

## **AMENDED TERMS AND CONDITIONS – POSTED 6/1/12**

contract for or provide such goods or services with or to any private entity where the power to contract, appoint or retain on behalf of such private entity is exercised, directly or indirectly, by a state agency or officer thereof, unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding. This paragraph shall not apply to the publication of resolutions, advertisements or other legal propositions or notices in newspapers designated pursuant to law for such purpose and for which the rates are fixed pursuant to law.

As provided in Public Officer's Law Section 73(1)(i), the term "state officer or employee" shall mean:

- (i) heads of state departments and their deputies and assistants other than members of the board of regents of the university of the state of New York who receive no compensation or are compensated on a per diem basis;
- (ii) officers and employees of statewide elected officials;
- (iii) officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis; and
- (iv) members or directors of public authorities, other than multistate authorities, public benefit corporations and commissions at least one of whose members is appointed by the governor, who receive compensation other than on a per diem basis, and employees of such authorities, corporations and commissions.

Public Officer's Law Section 73 can be found at:

<http://www.nyintegrity.org/law/ethc/POL73.html>.

### **4.10 Draft Contract**

The State of New York Agreement (Section 4.10), Appendix A – Standard Clauses for all NYS Contracts (Section 4.11), Appendix A-1 – NYSED standard changes and additions to the State of New York Agreement (Section 4.12), Appendix Q – Amendments and Additions to Appendix A-1 for this Contract and Additional Contractual Provisions (Sections 4.13.1 to 4.13.41), and Appendix A-2 – American Recovery and Reinvestment Act of 2009, Additional Contract Record Keeping Requirements (Section 4.14) **WILL BE INCLUDED** in the contract that results from this RFP.

Please note that Appendix A has priority over all other portions of the Contract. The order of precedence for these terms and conditions in the Contract will be: Appendix A, Appendix B, Appendix C, Appendix A-2, Appendix Q, Appendix A-1, and the State of New York Agreement. In the event of perceived conflict as to the terms and conditions of this Agreement, the Statement of Work (Appendix D) and its attachments shall be subordinate to Appendices A, B, C, A-2, Q, A-1, and the State of New York Agreement.

**Vendors who are unable to complete or abide by these assurances should not respond to this request.**

## **AMENDED TERMS AND CONDITIONS – POSTED 6/1/12**

### STATE OF NEW YORK AGREEMENT

This AGREEMENT is hereby made by and between the People of the State of New York, acting through John B. King, Jr., Commissioner of Education of the State of New York and Chief Executive Officer of the Board of Regents of the University of the State of New York, party of the first part, hereinafter referred to as the (STATE) and the public or private agency (CONTRACTOR) identified on the face page hereof.

#### WITNESSETH:

WHEREAS, the STATE has the authority to regulate and provide funding for the establishment and operation of program services and desires to contract with skilled parties possessing the necessary resources to provide such services; and

WHEREAS, the CONTRACTOR is ready, willing and able to provide such program services and possesses or can make available all necessary qualified personnel, licenses, facilities and expertise to perform or have performed the services required pursuant to the terms of this AGREEMENT;

NOW THEREFORE, in consideration of the promises, responsibilities and covenants herein, the STATE and the CONTRACTOR agree as follows:

#### I. Conditions of Agreement

A. This AGREEMENT may consist of successive periods (PERIOD), as specified within the AGREEMENT or within a subsequent Modification Agreement(s) (Appendix X). Each additional or superseding PERIOD shall be on the forms specified by the particular State agency, and shall be incorporated into this AGREEMENT.

B. Funding for the first PERIOD shall not exceed the funding amount specified on the face page hereof. Funding for each subsequent PERIOD, if any, shall not exceed the amount specified in the appropriate appendix for that PERIOD.

C. This AGREEMENT incorporates the face pages attached and all of the marked appendices identified on the face page hereof.

D. For each succeeding PERIOD of this AGREEMENT, the parties shall prepare new appendices, to the extent that any require modification, and a Modification Agreement (The attached Appendix X is the blank form to be used). Any terms of this AGREEMENT not modified shall remain in effect for each PERIOD of the AGREEMENT.

To modify the AGREEMENT within an existing PERIOD, the parties shall revise or complete the appropriate appendix form(s). Any change in the amount of consideration to be paid, or change in the term, is subject to the approval of the Office of the State Comptroller. Any other modifications shall be processed in accordance with agency guidelines as stated in Appendix A1.

E. The CONTRACTOR shall perform all services to the reasonable satisfaction of the STATE. The CONTRACTOR shall provide services and meet the program objectives summarized in the Program Workplan (Appendix D) in accordance with: provisions of the AGREEMENT; relevant laws, rules and regulations, administrative and fiscal guidelines; and where applicable, operating certificates for facilities or licenses for an activity or program.

F. If the CONTRACTOR enters into subcontracts for the performance of work pursuant to this AGREEMENT, the CONTRACTOR shall take full responsibility for the acts and omissions of its subcontractors. Nothing in the subcontract shall impair the rights of the STATE under this AGREEMENT. No contractual relationship shall be deemed to exist between the subcontractor and the STATE.

G. Appendix A (Standard Clauses as required by the Attorney General for all State contracts) takes precedence over all other parts of the AGREEMENT.

#### II. Payment and Reporting

A. The CONTRACTOR, to be eligible for payment, shall submit to the STATE's designated payment office (identified in Appendix C) any appropriate documentation as required by the Payment and Reporting Schedule (Appendix C) and by agency fiscal guidelines, in a manner acceptable to the STATE.

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B. The STATE shall make payments and any reconciliations in accordance with the Payment and Reporting Schedule (Appendix C). The STATE shall pay the CONTRACTOR, in consideration of contract services for a given PERIOD, a sum not to exceed the amount noted on the face page hereof or in the respective Appendix designating the payment amount for that given PERIOD. This sum shall not duplicate reimbursement from other sources for CONTRACTOR costs and services provided pursuant to this AGREEMENT.

C. The CONTRACTOR shall meet the audit requirements specified by the STATE.

### III. Terminations

A. This AGREEMENT may be terminated at any time upon mutual written consent of the STATE and the CONTRACTOR.

B. The STATE may terminate the AGREEMENT immediately, upon written notice of termination to the CONTRACTOR, if the CONTRACTOR fails to comply with the terms and conditions of this AGREEMENT and/or with any laws, rules, regulations, policies or procedures affecting this AGREEMENT.

C. The STATE may also terminate this AGREEMENT for any reason in accordance with provisions set forth in Appendix ~~A4~~A-1.

D. Written notice of termination, where required, shall be sent by personal messenger service or by certified mail, return receipt requested. The termination shall be effective in accordance with the terms of the notice.

E. Upon receipt of notice of termination, the CONTRACTOR agrees to cancel, prior to the effective date of any prospective termination, as many outstanding obligations as possible, and agrees not to incur any new obligations after receipt of the notice without approval by the STATE.

F. The STATE shall be responsible for payment on claims pursuant to services provided and costs incurred pursuant to terms of the AGREEMENT. In no event shall the STATE be liable for expenses and obligations arising from the program(s) in this AGREEMENT after the termination date.

### IV. Indemnification

A. The CONTRACTOR shall be solely responsible and answerable in damages for any and all accidents and/or injuries to persons (including death) or property arising out of or related to the services to be rendered by the CONTRACTOR or its subcontractors pursuant to this AGREEMENT. The CONTRACTOR shall indemnify and hold harmless the STATE and its officers and employees from claims, suits, actions, damages and costs of every nature arising out of the provision of services pursuant to this AGREEMENT.

B. The CONTRACTOR is an independent contractor and may neither hold itself out nor claim to be an officer, employee or subdivision of the STATE nor make any claim, demand or application to or for any right based upon any different status.

### V. Property

Any equipment, furniture, supplies or other property purchased pursuant to this AGREEMENT is deemed to be the property of the STATE except as may otherwise be governed by Federal or State laws, rules or regulations, or as stated in Appendix A1.

### VI. Safeguards for Services and Confidentiality

A. Services performed pursuant to this AGREEMENT are secular in nature and shall be performed in a manner that does not discriminate on the basis of religious belief, or promote or discourage adherence to religion in general or particular religious beliefs.

B. Funds provided pursuant to this AGREEMENT shall not be used for any partisan political activity, or for activities that may influence legislation or the election or defeat of any candidate for public office.

C. Information relating to individuals who may receive services pursuant to this AGREEMENT shall be maintained and used only for the purposes intended under the contract and in conformity with applicable provisions of laws and regulations, or specified in Appendix A1.

#### 4.11 Appendix A - Standard Clauses For NYS Contracts

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

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

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

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

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

**5. NON-DISCRIMINATION REQUIREMENTS.** To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory

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

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

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

**8. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the

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

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

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

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.** (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification

number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

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

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

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

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

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

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

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

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

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

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

**17. SERVICE OF PROCESS.** In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return

thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

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

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

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

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

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

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

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

NYS Department of Economic Development

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

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

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

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

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

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

**21. RECIPROCITY AND SANCTIONS PROVISIONS.**

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

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

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

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

If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar

services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

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

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

To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State. (December 2011)

## 4.12 Appendix A-1

### Payment and Reporting

- A. In the event that Contractor shall receive, from any source whatsoever, sums the payment of which is in consideration for the same costs and services provided to the State, the monetary obligation of the State hereunder shall be reduced by an equivalent amount provided, however, that nothing contained herein shall require such reimbursement where additional similar services are provided and no duplicative payments are received.
- B. Variations in each budget category not exceeding ten percent (10%) of such category, whichever is greater, may be approved by the Commissioner of Education. Any such variations shall be reflected in the final expenditure report and filed in the Office of the State Comptroller. Variations in each budget category which do exceed ten percent (10%) of such category must be submitted to the Office of the State Comptroller for approval.
- C. For each individual for whom costs are claimed under this agreement, the contractor warrants that the individual has been classified as an employee or as an independent contractor in accordance with 2 NYCRR 315 and all applicable laws including, but not limited to, the Internal Revenue Code, the New York Retirement and Social Security Law, the New York Education Law, the New York Labor Law, and the New York Tax Law. Furthermore, the contractor warrants that all project funds allocated to the proposed budget for Employee Benefits, represent costs for employees of the contractor only and that such funds will not be expended on any individual classified as an independent contractor.

