



# **ESSEX COUNTY**

## **OFFICE OF THE MANAGER**

7551 Court Street · P.O. Box 217 · Elizabethtown, New York 12932  
Telephone (518) 873-3333 · Fax (518) 873-3339

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Daniel L. Palmer  
County Manager

Linda M. Wolf  
Purchasing Agent

**TO:** All Bidders

**FROM:** Linda Wolf, CPA, Purchasing Agent

**DATE:** April 6, 2012

**SUBJECT:** Addendum #1 DEFERRED COMPENSATION

**This Addendum, issued to bid document holders of record, indicates changes to the bid documents for the *DEFERRED COMPENSATION RFP* Opening May 25, 2012.**

**Please make note of the following when preparing your response:**

**The County has roughly 570 employees eligible to participate in the plan and we have 159 participants who defer roughly \$410,000 per year. The plan is currently with two different companies and total combined assets for the two companies are roughly \$5,670,216.**

END OF ADDENDUM #1

## **REQUEST FOR PROPOSALS**

NOTICE IS HEREBY GIVEN; that the Undersigned, on behalf of the Essex County Board of Supervisors, will accept sealed proposals at the Office of the Purchasing Agent until May 25, 2012 at 2:00 P.M. for a Deferred Compensation Plan.

Specifications are available by contacting the Office of the Purchasing Agent, Linda M. Wolf, CPA, Government Center, 7551 Court St., Elizabethtown, New York 12932 or by calling 518-873-3332. Specifications are also available on the website at: [www.co.essex.ny.us](http://www.co.essex.ny.us).

All proposals submitted in response to this notice shall be marked "SEALED PROPOSAL – DEFERRED COMPENSATION" clearly on the outside of the envelope.

In addition to the proposal, the proposer shall submit executed non-collusion bid certificates signed by the proposer or one of its officers as required by the General Municipal Law Sec. 103d.

The successful proposer will be notified promptly by letter and must be prepared to enter into a contract to furnish the materials or services.

Essex County reserves the right to reject any and all proposals not considered to be in the best interest of Essex County, and to waive any technical or formal defect in the proposals which is considered by Essex County to be merely irregular, immaterial, or unsubstantial.

PLEASE TAKE FURTHER NOTICE that Essex County affirmatively states that in regard to any contract entered into pursuant to this notice, without regard to race, color, sex, religion, age, national origin, disability, sexual preference or Vietnam Era veteran status, disadvantaged and minority or women-owned business enterprises will be afforded equal opportunity to submit bids in response hereto.

Dated: April 4, 2012

Linda M. Wolf, CPA  
Purchasing Agent  
Essex County Government Center  
Elizabethtown, New York 12932  
(518) 873-3332

**Essex County**

**“Request for Proposal”  
Section 457 Deferred Compensation Plan**

**April 4, 2012**

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## Procedures Governing Submission of Proposals

The purpose of the proposed deferred compensation plan will be to provide eligible employees with a convenient way to provide for a long-term retirement program and to encourage broad-based participation of employees in the plan.

We do not want to imply that any specified amount of contributions will be made, but we do want to assure that this additional benefit is recognized by all employees, that they have the opportunity *to receive one-on-one counseling* and voluntarily participate.

The plan is intended to qualify as an ‘eligible deferred compensation plan’ under Section 457 (“Section 457”) of the Internal Revenue Code of 1986 (“Code”), as now in effect or hereinafter amended. To become an “eligible deferred compensation plan” in the State of New York, you must meet the requirements of the “Rules and Regulations” [Parts 9000 to 9006 of Subtitle II of Title 9 NYCRR (“Subtitle II”)] (the “Regulations”) promulgated by the New York State Deferred Compensation Board (the “Board”) pursuant to the authority granted by the State Finance Law, Article 2, Section 5.

This document constitutes a request from qualified Administrative Service Agencies and/or Financial Organizations relating to (1) trust service, (2) administration and/or (3) funding of an “eligible deferred compensation plan”. *If you are “qualified” according to the Regulations to administer, maintain records and accounts of plans and/or if you have appropriate trust services and/or products available for use as funding media and are interested in making those services and/or products available, you are requested to complete this invitation for proposal.*

### Due Date

#### **To receive consideration, all proposals:**

- Must submit (6) copies of the proposal by first-class or overnight delivery service to arrive no later than 2:00 PM, on May 25, 2012.

**Send to: Linda M. Wolf, CPA  
Essex County Purchasing Agent  
7551 Court St., PO Box 217  
Elizabethtown, New York 12932**

Must display the following identification on the outside lower left-hand corner:

***RESPONSE TO REQUEST FOR PROPOSAL  
DEFERRED COMPENSATION ENCLOSED***

## Form and Substance

Attached you will find: the “Rules and Regulations” (effective March 12, 2003), hereafter referred to as the “Regulations”, and the Model Plan (including amendments through May 21, 2004) promulgated by the Board for which you are to rely on for responding to this invitation for proposal. Failure to conform to or satisfy any requirement of these documents will result in the immediate rejection of the proposal.

- Must include a fully completed questionnaire, restating each statement or question in Section I through Section V inclusive, and by recording your response directly below each statement or question.
- Must respond to all questions in the “Contractual Requirements” section (Section I) and must conform to the specifications set forth in this Request For Proposal (“RFP”). If recordkeeping services are provided by a “person” (defined by Regulations) that is neither the parent nor subsidiary company of the Financial Organization, then separate and complete responses must be received by each company.
- Must include a **transmittal letter** on the Company’s official letterhead signed by an official of the Company who is authorized to commit the organization to perform the services outlined in the submitted proposal: you must indicate such commitment. The **transmittal letter** must contain a **representation** that the proposal complies with all requirements of the Regulations and the Model Plan.

It is each bidder’s responsibility to assure that proposals are shipped in a timely fashion so as to be received by the designated party on or before the due date. Proposals received after the specified date will not be considered. We accept no responsibility for lost and/or late delivery of proposals.

By submitting a proposal, each bidder agrees not to make any claims for or have any right to damages because of any misunderstanding or misrepresentation of specifications, because of any misinformation or lack of information or because such bidder is not selected to provide the services proposed. Submission also indicates acceptance of the conditions contained in the Request For Proposal, unless clearly and specifically noted otherwise in the response. All costs for developing proposals are entirely the responsibility of the bidder.

## Evaluation Criteria

In selecting, we will use criteria which comply with the requirements of the Regulations, including Section 9003.3(a) (1 through 7) of the Regulations.

All qualified proposals, sought in conjunction with the requirements of Section 9003.2 of the Regulations, will be evaluated and awards made to the bidder or bidders whose bid is determined to be in the best interest of the plan participants.

## Selection Process

Section 9001.2(b) of the Regulations, recognizes that we have appointed a committee to act on our behalf, to the extent permitted or required by the Regulations and by the Model Plan. Section 9003.3(c): before any contract or agreement entered into by the committee may become effective, the committee must submit in writing, to the President of the New York State Civil Service Commission (“the President”), the name of such selected bidder(s) and a “**certification**” signed by the chief executive officer and chief legal officer stating that such bidder(s) has been duly selected to provide services in accordance with provisions of the Regulations.

Contracts or agreements cannot be awarded before the expiration of ninety (90) days from date of our announcement publication in the State Register and local paper.

Invitations **may** be made for oral presentations.

Any award of a contract or agreement as a result of this invitation will be made by written notification.

We reserve the right to reject any or all proposals or parts thereof. We reserve the right to establish a deferred compensation plan by any of the methods prescribed by Section 9001.2(a) of the Regulations.

## Term of Contract

Pursuant to Section 9003.5(a) of the Regulations, we expect to enter into a written contractual arrangement(s) of up to ***five (5) years*** in duration. All contracts and agreements entered into shall impose ***no penalties or surrender charges*** for the transfer of assets or responsibilities on expiration of the contract or agreement. Upon the expiration or termination of any contract(s) or agreement(s), the committee shall follow procedures set forth in the Regulations in Part 9003 for awarding new contracts and entering into new agreements.

<p style="text-align: center;"><b>SECTION I</b> <b>CONTRACTUAL REQUIREMENTS</b></p>
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**“Agree” or “Disagree” must be indicated for each of the following specifications. The following specifications can be found in either the Regulations or the Model Plan, all of which should have been enclosed as attachments. Please include reasons for any rejection or disagreement of any specification and alternative options, if applicable. There should be neither elaboration nor qualification for “agree” unless otherwise requested.**

**Specifications of the Regulations**

- 1. Section 9000.2(b)(4)- As a Financial Organization authorized to do business (provide investment products) in New York State, you agree that your firm is one of the following: (a) a Registered Investment Advisor, (b) a Bank or (c) an Insurance Company qualified under the laws of more than one state.**

**If you are an Insurance Company acting through a subsidiary in New York State, then the Subsidiary Insurance Company must certify that it (the Subsidiary Insurance Company) is qualified to do business under the laws of more than one state.**

- 2. Section 9001.2(b) - We have appointed a deferred compensation committee to act on our behalf and you agree to interface with this committee. Additionally, we may decide to be the grantor of our own trust, then you also agree to interface with the trust and trustee: *all funding contracts, of whatever nature, will be “issued to, owned and retained by the trustee”*.**
- 3. Section 9001.4(a) through (d) - You agree to abide by all four (4) provisions, *especially not allowing annuity type payouts*.**
- 4. Section 9002.2(a) (5) - You will provide evidence that bonds and insurance have been secured by you pursuant to the Regulations.**
- 5. Section 9002.2(a)(6) - *You will acknowledge in writing that you will act as a fiduciary under Section 457(g) of the Code and under State and common trust law principles with respect to all trusteeship, administrative, or investment matters for which you assume responsibility. Additionally, you agree to indemnify our Plan as a result of any cause of action brought against it as a result of acts or omissions together with the reasonable costs of litigation arising therefrom.***
- 6. Section 9003.3(a) - Your proposal shall be in writing and contain a representation that the proposal complies with all requirements of the Regulations and clearly indicate all direct fees, indirect fees and charges.**
- 7. Section 9003.5(c) - All contracts and/or agreements shall be in writing, shall be awarded on the basis of a competitive bid, and shall not exceed five (5) years in duration, *and shall impose no penalties or surrender charges for the transfer of any asset(s) or responsibilities on expiration of the contract or agreement.***



8. Section 9003.5(b) - You will not permit any other Trustee, Administrative Service Agency, Financial Organization, independent consultant or person to provide services in respect to the Model Plan we have adopted.
9. Section 9003.7 - You will not permit an investment of any amount, in any annuity contract providing for a term which could exceed five (5) years or which is measured by one or more natural lives or any life insurance or other contract providing traditional death benefits.
10. Section 9004.1 - All information obtained by your position will remain confidential and you will neither solicit nor provide products other than deferred compensation.
11. Section 9005.3 - Statements to participants will be provided at least quarterly, *even in situations where no contributions are being made but funds are on deposit*. You also agree to provide, at least annually, an additional statement to participants disclosing all fees and expenses paid out of or charged against plan assets.
12. Section 9005.4 - Agree to satisfy the bonding and insurance requirements of this Section and provide evidence of such.
13. Section 9006.2 - You agree to include in your contracts and agreements a provision that the contracts and agreements are subject to the Regulations and the Model Plan and that such Regulations and the Model Plan are made part thereof.

