for any third party products offered under the above contract and provide such warranty at the time of bid, product order or product quote. Where such third party product pass-through is not given, Vendor shall declare such third party products as being "non-compliant" at the time of bid, product order or quote.

Vendor shall furnish this compliance statement and a statement for any non-compliant product or system to the Authorized User at the time of bid, product order or product quote.

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APPENDIX H

OGS Procedures for Updating the Contract

As set forth in the Contract, Contractor is responsible for hosting the Contract at the Contractor's Internet site. Contractor shall automatically update the website to reflect all Auto-Add changes as defined below. Regular and Special Adds shall be filed with OGS as outlined, and Contractor shall update the website to reflect Regular and Special Adds after Office of General Services (OGS) and the Office of the State Controller (OSC) prior approval has been received.

The following guidelines are subject to change at the discretion of OGS.

A. TYPES OF CONTRACT UPDATES In order to expedite processing of a change request, where proposed changes involve more than one category below, they should be submitted to OGS as separate requests.

- 1) AUTO ADDS / DELETIONS - "Auto Adds/Deletions" are Contract changes and updates made in accordance with the previously approved Contract pricing formula; e.g., a "discount from list" or pricing based on an approved GSA-based price schedule. Auto Adds do not include any price increases. Auto Adds/Deletions include: i) adding new Products within the established, previously approved pricing structure, ii) lowering pricing for Products previously incorporated under the Contract, iii) deleting Products previously incorporated under the Contract and iv) amending value added reseller (VAR) lists. For categories (i), (ii) and (iv) Auto Adds: Contractor shall electronically submit a list of ADDS 5 (five) days prior to the effective date. OGS will review the ADDS and notify the Contractor within that 5 (five) day period whether any of the ADDS are beyond the scope of the Contract. If OGS does not notify the Contractor of any issues before the close of business on the fifth day, the Contractor may then automatically update the Contract price list without prior approval of either OGS or the Comptroller and may proceed with selling Products. Contractor should note, however, that all Auto Adds approved by OGS are subject to a post audit by the Office of the State Comptroller. For category (iii) Auto Deletions, at the end of and subject to the period specified in Appendix B-1, Clause 80 ("Changes in Product or Service Offerings"), Contractor may automatically update the Contract price list by deleting the Product(s) without prior approval of either OGS or the Comptroller.

After meeting the above criteria, Auto Adds must be immediately posted electronically by the Contractor at the Contract web site.

- 2) REGULAR ADD - "Regular Adds" are requests for i) price increases for Products which are already incorporated under the Contract, and ii) addition of new Products to the Contract which do not fall under the previously established price structure or discounts for Product types previously approved under the Contract. Regular Adds include rebundled Products or Services. Regular Adds must be submitted to OGS for prior approval and must be accompanied by a justification of reasonableness of price. Regular Adds are subject to pre-audit by the Comptroller. If approved, OGS staff will notify Contractor in writing. Price increases or new Product offerings that do not conform to

the established price structure may not be electronically posted by Contractor until after receipt of OGS approval of the "Regular Add".

When the Contract pricing is based on GSA prices, the revised prices or prices of new Products must reflect current GSA prices adjusted as necessary for any additional discounts, including an additional 1% discount representing the Industrial Funding Fee.

- 3) SPECIAL ADD - Contract changes and updates that do not fall within either of the above categories, will be processed as "Special Adds". Special Adds are changes that are not specifically covered by the terms of the Contract but inclusion is found to be in the best interest of the State. Contractor must provide a justification of reasonableness of the prices offered and a statement explaining why it is in the best interest of the State to approve the new Products. Special Adds are subject to pre-audit by the Office of the State Comptroller. If approved, OGS staff will notify Contractor in writing. New offerings may not be electronically posted by Contractor until after receipt of OGS approval of the Special Add.
- 4) CHANGES IN RESELLER LIST - If the Contractor allows resellers to participate in the Contract in accordance with the Use of Alternate Channel Participation (Resellers/Distributors) clause of this Contract, requests to add or delete resellers or to modify reseller information must be submitted for prior approval of OGS and the State Comptroller. Contractor may request changes to the designated Reseller List by submission of a completed, revised Appendix F.

B. CONTRACTOR'S SUBMISSION OF CONTRACT UPDATES In connection with any Contract update, OGS reserves the right to:

- request additional information
- reject Contract updates
- remove Products from Contracts
- remove Products from Contract updates
- request additional discounts for new or existing Products

C. PRICE JUSTIFICATION - FORMAT Contractor is required to submit the Product and price information for the update in an Excel spreadsheet format in hard copy in triplicate and on a floppy disk or electronically via e-mail to the OGS Purchasing Officer. The list must be dated and the format should be consistent with the format of the price list(s) included in the NYS Net Price List (Appendix C) of this Contract. The price list should separately include and identify (e.g., by use of separate worksheets or by using italics, bold and/or color fonts):

- Price increases
- Products being added

OGS or the State Comptroller reserves the right to require a revised NYS Net Price List at any time during the Contract period, and it will be requested if there have been numerous updates since the last complete update. Each updated price list must include the date the price list was prepared.