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### Terminations

- A. The State may terminate this Agreement without cause by thirty (30) days prior written notice. In the event of such termination, the parties will adjust the accounts due and the Contractor will undertake no additional expenditures not already required. Upon any such termination, the parties shall endeavor in an orderly manner to wind down activities hereunder.
- B. SED reserves the right to terminate this Agreement in the event it is found that the certification by the Contractor in accordance with New York State Finance Law §139-k was intentionally false or intentionally incomplete. Upon such finding, SED may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms of this Agreement.

### Property

- A. The Contractor shall maintain a complete inventory of all realty, equipment and other non-expendable assets including, but not limited to, books, paintings, artifacts, rare coins, antiques and other collectible items purchased, improved or developed under this agreement. The Contractor shall submit a copy of the inventory in a form identical to or essentially similar to, Exhibit A annexed hereto. The term "non-expendable assets" shall mean for the purposes of this agreement any and all assets which are not consumed during the term of this agreement and which have a cost of One Thousand Dollars (\$1,000) or more.

Inventories for non-expendable assets must be submitted with the final expenditure report. In addition to or as part of whatever rights the State may have with respect to the inspection of the Contractor, the State shall have the right to inspect the inventory without notice to the Contractor.

The Contractor shall not at any time sell, trade, convey or otherwise dispose of any non-expendable assets having a market value in excess of Two Thousand Dollars (\$2,000) at the time of the desired

disposition without the express permission of the State. The Contractor may seek permission in writing by certified mail to the State.

The Contractor shall not at any time use or allow to be used any non-expendable assets in a manner inconsistent with the purposes of this agreement.

- B. If the Contractor wishes to continue to use any of the non-expendable assets purchased with the funds available under this agreement upon the termination of this agreement, it shall request permission from the State in writing for such continued use within twenty-five (25) days of the termination of this agreement. The Contractor's request shall itemize the non-expendable assets for which continued use is sought. The State may accept, reject or accept in part such request. If the request for continued use is allowed to any degree, it shall be conditioned upon the fact that said equipment shall continue to be used in accordance with the purposes of this agreement.

If after the State grants permission to the Contractor for "continued use" as set forth above the non-expendable assets are not used in accordance with the purposes of this agreement, the State in its discretion may elect to take title to such assets and may assert its right to possession upon thirty (30) days prior written notice by certified mail to the Contractor. The State upon obtaining such non-expendable assets may arrange for their further use in the public interest as it in its discretion may decide.

- C. Upon termination of this agreement, the State in its discretion may elect to take title and may assert its right to possession of any non-expendable assets upon thirty (30) days prior written notice by certified mail to the Contractor. The State's option to elect to take title shall be triggered by the termination of this agreement or by the State's rejection of continued use of non-expendable assets by the Contractor as set forth herein. The State upon obtaining such non-expendable assets may arrange for their further use in the public interest as it in its discretion may decide.
- D. The terms and conditions set forth herein regarding non-expendable assets shall survive the expiration or termination, for whatever reason, of this agreement.

Safeguards for Services and Confidentiality

- A. Any copyrightable work produced pursuant to this agreement shall be the sole and exclusive property of the author(s) of the work and/or artist. Should the Contractor use the services of consultants or other organizations or individuals who are not regular employees of the Contractor, the Contractor and such organization or individual shall, prior to the performance of any work pursuant to this agreement, enter into a written agreement, duly executed, which shall set forth the services to be provided by such organization or individual and the consideration therefore. Such agreement shall provide that the State shall have the rights outlined in this Agreement with regard to any copyrightable work produced pursuant to said agreement. A copy of such agreement shall be provided to the State.
- B. The New York State Education Department will receive a copy of any such written document owned by the author(s) and/or produced by the artist(s) in both hard copy and electronic form where feasible. The New York State Education Department shall have a non-exclusive, royalty-free right to use any such copyrightable works for non-commercial purposes including but not limited to dissemination of written materials, using excerpts of written materials in other documents issued by the Department, or using copyrightable works or providing the copyrightable works to future contractors for derivative use including creating derivative works for non-commercial purposes of the Department. The data received by the Contractor, authors and/or artist from survey responses, and other input received from interested groups or persons as a result of this contract, shall belong to the Department and the Contractor and the authors/artists shall have a non-exclusive, royalty-free right to use such data or other input for further research or other non-commercial purposes.
- C. All reports of research, studies, publications, workshops, announcements, and other activities funded as a result of this proposal will acknowledge the support provided by the State of New York.

- D. This ~~agreement~~Agreement cannot be modified, amended, or otherwise changed except by a writing signed by all parties to this contract.
- E. No failure to assert any rights or remedies available to the State under this agreement shall be considered a waiver of such right or remedy or any other right or remedy unless such waiver is contained in a writing signed by the party alleged to have waived its right or remedy.
- F. Expenses for travel, lodging, and subsistence shall be reimbursed at the per diem rate in effect at the time for New York State employees.
- G. No fees shall be charged by the Contractor for training provided under this agreement.
- H. Nothing herein shall require the State to adopt the curriculum developed pursuant to this agreement.
- I. This ~~agreement~~Agreement, including all appendices, is, upon signature of the parties and the approval of the Attorney General and the State Comptroller, a legally enforceable contract. Therefore, a signature on behalf of the Contractor will bind the Contractor to all the terms and conditions stated therein.
- J. The parties to this ~~agreement~~Agreement intend the foregoing writing to be the final, complete, and exclusive expression of all the terms of their agreement.

#### Certifications

- A. Contractor certifies that it has met the disclosure requirements of State Finance Law §139-k and that all information provided to the State Education Department with respect to State Finance Law §139-k is complete, true and accurate.
- B. Contractor certifies that it has not knowingly and willfully violated the prohibitions against impermissible contacts found in State Finance Law §139-j.
- C. Contractor certifies that no governmental entity has made a finding of non-responsibility regarding the Contractor in the previous four years.
- D. Contractor certifies that no governmental entity or other governmental agency has terminated or withheld a procurement contract with the Contractor due to the intentional provision of false or incomplete information.
- E. Contractor affirms that it understands and agrees to comply with the procedures of the STATE relative to permissible contacts as required by State Finance Law §139-j (3) and §139-j (6)(b).
- F. Contractor certifies that it is in compliance with NYS Public Officers Law, including but not limited to, §73(4)(a).

#### Notices

Any written notice or delivery under any provision of this AGREEMENT shall be deemed to have been properly made if sent by certified mail, return receipt requested to the address(es) set forth in this Agreement, except as such address(es) may be changed by notice in writing. Notice shall be considered to have been provided as of the date of receipt of the notice by the receiving party.

#### Miscellaneous

- A. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section ~~889899~~-aa; State Technology Law Section 208). Contractor shall be liable for the costs associated with such breach if caused by Contractor's negligent or willful acts or omissions, or the negligent or willful acts or omissions of Contractor's agents, officers, employees or subcontractors.
- B. If required by the Office of State Comptroller ("OSC") Bulletin G-226 and State Finance Law §§ 8 and 163, Contractor agrees to submit an initial planned employment data report on Form A and an

annual employment report on Form B. State will furnish Form A and Form B to Contractor if required.

The initial planned employment report must be submitted at the time of approval of this Agreement. The annual employment report on Form B is due by May 15<sup>th</sup> of each year and covers actual employment data performed during the prior period of April 1<sup>st</sup> to March 31<sup>st</sup>. Copies of the report will be submitted to the NYS Education Department, OSC and the NYS Department of Civil Service at the addresses below.

By mail: NYS Office of the State Comptroller  
Bureau of Contracts  
110 State Street, 11<sup>th</sup> Floor  
Albany, NY 12236  
Attn: Consultant Reporting  
By fax: (518) 474-8030 or (518) 473-8808

Reports to DCS are to be transmitted as follows:

By mail: NYS Department of Civil Service  
Alfred E. Smith Office Building  
Albany, NY 12239  
Office of Counsel

Reports to NYSED are to be transmitted as follows:

By mail: NYS Education Department  
Contract Administration Unit  
Room 505 W EB  
Albany, NY 12234  
By fax: (518) 408-1716

C. Consultant Staff Changes. If this is a contract for consulting services, Contractor will maintain continuity of the consultant team staff throughout the course of the contract. All changes in staff will be subject to STATE approval. The replacement consultant(s) with comparable skills will be provided at the same or lower hourly rate

#### **4.13 Appendix Q - Amendments and Additions to Appendix A-1 for this Contract and Additional Contractual Provisions**

##### **4.13.1 Contractor Staff**

This section (4.13.1) replaces "Miscellaneous" paragraph C, "Consultant Staff Changes", in 4.12 Appendix A-1. All employees of the Contractor, or of its subcontractors, who shall perform Services under this resulting contract(s), shall possess the necessary qualifications, training, licenses, and permits as may be required within the jurisdiction where the Services specified are to be provided or performed, and shall be legally entitled to work in such jurisdiction. All persons, corporations, or other legal entities that perform Services under the Agreement on behalf of Contractor shall, in performing the Services, comply with all applicable Federal and State laws concerning employment in the United States.

##### **A. Staffing Changes**

###### **Key Project Staff**

Except as otherwise provided for herein or for cessation of work for Reasons Beyond the Contractor's Control (as defined below), the Contractor agrees that the Key Project Staff (Senior Engagement Executive, Project Director, and Project Manager[s]) will continue their assignment to completion of said assignment except as provided in this section.