### Specifications of the Model Plan

1. Section 3.2(a) - The Model Plan requires a minimum deferral amount to be \$260 for any plan year. Your proposal will state this minimum requirement wherever requested.
2. Section 4.1 - You acknowledge that the amounts of compensation deferred by the participants will be invested, according to the participant's investment directions, no later than two (2) business days following receipt thereof, in the appropriate investment funds.
3. Section 4.7(a) - The entire value of each participant's account, including any annuities will be set aside and held by the trustee, in trust, and that your contracts and agreements will recognize and reflect such.

## **SECTION II**

### **TRUSTEE SERVICES**

**NOTE:** *You may skip this section entirely if you are not a Financial Organization bidding to become Trustee. You do not need to copy any of the questions. Move to next applicable Section.*

Section 9002.1(a) of the Regulations states that assets must be held by one or more trustees pursuant to one or more trust agreements. Such agreements must satisfy all the requirements of Section 9002.1(b). Section 9002.1(b) also indicates who may be trustee. We reserve the right to create our own trust as provided by this Section 9002.1(b) but desire to explore the alternative of a Financial Organization acting as trustee.

Please respond to each of the following statements if you desire to be considered as trustee. If any statement does not apply, please indicate so by responding: ***“Not Applicable”***.

### **Requested Information**

- A. The name of your firm, address, name of primary contact person and telephone number.**
- B. Whether your firm has provided trust services to any New York State municipality for their Code Section 457(b) deferred compensation plan. List names of all such municipalities.**
- C. Description of trust services you would provide acting as a Financial Organization rendering only trust services. Please specify all fees, expenses, charges and costs for the trustee services. Please provide disclosure of any compensation structure.**
- D. If you are selected as the Financial Organization acting as our trustee and desire to additionally respond to performing the duties of an Administrative Service Agency, as described in Sections 9000.2(b)(1) and 9002.1(b)(4) of the Regulations, please indicate your intention here.**

**If you respond affirmatively, then it will be necessary for you to complete the questions in Sections III and IV addressed to the Administrative Service Agency bidder. However, in addition to stating your intention to bid, it is requested that you indicate here the effect this will have on any fees, expenses, charges and costs as distinguished from those previously stated in this Section.**

- E. The trustee will also be requested to acknowledge in writing that it is a fiduciary with respect to all administrative or investment matters for which it has assumed responsibility as outlined in Section 9002.2(a)(6) and 9003.6 of the Regulations.**
- F. Referring to Section 9005.4 of the Regulations, describe the type of bond and its limits that you will be furnishing. Include “cost disclosure” if it is your intention for us to satisfy any part of this obligation.**
- G. Do you intend to supply us with a sample trust agreement for our consideration? If so, do you attest that this agreement meets all of the requirements applicable to trusts as stated in Section 9002.1(b) of the Regulations and Section 457(g) of the Code.**

<p style="text-align: center;"><b>SECTION III</b> <b>ADMINISTRATIVE SERVICE AGENCY/ FINANCIAL ORGANIZATION</b></p>
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*(Excluding Trustee)*

Please respond to each of the following statements if you desire to be considered as either the *Administrative Service Agency* and/or the *Financial Organization*. If you feel any statement does not apply, please indicate so by responding: "Not Applicable" and provide your reasoning.

**Company Background**

- A. The name of your firm, home office address, New York State address (if any), and the name (including title), address and phone number of your primary contact person whom we may contact about your proposal.**
  
- B. Give a very brief description of your company and its history of participation in similar public employee Code Section 457(b) deferred compensation plans for state and local government employers. In New York State such plans first materialized in 1985, include your specific experience in similar plans in New York since that time.**
  
- C. How many public employee elective deferral retirement plans and deferred compensation plans do you currently provide administrative services and/or investment products for? How many of these plans are New York plans?**
  
- D. In the past three (3) years has any public employee Code Section 457(b) deferred compensation plan/program, regardless of geographic location, terminated your (parent, subsidiary or affiliate) services either through the competitive bid process or for cause? If so, by whom and under what circumstances?**
  
- E. List ten. (10) client Code Section 457(b) deferred compensation plan references for which your organization provides services and/or investment products similar to those requested in this proposal. It would be preferable if five (5) of the references could represent different size clients (based on assets) from New York State, if possible. Please include contact person name, title, address and telephone number, number of participants and approximate size of plan assets and the number of years you have been providing services. Spreadsheet format preferred.**
  
- F. What professional liability coverages are maintained by your company for errors and omissions or any other act?**
  
- G. Financial Organization's should provide appropriate "ratings" from the following: A.M. Best, Standard & Poor's, Moody's, and Fitch (formerly Duff & Phelps). Has your rating in any of these agencies fallen below "A-" in the last three (3) years? If yes, give complete details. If, as a Financial Organization, you have no ratings by any of these agencies, please explain.**
  
- H. Provide any additional information that would distinguish your firm.**

## **SECTION IV**

### **SERVICES**

Please respond to each of the following statements if you desire to be considered as the Administrative Service Agency. If you feel any statement does not apply, please indicate so by responding: “*Not Applicable*” and provide your reasoning.

#### **Marketing and Enrollment Services**

- 1. Briefly describe the marketing and employee communication strategy which will be used with our plan. Indicate the use and capabilities of laptop computers, if utilized.**
- 2. Briefly describe the types of marketing/promotional materials to be utilized. How will you work to develop a marketing program unique to our needs?**
- 3. Do you provide communications to participants on a regular basis, if so, please describe?**
- 4. Will these services and materials be prepared and distributed at your cost?**
- 5. What educational materials will be provided to the Plan to maintain compliance?**
- 6. Briefly describe how you propose to conduct group enrollment meetings and ongoing educational sessions so that all interested employees have an opportunity to attend at a convenient time and location. How often are these type sessions proposed? Indicate the use and capabilities of laptop computers, if used.**
- 7. Please describe, in detail, your one-on-one counseling sessions. Your response should emphasize how you plan to satisfy “*the individual one-on-one on demand availability*” of your enrollment specialist especially at times and locations convenient to our employees.**
- 8. What educational services are provided for retirees?**
- 9. Describe your approach to asset allocation and diversification.**
- 10. How do you follow-up with or contact employees that did not have an opportunity to attend a group session or with an employee subsequently hired after that meeting date? Your comments on the one-on-one availability of your enrollment specialists for this function are important.**
- 11. Briefly describe your continuing education program, if any.**

- 12. Do you attest that these Enrollment Services are provided only by a properly licensed representative: licensed to meet both Federal and New York State requirements?**

## Administrative Services

### **A. Services offered to the Plan Sponsor**

- 1. Do you offer a dedicated toll-free Plan Sponsor line?**
- 2. How does your organization provide assistance with revisions to the New York State Model Plan Document?**
- 3. Does your company provide loans to participants?**
- 4. Will your company withhold, remit and report income taxes deducted from distributions? Does this service include the production and distribution all income tax reports to all the necessary parties as required by federal and state laws?**
- 5. Specify all reports which will be issued to us, our participants and governmental agencies.**
- 6. The Committee anticipates plan expenses related to the administration of the Plan. Would you be willing to reimburse the Committee for these expenses and if so, to what level?**

### **B. Services offered to Participants**

- 1. Describe your voice response telephone system. Identify all available services including customer service options as well as “Voice Response Systems” or automated options. Include security features and voice options, if applicable.**
- 2. Can your customer service representatives assist non-English speaking participants?**
- 3. Describe your internet strategy. What features are currently available on your website? What services are you developing for the near future? What security safeguards are used?**
- 4. Please describe the settlement options available to each participant at retirement, voluntary termination and death. Please state your compliance to reflect the Board’s continued prohibition on annuity distribution options (Section 9001.4 of the Regulations).**
- 5. In the event you are asked to administer our plan along side another provider(s), please describe your required process for assisting with participant requests to transfer plan assets from your program to one of the other carriers. Describe in detail the forms, signatures and overall process that you require.**

## Recordkeeping System

- 1. Specify the basic recordkeeping system to be provided for our plan, with particular reference to the ability to receive, disburse, control and audit deductions, and to ensure timeliness, accuracy and confidentiality of records and describe the software used.**
- 2. Briefly describe data processing operations, including the media by which your company can receive payroll deduction information, and its security provisions. Include a statement about your disaster recovery plan and its site location. Identify any subcontracting requirements for your primary administration responsibilities and comment on how this is possible in light of Section 9003.5(b) of the Regulations.**
- 3. Indicate all interfacing: payroll deduction inputs, required certifications and any other transactions, specifying all direct and indirect costs. Specify how payroll deduction information is to be supplied. Indicate ability to interface with internal data processing systems.**

## **SECTION V**

### **INVESTMENTS**

Please respond to each of the following statements if you desire to be considered as the Financial Organization. If you feel any statement does not apply, please indicate so by responding: ***“Not Applicable”*** and provide your reasoning.

#### **Fund Offerings**

*Information should be for the most recent calendar quarter completed.*

1. **Describe fully the various attributes of each investment option your company has to offer. For each option include an Investment Options Summary sheet which includes the funds objective, portfolio statistics, asset allocation, top 10 holdings, and industry diversification.**
2. **Describe fully your “fixed” investment option. Include a one-page summary including applicable rates for the current calendar year, asset composition, and rating methodology.**
3. **Does your company offer a self-directed brokerage window as a potential option? Please fully describe the services and fees associated with the administration of the brokerage accounts.**
4. **Illustrate in *spreadsheet format* provided, (see Exhibit A) the “variable” values for each equity type investment. Please give annualized returns for ‘year-to-date’, ‘one year’, ‘three year’, ‘five year’ ‘ten year’ and ‘since inception’ values.**
5. **Illustrate in *spreadsheet format* provided, (see Exhibit B) all charges including loading costs, policy fees, surrender charges, actuarial margins, asset fees, transfer charges, distribution charges, withdrawal fees, redemption fees, commission, termination/withdrawal of contract fees, etc., etc.**

#### **Investment Flexibility**

1. **Describe fully all matters related to the exchange/transfer limitations or conditions, termination/withdrawal of contract provisions, any other restrictions or penalties, etc., etc. Include any information on “unrestricted” and/or “free” transfers or plan transfer limitations**
2. **Identify any other charges or limitations not described in the previous responses.**

## **SECTION VI**

### **CONVERSION SERVICES**

**NOTE:** *The following questions are to be answered only by an Administrative Service Agency bidding on an existing case that is administered by another provider: not on cases where you are the incumbent or on new cases that haven't had a prior plan. If these questions do not apply, you may skip to the next section without copying the questions.*

#### Experience

1. **Provide a detailed description and complete history of Code Section 457(b) plans that you have been successful in taking over completely. Include entity name and date of takeover, the name of the former provider, the asset size of the plan, the number of participants, transition time, staffing requirement and other detail you believe is significant.**

#### Process

1. **Fully describe transition activities stating the time frame for a complete transition. Identify any cost to us or to our participants for each step or phase: for the complete conversion.**
2. **What on-site support will be provided during the transition? Who will provide this service? Would the key individuals be willing to meet with the Plan?**
3. **What impact, if any, would there be on our plan if you were to be appointed the sole administrator? For example, would fees be reduced, would we qualify for additional services, etc., etc.**
4. **Please provide references for three plans you recently transitioned. If possible, please provide those located within New York.**