- D. SUPPORTING DOCUMENTATION Each update request must include the current U.S. commercial price list relevant to the Products included in the update. If the NYS Net Prices are based on a GSA Schedule, the current GSA Schedule must also be included with the update request. Requested price increases not based on an approved GSA schedule must also include a copy of the current National Consumer Price Index as described in the “Payments/Pricing” section of the Contract.
- E. COVER LETTERS A Contract update must be accompanied by three (3) copies of the contract update format set forth in Appendix H. Contractor should briefly describe the nature and purpose of the update (e.g., update requested in order to reflect a recently approved GSA schedule, and/or for new Products or services which fall into a new group or category that did not exist at the time of approval of the Contract by the State Comptroller, etc.). Each of the three copies of the cover letters must contain original signatures by an individual authorized to sign on behalf of Contractor, and an original corporate acknowledgment (see below).

The Cover Letter must be signed by an individual given the authority to perform this action by the corporation’s board of directors and the signature must be notarized using the language that follows.

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STATE OF NEW YORK
EXECUTIVE DEPARTMENT - OFFICE OF GENERAL SERVICES
PROCUREMENT SERVICES GROUP
Corning Tower – 37th Floor
Empire State Plaza
Albany, New York 12242

CONTRACT UPDATE FORM	
OGS CONTRACT NO.: _____	DATE OF SUBMISSION: _____
CONTRACT PERIOD: From: _____ To: _____	VENDOR CONTACT: NAME: _____ PHONE NO.: _____ FAX NO.: _____ E-MAIL: _____
NOTE: Submission of this FORM does not constitute acceptance by the State of New York until approved by the appropriate New York State representative(s).	

INSTRUCTIONS:

1. **This form is to be used for all contract updates. The form is to be completed in triplicate and submitted to the OGS Procurement Services Group for final approval. Vendors shall complete, sign, and notarize where indicated, and attach this form to a cover letter written on standard company letterhead. Any submission that is not complete or signed in triplicate will be rejected.**
2. *Contractor may be required to submit the Product and price information for the update in an Excel spreadsheet format in hard copy and on a floppy disk and/or electronically via e-mail to the OGS Purchasing Officer.*
3. *To expedite the processing of updates that qualify as Auto Adds, do not combine Auto Adds with Regular Adds. **If more than one type of update is being submitted, they should be submitted as totally separate requests.***
4. *The list must be dated and the format should be consistent with the format of the price list(s) included in the Pricing Appendix of the Contract.*
5. *The contract update must be accompanied by either the GSA Price List and revised NYS Net Price List incorporating all changes or the US Commercial Price List and revised NYS Net Price List incorporating all changes, whichever is applicable.*

COMPLETE STATEMENTS 1 THROUGH 8 BELOW:

1. This request is an: <input type="checkbox"/> Auto Add <input type="checkbox"/> Regular Add See contract for an explanation of these terms.	2. The intent of this submittal is to: <input type="checkbox"/> Add new products <input type="checkbox"/> Delete products <input type="checkbox"/> Increase pricing <input type="checkbox"/> Reduce pricing <input type="checkbox"/> Amend VAR list
3. All terms and conditions of the contract shall apply to this request. <input type="checkbox"/> Agree <input type="checkbox"/> Disagree	4. All discounts as agreed to in the contract shall apply. <input type="checkbox"/> Agree <input type="checkbox"/> Disagree
5. All discounts are: <input type="checkbox"/> GSA <input type="checkbox"/> Most Favored Nation* *Prices offered are the lowest offered to any similarly situated entity.	6. Attached documentation includes: <input type="checkbox"/> Current approved GSA (labeled "For information only") <input type="checkbox"/> Current commercial price list (labeled "For information only") <input type="checkbox"/> Revised NYS Net Price List

7. If other than an auto-ad, describe the Nature and Purpose of the update:

8. For a regular add, please explain how pricing has been restructured to customers, and/or identify and describe new Products or services, which fall into a new group or category that did not exist at the time of approval of the Contract by the New York State Comptroller. If not applicable, state NA:

The following CORPORATE ACKNOWLEDGEMENT statement is to be included in each of the three original forms. The request must be signed by an individual given the authority to perform this action by the corporation's board of directors and the signature must be notarized.

Signature of Authorized Vendor Representative:

<u>CORPORATE ACKNOWLEDGMENT</u>	
STATE OF	}
	:
	ss.:
COUNTY OF	}
On the ____ day of _____ in the year _____, before me personally came: _____, to me known, who, being by me duly sworn, did depose and say that he/she/they reside(s) in _____; that he/she/they is (are) _____ (the President or other officer or director or attorney in fact duly appointed) of _____, the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by authority of the board of directors of said corporation.	
_____ Signature and Office of Person Taking Acknowledgment	

FOR STATE USE ONLY	
<p style="text-align: center;"><u>OGS APPROVAL:</u></p> <p>Approved _____ Approved as amended _____ Disapproved _____</p> <p>Name: _____ Title: _____ Date _____</p>	<p style="text-align: center;"><u>OSC APPROVAL:</u></p> <p>Approved _____ Disapproved _____</p> <p>Name: _____ Title: _____ Date _____</p>

Regular and Special Adds requests to update the contract that are not submitted in accordance with the above requirements shall be returned to the Contractor without action.