- a. The Contractor's Senior Engagement Executive is an integral part of the Contractor's project team. The Senior Engagement Executive shall be available, at a minimum, two full Business Days per month, on site at least once per month, throughout the term of the resulting Agreement and shall be totally accountable to the State for the successful completion of all aspects of the resulting Agreement. The Senior Engagement Executive's role shall include, but not be limited to, the review and sign off on all Deliverables prior to release of said Deliverables for review and sign off by the State; acceptance testing as described in the RFP, the resulting Agreement, and any acceptance procedures established by the Acceptance Management section of the Project Plan; being present on-site at critical points during project development; and meeting, upon reasonable notice, with the State's Project Manager and other State executives when requested by the State's Project Manager.
- b. The Contractor's Project Director is an integral part of the Contractor's project team. The Project Director will be assigned full time to the project and will be responsible for working directly with the State's Project Director or Manager to oversee the entire EDP program, including day-to-day management of the project's timetable, personnel, and administration. His/Her role shall include, but not be limited to, resource allocation, ensuring Contractor staff performance, ensuring the timely development and acceptance of implementation documents and all other Deliverables, communicating with the Project Team, chairing the status meetings, and meeting with the State's Project Director or Manager on a daily basis. The Contractor's Project Director shall always be able to be contacted through the contract term.
- c. The Contractor's Project Manager(s) will be assigned full time to the project and will be responsible for the day-to-day management of one or more components of the project's timetable, personnel, and administration. His/Her role shall include, but not be limited to, resource allocation, ensuring Contractor staff performance, ensuring the timely development and acceptance of implementation documents and all other Deliverables, communicating with the Project Team, chairing the status meetings, and meeting with the State's Project Director on a daily basis. The Contractor's Project Manager(s) shall always be able to be contacted through Final Acceptance of the System.
- d. The Contractor understands that the State's selection of the Contractor to perform the work under the resulting Agreement will be based, in part, upon the State's confidence in the abilities of the Key Project Staff. Therefore, if the Contractor wishes to remove any of the Key Project Staff from the Project prior to commencement of his or her assignment, or during his or her

assignment period, the Contractor shall first, before proceeding with such removal, consult with and seek the advice and opinion of the State Project Director. If, after said consultation, it is mutually agreed that such removal shall take place, the Contractor must immediately provide the résumés of three or more potential replacements with similar or better qualifications for the State Project Director's review and approval. If the State Project Director does not approve one of those candidates, the Contractor must immediately provide additional candidates for the State Project Director's review. If the State Project Director still cannot agree to a replacement, it reserves the right to either (a) have Key Project Staff remain on the Project, or (b) terminate the resulting Agreement for cause pursuant to RFP Section 7.3.12 Agreement Termination Provisions. Upon the State Project Director's approval, the replacement will become Key Project Staff and will be subject to the terms and conditions of the resulting Agreement. If the Key Project Staff member's work has already commenced, the Contractor will ensure that there is a smooth transition, including having the Contractor staff who is leaving train the replacement Contractor staff at the State's facilities (see Staff Transition Period, below).

- e. If the State Project Director does not agree to the replacement of Key Project Staff and does not wish to terminate the Agreement, and the Key Project Staff has not ceased work for Reasons Beyond the Contractor's Control, then the Key Project Staff member must remain on the Project and must continue to work with the same degree of professionalism he or she provided prior to the Contractor's request for removal. If the Key Project Staff fails to do so, or if the Contractor removes the Key Project Staff without the State Project Director's consent, the State has the right to terminate the resulting Agreement for cause pursuant to RFP Section 7.3.12 Agreement Termination Provisions.
- f. If the State Project Director reasonably and in good faith believes that a member of the Contractor's Key Project Staff is not performing adequately and is jeopardizing the timely delivery of deliverables meeting the acceptance criteria, the State Project Director will notify the Contractor and the NYSED Executive Sponsor. The Contractor will have 5 business days to propose a remediation plan to the Department. If the remediation plan is not satisfactory to the NYSED Executive Sponsor, then the Contractor must provide the resumes of three or more potential replacements with similar or better qualifications for the State Project Director's review and approval. If the State Project Director does not approve one of these candidates, the Contractor must immediately provide additional candidates for the State Project Director's review. If the State Project Director still cannot agree to a replacement, it reserves the right to either (a) have Key Project Staff remain on the Project, or (b) terminate the resulting Agreement for cause pursuant to RFP Section 7.3.12 Agreement Termination Provisions. Upon the State Project Director's approval, the replacement will become Key Project Staff and will be subject to the terms and conditions of the resulting Agreement. If the Key Project Staff member's work has already commenced, the Contractor

will ensure that there is a smooth transition, including, having the Contractor staff who is leaving train the replacement Contractor staff at the State's facilities (see Staff Transition Period, below).

#### **Other Contractor Staff**

The parties hereto understand that staff turnover is detrimental to Project progress, the quality of the Deliverables and Services to be provided hereunder, and the skills transfer process. The State believes, therefore, that it is in its best interest to maintain the continuity of work assignments for all levels of Employees. The State also recognizes that it can be difficult, or in some cases impractical, to maintain said continuity. The Contractor agrees, therefore, to make a good-faith, commercially reasonable effort to minimize turnover of Employees it assigns to the Project. The Contractor further agrees that if the Contractor removes an Employee assigned to the project, who is not Key Project Staff, prior to completion of his or her assignment, the Contractor will so notify the State's Project Manager, in writing, five (5) business days prior to said Employee's leave date. The Contractor will provide a replacement with similar or better qualifications. The Contractor will ensure that there is a smooth transition, including having the Employee who is leaving train the replacement Employee ~~at the State's facilities as needed.~~

#### **Cessation of Work by Contractor Staff For Reasons Beyond Contractor's Control**

- a. Reasons beyond the control of the Contractor shall be defined as: (i) death of the Contractor Staff member; (ii) new disability or illness; (iii) Contractor Staff member resigns his or her position; (iv) termination of this Contract; or (v) any other reason deemed acceptable by the State's Project Director.
- b. In the event that any Contractor Staff member ceases work for the reasons specified in (i) through (v), written notification must be forwarded to the State's Project Director.
- c. The provisions of this section do not preclude any Contractor Staff member from reasonable sick leave or annual leave.
- d. The contractor shall take prompt, commercially reasonable steps to resolve the difficulties caused by the Reasons Beyond Contractor's Control, and will seek to replace a staff member or Key Project Staff member in accordance with the provisions of this section.

#### **Staff Transition Period**

In the event the Contractor initiates a staffing change of either a Contractor employee or a subcontractor employee who is identified as Key Project Staff under the Agreement, or who has been on-site 80% or greater for a period of six (6) months or greater, the Contractor will offer State a mutually agreed upon transition period up to two (2) weeks. During the transition period, the departing

staff and the new staff will work together to develop a transition plan to transition the responsibilities, at no additional cost to NYSED. The State reserves the right to approve this transition plan, in writing, for Key Project Staff.

#### **B. Work Site and Schedule**

The Contractor's team members shall perform their duties primarily on-site in Albany, New York, to the degree indicated in the schedule in Section 1.3.3, unless otherwise agreed to by the State, in writing. Non-full-time Contractor and subcontractor staff are not required to be based in Albany but shall be available to be on-site during their active periods of project engagement, as reasonably requested by the State Project Director. All team members working on-site shall be identified to the State, along with any Contractor-issued equipment intended to be used on-site. Contractor team members working on site shall comply with all building policies, and Contractor team members using NYSED-issued equipment, software, or infrastructure, or Contractor-issued equipment within the NYSED IT environment, or accessing NYSED-owned data, will be responsible for following all IT and acceptable use policies. No reasonable request by the Contractor to permit the use of State equipment off-site shall be refused.

The State and the Contractor will determine equipment/computer needs of the on-site Contractor's Team that the State can provide.

The Contractor shall provide the State with an advance monthly staff schedule no later than five (5) business days before the last day of the preceding month. Unless otherwise agreed to by both parties, the Contractor's Team will work onsite in Albany to the degree indicated in the schedule in Section 1.3.3. On the off-site days, the Contractor shall designate individuals to provide on-site coverage to fill in for the Key Project Staff (Project Manager and lead staff) where appropriate.

Contractor employees and subcontractors assigned to each Deliverable will be required to devote to the State Project the percentage of their working time that is defined in the Master Project Schedule.

The Contractor's assigned staff and any subcontractor's staff, when working on-site, shall be located at offices designated by the State Project Director and shall be provided 24/7 access to such offices to the extent possible.

#### **4.13.2 Deliverable Acceptance**

Deliverables must meet all applicable State-approved Acceptance Criteria developed in accordance with State-approved Acceptance Management Plans and Test Plans (as defined in Section 1.4 Required Implementation and Support Services).

For each document-based Deliverable (as defined in Section 1.4 Required Implementation and Support Services) other than status reports, the State shall have an acceptance period beginning on the date written notification of completion was received from the Contractor and as outlined herein. All document-based Deliverables shall require written approval by the State Project

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Director or his or her written designee that such Deliverables comply with the terms of the Agreement.

The Contractor shall provide document-based Deliverables in the form and format agreed to by the State using deliverable specification sheets approved by the State Project Director. The deliverable specification sheets will include, but not be limited to the following information: Deliverable title, frequency, draft, and final due dates, approval requirements, outline of contents, and delivery of media.

- A. The number of business days for any State initial review of a document-based Deliverable shall be no more than ten (10) business days, unless otherwise mutually agreed to by the State Project Director and the Contractor's Project Manager in the Project Work Plan. The ten (10) day period shall begin upon written transmittal by the Contractor Project Manager to the State Project Manager that the Deliverable is in final form and ready for approval, and shall be counted from and include the first working day following the delivery of the Deliverable to the State. The State shall provide Contractor (i) with approval of the Deliverable or (ii) with a written statement, of the itemized deficiencies preventing approval.
- B. The Contractor shall have ten (10) business days to complete all corrective actions or changes in order for such document-based Deliverable to conform in all material respects with the requirements set forth in the Agreement. The count of such business days shall begin on the first business day following Contractor's receipt of the written statement of required corrective actions or changes.
- C. If the State cannot approve the document-based Deliverable after correction by Contractor, the Contractor's Project Manager and the State Project Director may mutually agree to further steps to correct outstanding material deficiencies. However, in no event shall the total time allocated for review, correction, and re-review of material deficiencies in a Deliverable exceed forty (40) business days, except for good cause in the sole discretion of the State.
- D. The State will have final approval of all document-based Deliverables.

For Deliverables that contain hardware or software programs, the State's Deliverable review process will include acceptance testing as detailed in an approved Acceptance Test Plan. The number of business days for any State initial review/test of a software-based Deliverable shall be set forth in the Acceptance Test Plan, but will be not less than ten (10) business days, unless otherwise mutually agreed to by the State Project Director and the Contractor's Project Manager. The process for software Deliverables will be as follows: User Acceptance testing will take place in a test environment. After approval by the State, the software Deliverable will be migrated to the production environment. The software Deliverable will then be monitored to verify performance in accordance with all requirements and acceptance criteria. The State will provide Deliverable Acceptance upon completion of Production Verification. If any issues are reported by the State during Production Verification, the review period will

reset starting on the date the State is notified that the correction has been made in the production system. The State shall have final approval of all hardware or software-based Deliverables.