## Exhibit A

## Fund Offerings – Section V, question 3

**Illustrate in *spreadsheet format* provided, the “variable” values for each equity type investment. Please give annualized returns for ‘year-to-date’, ‘one year’, three year’, ‘five year’ and ‘since inception’ values.**

*Fund performance should be net of all administrative charges, fund level expenses, and other fees or charges assessed.*

[illegible]

## **Exhibit B**

Fund Offerings – Section V, question 4

**Illustrate in *spreadsheet format* provided, all charges, including loading costs, policy fees, surrender charges, actuarial margins, asset fees, transfer charges, distribution charges, withdrawal fees, redemption fees, commission, termination/withdrawal of contract fees, etc., etc.**

### *Fee Schedule*

[illegible]

September 23, 2004

Plan Document  
for the  
DEFERRED COMPENSATION PLAN  
FOR EMPLOYEES OF  
ESSEX COUNTY

**As amended and restated January 1, 2002**  
**(including Amendments through May 21, 2004)**

**September 23, 2004**



**Deferred Compensation Plan**

**for Employees of**

**Essex County**

**Plan Document**

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## **Deferred Compensation Plan**

**for Employees of**

**Essex County**

**Plan Document**

### **PURPOSE**

The purpose of the Plan is to encourage Employees to make and continue careers with Essex County by providing eligible Employees with a convenient way to save on a regular and long-term basis and thereby provide for their retirement as set forth herein. A Local Employer that is not a participating employer in the Deferred Compensation Plan for Employees of the State of New York and Other Participating Jurisdictions or the sponsor of any other eligible deferred compensation plan may adopt this Plan by complying with the procedures set forth in the Regulations.

The benefits provided to any Participant under the Plan will be based upon the aggregate Plan Benefit and will depend upon the investment results achieved by the Financial Organizations appointed to invest the assets of the Plan allocated to each of the Plan's Investment Funds hereunder and the Participant's individual investment choices among the Plan's Investment Funds. Each Participant shall be 100 percent vested at all times in his or her Plan Benefit in accordance with the terms of the Plan.

In accordance with amendments made to Section 457 of the Code and other federal laws by the Small Business Job Protection Act of 1996 and the Economic Growth and Tax Relief Reconciliation Act of 2001, all amounts of Compensation deferred under the Plan, all



property and rights purchased with such amounts and all income attributable to such amounts, property and rights are held in trust as of the Effective Date for the exclusive benefit of Participants and their Beneficiaries and Alternate Payees pursuant to the Trust Agreement. The terms and provisions of the Plan in effect prior to the Effective Date, if any, shall govern with respect to periods prior to the Effective Date.

The Plan and the Trust Agreement are intended to satisfy the requirements for an “eligible deferred compensation plan” under Section 457 of the Code.

## DEFINITIONS

When used herein the following terms shall have the following meanings:

*“Account”*

means the account established and maintained in respect of a Participant pursuant to Section 5.1. The Account shall include all Amounts Deferred and Section 457 Transfers.

*“Administrative Service Agency”*

means an Administrative Service Agency as defined in the Regulations selected by the Committee to provide services in respect of the Plan. If the Trust Agreement so provides, the record keeping services normally performed by an Administrative Service Agency may be performed by the Trustee, provided that the Trustee otherwise qualifies as an Administrative Service Agency.

*“Alternate Payee”*

means any spouse, former spouse, child or other dependent of a Participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefit payable under the Plan with respect to such Participant.

*“Alternate Payee Account”*

means the account established for an Alternate Payee pursuant to a Qualified Domestic Relations Order, *provided, however*, that the Alternate Payee Account shall separately account for all amounts received from (i) the Participant’s Rollover Account and (ii) from all amounts rolled into the Plan by the Alternate Payee pursuant to Section 7.5(b)(ii).

*“Amount Deferred”*

means Compensation deferred by a Participant pursuant to Section 3.1.

*“Beneficiary”*

means the beneficiary or beneficiaries designated by a Participant pursuant to Section 8 to receive the amount, if any, payable under the Plan upon such Participant’s death.

*“Business Day”*

means any day that is not a Saturday, a Sunday or other day on which the New York Stock Exchange is not open for the trading of securities.

*“Code”*

means the Internal Revenue Code of 1986, as now in effect or as hereafter amended. All citations to sections of the Code are to such sections as they may from time to time be amended or renumbered.

*“Committee”*

means the Deferred Compensation Committee of Essex County.

*“Compensation”*

means all compensation for services to the Employer, including salary, wages, fees, commissions and overtime pay that is includible in the Employee’s gross income for each Plan Year under the Code and any accumulated sick pay, accumulated vacation pay and back pay paid to a Participant by his or her Employer.

*“Distributee”*

means (a) an Employee or former Employee, (b) the Surviving Spouse of an Employee or former Employee and (c) the spouse or former spouse of an Employee or former Employee, but only to the extent such spouse or former spouse is an Alternate Payee under a Qualified Domestic Relations Order and only with regard to the interest of such spouse or former spouse.

*“Earliest Retirement Date”*

means the earlier of (a) the date on which the Participant Severs from Employment and (b) the date the Participant attains age 50.

*“Effective Date”*

means January 1, 2002, unless otherwise stated.

*“Eligible Retirement Plan”*

means (i) an individual retirement account described in Section 408(a) of the Code, (ii) an individual retirement annuity described in Section 408(b) of the Code, (iii) a qualified trust under Section 401(a) or 401(k) of the Code, (iv) an annuity contract described in Section 403(b) of the Code and (v) an eligible deferred compensation plan described in Section 457 of the Code that is maintained by a state, political subdivision of a state, any agency or instrumentality of a state or political subdivision of a state.

*“Eligible Rollover Distribution”*

means all or any portion of the pretax contributions and earnings thereon to the credit of a Distributee, except that an Eligible Rollover Distribution shall not include (a) any distribution that is (i) one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the Distributee or the joint lives (or joint life expectancies) of the Distributee and the Distributee’s Beneficiary or (ii) for a specified period of ten years or more, (b) any distribution to the extent such distribution is required under Section 401(a)(9) of the Code, (c) any distribution due to a hardship of the Distributee, including, without limitation, an unforeseen emergency pursuant to Section 6.1, and (d) the portion of any distribution that is not includible in gross income; *provided, however*, that clause (d) shall not apply to the extent such portion is transferred (i) in a direct trustee-to-trustee

transfer to a qualified trust under Section 401(a) of the Code that is part of a defined contribution plan and that separately accounts for amounts so transferred or (ii) to an Eligible Retirement Plan under Section 408 of the Code.

*“Employee”*

means any individual who receives compensation for services from the Employer, including any elected or appointed officer or employee of the Employer, and any employee who is included in a unit of employees covered by a negotiated collective bargaining agreement which specifically provides for participation in the Plan. An Employee shall not include an independent contractor, a consultant or any other individual classified by the Employer as not eligible to participate in the Plan.

*“Employer”*

means Essex County, New York.

*“Enrollment Date”*

means, with respect to an Employee, each payroll date on which such Employee receives Compensation, or such other date or dates as the Committee may establish either in lieu of, or in addition to, such dates.

*“Financial Organization”*

means a Financial Organization as defined in the Regulations selected by the Committee to provide services in respect of the Plan. If the Trust Agreement so provides, the financial services provided by a Financial Organization may be performed by the Trustee, provided that the Trustee otherwise qualifies as a Financial Organization.

*“Includible Compensation”*

means “includible compensation” as defined in Section 457(e)(5) of the Code.

*“Investment Fund”*

means each of the Investment Funds provided for in Section 4.1.

*“Local Employer”*

means a Local Employer as defined in Section 5 of the State Finance Law.

*“Normal Retirement Age”*

means, for purposes of Section 3.2(b), any age designated by a Participant

(i) beginning no earlier than the earliest age at which a Participant has the right to retire under the Employer’s basic pension plan, if any, and to receive immediate retirement benefits without actuarial or similar reduction because of retirement before some later age specified in such basic pension plan or, in the case of a Participant who does not participate in such basic pension plan, age 65, and (ii) ending no later than age 70½. Notwithstanding the previous sentence, a Participant who is a qualified police officer or firefighter (as defined under Section 415(b)(2)(H)(ii)(I) of the Code) may designate a Normal Retirement Age that is earlier than the earliest Normal Retirement Age described above, but in no event may such Normal Retirement Age be earlier than age 40. Notwithstanding anything in the Plan to the contrary, the Participant’s designation of a Normal Retirement Age under Section 3.2(b) shall not control the date that payment of such Participant’s benefits shall commence pursuant to Section 7. Effective for Plan Years prior to January 1, 2003, in the case of a Participant who continued to work beyond age 70½ and who, upon the attainment of age 70½, had not made the catch-up election provided for under Section 3.2(b), the Normal Retirement Age shall be the age designated by the Participant, which shall not be later than the age at which the Participant Severs from Employment with the Employer.

*“Participant”*

means an Employee or former Employee who has given an investment direction under Section 4 and who continues to have an Account or Rollover Account under the Plan.

*“Participation Agreement”*

means a written agreement between an Employee and the Employer, pursuant to which the Employee elects to reduce his or her Compensation and to have the Amount Deferred contributed to the Plan on his or her behalf in accordance with the terms of the Plan; *provided, however*, that in the case of a deferral of accumulated sick or vacation pay or back pay, such Participation Agreement shall be entered into in accordance with the timing requirements of the Treasury Regulations promulgated under Section 457 of the Code.

*“Plan”*

means the Deferred Compensation Plan for Employees of Essex County, New York, as the same may be amended from time to time.

*“Plan Benefit”*

means, with respect to a Participant, the interest of such Participant in the Trust Fund, excluding any portion of such interest payable to an Alternate Payee pursuant to a Qualified Domestic Relations Order.

*“Plan Year”*

means the calendar year.

*“Qualified Domestic Relations Order”*

means any judgment, decree or order, including, but not limited to, approval of a property settlement agreement, which has been determined by the Administrative Service Agency to meet the requirements of a qualified domestic relations order within the meaning of Section 414(p) of the Code.

*“Regulations”*

means the rules and regulations promulgated by the Deferred Compensation Board of the State of New York pursuant to Section 5 of the State Finance Law, as the same may be amended from time to time.

*“Review Committee”*

means the committee designated by the Committee to review claims to rights or benefits under the Plan in accordance with Section 9.5 and requests for hardship withdrawals under Section 6.

*“Rollover Account”*

means the account established and maintained in respect of a Participant or a Beneficiary who is a Participant’s Surviving Spouse pursuant to Section 7.5(b)(ii).

*“Rollover Contribution”*

means a cash amount contributed by a Participant, a Beneficiary who is a Participant’s Surviving Spouse or Alternate Payee to a Rollover Account or, if applicable, an Alternate Payee Account, which the Administrative Service Agency has determined qualifies as an Eligible Rollover Distribution and which the Administrative Service Agency, in accordance with guidelines promulgated by the Committee, has determined may be contributed; *provided, however,* that the distributing Eligible Retirement Plan shall not be an eligible deferred compensation plan under Section 457(b) of the Code and *provided further* that the distributing Eligible Retirement Plan shall have separately accounted for all amounts included in the Rollover Contribution.