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APPENDIX I

Contractor's Requirement Under Executive Law Article 15-A

CONTRACTOR'S REQUIREMENT UNDER ARTICLE 15-A

In July of 1988, Article 15-A of the Executive Law was passed by the New York State Legislature. This legislation provides specific rules, regulations and procedures for minority and women-owned enterprise participation in certain State contracts.

The Office of General Services (OGS) is required to implement the provisions of Article 15-A for all of its contracts (1) in excess of \$25,000 for labor, services, supplies, equipment, materials, or any combination of the foregoing and (2) for contracts in excess of \$100,000 for real property renovation and construction. For purposes of this contract, OGS hereby establishes a goal of 0% for minority business enterprises (MBE) participation and 0% for women-owned business enterprises (WBE) participation.

In order to be awarded an OGS contract, every bidder must comply with the requirements, rules and regulations outlined in Article 15-A.

POLICY AND PROVISIONS

It is the policy of the State of New York to promote equality of economic opportunity for minority and women-owned business enterprises (M/WBEs) in State contracting. In order to comply with the State's objectives, the Contractors shall use "good faith efforts" to provide meaningful participation by M/WBE subcontractors or suppliers in the performance of this contract.

For the purpose of determining a Contractor's good faith effort to comply with the requirements of Article 15-A or to be entitled to a waiver therefrom, the contracting agency shall consider:

- (a) Whether the Contractor has advertised in general circulation media, trade association publications, minority-focus and women-focus media. In such event,
 - (i) whether or not certified minority or women-owned businesses which have been solicited by the Contractor exhibited interest in submitting proposals for a particular project by attending a pre-bid conference; and
 - (ii) whether certified businesses which have been solicited by the Contractor have responded in a timely fashion to the Contractor's solicitations for timely competitive bid quotations prior to the contracting agency's bid date; and
- (b) Whether there has been written notification to appropriate certified businesses that appear in the Directory of Certified M/WBE prepared pursuant to paragraph (f) of subdivision three of section three hundred eleven of this article; and
- (c) Whether the Contractor can reasonable structure the amount of work to be performed under subcontracts in order to increase the likelihood of participation by certified businesses.
- (d) **GOALS** - The MBE and WBE participation goals as stated earlier are based on the availability of M/WBEs currently certified by New York State and geographically located to be able to perform the work in the region where the project is located. The total dollar value of the contract, scope of work, the supplies and equipment necessary to perform the project, are also considerations used to determine the percentage goals.

- A. **UTILIZATION** - The Contractor may count as M/WBE participation: subcontracting part of the contract to certified firms or purchasing supplies and equipment used to perform the terms and conditions of the contract from certified firms.

Upon a showing by the Contractor of every good faith effort to achieve the goal for M/WBE participation in the work, the State will waive a Contractor's failure to achieve the goal M/WBE participation.

- C. **MINORITY AND WOMEN-OWNED BUSINESS OFFICER** - The Contractor shall designate a Affirmative Action officer and assign the officer the responsibility and authority to monitor the M/WBE program for this contract. The OGS' Office of Minority and Women-owned Business Enterprises' staff is available to help in identifying certified M/WBEs.
- D. **REQUIRED REPORTS** - The Contractor is required to submit a Utilization Plan (BDC-328) to the NYS Office of General Services within five (5) days after the opening of bids for construction contracts exceeding \$100,000 and 14 days after notification of award for commodity and service contracts exceeding \$25,000. The Contractor must also submit the MBE/WBE Letter of Intent to Participate (BDC-49). The Letter MBE/WBE of Intent to Participate is a commitment by the Contractor and the subcontractor/supplier that the terms and conditions for M/WBE participation on this contract are agreed to. Any modifications or changes to the agreed participation by certified M/WBEs, over the term of the contract, must be reported on a revised Utilization Plan.
- E. **NONDISCRIMINATION** - The Contractor agrees not to discriminate on the basis of race, creed, color, national origin, gender, age, disability, or marital status, in any respect, against any potential subcontractor, supplier, other company, firm, or enterprise in any manner relating to the performance of this contract.

POST AWARD

The Contractor must submit to the Office of Minority and Women-owned Business Enterprises after notification of award, the following forms, by the 10th day of each month:

1. (BDC-58) Cumulative Monthly Payment Statements
2. (BDC-25) Monthly Affirmation of Income Payments

All questions regarding compliance to Article 15-A requirements or copies of the forms should be addressed to:

New York State Office of General Services
Office of Minority and Women-owned Business Enterprises
35th Floor, Room 3580
Corning Tower Building
Empire State Plaza
Albany, NY 12242

The telephone numbers and addresses for New York State Empire State Development are as follows:

New York State Empire State Development
633 Third Avenue
New York, NY 10017

Telephone: (212) 803-2414

New York State Empire State Development
Division of Minority and Women's Business Development
30 South Pearl Street
Albany, NY 12245

Telephone: (518) 292-5250

Revised 1/2002