#### 4.13.3 Task Orders

Task Orders will be used when work is required by the Contractor that had not been included in the Deliverables or in the contract's Statement of Work. Prior to the parties' entering into a Task Order, a reasonability determination will be performed by the State Project Director or designee. Such reasonability determination shall include the State's review of the Contractor's required number of hours for the task; the titles of staff performing such tasks; and the rates for such tasks consistent with the Contractor's rates submitted in its Cost Proposal. Upon the parties' acceptance, in writing, of the terms of the Task Order, and approval by the State Comptroller if required, the Contractor shall perform such Task Order.

The Task Order will specify:

- The work to be performed
- The acceptance criteria
- The name of the Contractor's ~~staff member(s)~~Staff who will be assigned to fulfill the ~~Task Order~~accountable point of contact for the work
- The estimated number of hours to be worked by ~~the Contractor's~~staffproject role or title
- ~~The total amount to be paid for each Contractor's staff member~~
- The total amount to be paid for the Services performed

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#### 4.13.4 Manner of Payment/Retainage

##### A. Hourly Rate Escalation

Rates will be fixed for Years 1 to 3 of the contract. Year 4 rates will be based on the year-over-year increase or decrease in CPI for All Urban Consumers, US City Average from ~~the~~ month prior to the Year 1 start date of the contract to the month prior to the start date of the Year 4 annual renewal. Year 5 rates will be based on the year-over-year increase or decrease in CPI for All Urban Consumers, US City Average from the month prior to the Year 4 start date of the contract to the month prior to the start date of the Year 5 annual renewal.

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##### B. Payment Schedule

The State anticipates that the Deliverable payment schedule will be consistent with Section 2.3.2 Cost Proposal, but the exact schedule will be established by the State and the successful Bidder.

Maintenance and Support will begin at the end of the System Warranty period, and will be billable annually at the start of each Maintenance and Support contract year.

#### 4.13.5 Warranties

Where Contractor generally offers additional or more advantageous warranties than set forth below, Contractor shall offer or pass through any such warranties to the State.

##### A. Representations and Warranties

The Contractor warrants that the Services rendered by the Contractor shall be performed in accordance with all the terms and conditions, covenants, statements, and representations contained in the Contract, including all appendices. See also Section 4.10, State of New York Agreement, Paragraph I(E).

##### B. Deliverables

The Contractor warrants that the Contractor's Deliverables and the components of the System provided by Contractor will, in order of precedence, conform in all material respects to: (i) the Detailed Requirements (Attachment 6.2), specifications, and all applicable State-approved Acceptance Criteria developed in accordance with State approved Acceptance Management Plans and Test Plans for such Deliverables in Contractor's most recently approved deliverable specification or task order, and (ii) the applicable requirements for such Deliverables in the Agreement.

The Contractor warrants that: ~~(i) any Deliverable(s)-, Services, and Software that it creates or provides to the State or operates for the State, shall be substantially free from defects, as defined herein, and; (ii) the Services relating conform in all material respects to the integration, development, agreed requirements, specifications and implementation of the Software by means of the Contractor's configuration, modification, and/or enhancement of such Software shall not introduce defects to, or negatively impact the operations of, any pre-existing or newly-developed software~~ published documentation.

The Contractor warrants that it shall be responsible for performance of Contractor's software and any third-party software provided by the Contractor to the State. Software used by the Contractor to develop the product and any third-party software supplied to the State by the Contractor must be currently supported by the manufacturer ~~and free of any known defect.~~

"Defects" shall mean: (i) a failure of a configuration, modification, and/or customization of the software to operate in accordance with the Acceptance Criteria or RFP functional or technical requirements, or (ii) a failure of the Software to operate in accordance with the Software program documentation.

##### C. Workmanship Warranty

The Contractor warrants that all services provided by the Contractor and its subcontractors under the Agreement will be performed using a professional and

workmanlike manner, in accordance with highest applicable industry standards. For purposes of the Contract, "highest applicable industry standards" shall be defined as the degree of care, skill, efficiency, and diligence that a prudent person possessing technical expertise in the subject area and acting in a like capacity would exercise in similar circumstances. The Contractor shall meet or exceed the manufacturers' installation standards.

#### **D. Contractor Compliance**

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

#### **E. Personnel Eligible for Employment**

The Contractor further warrants to the State that Contractor personnel performing services under the Agreement from within the United States are eligible for employment in the United States.

#### **F. Product Performance**

~~Products delivered pursuant to the Agreement shall conform to the specifications and performance standards defined by the RFP and the Product's documentation. The Product's documentation shall fully describe the proper procedure for using the Products.~~

~~[Deleted and incorporated into H]~~

#### **G. System Support**

~~[Deleted and incorporated into H]~~

#### **H. System Warranty**

Commencing from the first User Acceptance of the first project phase Test, through Final Acceptance, the period of this Agreement and any extensions thereof (the "Warranty Period"), the Contractor shall warrant the following:

- a. ~~Components or Deliverables specified and furnished by or through the Contractor in the course of providing the services described in the Agreement shall, individually and together, operate in accordance with all Acceptance Criteria for such Deliverables and the components of the System provided by Contractor, and shall operate, substantially~~

uninterrupted and error-free, and be guaranteed against faulty material and workmanship.

b. ~~Defects in the materials or workmanship of components or Deliverables specified and furnished by or through Contractor shall be promptly repaired or replaced by Contractor at no cost or expense to the State.~~

c. ~~Accepted Deliverables and the System, as a whole, shall: (i) continue to meet the functional, performance, and reliability requirements of the State, as set forth in the RFP, the Agreement, and the manufacturers' specifications for the Equipment and Software, as the same may be amended and updated, and (ii) operate, in conformance with the acceptance criteria established for each Deliverable, the System, as a whole, and by the Acceptance Management Plan.~~

~~The Contractor shall promptly provide all necessary services and support, at no cost, to the State to ensure all Deliverables and the System operate in accordance with the warranties set forth in a, b, and c above.~~

~~Where the Contractor or other third-party manufacturer/developer 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, the Contractor's obligations for System Support described herein. Where such standard commercial warranty covers all or some of the System Support, Contractor shall be responsible for the coordination with other third-party Product manufacturer(s)/developer(s) for warranty repair or replacement of other third-party manufacturer's/developer's Product.~~

~~Where the Contractor or other third-party Product manufacturer/developer markets any Project Deliverable with a standard commercial warranty which goes beyond the System Support, the Contractor shall notify the State and pass through the manufacturer's standard commercial warranty to the State, at no additional charge.~~

#### **H. System Warranty**

~~For the period of this agreement and any extensions thereof (the "Warranty Period"), the Contractor shall warrant the following:~~

a. ~~Components or Deliverables specified and furnished by or through the Contractor in the course of providing the services described in the Agreement shall, individually and together, operate in accordance with all Acceptance Criteria for such Deliverables and the System and shall operate, substantially uninterrupted and error-free, and be guaranteed against faulty material and workmanship.~~

b. Defects in the materials or workmanship of components or Deliverables specified and furnished by or through Contractor shall be promptly repaired or replaced by Contractor, at no cost or expense to the State.

c. Accepted Deliverables and the Components of the System provided by Contractor, as ~~a whole~~, integrated into the EDP according to agreed upon

specifications and test cases, shall: (i) continue to meet the functional, performance, and reliability requirements of the State, as set forth in ~~the RFP, the~~this Agreement, and the manufacturers' specifications for the Equipment and Software, as the same may be amended and updated, and (ii) operate in conformance with the acceptance criteria established for each Deliverable, the ~~System as a whole~~Components of the System provided by Contractor as integrated into the EDP, and by the Acceptance Management Plan.

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The Contractor shall promptly provide all necessary services and support, ~~at no cost to the State~~, to ensure all Deliverables and the System operate in accordance with the warranties set forth in a, b, and c above.

Where the Contractor or other third-party manufacturer/developer 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, the Contractor's obligations for System Warranty described herein. Where such standard commercial warranty covers all or some of the System Warranty, Contractor shall be responsible for the coordination with other third-party Product manufacturer(s)/developer(s) for warranty repair or replacement of other third-party manufacturer's/developer's Product.

Where the Contractor or other third-party Product manufacturer/developer markets any Project Deliverable with a standard commercial warranty which goes beyond the System Support, the Contractor shall notify the State and pass through the manufacturer's standard commercial warranty to the State, at no additional charge.

#### **I. Training and Certification Warranty**

The Contractor warrants that all staff assigned to the State's account will be kept current in training and certification. Any fees or charges incurred by the Contractor to obtain and maintain such training and certification shall be the responsibility of the Contractor and may not be billed to the State.

#### **J. Survival of Warranties**

~~All warranties contained in the Agreement shall survive the termination of the Agreement. The~~To the extent applicable, the Contractor will maintain all original manufacturers' warranties, organized by installation location, and will present the organized warranty package to the State upon completion and/or termination of Agreement.

#### **K. Virus Warranty**

The Contractor warrants that services relating to the integration, development, and implementation of the Software by means of the Contractor's configuration, modification, and/or enhancement of such Software shall be performed in a

manner so as not to result in introducing a virus or other malware to the software. The Contractor will utilize commercially reasonable virus detection and vulnerability scanning software on its equipment to ensure that any configuration, modification, and/or enhancement it creates and provides to the State shall not contain any virus or vulnerability.

#### L. Date/Time Warranty

The Contractor warrants that Product(s) furnished pursuant to the resulting 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.

#### M. Breach of Warranty

~~In the event of any breach of the above warranties, the Contractor shall, as applicable: (i) correct errors and defects that caused the breach of warranty, or (ii) re-perform the deficient services.~~ If the Contractor does not correct the program errors or re-perform the service in a commercially reasonable time and manner, the State may pursue other remedies as described below.