*“Section 457 Transfer”*

means a transfer made into an Account pursuant to Section 7.5(b)(i).



*“Severance from Employment” or “Severs from Employment”*

means a severance from the employment of the Employer within the meaning of Section 457 of the Code and the Treasury Regulations thereunder and USERRA.

*“State”*

means the State of New York.

*“Surviving Spouse”*

means the survivor of a deceased Participant to whom such Participant was legally married on the date of the Participant’s death.

*“Treasury Regulations”*

means the regulations promulgated by the Treasury Department under the Code, as now in effect or as hereafter amended. All citations to sections of the Treasury Regulations are to such sections as they may from time to time be amended or renumbered.

*“Trust Agreement”*

means an agreement entered into in respect of the Plan between the Committee and one or more Trustee(s) pursuant to which all cash and other rights and properties and all income attributable to such cash and rights and properties are held in trust for the exclusive benefit of Participants and their Beneficiaries and Alternate Payees, as such agreement may be amended from time to time.

*“Trust Fund”*

means the assets of the Plan, including cash and other rights and properties arising from Amounts Deferred, Section 457 Transfers and Rollover Contributions which are held and administered by the Trustee pursuant to the Trust Agreement.

*“Trustee”*

means the trustee or trustees acting as such under the Trust Agreement, and any successors thereto.

*“Unit”*

means a unit measuring the value of a Participant’s proportionate interest in an Investment Fund.

*“USERRA”*

means the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 contained in chapter 43 of title 38 of the United States Code.

*“Valuation Date”*

means each Business Day, except that for purposes of an Investment Fund invested primarily in guaranteed investment contracts and synthetic guaranteed investment contracts, Valuation Date shall mean the last Business Day of each month of each Plan Year unless the Committee shall, in its discretion, determine that the Valuation Date of such Investment Fund shall occur more frequently.

## SECTION 11. PARTICIPATION

2.1 (a) Each Employee shall be eligible to participate in the Plan as of any Enrollment Date following the date he or she becomes an Employee, and shall commence such participation in the Plan by duly filing with the Employer and the Administrative Service Agency, in a manner prescribed by the Committee, by the tenth day of the calendar month preceding such Enrollment Date or such other date as the Committee may determine, a Participation Agreement and any enrollment forms or other pertinent information concerning the Employee and his or her Beneficiary which the Committee may require; *provided, however*, that in no event shall any deferral be accepted until the first Enrollment Date following the date on which such Participation Agreement is filed.

(b) Each Employee enrolling in the Plan shall provide the Administrative Service Agency, at the time of initial enrollment and thereafter if there are any changes, with such information as may be required by the Committee.

2.2 Participation in the Plan by Employees shall be wholly voluntary.

2.3 The participation of a Participant shall cease upon payment to the Participant of the entire value of his or her Plan Benefit or upon the Participant's death prior to such payment.

## SECTION 12. AMOUNTS DEFERRED

3.1 (a) A Participant may elect to defer Compensation under the Plan by authorizing, on his or her Participation Agreement, regular payroll deductions that do not in the aggregate exceed the limitations of Section 3.2.

(b) A Participant may increase or decrease the rate of deferral of his or her Compensation, within the limitations of Section 3.2, as of any Enrollment Date by duly filing a new Participation Agreement, or such other form authorized for such purpose by the Committee, with the Employer and the Administrative Service Agency by the tenth day of the calendar month preceding such Enrollment Date, or such other date during the calendar month preceding such Enrollment Date as the Committee may determine.

(c) A Participant may discontinue, or temporarily suspend, his or her deferral of Compensation as of any Enrollment Date by giving written notice thereof to the Employer and the Administrative Service Agency at least twenty, or such other number as the Committee may determine, days prior to such date.

3.2 (a) The amount that may be deferred by a Participant for any Plan Year shall be a minimum of \$260 and shall not exceed the lesser of:

- (i) \$11,000 or such other greater amount as may be permitted pursuant to Section 457(e)(15) of the Code, and
- (ii) 100% of the Participant's Includible Compensation for the Plan Year.

(b) Notwithstanding the limitation provided for in Section 3.2(a), a Participant may file an election in the manner provided by the Committee to have the

catch-up limitation set forth in this Section 3.2(b) apply to the determination of the maximum amount that may be deferred during one or more of the last three Plan Years ending before attainment of the Participant's Normal Retirement Age. If the catch-up limitation is elected, the maximum amount that may be deferred for each of the Plan Years covered by the election shall not exceed the lesser of:

- (i) twice the dollar amount set forth in Section 3.2(a)(i); and
- (ii) the sum of the limitations provided for in Section 3.2(a) for all Plan Years the Participant was eligible to participate in the Plan, minus the aggregate amount actually deferred for such Plan Years (disregarding any amounts deferred pursuant to Section 3.2(c)).

A Participant may not elect to have this Section 3.2(b)(i) apply more than once, whether or not the Participant rejoins the Plan after Severance from Employment

(c) (i) All Participants who have attained age 50 before the close of a Plan Year and who are not permitted to defer additional Compensation pursuant to Section 3.2(a) for such Plan Year, due to the application of any limitation imposed by the Code or the Plan, shall be eligible to make additional catch-up contributions in accordance with, and subject to, the limitations of this Section 3.2(c) and Section 414(v) of the Code and the Treasury Regulations thereunder.

(ii) additional catch-up contributions pursuant to this Section 3.2(c) shall not exceed the lesser of:

(A) the excess of 100% of Participant's Includible Compensation for the Plan Year over the sum of any other Amounts Deferred by the Participant for such Plan Year; and

(B) \$1,000, or such greater amount as may be permitted by Section 414(v)(2)(B) of the Code.

Notwithstanding anything in Sections 3.2(b) and 3.2(c) to the contrary, if a Participant who is eligible to make an additional catch-up contribution under Section 3.2(c) for a Plan Year in which the Participant has elected to make a catch-up contribution under Section 3.2(b), such Participant is entitled to the greater of :

- (i) the catch-up contribution limitation amount under Section 3.2(b); and
- (ii) the additional catch-up contribution amount under Section 3.2(c).

(b) Notwithstanding the limitation provided for in Section 3.2(a), any Participant who is entitled to reemployment rights pursuant to USERRA and who is so reemployed in accordance with the provisions of such law may elect to make such additional deferrals as are permitted or required by USERRA.

3.3 The Trustee shall withhold or cause to be withheld from any amounts distributed in respect of a Participant's Plan Benefit or in respect of a Qualified Domestic Relations Order all federal, state, city or other taxes as shall be required pursuant to any law or governmental ruling or regulation, including, but not limited to, Treasury Regulations.

2.4 In the event that any Amounts Deferred under the Plan for any Plan Year exceed the limitations provided for in Section 3.2, any such excess deferrals shall be distributed to the Participant, with allocable net income, as soon as practicable after the Administrative Service Agency determines that the amount was an excess deferral.

## **SECTION 12. INVESTMENT OF AMOUNTS DEFERRED AND ROLLOVER CONTRIBUTIONS**

4.1 All amounts of Compensation deferred in accordance with Section 3 shall be paid by the Employer as promptly as possible, but in no event later than two Business Days from the applicable payroll date, to the Trustee and shall be invested promptly in accordance with the investment directions of the Participant by the Trustee (but in no event later than two Business Days following receipt thereof by the Trustee) in the Investment Funds provided by one or more Financial Organizations appointed by the Committee in accordance with the Regulations, to be held, managed, invested and reinvested in accordance with the applicable agreement entered into by the Committee or the Trustee with each such Financial Organization. The Committee shall have the right in its sole discretion to replace any Financial Organization or Investment Fund with a successor Financial Organization or Investment Fund or to select any additional Financial Organization or Investment Fund and to incur any and all reasonable fees and expenses on behalf of the Plan and to allocate such fees and expenses among Accounts in connection with such replacement or addition.

4.2 An Employee who has enrolled in the Plan pursuant to Section 2 shall, by filing a direction in writing or in such other form as the Committee may authorize with the Administrative Service Agency, specify the percentage (in multiples of one percent or such other percentage as may be prescribed by the Committee from time to time) of the amount of his or her Amounts Deferred, Section 457 Transfers and Rollover Contributions that shall be allocated to each Investment Fund made available by the



Committee; *provided, however*, that the same percentages shall apply to the Rollover Account as apply to the Account.

4.3 Any investment direction given by a Participant shall be deemed to be a continuing direction until changed. A Participant may change his or her investment direction with respect to future Amounts Deferred, future Section 457 Transfers and future Rollover Contributions, as of any Enrollment Date, by giving notice in writing or in such other form as the Committee may authorize to the Administrative Service Agency at least one Business Day prior to such Enrollment Date; *provided, however*, that the same percentages shall apply to the Rollover Account as apply to the Account. All future Amounts Deferred, future Section 457 Transfers and future Rollover Contributions shall be invested by the Trustee in the Investment Funds in accordance with such changed direction.

4.4 (a) As of any Valuation Date during a Plan Year, a Participant may direct, by giving notice in writing or in such other form as the Committee may authorize, to the Administrative Service Agency that all, or any multiple of one percent (or such other percent as may be prescribed by the Committee from time to time), of his or her interest in any of the Investment Funds be liquidated and the proceeds thereof transferred to one or more other Investment Funds in the proportions directed by such Participant.

(b) If the Trustee or any Financial Organization appointed by the Committee shall advise the Committee that it is not reasonably able to prudently liquidate the necessary amount and transfer it from one of the Investment Funds to another, the amount to be transferred with respect to each Participant who duly requested such a transfer may be reduced in proportion to the ratio which the aggregate amount that the

Trustee or the Financial Organization has advised the Committee may not prudently be so transferred bears to the aggregate amount that all Participants have duly requested be so transferred. Regardless of any Participant's investment direction, no transfer between Investment Funds may be made in violation of any restriction imposed by the terms of the agreement between the Committee or the Trustee and a Financial Organization providing any Investment Fund or of any applicable law. Notwithstanding anything in this Section 4.4(b) to the contrary, the Trustee or the Financial Organization may have the right, without prior notice to any Participant, to suspend for a limited period of time daily transfers between and among Investment Funds for one or more days if the Trustee or the Financial Organization determines that such action is necessary or advisable (i) in light of unusual market conditions, (ii) in response to technical or mechanical problems with the Plan's automated system, if any, or the Plan's third-party record keeper and (iii) in connection with any suspension of normal trading activity on the New York Stock Exchange.

4.5 The Administrative Service Agency shall have the right to decline to implement any investment direction upon determination that: (i) the person giving the direction is legally incompetent to do so; (ii) implementation of the investment direction would be contrary to the Plan or applicable law or governmental ruling or regulation including, but not limited to, Treasury Regulations; (iii) implementation of the investment direction would be contrary to a court order, including, but not limited to, a Qualified Domestic Relations Order; or (iv) implementation of the investment direction would be contrary to the rules, regulations or prospectuses of the Investment Funds.

4.6 Each Participant is solely responsible for the investment and allocation of his or her Plan Benefit in and among the Investment Funds and shall assume all risk in connection with any decrease in the value of any or all of the Funds. Neither the Committee, any Trustee, any Employer nor the Administrative Service Agency is empowered to advise a Participant as to the manner in which such Plan Benefit shall be allocated among the Investment Funds. The fact that a particular Investment Fund is available to Participants for investment under the Plan shall not be construed as a recommendation for investment in such Investment Fund. Any investment guidance or advice services provided by the Plan to Participants shall not be considered a violation of this Section 4.6.

4.7 (a) The entire value of each Participant's Account and Rollover Account and each Alternate Payee Account under the Plan shall be set aside and held in the Trust Fund pursuant to the Trust Agreement for the exclusive benefit of Participants and their Beneficiaries and Alternate Payees and defraying reasonable expenses of the Plan and of the Trust Fund pursuant to Section 5.3.

(b) Each Participant shall be 100 percent vested at all times in his or her Plan Benefit in accordance with the terms of the Plan. Each Alternate Payee shall be 100 percent vested at all times in his or her Alternate Payee Account in accordance with the terms of the Plan.

4.8 (a) Notwithstanding any other provision of the Plan, during any period when an Alternate Payee Account is created and the corresponding interest in the Trust Fund is segregated on behalf of an Alternate Payee pursuant to a Qualified Domestic Relations Order as provided in Section 11.4(b), the Alternate Payee may be

entitled to direct the investment of such interest in accordance with this Section 4 as if he or she were the Participant, to the extent provided in such order. In the event that an Alternate Payee fails to specify an investment direction, such Alternate Payee's interest in the Trust Fund shall be invested in the same manner as the relevant Participant's Plan Benefit as of the date of creation of the Alternate Payee Account.

(b) Notwithstanding any other provision of the Plan, during any period following the death of a Participant and prior to distribution of the entire Plan Benefit of such Participant, such Participant's Beneficiary shall be entitled to direct the investment of such Plan Benefit, or, as applicable, his or her proportional interest in such Plan Benefit, in accordance with this Section 4 as if he or she were the Participant.

4.9 No power of attorney, other than one properly executed in accordance with Section 5-1501 of Title 15 of the General Obligations Law of the State, as such may be amended from time to time, shall be effective to permit an attorney-in-fact to make any investment direction on behalf of a Participant except upon specific determination by the Administrative Service Agency that the instrument expressly grants the power to act on behalf of the Participant regarding investment direction under this Plan.

### **SECTION 13. ACCOUNTS AND RECORDS OF THE PLAN**

5.1 (a) The Administrative Service Agency shall establish and maintain an Account and, as necessary, a Rollover Account in respect of each Participant (or in the case of a Rollover Account, a Beneficiary who is a Participant's Surviving Spouse, if applicable) and, to the extent his or her entire Plan Benefit has not been distributed, each former Participant showing the value of his or her Plan Benefit, the value of the portion of his or her Plan Benefit, if any, which is invested in each Investment Fund and other relevant data pertaining thereto. Each Account and Rollover Account shall be adjusted as of each Valuation Date to reflect all Units or dollars credited thereto and valued as provided in Section 5.2(b) less all Units or dollars distributed, withdrawn or deducted therefrom in accordance with the terms of the Plan. With respect to each Participant, all Amounts Deferred, all Section 457 Transfers in accordance with Section 7.5(b)(i) and all Rollover Contributions in accordance with Section 7.5(b)(ii) shall be credited to his or her Account or Rollover Account, as applicable.

(b) Each Participant and, for any period following the death of a Participant and prior to distribution of the entire Plan Benefit of such Participant, each Beneficiary shall be furnished with a written statement of his or her Account and Rollover Account (including the value of the interest he or she has, if any, in each Investment Fund and the amount of and explanation for each allocation to or deduction from his or her Account and Rollover Account since the last statement provided) at least quarterly. During the period prior to distribution of his or her entire interest under the Plan, each Alternate Payee shall be furnished with a written statement of his or her

Alternate Payee Account (including the value of the interest he or she has, if any, in each Investment Fund and the amount of and explanation for each allocation to or deduction from his or her Alternate Payee Account since the last statement provided) at least quarterly.

(c) The establishment and maintenance of, or allocations and credits to, the Account and Rollover Account of any Participant shall not vest in such Participant or his or her Beneficiary any right, title or interest in and to any Trust Fund assets or Plan benefits except at the time or times and upon the terms and conditions and to the extent expressly set forth in the Plan and the Trust Agreement. The establishment and maintenance of, or allocations and credits to, the Alternate Payee Account of any Alternate Payee shall not vest in such Alternate Payee any right, title or interest in and to any Trust Fund assets or Plan benefits except at the time or times and upon the terms and conditions and to the extent expressly set forth in the Qualified Domestic Relations Order, the Plan and the Trust Agreement.

5.2 (a) The Plan Benefit shall equal the value of a Participant's Account and Rollover Account which shall be determined by aggregating the value of his or her separate interests, if any, in each Investment Fund.

(b) The Trust Fund shall consist of the Investment Funds. The aggregate value of the Accounts and the Rollover Accounts, the Alternate Payee Accounts and any reserve for expenses and suspense accounts, if any, shall be equal to the value of the Trust Fund. Each Investment Fund shall be valued either in Units or in dollars. As of each Valuation Date, each Fund shall be valued pursuant to the Trust Agreement and the agreements between the Committee or the Trustee and the Financial Organizations to

reflect the effect of income received and accrued, realized and unrealized profits and losses, and all other transactions of the preceding period.

5.3 (a) The expenses of administering the Plan, including (i) the fees and expenses of the Financial Organizations and Administrative Service Agency for the performance of their duties under the Plan, (ii) the expenses incurred by the Committee or any of its members or any Trustee in the performance of their duties under the Plan (including reasonable compensation for any legal counsel, certified public accountants, consultants, and agents and cost of services rendered in respect of the Plan and the Trust Agreement (as provided therein)), and (iii) all other proper charges and disbursements of the Financial Organizations, Administrative Service Agency, the Committee or its members (including settlements of claims or legal actions approved by counsel to the Plan) or any Trustee shall be paid out of the Trust Fund, and allocated to and deducted from the Accounts and Alternate Payee Accounts as of each Valuation Date, unless paid by the Committee from State funds allocated for such expenses or the Employer elects to pay such expenses directly.

(b) Brokerage fees, transfer taxes and any other expenses incident to the purchase or sale of securities by the Financial Organizations for the Investment Funds shall be deemed to be part of the cost of such securities, or deducted in computing the proceeds therefrom, as the case may be. Taxes, if any, of any and all kinds whatsoever which are levied or assessed on any assets held or income received by the Trust Fund shall be allocated to and deducted from the Accounts and Alternate Payee Accounts in accordance with the provisions of this Section 5.

**SECTION 14. WITHDRAWALS FOR UNFORESEEABLE EMERGENCIES;  
WITHDRAWALS OF SMALL ACCOUNTS; LOANS; WITHDRAWALS OF  
ROLLOVER ACCOUNTS**

6.1 Upon a showing by a Participant of an unforeseeable emergency, the Administrative Service Agency may, in its sole discretion, permit a payment to be made to the Participant in an amount which does not exceed the lesser of (i) the amount reasonably needed to meet the financial need created by such unforeseeable emergency or (ii) an amount which, together with any prior distribution or withdrawal, does not exceed the value of the Participant's Plan Benefit determined as of the most recent Valuation Date. Any such payment shall be made from the Trust Fund by the Trustee upon the direction of the Administrative Service Agency and shall be withdrawn by the Trustee pro rata from the Investment Funds in which the Participant has an interest, unless the Participant specifies in the request for such a payment the portion of the total amount to be withdrawn by the Trustee from each Investment Fund. Such payment shall first be charged to the Account of the Participant and, if necessary, then to the Rollover Account. All payments shall be made in one lump cash sum within sixty days after approval of the request.

6.2 (a) For purposes of this Section 6, an unforeseeable emergency is defined, as required by the Treasury Regulations promulgated under Section 457 of the Code, as a severe financial hardship of a Participant resulting from an illness or accident of the Participant, the Participant's spouse or the Participant's dependent, as defined in Section 152(a) of the Code, loss of the Participant's property due to casualty, or other similar extraordinary and unforeseeable circumstances arising as a result of events



beyond the control of the Participant. In accordance with the Treasury Regulations, the need to send a Participant's child to college or the desire to purchase a home does not constitute an unforeseeable emergency.

(b) For purposes of this Section 6, an amount will not be considered to be reasonably needed to meet the financial need created by an unforeseeable emergency to the extent that such need is or may be relieved (i) through reimbursement or compensation by insurance or otherwise, (ii) by liquidation of a Participant's assets, to the extent the liquidation of such assets would not itself cause severe financial hardship, or (iii) by cessation of deferrals under the Plan.

6.3 A Participant with respect to whom his or her Account, irrespective of the amount in the Participant's Rollover Account, does not exceed \$5,000 (or such greater amount as may be permitted by Section 401(a)(11) of the Code) may elect at any time to receive a lump sum distribution, not to exceed \$5,000 of his or her Account and Rollover Account at least sixty days following such election, *provided* that:

(a) there has been no Amount Deferred by such Participant during the two-year period ending on the date of distribution, and

(b) there has been no prior distribution elected by such Participant pursuant to this Section 6.3.

6.4 With respect to a Participant or an Alternate Payee whose Account or Alternate Payee Account does not exceed the amount set forth in Section 6.3, the Committee, at its discretion, may direct the Trustee to distribute the Participant's Account and Rollover Account or the Alternate Payee's Alternate Payee Account as soon as practicable following the Participant's Severance from Employment or in accordance

with the requirements and provisions of Sections 6.3(a) and 6.3(b); *provided, however*, that such distributions shall be made in accordance with the requirements of Section 401(a)(31) of the Code and any Treasury Regulations, or any other applicable regulations, promulgated thereunder; and *provided further*, that the Plan shall be amended, in accordance with the Regulations, to set forth such requirements as soon as practicable after final Treasury Regulations, or any other applicable regulations have been issued.