#### 4.13.6 Indemnification ~~Relating to, Open Source, and~~ Third-Party Rights

~~A. This provision (4.13.6 (A)) replaces The State of New York Agreement (Section 4.10), Section IV, Paragraph A: Contractor shall indemnify, defend and hold harmless the NYSED and its affiliates, employees, and directors, and each of them, from and against any loss, cost, damage, claim, expense, or liability arising out of any claim by any third party, including but not limited to any such claim alleging liability as a result of injury to or death of any person or damage to or loss or destruction of any property, to the extent resulting from the negligence or wrongful/tortious act or omission in the performance of this Agreement by the Contractor or an agent or employee of Contractor.~~

B. The Contractor warrants that it owns or holds appropriate license rights in any intellectual property ~~used or provided to~~ used or provided to by the ~~State/Department~~ Contractor in the performance of this contract, and that any such use of intellectual property in accordance with this contract will not infringe on those rights. The Contractor shall indemnify, defend, and hold the State harmless, without limitation, from and against any and all damages, expenses (including reasonable attorney's 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 and/or any other ownership interest, services and Deliverables furnished, or of any copyright, trademark, trade secret, or other third-party proprietary right in relation to the Contractor's products, Deliverables, or services furnished or utilized under the Agreement, provided that the State shall give Contractor: (i) prompt written notice of any action, claim, or threat of infringement suit, or other suit; (ii) the opportunity to take over, settle, or defend such action, claim, or suit at Contractor's sole expense; and (iii) reasonable assistance in the defense of any such action at the expense of Contractor. Where a dispute or claim arises

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relative to a real or anticipated infringement, the State may require Contractor, at its sole expense, to submit such information and documentation, including formal patent attorney opinions, as the State shall require.

C. The State intends to encourage the cost-effective use of open source software in the provision of products and services for the EDP. The Contractor may use open source or public domain software in the provision of services under this contract provided that the Contractor conducts reasonable due diligence to verify that the software is not subject to any action, claim, or threat of infringement suit, or other suit. Evidence of widespread use and adoption of the open source software by governments and/or major corporations is desirable. Notwithstanding anything to the contrary in this Agreement, Contractor is not required to indemnify NYSED against third-party claims for NYSED's use of open source or public domain software provided by Contractor in its provision of services, provided that (i) the results of the Contractor's due diligence are presented to NYSED and the software is approved for use by NYSED; and (ii) the Contractor shall give the State prompt written notice of any action, claim, or threat of infringement suit, or other suit arising subsequent to that approval.

D. If the use of any Contractor product, Deliverable, or part(s) thereof shall be enjoined for any reason, or if the Contractor believes that it may be enjoined, Contractor shall have the right, at its own expense and sole discretion, to take action in the following order of precedence: (i) to procure for the State the right to continue using such product, Deliverable(s) or part(s) thereof, as applicable; (ii) to modify the product or Deliverable(s) so that it becomes non-infringing and is of at least equal quality and performance; (iii) to replace said product or Deliverable or part(s) thereof, as applicable, with a non-infringing product or Deliverable of at least equal quality and performance; or (iv) if none of the foregoing is commercially reasonable, then the State agrees to return the product or Deliverable (or part thereof), and Contractor shall provide monetary compensation to the State for its inability to continue to provide to LEAs for their use the affected product or Deliverable (or part thereof) up to the applicable dollar amount specified in the Limitation of Liability section below.

E. The Contractor further agrees that, in the event the State is sued by a third party for issues related to the work performed by the Contractor under this Agreement and/or the deliverables, the Contractor will cooperate with the State in defense of the action and will provide such experts and witnesses as may be necessary to defend any allegations regarding such work or deliverables, at Contractor's cost. DefenseCooperation shall include, but is not limited to, consultation with the State's representatives and attorneys, and appearance at depositions or trials to give testimony.

F. Contractor will have no indemnification obligation to the State for any infringement due to: (A) an unauthorized modification of the Services by the State; or (B) the State's failure to timely install an upgrade, update, or other fix or error correction provided by Contractor if installation within the reasonable time period specified by the Contractor of such would have avoided the infringement;

G. Without prejudice to the State's rights to assert third-party responsibility therefore, and without prejudice to Contractor's rights and remedies under applicable laws, rules, regulations or orders, including but not limited to, its rights to impleader, as between Contractor and the State, the Contractor shall not be responsible under this Agreement for damages, costs and attorneys fees, and any obligation on the part of Contractor to defend and indemnify shall not apply to, any Claim or portion arising out of (i) any third-party claim of infringement of U.S. patents, copyrights, trademarks or tradenames resulting from the Contractor's use of the State's Materials during the term of the applicable SOW, and (ii) any third party claim against the Contractor resulting from the State's breach of Contractor's use policies, copies of which were provided in writing by the Contractor and accepted by the State.

#### 4.13.7 Limitation of Liability

Except as set forth in the Indemnification paragraphs above, the limit of liability shall be as follows, except as otherwise provided for herein:

- a. The Contractor's liability to the State for any claim, loss, or liability arising out of, or connected with the products or services provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation, or otherwise, shall in no case exceed direct damages in: ~~(i) an amount equal to two (2) times~~ the amount disbursed by the State to the Contractor under the Agreement.
- b. The State may retain such monies from any amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted against the State unless Contractor, at the time of the presentation of claim, shall demonstrate to the State's reasonable satisfaction that sufficient monies are set aside by the Contractor in the form of a bond or through insurance coverage to cover associated damages and other costs.
- c. Neither the Contractor nor the State shall be liable to each other for any consequential, indirect, or special damages of any kind which may result directly or indirectly from such performance, including, without limitation, damages resulting from loss of use or loss of profit by the State, the Contractor, or by others (exclusive of a party's misappropriation or misuse of confidential information in breach of its confidentiality obligations under the Agreement).

Notwithstanding the foregoing, the Contractor remains liable, without monetary limitation, for direct damages for personal injury, death, or damage to real property or tangible personal property or intellectual property attributable to the negligence or other tort of contractor, its officers, employees, subcontractors, partners, or agents, or due to a breach of the provisions of this Agreement related to confidentiality of data and/or violation of State or federal confidentiality laws.

Notwithstanding any other provision in this contract, the Contractor shall be responsible for any and all notification obligations arising out of a breach of

confidentiality by Contractor, its officers, employees, subcontractors, partners or agents, of data provided by the State or an LEA, school or BOCES pursuant to this contract and during the term of this Agreement. The costs of such notification will be borne solely by the Contractor.

#### **4.13.8 Force Majeure**

Neither Party will be liable for losses, defaults, or damages under the resulting Agreement which result from delays in performing, or inability to perform, all or any of the obligations or responsibilities imposed upon it pursuant to the terms and conditions of the resulting Agreement, due to or because of acts of God, the public enemy, acts of government, earthquakes, floods, civil strife, fire, or any other cause beyond the reasonable control of the party that was so delayed or so unable to perform, provided that such party was not negligent and shall have used reasonable efforts to avoid and overcome such cause. Such party will resume full performance of such obligations and responsibilities promptly upon removal of any such cause.

#### **4.13.9 Conflict Resolution**

In connection with the Contractor's performance under the Agreement, to the extent consistent with this Agreement (including the Statement of Work or any Task Order entered into pursuant hereto), the Contractor shall cooperate in a reasonable manner with the State and any other Contractor(s) or consultant(s) retained by the SLC or the State to work on the NYSED Education Data Portal system.

In the event of conflicts between the Contractor and other consultants, contractors, or subcontractors, the Contractor shall submit to the State a timely written explanation of the details of the conflict, including such pertinent facts as may provide the State with a firm basis for understanding the nature of the conflict. The Contractor agrees to act in a good-faith effort to avoid conflicts, and to resolve conflicts with other consultants, contractors or subcontractors that cannot be avoided.

With respect to the conflicts detailed above, if the Contractor is unable to resolve a conflict, the State Project Director (or designee) shall have the right and authority to direct the involved parties on the appropriate course of action to be taken to resolve the conflict: to the extent consistent with this Agreement (including the Statement of Work or any Task Order entered into pursuant hereto).

If the Contractor or a subcontractor is also a Contractor or subcontractor for the Data Dashboard contract, and a conflict arises between the work being performed on one EDP contract vis-à-vis the other EDP contract, the conflict shall immediately be escalated to the State Project Director.

#### 4.13.10 Remedies for Breach

It is understood and agreed that all rights and remedies set forth in this Agreement shall be in addition to all remedies or actions otherwise authorized or permitted by law:

- A. Withhold Payment: In any case where ~~a question~~ documentary evidence of non-performance or deficient performance by the Contractor ~~arises~~ has been delivered to the Contractor, payment may be withheld, in whole or in part, at the reasonable discretion of the Department.
- B. Bankruptcy: In the event that the Contractor files a petition under the U.S. Bankruptcy Code during the term of the Contract, the State may, at its discretion, make application to exercise its right to set-off against monies due the Debtor or, under the Doctrine of Recoupment, credit the State the amounts owed by the Contractor arising out of the same transactions.
- C. Reimbursement of Costs Incurred: The State shall have the right to award a new contract to complete the NYSED Education Data Portal system as described by the RFP, and the Contractor shall be responsible for damages and for all additional costs incurred in re-letting the contract.
- D. Deduction/Credit: Sums due as a result of these remedies may be deducted or offset by the State from payments due, or to become due, to 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 the amount of such claim or portion of the claim still outstanding, on demand. The State, acting reasonably, reserves the right to determine the disposition of any rebates, settlements, restitution, liquidated damages, etc., which arise from the administration of the Contract.

#### 4.13.11 Suspension of Work

The State reserves the right to suspend any or all activities under the Agreement, at any time, in the best interest of the State. 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 freeze on State spending, revocation of any grant funding associated with the project, declaration of emergency, or other such circumstances. Upon receipt of such notice, the Contractor shall immediately comply with the suspension order. Activity may resume at such time as the State issues a formal written notice authorizing a resumption of work. The Contractor and State shall review the need for any amendment of the contract caused by the suspension.

#### 4.13.12 Mitigation of Costs

The Contractor shall not undertake any additional or new contractual obligations pursuant to this Agreement on or after the date of a termination notice without the

prior written approval of the State. On or after the date of termination notice, and during the termination notice period, if any, the Contractor shall take all commercially reasonable and prudent actions to close out outstanding, existing obligations to the extent possible and as economically as possible for the State.

#### 4.13.13 Termination and Closeout Plan

A. This paragraph (A) replaces the State of New York Agreement (Section 4.10) Paragraph III.B: The State may terminate the AGREEMENT, upon thirty (30) days' prior written notice of termination to the CONTRACTOR and an opportunity to cure, if the CONTRACTOR fails to comply with a material term or condition of this AGREEMENT and/or any laws, rules, regulations, policies or procedures affecting this AGREEMENT; except that, for material breaches related to the security, confidentiality, or privacy requirements of this AGREEMENT, the STATE may terminate the contract immediately upon notice to the CONTRACTOR.