6.5 On or after the date on which the Committee adopts a loan program, which date may not be before January 1, 2003, upon request of an eligible Participant, the Committee may, in its sole discretion and on such terms and conditions as it shall prescribe under written uniform rules which shall be deemed to be a part of the Plan; *provided* that such rules are consistent with the provisions set forth in this Section 6.5, direct the Trustee to make loans to such eligible Participant. Plan loans shall be granted to those Participants who are active Employees, and, if the Committee shall determine, to those Participants who are on an approved leave of absence from their Employer. Each Participant shall have only one outstanding Plan loan at a time. The principal amount of any Plan loan shall be for an amount equal to at least \$1,000, or such other amount as the Committee shall determine, and shall not exceed the lesser of (i) 50% of the value of the sum of (A) the Participant's Account and (B) the Participant's Rollover Account, if applicable, and (ii) \$50,000. All Plan loans, other than those for the purpose of acquiring the dwelling unit which is, or within a reasonable time shall be, the principal residence of the Participant, shall be repaid over a non-renewable repayment period of five years. A Plan loan made for acquiring a principal residence shall be repaid over a non-renewable repayment period of up to 15 years, or such other term as the Committee shall determine. Each Plan loan granted shall bear a rate of interest equal to one percentage point above the prime interest rate as published in the Wall Street Journal, or such other reasonable rate of interest as the Committee shall determine. A Plan loan shall be made first from the Participant's Account, until exhausted, and then from his or her Rollover Account. Any Plan loan shall be repaid in substantially equal installments of principal and accrued interest which shall be paid at least quarterly, subject to the methods and procedures as shall be determined by the Committee and the Administrative Service Agency. All Plan loans shall be made from of the Trust Fund and notes evidencing such obligations shall be considered assets of the Trust Fund. All Plan loans shall be secured, as of the date of the Plan loan, by the sum of (i) the Participant's Account and (ii) the Participant's Rollover Account, if applicable, *provided, however*, that no more than 50% of such Participant's Account balance shall be used as security for the Plan loan. If a Participant fails to make any scheduled repayment of his or her Plan loan within 90 days of its due date, or such other period as the Committee shall determine, such Participant shall be considered in default and the Administrative Service

Agency shall declare a deemed distribution to have occurred with respect to such Plan loan, effective as of the date of the default. The Committee, may in its sole discretion, establish or change from time to time, the standards or requirements for making any Plan loan, including, without limitation, assessing an administrative fee against the Participant for such Plan loan. For purposes of this Section 6.5, an outstanding loan shall include (i) any loan that is being repaid in compliance with this Section 6.5 until repaid in full and (ii) any loan that is considered in default until subsequently repaid. Notwithstanding anything in this Section 6.5 to the contrary, a participant who has defaulted on a loan made under the Plan and which is not repaid shall not be eligible to obtain another loan hereunder until such time as the maximum non-renewable payment period over which such defaulted loan could have been repaid has expired, and then only to the extent permitted by Section 1.72(p)-1 of the Treasury Regulations, considering such defaulted and unpaid loan as still outstanding.

6.6 Effective as of May 21, 2004, **the Committee may provide that a** Participant who has a Rollover Account shall be permitted to withdraw all or any portion of such Rollover Account at any time during a Plan Year; *provided* that such withdrawals shall be paid pursuant to a method of payment elected by the Participant, and the value of such shall be determined, in accordance with Section 7.3 hereof.

6.7 If a Participant should die prior to the payment of any withdrawal requested under this Section 6, or the disbursement of the proceeds of any Plan loan requested under this Section 6, the Participant's withdrawal or loan request shall be void as of the date of death.

## **SECTION 15. DISTRIBUTIONS FROM THE PLAN AND OTHER ELIGIBLE RETIREMENT PLANS**

7.1 (a) Except as otherwise provided in Section 6, a Participant may not receive distribution of his or her Plan Benefit at any time prior to the earlier of (i) such Participant's Severance from Employment with the Employer or (ii) the Plan Year in which such Participant attains age 70½. Upon a Participant's Severance from Employment with the Employer for any reason other than death or upon commencement of the Plan Year in which he or she attains age 70½, the Participant shall be entitled to receive an amount equal to the value of his or her Plan Benefit, which shall be paid in cash by the Trustee from the Trust Fund in accordance with one of the methods described in Section 7.3 and as of the commencement date elected by the Participant in accordance with the procedures prescribed under Section 7.4(a). In the case of a Participant who continues in service with the Employer following his or her attainment of age 70½, such Participant may elect to commence the distribution of his or her Plan Benefit and such election shall designate a method of payment in accordance with Section 7.3; *provided, however*, that payments may not commence earlier than forty-five days, or such other number the Committee shall determine, following the Participant's attainment of age 70½.

(b) Notwithstanding anything in this Section 7.1 to the contrary, in accordance with the requirements of Section 401(a)(9) of the Code, distributions shall commence no later than the April 1<sup>st</sup> following the close of the Plan Year in which (i) the Participant attains age 70½ or (ii) the Participant Severs from Employment, whichever is later.

7.2 If a Participant dies before receiving final distribution of his or her Plan Benefit, an amount equal to the value of the unpaid portion thereof as of the date of death shall be paid in cash by the Trustee from the Trust Fund to the Participant's Beneficiary by one of the methods described in Section 7.3; *provided, however*, that if the Participant dies after payments have commenced then payment to the Participant's Beneficiary must be made in accordance with the provisions of Section 401(a)(9) of the Code.

7.3 (a) Subject to the following provisions of this Section 7.3, any payment made under this Section 7 shall be made in one of the following methods, as the Participant (or, in the case of the death of a Participant, his or her Beneficiary) may elect pursuant to Section 7.4 hereof:

(i) one lump cash sum payment; or

(ii) with respect to such Participant's Account and Rollover Account, substantially equivalent monthly, quarterly, semi-annual or annual installment payments; *provided, however*, that a Participant (or, in the case of the death of a Participant, his or her Beneficiary) may elect to receive (A) an initial installment payment in a specified amount and (B) the balance of his or her Account in substantially equivalent monthly, quarterly, semi-annual or annual installment payments as long as the initial payment is in an amount greater than the amount of the subsequent installment payments at the time they commence and such subsequent payments commence within two years of such initial payment.

(iii) A Participant who elects to receive installment payments or who is currently receiving installment payments pursuant to Section 7.3(a)(ii), may elect, in

accordance with procedures established by the Administrative Service Agency, to receive a portion of his or her Account or Rollover Account distributed in a lump sum; *provided, however*, that no lump sum payment shall be less than \$500.00, or such other amount as the Committee shall determine, and *provided further*, that such elections shall not be made more than twelve times per Plan Year, or such other number as the Committee shall determine. Such lump sum payment shall not result in a discontinuation of subsequent installment payments; *provided, however*, that such subsequent payments may be redetermined in accordance with methods and procedures established by the Administrative Service Agency.

(b) If a Participant (or, in the case of death of a Participant, his or her Beneficiary) elects a lump sum payment, pursuant to Sections 7.3(a)(i) or 7.3(a)(iii), the value of the Participant's Plan Benefit shall be determined as of the Valuation Date coincident with or last preceding the date on which the Plan Benefit is withdrawn from the Investment Funds and liquidated for distribution.

(c) If a Participant (or, in the case of death of a Participant, his or her Beneficiary) elects to receive installment payments, subject to Section 7.3(a)(ii), such Participant's Account and Rollover Account shall continue to participate in the investment performance of the Investment Fund or Funds in which such amounts are invested and to bear its allocable share of administrative and investment expenses until the Valuation Date coincident with or last preceding the date on which such Plan Benefit amounts are withdrawn from the Investment Funds and liquidated for distribution; *provided, however*, that the amount of the installments need not be redetermined to reflect changes in the value of the Account more frequently than annually. All such

redeterminations shall be made by the Administrative Service Agency in accordance with procedures of uniform application.

7.4 (a) In the case of the Participant's Severance from Employment with the Employer or death, a distribution election may be made by the Participant or his or her Beneficiary prior to, or after, payments commence pursuant to the provisions of this Section 7. Such election shall specify the form of payment described in Section 7.3 elected and the date on which payments shall commence; *provided, however*, that payments may not commence earlier than forty-five days, or such other number the Committee shall determine, following the Participant's Severance from Employment or death. A Participant or his or her Beneficiary, including a Participant or his or her Beneficiary who is currently receiving distributions under the Plan, irrespective of the date on which such distributions commenced, may change both the timing and the form of payment elected in accordance with procedures established by the Administrative Service Agency, subject to Section 7.6.

(b) If a Participant dies before distribution of his or her Plan Benefit has commenced, a distribution will be made to the Beneficiary pursuant to the Beneficiary's election duly filed with the Administrative Service Agency in accordance with the provisions of Section 7.4(a); *provided, however*, any distribution to a Beneficiary shall be made in accordance with the provisions of Section 401(a)(9) of the Code. All distributions shall commence not later than the close of the Plan Year immediately following the Plan Year in which the Participant died, or, in the event such Beneficiary is the Participant's Surviving Spouse, on or before the close of the Plan Year in which such Participant would have attained age 70½, if later (or, in either case, on any

later date prescribed by the Treasury Regulations). If such Beneficiary who is also the Surviving Spouse dies after the Participant's death but before distributions to such Beneficiary commence, this provision shall be applied to require payment of any further benefits as if such Surviving Spouse were the Participant.

7.5 (a) In connection with a Participant's Severance from Employment, the Distributee may elect, at the time and in the manner prescribed by the Administrative Service Agency, to have all or any portion of the Participant's Account and Rollover Account that qualifies as an Eligible Rollover Distribution paid directly to the trustee of an Eligible Retirement Plan, *provided* that such other plan provides for the acceptance of such amounts by the trustee. The Plan shall provide written information to Distributees regarding Eligible Rollover Distributions to the extent required by Section 402(f) of the Code.

(b) Compensation previously deferred by a Participant, a Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee pursuant to another eligible deferred compensation plan under Section 457 of the Code maintained by another employer that is a state, political subdivision of a state, any agency or instrumentality of a state or political subdivision of a state shall be accepted for transfer by the Trustee in the form and in the manner specified by the Administrative Service Agency. All such Section 457 Transfers shall be credited to the Participant's Account or the Alternate Payee Account and shall be invested in accordance with the investment direction of the Participant, the Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee pursuant to Sections 4.2, 4.3, or 4.8, whichever is applicable; such Section 457 Transfers are subject to all of the terms and conditions of the Plan.



(ii) (A) An accrued benefit of a Participant, a Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee under an Eligible Retirement Plan that is distributed to the Participant, a Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee or is directly rolled over to the Plan as an Eligible Rollover Distribution may be accepted as a Rollover Contribution by the Trustee in the form and in the manner specified by the Administrative Service Agency; *provided, however*, that such Participant, Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee has made an Investment Fund direction pursuant to Sections 4.2, 4.3, or 4.8, whichever is applicable, and filed a written request with the Administrative Service Agency requesting that such transfer be accepted.

(B) The Administrative Service Agency, in accordance with the Code and procedures established by the Committee, shall, as soon as practicable following its receipt of the written request of a Participant, a Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee, determine whether the Rollover Contribution shall be accepted by the Plan. Any written request filed by a Participant, a Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee pursuant to this Section 7.5(b) shall set forth the fair market value of such Rollover Contribution and a statement satisfactory to the Administrative Service Agency that the amount to be transferred constitutes a Rollover Contribution. In the event the Administrative Service Agency permits the transfer of the Rollover Contribution, the Trustee shall accept such Rollover Contribution and the transfer of such Rollover Contribution shall be deemed to have been made on the Valuation Date next following the date on which it was paid over to the Trustee. The Rollover Contribution shall be maintained in a separate, fully vested

Rollover Account for the benefit of the contributing Participant or the Beneficiary who is a Participant's Surviving Spouse and, in the case of a spousal Alternate Payee, the Alternate Payee Account, and shall be invested in accordance with the investment direction of the Participant, the Beneficiary who is a Participant's Surviving Spouse or spousal Alternate Payee, pursuant to Sections 4.2, 4.3 or 4.8, whichever is applicable.

(C) All amounts so transferred shall be credited to the Participant's Rollover Account or Alternate Payee Account and if the Committee so provides in accordance with Section 6.6, shall be available for distribution at any time during the Plan Year. No other contributions shall be allocated to the Rollover Account.