B. For avoidance of doubt, if the State terminates without cause (pursuant to Appendix A-1, Terminations, Paragraph A), then the Contractor is entitled to costs for obligations irreversibly incurred pursuant to this Agreement as of the date of the notice, upon a showing that Contractor tried unsuccessfully to mitigate the costs; and payment for all services delivered pursuant to this Agreement prior to termination and accepted by NYSED.

C. Within thirty (30) calendar days of receipt of a notice of termination as set forth in the Agreement, or at the end of the contract term, the Contractor shall provide for approval by the State a detailed written plan for transition. The closeout plan shall outline, at a minimum, the tasks, milestones, and Deliverables associated with the smooth transition of the Project to a successor Contractor or to identified persons with the State. The closeout plan shall include all other information mutually agreed upon by the Parties to the Agreement. Consideration for the closeout plan shall be considered paid as part of the payments for the Deliverables in the Agreement. No further compensation shall be due for the completion of the closeout plan.

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#### 4.13.14 General Provision as to Remedies

The Parties may exercise their respective rights and remedies at any time, in any order, to any extent, and as often as deemed advisable, without regard to whether the exercise of one right or remedy precedes, concurs with, or succeeds the exercise of another. A single or partial exercise of a remedy shall not preclude a further exercise of the right or remedy or the exercise of another right or remedy. No delay or omission in exercising a right or remedy, or delay, inaction, or waiver of any event of default, shall exhaust or impair the right or remedy or constitute a waiver of, an event otherwise constituting a breach or default under the Agreement.

#### 4.13.15 Public Announcements

Public announcements or news releases regarding the NYSED EDP program may not be released by any Bidder, the Contractor, or their agent without prior review and approval of the NYSED. Such approval shall not be considered until an executed Agreement is in place; provided that once the executed Agreement has been approved by the Office of the State Comptroller, the Contractor shall have the right to disclose to third parties the existence of the Agreement and to describe the nature of services being provided hereunder.

Publicity includes but is not limited to news conferences, news releases, advertising, brochures, reports, discussions, and/or presentations at conferences or meetings.

#### 4.13.16 Conflict of Interest

In providing its services, the Contractor warrants and represents, to the best of its knowledge and belief, that Contractor's other obligations to third parties or to the State will not result in a conflict of interest or in the appearance of a conflict of interest that would render Contractor, its employees, subsidiaries, affiliates, partners, agents, or subcontractors unable to legally provide the Products or Services under the Agreement.

In the event that the Contractor, through reorganization, consolidation, merger, or otherwise, becomes an affiliate, or is expected by Contractor to become an affiliate of the Data Dashboard prime contractor, the quality management provider or any other consultant engaged by the State, the Contractor shall immediately notify the State Project Director. Upon such notification, the State/NYSED reserves the right, after discussions with the Contractor as to appropriate alternative resolutions, to terminate the Agreement.

If the Contractor develops a conflict of interest based upon its other business relationships, which would render the Contractor unable to legally perform the Services, the Department may terminate the Agreement upon written notice. The Contractor shall notify the Department of any such conflict upon becoming aware of such conflict.

The Contractor represents and covenants that it has, and will maintain during the term of the Agreement, quality control systems to prevent such a conflict of interest and that it maintains, and will maintain during the term of the Agreement, adequate safeguards to comply with this requirement.

If NYSED terminates the Agreement as a result of the Contractor establishing a new business relationship with a third party, the Contractor shall compensate the State/NYSED for any and all reasonable, documented, direct costs that the State/NYSED incurs to procure a new Contractor to perform the portion of the Services not yet performed by the Contractor as of the effective date of termination. Prior to any such termination the NYSED will provide notice to the Contractor.

The Contractor must disclose the name of any officer, director, project staff, or senior executive who is also an employee of New York State. Further, the Contractor must disclose the name of any State employee who directly owns an interest of ten percent (10%) or more in the Contractor's Firm or any of its subsidiaries. No State employee shall receive, directly or indirectly, any compensation from the Contractor or any of its subsidiaries as a result of this contract. The Contractor will take appropriate steps to make a similar determination regarding its sub-contractors.

This shall be an ongoing requirement, and failure to comply will subject the Agreement to cancellation.

#### **4.13.17 Required Consents**

Each party is responsible for promptly obtaining and providing all required consents necessary for the Parties to provide the Services described in the Agreement. A Required consent means any consents or approvals required to give the parties, and the Contractor's subcontractors, the right or license to access, use and/or modify (including creating derivative works) the hardware, software, firmware, and other products by the State of New York Users [as required in this Agreement](#), without infringing the ownership or license rights (including patent and copyright) of the provisions of owners of such products.

#### **4.13.18 Confidentiality**

All work will be performed by the Contractor, its subcontractor and their respective officers, agents, and employees under the supervision of the Contractor or the Contractor's employees.

Any information made available to the Contractor, its subcontractor, or their respective officers, agents, and employees, in any format, shall be used only for the purpose of carrying out the provisions of the Agreement. Information contained in such material will be treated as confidential and will not be divulged or made known, in any manner, to any person except as may be necessary in the performance of the Agreement. Disclosure to anyone other than an officer, agent, or employees of the Contractor or its subcontractors is prohibited. The Contractor will be required to sign an Information Protection Agreement, and a Confidentiality and Non-Disclosure Agreement, to be provided subsequent to award.

All information will be accounted for by the Contractor upon receipt and properly stored before, during, and after processing. In addition, all related output will be given the same level of protection as required for the source material.

The Contractor agrees that the data processed during the performance of the Agreement will be completely purged from all data storage components of the Contractor's computer facility, and no output will be retained by the Contractor at the time the work is completed. If immediate purging of all data storage components is not possible, the Contractor will certify that any data remaining in any storage component will be safeguarded to prevent unauthorized disclosures.

The Contractor will provide written notification to the State Project Director when all data have been destroyed.

The Contractor will be responsible for the destruction of the spoilage or any intermediate hard copy printouts and will provide the State Project Director or his/her designee with a statement containing the date of the destruction, description of material destroyed, and the method used. In the event that it becomes necessary for the Contractor to receive confidential information, which Federal or State statute or regulation prohibits from disclosure, the Contractor hereby agrees to destroy all such confidential information that has been received as part of this Agreement when the purpose that necessitated its receipt by the Contractor has been completed. In addition, Contractor agrees not to retain any confidential information which Federal or State statute or regulation, including but not limited to the federal Family Educational Rights and Privacy Act (FERPA), prohibits from disclosure after termination of the Agreement. Contractor will provide written notification to the State Project Manager when the confidential information has been destroyed. The Contractor will require all project staff who have access to such confidential information to sign a confidentiality agreement that they will use the confidential information solely for purposes of this contract, and will not disclose the information to any third parties, nor to any person within Contractor's firm or sub-contractors unless such person has a legitimate business need to access such information for purposes of this contract.

The Contractor agrees that it will use all appropriate safeguards to prevent any unauthorized use or unauthorized disclosure of the State's confidential information, which Federal or State statute or regulation prohibits from disclosure. At a minimum, the Contractor shall comply with, and shall require and ensure that its subcontractor(s) comply with, the data and information security policies of NYSED; New York State Cyber Security Policy P03-002 (see <http://www.dhses.ny.gov/ocs/resources/documents/Cyber-Security-Policy-P03-002-V3.4.pdf>); and the federal Family Educational Records and Privacy Act (FERPA). However, if the laws of the state in which the data is housed by Contractor or a subcontractor provide greater protection for confidentiality and security of the data, then the Contractor or subcontractor must comply with the most stringent security and confidentiality laws. Failure to abide by the more stringent laws of the other state, where the data is housed, will be considered a violation of this contract in the same manner as violation of applicable New York or federal law.

The Contractor shall never disclose information which Federal, State statute, or regulation prohibits from disclosure. Other confidential information disclosed under the Agreement will be subject to the Agreement for five years following the initial date of disclosure.

The Contractor agrees that it shall immediately report to the State the discovery of any unauthorized use or unauthorized disclosure of such confidential information of any New York State agency information directly to that New York State agency. The State may terminate the Agreement for cause if it determines

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that the Contractor has violated a material term of this section. The terms of this section shall apply equally to the Contractor, its agents, and subcontractors, if any. The Contractor agrees that all subcontractors, if any, and agents shall be made aware of and shall agree to the terms of this section.

The State will have the right to terminate the Agreement for cause if the Contractor fails to provide the safeguards described above.

Notwithstanding the language contained in this section, the Contractor may release any information pursuant to a final order issued from a Court of competent jurisdiction, provided the State has had an opportunity to be heard. The Contractor shall immediately forward to the State Project Director a copy of any such order requiring disclosure of confidential information, and shall advise the court of this provision.

Notwithstanding the foregoing, information which falls into any of the following categories shall not be considered confidential information:

- a. Information that is previously rightfully known to the receiving party without restriction on disclosure;
- b. Information that becomes, from no act or failure to act on the part of the receiving party, generally known in the relevant industry or is in the public domain;
- c. Information that is independently developed by the Contractor without use of confidential information of the State;
- d. Information unrelated to the scope of this engagement and not required by State or federal law to be kept confidential; and
- e. That the State has approved for disclosure, but solely in accordance with the State's approval or direction.

#### **4.13.19 Insurance**

Prior to the commencement of the work to be performed by the Contractor hereunder, the Contractor must obtain and furnish Certificates of Insurance evidencing compliance with all insurance requirements contained herein. Such Certificates shall be, in form and substance, reasonably acceptable to the State.

Acceptance and/or approval of Certificates of Insurance by the State shall not diminish any of Contractor's obligations, responsibilities, or liabilities under the Agreement.

All insurance required by the Agreement shall be obtained at the sole cost and expense of the Contractor; shall be maintained with insurance carriers licensed to do business in New York State; or the state of location of the office where work will take place; shall be primary and non-contributing (only with respect to liability arising out of the Agreement) to any insurance or self-insurance maintained, and shall be endorsed to provide that reasonable efforts will be used for written notice to be given to the State at least thirty (30) calendar days prior to the cancellation or non-renewal of such policy or policies, which notice, evidenced by return receipt of United States Certified Mail, shall be sent to the State/Department. The insurance policy(ies) shall name the State of New York, its officers, agents, and

employees as additional insureds. The additional insured requirement does not apply to Workers' Compensation or Disability coverage.

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

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

The Contractor shall cause all insurance to be in full force and effect as of the commencement date of the Agreement and to remain in full force and effect throughout the term of the Agreement and as further required by the Agreement. The Contractor shall not take any action, or omit to take any action, that would suspend or invalidate any of the required coverage during the period of time such coverage is required to be in effect.

Not less than thirty (30) calendar days prior to the expiration date or renewal date, the Contractor shall supply with updated replacement Certificates of Insurance, and amendatory endorsements.

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

Commercial General Liability Insurance with a limit of not less than \$1,000,000 each occurrence. Such liability shall be written on the ISO occurrence form CG 0001, or a substitute form providing equivalent coverage and shall cover liability arising from premises, operations, independent contractors, products-completed operations, broad form property damage, personal & advertising injury, cross liability coverage, liability assumed in a contract (including the tort liability of another assumed in a contract).

Workers' Compensation, Employers Liability, and Disability Benefits as required by New York State. If employees will be working on, near, or over navigable waters, US Longshore and Harbor Workers' Compensation Act endorsement must be included. Sections 57 and 220 of the New York State Workers' Compensation Law (WCL) require that the State shall not enter into any contract unless proof of workers' compensation and disability benefits insurance coverage is produced. Prior to entering into a contract with the State, the Contractor shall be required to verify for the State, on forms authorized by the New York State Workers' Compensation Board, that they are properly insured or are otherwise in compliance with the insurance provisions of the WCL (see Appendix J: Compliance with Workers' Compensation Law). Any questions relating to either Workers'

Compensation or disability benefits coverage should be directed to the New York State Workers' Compensation Board.

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

Employee dishonesty coverage on all employees, including contract and temporary, in an amount of \$250,000.

#### 4.13.20 Mergers, Acquisitions or Divestitures

In the event there is a substantial or material change, as defined below, in the ownership or financial viability of the Contractor, its corporate affiliates, subsidiaries or divisions, or subcontractors, the Contractor is required to provide prompt written notice to the State with all details of any such change.

"Substantial" or "material" change in Contractor status shall be defined to include, but not be limited to, a sale, acquisitions, mergers, or takeovers involving the Contractor, its corporate affiliates, subsidiaries or divisions, or partners which result in a change in the controlling ownership or assets of ~~such entity~~the Contractor relevant to the performance of this Agreement after the submission of the proposal; or entry of an order for relief under Title 11 of the United States Code; the making of a general assignment for the benefit of creditors; the appointment of a general receiver or trustee in the bankruptcy of the Contractor, its corporate affiliates, subsidiaries or division, or partners under any state insolvency or similar law for the purposes of its bankruptcy, reorganization or liquidation; or court ordered liquidation against Contractor, its corporate affiliates, subsidiaries, or divisions or partners.

Upon receipt by the State of such notice, the State shall have thirty (30) business days from the date of notice to review the information. ~~The Contractor may not transfer or assign the Agreement without the consent of the State.~~ In addition to any other remedies available at law or equity, the State shall have the right to terminate this Agreement immediately, in whole or in part, if it finds that such change materially and adversely affects the delivery of services solely determined with reference to the best interests of the State, or if the change in Contractor status causes a conflict of interest or violation of law.

The Contractor may not transfer or assign the Agreement without the consent of the State, which shall not withhold consent unreasonably. In the event the Contractor is acquired or merged, the Contractor shall continue to be bound by, and shall perform under, all terms and conditions set forth herein.

#### 4.13.21 ~~Material Change in Contractor~~Miscellaneous Ownership Status

##### A. Ownership

The Contractor, or its licensors, retain all ownership and intellectual property rights to ~~the licenses in perpetuity~~its proprietary property used in performance of

this Agreement. Any property or material furnished or provided by the State to the Contractor hereunder, is and will remain the property of the State.

#### **B. Prior Licensed Software**

The State's prior licensed software shall not be extinguished or merged by execution of the resulting Agreement or by unilateral acts of the Contractor.

#### **C. Safeguards**

Sections A, B, and G of "Safeguards for Services and Confidentiality" of 4.12 Appendix A-1 are withdrawn from this Agreement.

#### **4.13.22 Open Source and Third Party Software Disclaimer**

Open source software and Third Party software is developed independently of Contractor and may be governed by a separate license. If such software is governed by a separate license, Contractor shall provide a copy of that license in the applicable Documentation, and the Authorized User's license rights and obligations with respect to that open source software shall be defined by those separate license terms and subject to the conditions, if any, therein. Nothing in the Contract shall restrict, limit, or otherwise affect any rights or obligations the Authorized User may have, or conditions to which the Authorized User may be subject, under such separate open source license terms. The Contractor may not use material pursuant to an "open source", "copyleft", or "sharealike" license such as a Creative Commons or Gnu General Public License for performance of its responsibilities under this contract without prior approval of the State, and shall ensure that any such material is free from all obligations to third parties, including but not limited to royalties except for such provisions in writing that Contractor has expressly brought to the attention of the State and which have been expressly approved by the State.

#### **4.13.23 Ownership of Data and Records**

All data and other records contained in or entered into any Contractor accessible data store by the State or LEA, or supplied to the Contractor by the State or LEA are, and shall remain, the sole property of the State or LEA respectively. The Contractor shall not copy or use such records except to carry out contracted work under the terms herein, and shall not transfer or display such records to any other party not involved in the performance of the resulting Agreement. Contractor will certify in writing that all data and records have been destroyed upon completion of the work hereunder.

#### **4.13.24 Title, Copyrights, and Legal Interest in Agreement Deliverables**

Unless Subject to the license terms of any Open Source elements required by the RFP, and provision 4.13.22 above, or unless otherwise specified in the Agreement, all materials developed pursuant to the terms of the Agreement

without limitation, including materials developed as a result of Task Orders, contract documentation, software coding or modifications, and all other contract Deliverables of whatever description, custom program code developed or prepared for the State by the Contractor under the Agreement, whether or not the Agreement is completed, is confidential information and the property of the State, and all title and interest therein shall vest in the State and shall be deemed to be a "work made for hire" and made in the course of the services rendered hereunder. To the extent that title to any such works may not, by operation of law, vest in the State, or such works may not be considered works made for hire, all rights, title and interest therein are hereby irrevocably assigned to the State. All such materials shall belong exclusively to the State, with the State having the right to obtain and to hold in its own name copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. The Contractor agrees to give the State, and any person designated by the State, reasonable assistance, at the State's expense, required to perfect the rights defined in this Paragraph.

Notwithstanding the foregoing, the Contractor or third parties shall retain all right, title and interest in any of their respective pre-existing software products. The State shall receive a non-exclusive royalty-free, perpetual license to any Contractor property that is integrated with software deliverables developed for use by the State under this Agreement. This license shall permit the State to continue to operate, maintain, enhance, modify, create or sublicense to have created for the State derivatives of the Deliverables and the EDP components provided under this Agreement indefinitely. The Contractor shall be responsible for obtaining a non-exclusive, royalty-free, perpetual license for the same indefinite uses by the State from any third-party whose property is used and/or incorporated in the deliverables or services under this contract, at Contractor's cost. The State acknowledges that the successful Contractor or its licensors shall retain all ownership and intellectual property rights to proprietary code offered to the State under a licensing agreement. Any property or material furnished or provided by the State to the Contractor hereunder is and will remain the property of the State.

Nothing herein shall preclude the State from entering into an agreement with the Contractor to jointly own a specific work developed under the Agreement.

#### **4.13.25 Software Use**

The Contractor shall pay all associated license, maintenance, and support fees from the start date of the resulting agreement and continuing through the end of the System Warranty Period. All software licenses will be held by the Contractor for the State during the phased implementation period, with the State as the sub-licensee or grantee of all rights necessary to allow it to conduct its proposed activities during the project. All privileges extended to the licensee shall also be extended to the State, the sub-licensee. Upon completion of the System

Warranty Period, all software licenses shall automatically pass to the State. In the event of Termination of the contract, the Contractor shall immediately grant all software licenses to the State, upon the State's request. The Contractor shall ensure that these provisions are included in any software license obtained by Contractor ~~feefrom~~ a third-party for use in this contract.

Where use of software is granted on a licensed basis, the following shall constitute the license grant with respect to use of the licensed software by NYSED:

- A. License Scope – NYSED is to be granted a non-exclusive, royalty-free, perpetual license to use, execute, reproduce, display, perform, or merge the software within its business enterprise up to the maximum licensed capacity stated in the license agreement. Software may be accessed, used, executed, displayed or performed for the purposes outlined in the Content Management and System Services Contract. NYSED shall have the right to use and modify or customize the software for the purposes in the Content Management and System Services contract, provided that any modifications, however extensive, shall not diminish Licensor's proprietary title or interest. No license, right or interest in the trademark, trade name, or service mark is granted hereunder. The software will not be distributed to any third parties, except for use by the federal government as may be required by 34 C.F.R. §80.34.
- B. Right to Purchase Additional Software – NYSED may elect to purchase additional software components/modules, to complement the integration of the existing collection of software components/modules to rapidly changing technology. The characteristics of an increment may vary depending upon the type of information technology being acquired and the nature of the system being developed. The following factors may be considered in choosing an appropriate contracting technique that facilitates the acquisition of subsequent software components:
- Takes advantage of any evolution in technology or needs that occur during implementation;
  - Address complex information technology objectives incrementally in order to enhance the likelihood of achieving workable systems or solutions for attainment of those objectives; and,
  - Reduce risk of potential adverse consequences on the overall project by isolating and avoiding custom-designed components of the System.

The Contractor shall offer to the State the lowest price offered to other customers. This provision of this contract shall survive termination or expiration of the contract.