(c) With respect to trustee-to-trustee transfers, a Participant or Beneficiary may elect, in accordance with procedures established by the Administrative Service Agency, to have all or any portion of the value of his or her Account and Rollover Account transferred to the trustee of a defined benefit governmental plan as described in Section 414(d) of the Code; *provided, however*, that such transfer is for the purchase of permissive service credit (as defined in Section 415(n)(3)(A) of the Code) under such plan or a repayment of contributions and earnings with respect to a forfeiture of service under such plan.

7.6 Notwithstanding anything in the Plan to the contrary, all distributions of a Plan Benefit to a Participant or his or her Beneficiary shall commence in accordance with the amount and timing requirements of the Treasury Regulations under Section 401(a)(9) of the Code, which are incorporated herein by reference.

## SECTION 16. DESIGNATION OF BENEFICIARIES

8.1 Each Participant shall file with the Administrative Service Agency a written designation of one or more persons as the Beneficiary who shall be entitled to receive the Plan Benefit, if any, payable under the Plan upon his or her death. A Participant may from time to time revoke or change his or her Beneficiary designation without the consent of any prior Beneficiary by filing a new designation with the Administrative Service Agency. The last such designation received by the Administrative Service Agency shall be controlling; *provided, however*, that no designation or change or revocation thereof shall be effective unless received by the Administrative Service Agency prior to the Participant's death, and in no event shall it be effective as of a date prior to such receipt.

8.2 If no such Beneficiary designation is in effect at the time of a Participant's death, or if no designated Beneficiary survives the Participant, or if no designated Beneficiary can be located with reasonable diligence by the Administrative Service Agency, the payment of the Plan Benefit, if any, payable under the Plan upon his or her death shall be made by the Trustee from the Trust Fund to the Participant's Surviving Spouse, if any, or if the Participant has no Surviving Spouse, or the Surviving Spouse cannot be located with reasonable diligence by the Administrative Service Agency, then to his or her estate. If the Administrative Service Agency is in doubt as to the right of any person to receive such amount, it shall inform the Committee and the Trustee and the Trustee may retain such amount, without liability for any interest thereon, until the rights thereto are determined, or the Trustee may pay such amount into

any court of appropriate jurisdiction or to any other person pursuant to applicable law and such payment shall be a complete discharge of the liability of the Trustee, Plan, Committee, Employer, Administrative Service Agency and Financial Organizations. If the Beneficiary so designated by the Participant shall die after the death of the Participant but prior to receiving a complete distribution of the amount that would have been paid to such Beneficiary had such Beneficiary's death not then occurred, then, for purposes of the Plan, the distribution that would otherwise have been received by such Beneficiary shall be paid to the Beneficiary's estate.

8.3 No power of attorney, other than one properly executed in accordance with Section 5-1501 of Title 15 of the General Obligations Law of the State, as such may be amended from time to time, shall be effective to permit an attorney-in-fact to make or change a Beneficiary designation on behalf of a Participant except upon specific determination by the Administrative Service Agency that the instrument expressly grants the power to act on behalf of the Participant regarding Beneficiary designation under this Plan.

## **SECTION 17. ADMINISTRATION**

9.1 Except as otherwise provided herein, the operation and administration of the Plan shall be the responsibility of the Committee. The Committee shall have the power and the duty to take all action and to make all decisions necessary or proper to carry out its responsibilities under the Plan. All determinations of the Committee as to any question involving its responsibilities under the Plan, including, but not limited to, interpretation of the Plan or as to any discretionary actions to be taken under the Plan, shall be solely in the Committee's discretion and shall be final, conclusive and binding on all parties.

9.2 Without limiting the generality of the foregoing, the Committee shall have the following powers and duties:

- (a) to require any person to furnish such information as it may request for the purpose of the proper administration of the Plan as a condition to receiving any benefit under the Plan;
- (b) to make and enforce such rules and regulations and prescribe the use of such forms as it shall deem necessary for the efficient administration of the Plan;
- (c) to interpret the Plan and to resolve ambiguities, inconsistencies and omissions;
- (d) to decide all questions concerning the Plan and the eligibility of any Employee to participate in the Plan;
- (e) to determine the amount of benefits which shall be payable to any person in accordance with the provisions of the Plan

(f) to permit more lenient time periods than otherwise may be specified in Sections 2.1, 3.1(b), 3.1(c), 4.3, 6.1, 6.3, 6.5, 7.1(a) and 9.5 of the Plan; *provided, however*, in no case may a Participant's election to commence Compensation deferrals, or to modify existing Compensation deferrals, be effective until notice of such election is filed with the Employer or Administrative Service Agency; and

(g) to determine the methods and procedures for the implementation and use of any automated telephone, computer, internet, intranet or other electronic or automated system adopted by the Committee for purposes of Plan administration, including, without limitation, for receiving and processing enrollments and instructions with respect to the investment of assets allocated to a Participant's Account or Rollover Account and for such other purposes as may be designated from time to time.

9.3 Except as may be prohibited by applicable law, the Committee or any member thereof, or any person, firm or corporation to whom may be delegated any duty or power in connection with administering, managing or supervising the administration or management of the Plan or Trust Fund, shall not be liable for (a) anything done or omitted to be done by it or by them unless the act or omission claimed to be the basis for liability amounted to a failure to act in good faith or was due to gross negligence or willful misconduct; (b) the payment of any amount under the Plan; or (c) any mistake of judgment made by it or on its behalf by a member of the Committee. No member of the Committee, nor any delegate, shall be personally liable under any contract, agreement, bond or other instrument made or executed by him or her or on his or her behalf in connection with the Plan or Trust Fund.

9.4 Except as otherwise provided in the Plan and the Trust Agreement, the Trustee shall have responsibility with respect to the control or management of the assets of the Plan and the Trust Fund. The Committee shall periodically review the performance and methods of the Trustee and the Committee may appoint and remove or change the Trustee. The Committee shall have the power to appoint or remove one or more Financial Organizations and to delegate to such Financial Organization(s) authority and discretion to manage (including the power to acquire and dispose of) the assets of the Plan and Trust Fund in accordance with the Regulations and shall periodically review the performance and methods of such Financial Organization(s) and may direct the acquisition or disposition of the assets in any Investment Fund.

9.5 (a) The Committee shall have general authority under the Plan. The decisions of the Committee shall be final, binding and conclusive on all interested persons for all purposes. The Committee may delegate its general authority as it deems appropriate in accordance with the terms of the Plan and all applicable Code sections and Treasury Regulations; *provided, however*, that such delegation shall be subject to revocation at any time at the discretion of the Committee. Notwithstanding any other provision of the Plan, the Committee's general authority shall include the right to review, revise, modify, revoke, or vacate any decision made or action taken by any party under the Plan which right includes, but is not limited to, the right to review, revise, modify, revoke, or vacate any decision of the Review Committee at any time upon reasonable notice to the claimant.

(b) Any claim to rights or benefits under the Plan, including, without limitation, any purported Qualified Domestic Relations Order, or request for hardship

withdrawal under Section 6 must be filed in writing with the Committee, or with such other entity as the Committee may designate. Within sixty days after receipt of such claim, the Committee, or such other entity designated by the Committee, shall notify the claimant and, if such claimant is not the Participant, any Participant against whose Plan Benefit the claim is made, that the claim has been granted or denied, in whole or in part. Notice of denial of any claim in whole or in part by the Committee, or by such other entity designated by the Committee, shall include the specific reasons for denial and notice of the rights granted by Section 9.5(c).

(c) Any claimant or Participant who has received notice of denial or grant, in whole or in part, of a claim made in accordance with the foregoing subsection (b) may file a written request within thirty days of receipt of such denial for review of the decision by the Review Committee. Within ninety days after receipt of such request for review, the Review Committee shall notify the claimant and, as applicable, the Participant, that the claim has been granted or denied, in whole or in part; *provided, however*, that the Review Committee may in its discretion extend such period by up to an additional 120 days upon notice to the claimant and, as applicable, the Participant, prior to expiration of the original ninety days that such additional period is needed for proper review of the claim. Notice of denial of any claim in whole or in part by the Review Committee shall include the specific reasons for denial and shall be final, binding and conclusive on all interested persons for all purposes.

(d) Subject to the discretion of the Committee or such other entity as the Committee may designate to determine otherwise, no distribution of any Plan Benefit shall be permitted during any period during which a claim, including, without limitation,



a purported Qualified Domestic Relations Order, against all or part of such Plan Benefit is being reviewed in accordance with the provisions of this Section 9.5. If the Trustee or the Administrative Service Agency reasonably believes that a claim, including, without limitation, a purported Qualified Domestic Relations Order, against all or part of any Plan Benefit is likely to be asserted, such Trustee or Administrative Service Agency shall notify the Committee and it shall be within the discretion of the Committee to refuse to permit any distribution of all or part of such Plan Benefit pending determination of such claim.

9.6 The Committee shall arrange for the engagement of legal counsel and certified public accountants, who may be counsel or accountants for the Employer, and other consultants, and make use of agents and clerical or other personnel, for purposes of this Plan. The Committee may rely upon the written opinions of counsel, accountants and consultants, and upon any information supplied by the Trustee, a Financial Organization or Administrative Service Agency appointed in accordance with the Regulations, and delegate to any agent or to any member of the Committee its authority or the authority of the Employer to perform any act hereunder, including without limitation those matters involving the exercise of discretion; *provided, however*, that such delegation shall be subject to revocation at any time at the discretion of the Committee.

9.7 No member of the Committee shall be entitled to act on or decide any matters relating solely to such member or any of his or her rights or benefits under the Plan.

9.8 Any action of the Committee may be taken at a meeting. The Committee shall establish its own procedures and the time and place for its meetings and provide for the keeping of minutes of all meetings.

9.9 Notwithstanding any other provision hereof, the Plan shall at all times be operated in accordance with the requirements of applicable law, including, without limitation, the Regulations.

## **SECTION 18. AMENDMENT OR TERMINATION**

10.1 (a) Subject to Section 10.1(b) and any requirements of State or federal law, the Committee reserves the right at any time and with or without prior notice to amend, suspend or terminate the Plan, any deferrals thereunder, the Trust Agreement and any Investment Fund, in whole or in part and for any reason and without the consent of any Employee, Participant, Beneficiary or other person. The Plan shall be terminated automatically upon complete and final discontinuance of all deferrals thereunder.

(b) No amendment or modification shall be made which would retroactively impair any individual's rights to any benefits under the Plan, except as provided in Section 10.1(c).

(c) Any amendment, suspension or termination of any provisions of the Plan, any deferrals thereunder, the Trust Agreement or any Investment Fund may be made retroactively if required to meet any applicable requirements of the Code or any other applicable law.

10.2 Upon termination of the Plan, the Employer shall permit no further deferrals of Compensation under the Plan and all Plan Benefits and other interests in the Trust Fund shall thereafter be payable as provided in the Plan. Any distributions, transfers or other dispositions of the Plan Benefits as provided in the Plan shall constitute a complete discharge of all liabilities under the Plan. The Committee and the Trustee(s) shall remain in existence and the Trust Agreement and all of the provisions of the Plan which in the opinion of the Committee are necessary for the execution of the Plan and the

administration and distribution, transfer or other disposition of interests in the Trust Fund shall remain in force.