The information technology acquired through this Contract for each increment should ~~be compatible, integrate seamlessly with the existing software~~

~~products,~~ comply with commercially acceptable information technology standards when available and appropriate, and shall conform to the State's information technology architecture. ~~The performance requirements of each increment should be consistent with the performance requirements of the overall solution, and should address interface requirements with succeeding increments.~~

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C. Licensed Documentation – If commercially available, ~~Licensee~~the State shall have the option to require the Contractor to deliver, at Contractor's expense one (1) hard copy and one (1) master electronic copy of the Documentation in CD format; Contractor hereby grants to ~~Licensee~~the State 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. Contractor must also ~~provide access to an on-line library to ensure that users have access to maintain~~ the most recent user manuals and other documentation. ~~in an online repository or wiki accessible to the State, as required by the State~~

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~~D. Platform Migration – The State may elect to change its technical infrastructure including the hardware, operating system, and database management system, to another platform supported by the Contractor. In such a case, the Contractor will provide the State, at no charge and with no amendment to the terms and conditions set forth herein, with all updates and software replacements necessary to use the licensed software on the new platform.~~

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~~E.D.~~ The State acquires only the right to use the Software and does not acquire any rights of ownership, other than for application programs developed specifically for this Agreement. All rights, title, and interest in the Software shall at all times remain the property of the Contractor. The Contractor represents that (i) it is the owner of the Software developed by the Contractor, with the exception of the application programs developed specifically for the Agreement and that it has the right to modify same and to grant the State a license for its use.

~~F.E.~~ Notwithstanding any other provisions of the Agreement, NYSED will have unlimited access to: (i) all source code which was written specifically for System applications or is reasonably required in order to make modifications to any such applications; and (ii) all application programming interfaces, whether or not developed specifically for purposes related to the Agreement, which are reasonably required in order to modify any application, either written or to be written, and which are related to the System applications.

#### 4.13.26 Source Code Delivery

##### ~~A. Source Code~~

The State will receive source code to the EDP project software (Programs) developed by the Contractor under this Contract, and any enhancement or configuration thereto.

#### 4.13.27 Product Version

Products licensed or provided shall be the 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 the State Project Director and Contractor is willing to provide such version.

#### 4.13.28 No Hardstop/Passive License Monitoring

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

#### 4.13.29 Use by Other Agencies and the Federal Government

Any contract entered into pursuant to an award of this RFP shall contain a provision that grants the option to extend the terms and conditions of such contract to any other State agency in New York. The Contractor recognizes that this contract is funded by federal Race to the Top / American Recovery and Reinvestment Act (ARRA) funds, and that the federal government reserves a right to use material or works created pursuant to this contract pursuant to 34 C.F.R. §80.34, to the extent that provision is applicable.

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#### **4.13.30 Additional Services Requested**

NYSED may, at any time, by written notice, make changes or additions to work or services within the general scope of this contract for unanticipated needs. If any such change or addition causes an increase or decrease in the cost of, or in the time required for, performance of the Agreement, an equitable adjustment shall be made in the cost using the billing rates set forth in the Agreement, and the Contractor shall be notified, in writing, accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 calendar days from the date of receipt by the Contractor of the notification of change; provided however, that NYSED, if it decides that the facts justify such action, may receive and act upon such claim as asserted at any time. Nothing in this clause shall excuse the Contractor from proceeding with the Agreement as modified. A change to the scope of the Agreement or budget would be subject to the approval of the State Comptroller.

#### **4.13.31 Freedom to Undertake**

With respect to any contract or employment as an independent Contractor or employee of New York State, or any New York public corporation as defined in Section 66 of the New York General Construction Law or any agency or department of either, pursuant to the terms of any other present or future agreement, expressed, implied, entered into with such entity, if any, the Contractor by submitting a proposal thereby covenants and represents that there is no conflict as to hours required to be worked or duties required to be performed pursuant to the terms of this proposal and any aforesaid contract or employment.

#### **4.13.32 Reports and Findings**

Any and all reports and findings rendered to NYSED by the Contractor shall be the exclusive property of NYSED and subject to its exclusive use and control. The Contractor herewith waives any and all rights to such reports and findings and the control thereof.

The Contractor shall take all appropriate action to protect the confidentiality of all information supplied to it or developed by it during the course of its performance under the terms of the contract.

#### **4.13.33 Records Access**

NYSED staff, others authorized by NYSED such as representatives of the Federal government, or other State agencies authorized by State law, shall have access to and the right to examine the books, documents, work papers, documentation of charges, or other records of the Contractor involved in transactions relating to the contract during the contract period and for a period of six years after final payment for said services by the Department. The Contractor will make all records, including related documents of any and all subcontractors, available to New York State. Such retained records shall not include confidential data or information, as defined in this Contract, unless specifically mandated in

writing by NYSED to be retained. Otherwise, such confidential data and information shall be promptly destroyed as provided in this Contract.

As authorized by NYSED, the Contractor shall cooperate with Federal auditors and other independent auditors conducting audits of State and related Federal records and with any subsequent auditors for the examination of documents, systems, and financial statements. Such cooperative work shall be reported to NYSED and identified separately in all billings under the contract.

#### **4.13.34 Work Paper Retention and Availability**

The work papers to be prepared by the Contractor during the engagement will be the Contractor's property, although copies thereof and access to them will be made available, upon request, to NYSED, representatives of the Federal government and State agencies when authorized by NYSED, and other State agencies authorized by law, for a period of six (6) years following the date of the final payment under the contract. All such requests, and their disposition, shall be authorized by the Department.

The Contractor selected agrees to make personnel available to explain fully all data, materials, and work papers developed during the engagement for a period of six (6) years following the date of the final payment under the contract.

#### **4.13.35 Waiver, Modification, Execution, or Severability**

No waiver or modification of the contract or any covenant, condition, or limitation herein contained shall be valid unless in writing and executed by the parties hereto, and no evidence of any waiver or modification shall be offered or received in evidence in any action between the parties hereto arising out of or affecting the contract, or the rights or obligations of any party hereunder, unless such waiver or modification is in writing, duly executed as aforesaid, and the parties further agree that the provisions of the paragraph may not be waived except as herein set forth.

The written contract shall contain the sole and entire agreement between the parties and shall supersede any and all other agreements between the parties.

The parties hereto shall execute such other further documents as may be required to effectuate the terms of the contract.

In the event that any provision of the Agreement shall be declared void, voidable, illegal, or invalid for any reason, such provision shall be of no force and effect only to the extent that it is so declared void, voidable, illegal, or invalid. All of the provisions of the Agreement not specifically found to be so deficient shall remain in full force and effect.

#### **4.13.36 Freedom of Information Law**

New York State's Freedom of Information Law (FOIL) (Public Officers Law, Article 6, §§84-90), available at: <http://www.dos.state.ny.us/coog/index.html>, promotes the public's right to know the process of governmental decision-making

and grants maximum public access to governmental records. The proposal of the successful Bidder and the proposals of unsuccessful Bidders may be subject to disclosure under FOIL.

However, pursuant to Section 87(2)(d) of FOIL, a State agency may deny access to those portions of proposals or portions of a successful Bidder's contract which are "trade secrets" or submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise.

Please note that all information that a Firm may claim as proprietary, copyrighted, or rights-reserved is not necessarily protected from disclosure under FOIL.

As noted in Section 2.3.1 above, if there is information in a Firm's proposal that a Firm claims meets the definition set forth in Section 87(2)(d), the Firm should identify such information and provide an outline of its reasons for seeking exemption from FOIL disclosure.

Failure to identify the information which a Firm believes should be protected by Section 87(2)(d) may result in such information being disclosed if a request is received.

It is a Firm's responsibility to consult an attorney with any questions the Firm may have about New York State's Freedom of Information Law. All work products described herein may also be subject to FOIL disclosure.

The State will not honor any attempt by a Bidder either to designate its entire bid proposal as proprietary or to claim copyright protection for its entire proposal.

The Contractor must provide to the Department all information, records, and other written material it produces, possesses, or relies upon if such material is the object of a legitimate request to the Department pursuant to the Freedom of Information Law.

#### **4.13.37 Piggybacking**

This contract may be extended for use in accordance with the State Finance Law Section 163 (10)(e). NYSED reserves the right to convert any provisions that involve LEA procurement into a piggybacked OGS backdrop contract.

#### **4.13.38 Performance Monitoring**

The Contractor's performance will be assessed by the State according to the achievement of Contractor's contractual obligations in a timely and professional manner, as set forth herein. NYSED may utilize progress reports and periodic meetings to ensure that the project is carried out on a timely basis and results in effective recommendations and work product.

**4.13.39 Notices**

All notices, demands, instructions, claims, approvals, and disapprovals are required to be given to either Party at the addresses set forth in the final contract document or to such other address as either Party shall have provided the other.

**4.13.40 Reservations**

NYSED reserves the right to employ other consultants and contractors in connection with its responsibilities and functions. In that event, Contractor will, as directed by NYSED, cooperate and work in harmony with such consultants and contractors.

**4.13.41 Proposal Ownership**

All Subject to Contractor's copyrights, all proposals and accompanying documentation become the property of the State of New York and will not be returned. ~~The Department reserves the right to use any portions of the Bidder's proposal not specifically noted as proprietary.~~

#### 4.14 Appendix A-2

##### **American Recovery and Reinvestment Act of 2009 (ARRA)** ADDITIONAL CONTRACT RECORD KEEPING REQUIREMENTS

This contract is funded, in whole or in part, by the American Recovery and Reinvestment Act of 2009 (ARRA). The United States Office of Management and Budget (OMB) has released, "Implementing Guidance for Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009" (M-09-21). This guidance provides detailed information on reporting requirements included in Section 1512 of the Recovery Act.

Recipient vendors receiving ARRA funding will be required to submit quarterly information which will include at a minimum the following information:

- Vendor name and zip code of Vendor headquarters;
- Expenditures (per quarter and cumulative);
- Expenditure description; and
- Estimates on jobs created or retained via the expenditure of these funds by the Vendor.

Additional data may be required from vendors as a result of guidance issued by OMB.

Vendors will be required to submit the ARRA data in a form and format to be determined by the New York State Education Department (NYSED). NYSED anticipates that the reporting information will be provided to Vendors no later than August 30th. There will be no additional compensation for this reporting activity, and it is anticipated that the Quarterly Reporting forms will be required in both paper and electronic formats.

An employee of any non-federal employer receiving ARRA funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to law enforcement and other officials information that the employee reasonably believes is evidence of:

- Gross mismanagement;
- Gross waste of covered funds;
- A danger to public health and safety;
- An abuse of authority; or
- A violation of law.