## **SECTION 19. GENERAL LIMITATIONS AND PROVISIONS**

11.1 The Plan, as duly amended from time to time, shall be binding on each Participant and his or her Surviving Spouse, heirs, administrators, trustees, successors, assigns, and Beneficiaries and all other interested persons.

11.2 Nothing contained herein shall give any individual the right to be retained in the employment of the Employer or affect the right of the Employer to terminate any individual's employment. The adoption and maintenance of the Plan shall not constitute a contract between the Employer and any individual or consideration for, or an inducement to or condition of, the employment of any individual.

11.3 If the Administrative Service Agency shall find that any person to whom any amount is payable under the Plan is unable to care for his or her affairs, is a minor, or has died, then it shall so notify the Committee and the Trustee, and any payment due him or her or his or her estate (unless a prior claim therefor has been made by a Beneficiary, Surviving Spouse or duly appointed legal representative or the time period during which a Beneficiary or Surviving Spouse could make a claim under the Plan has not elapsed) may, if the Trustee so elects, be paid to his or her spouse, a child, a relative, or any other person maintaining or having custody of such person otherwise entitled to payment or deemed by the Trustee to be a proper recipient on behalf of such person. Any such payment shall be a complete discharge of all liability under the Plan therefor.

11.4 (a) Except insofar as may otherwise be required by law or in accordance with this Section 11.4, no amount payable at any time under the Plan shall be

subject in any manner to alienation by anticipation, sale, transfer, assignment, bankruptcy, pledge, attachment, garnishment, charge or encumbrance of any kind, and any attempt to so alienate such amount, whether presently or thereafter payable, shall be void. If any person shall attempt to, or shall, so alienate any amount payable under the Plan, or any part thereof, or if by reason of bankruptcy or other event happening at any time such amount would not be enjoyed by the person to whom it is payable under the Plan, then the Trustee shall notify the Committee and, if it so elects, may direct that such amount be withheld and that the same or any part thereof be paid to or for the benefit of such person, his or her spouse, children or other dependents, or any of them, in such manner and proportion as the Trustee may deem proper.

(b) Payments with respect to a Participant's Plan Benefit may be made by the Trustee from the Trust Fund to one or more Alternate Payees pursuant to the terms of a Qualified Domestic Relations Order; *provided however*, that such Qualified Domestic Relations Order shall not create any rights greater than the Participant's rights under the Plan. Notwithstanding any provisions of the Plan to the contrary, any distribution due to an Alternate Payee may be paid in one lump sum as soon as practicable following the qualification of the order if the Alternate Payee consents thereto; otherwise it shall be payable on or after the date on which the Participant attains Earliest Retirement Age. Upon receipt of a Qualified Domestic Relations Order by the Plan, a portion of the Participant's Account and Rollover Account, which portion shall be determined in accordance with the Qualified Domestic Relations Order, shall be segregated and maintained on behalf of each Alternate Payee designated under such Qualified Domestic Relations Order until payment is made to the Alternate Payee in

accordance with this Section 11.4 and the terms of the Plan. No liability whatsoever shall be incurred by the Committee, Trustee, Employer, Administrative Service Agency, Review Committee or any Financial Organization solely by reason of any action taken in accordance with this Section 12.4 pursuant to the terms of a Qualified Domestic Relations Order.

11.5 Each Participant shall file with the Administrative Service Agency such pertinent information concerning himself or herself and his or her Beneficiary as the Committee may specify, and no Participant, Beneficiary or other person shall have any rights or be entitled to any benefits under the Plan unless such information is filed by or with respect to him or her.

11.6 All elections, designations, requests, notices, instructions, and other communications from a Local Employer, Employee, Participant, Beneficiary, Surviving Spouse or other person to the Committee, Administrative Service Agency or the Employer required or permitted under the Plan shall be in such form as is prescribed from time to time by the Committee, shall be mailed by first class mail or delivered to such location as shall be specified by the Committee, and shall be deemed to have been given and delivered only upon actual receipt thereof at such location. Copies of all elections, designations, requests, notices, instructions and other communications from an Employee, Participant, Beneficiary, Surviving Spouse or other person to the Employer shall be promptly filed with the Administrative Service Agency.

11.7 All notices, statements, reports and other communications from a Local Employer, the Trustee or the Committee to any Employee, Participant, Beneficiary, Surviving Spouse or other person required or permitted under the Plan shall

be deemed to have been duly given when delivered to, or when mailed by first class mail, postage prepaid and addressed to such Employee, Participant, Beneficiary, Surviving Spouse or other person at his or her address last appearing on the records of the Committee, the Trustee or the Local Employer.

11.8 The Committee may, upon the recommendation of the Administrative Service Agency, enlarge or diminish the time periods set forth in Sections 2.1, 3.1(b), 3.1(c), 4.3, 6.1, 6.3, 6.5 and 9.5; *provided* it determines that such action is necessary or desirable to facilitate the proper administration of the Plan, and *provided further* that in no case may a Participant's election to commence Compensation deferrals, or to modify existing Compensation deferrals, be effective until notice of such election is filed with the Employer or Administrative Service Agency.

11.9 The amounts set aside and held in the Trust Fund shall be for the exclusive purpose of providing benefits to the Participants and their Beneficiaries and Alternate Payees and defraying expenses of Plan and Trust Fund administration and no part of the Trust Fund shall revert to any Employer; *provided, however*, that the setting-aside of any amounts to be held in the Trust Fund is expressly conditioned upon the following: if an amount is set aside to be held in the Trust Fund by an Employer in a manner which is inconsistent with any of the requirements of Section 457(b) of the Code, such amount shall be returned to such Employer prior to the first day of the first Plan Year commencing more than 180 days after the date of notification of such inconsistency by the Secretary of the Treasury. Any amounts so returned to the Employer, and the earnings thereon, shall be distributed to the Participants on whose behalf such amounts were set aside.



11.10 The Trust Fund shall be the sole source of benefits under the Plan and, except as otherwise required by applicable law, the Committee, the Employer and the Trustee assume no liability or responsibility for payment of such benefits, and each Participant, his or her spouse or Beneficiary, or other person who shall claim the right to any payment under the Plan shall be entitled to look only to the Trust Fund for such payment and shall not have any right, claim or demand therefor against the Committee, or any member thereof, the Employer, the Trustee, or any employee or director thereof.

11.11 Any and all rights or benefits accruing to any persons under the Plan shall be subject to the terms of the Trust Agreement or any other funding instrument that is part of the Plan and the Trust Fund.

11.12 The duties and responsibilities allocated to each person under the Plan and the Trust Agreement shall be the several and not joint responsibility of each, and no such person shall be liable for the act or omission of any other person.

11.13 The captions preceding the Sections hereof have been inserted solely as a matter of convenience and in no way define or limit the scope or intent of any provisions hereof.

11.14 The Plan and all rights thereunder shall be governed by and construed in accordance with the Code and the Treasury Regulations promulgated thereunder and the laws of the State.

**Rules and Regulations  
of the  
New York State Deferred Compensation Board**

**Effective Date: June 21, 2006**

**Following are the rules and regulations of the Deferred Compensation Board of the State of New York (the “Regulations”) as amended and restated consistent with the amendments adopted by the Board by resolution at a public meeting on June 2, 2006 and published in the State Register on June 21, 2006 at which time the amendments to the Regulations will become effective and enforceable.**

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**SUBTITLE II**

***Deferred Compensation Board***

**9000 Scope and Definitions**

**9001 General Provisions**

**9002 Establishment of Plan**

**9003 Selection of and Agreements with Trustees, Independent Consultants,  
Administrative Service Agencies, Financial Organizations and  
Certified Public Accountants**

**9004 Solicitation and Education**

**9005 Auditing, Bonding and Insurance**

**9006 Compliance**

**PART 9000**

**SCOPE AND DEFINITIONS**

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9000.1 Scope

Sec.

9000.2 Definitions

**Section 9000.1 Scope.** This Subtitle applies to every deferred compensation plan established by the board or any local employer pursuant to section 5 of the State Finance Law.

**9000.2 Definitions.** (a) Unless otherwise defined, the terms used herein shall have the same meaning as that used in the Internal Revenue Code of 1986 (the “Internal Revenue Code”), as now in effect or hereinafter amended, the State Finance Law and the State plan or the model plan.

(b) Wherever used herein, the following terms shall be construed as follows:

(1) *Administrative service agency* means a person duly authorized to do business in the State of New York and qualified to administer and maintain records and accounts

of defined contribution plans which meet the requirements for qualification under the Internal Revenue Code, governmental plans and eligible deferred compensation plans. The functions of an administrative service agency under this Subtitle may be carried out by a trustee, provided that the person serving as a trustee otherwise satisfies all of the requirements under this Subtitle applicable to an administrative service agency.

(2) *Board* means the deferred compensation board of the State of New York established by section 5 of the State Finance Law.

(3) *Deferred compensation committee* means the committee or board, or other entity, office or officer, appointed in accordance with applicable law by a local employer to act in respect of a plan in accordance with section 9001.2(b) of this Subtitle.

(4) *Financial organization* means a person duly authorized to do business in the State of New York and who:

(i) is registered as an investment adviser under the Investment Advisors Act of 1940, as such provisions may be amended from time to time;

(ii) is a bank, as defined in such act; or

(iii) is an insurance company qualified under the laws of more than one state to manage, acquire or dispose of any assets of plans which meet the requirements for qualification under the Internal Revenue Code, governmental plans and eligible deferred compensation plans.

The functions of a financial organization under this Subtitle may be carried out by a trustee, provided that the person serving as a trustee otherwise satisfies all of the requirements under this Subtitle applicable to a financial organization.

For the purposes of this Subtitle, a financial organization that provides self-directed investment services to a plan through a mutual fund or brokerage “window” arrangement sponsored by such financial organization shall be recognized as the sole financial organization in relation to such self-directed investment services and the term “financial organization” shall not be deemed to include any entity sponsoring mutual funds provided through such “window.”

(5) *Guaranteed investment contract* means a contract with an insurance company or a bank that guarantees a specific rate of return on the invested capital over the life of the contract and for the return of such invested capital and interest to the plan on one or more dates specified in the contract.

(6) *Independent Consultant* means a person duly authorized to do business in the State of New York and who may be or is retained by the board or a deferred compensation committee in accordance with the provisions of this Subtitle to provide advice to the board or deferred compensation committee on investment matters and who is registered as an investment adviser under the Investment Advisors Act of 1940, as such provisions may be amended from time to time.

(7) *Local employer* means a public employer as defined in section 5 of the State Finance Law but excluding the State of New York.

(8) *Model plan* means the form of plan authorized by the board for adoption in accordance with the provisions of this Subtitle by any local employer not participating in the State plan and not sponsoring a plan described in section 9001.2(a)(3) of this Subtitle, as such may be amended by the board from time to time. A copy of the model plan may be obtained from the board.

(9) *Participation agreement* means an agreement executed by an employee and the employer as described in the State plan and the model plan or such other similar agreement executed in connection with another plan.

(10) *Person* means any individual, corporation, partnership, association, trust, joint stock company, unincorporated organization or other similar entity.

(11) *President* means the president of the New York State Civil Service Commission.

(12) *Plan* means any of the State plan, the model plan and any other deferred compensation plan described in section 9001.2(a)(3) of this Subtitle.

(13) *Stable income fund* means, with respect to a plan, an investment option available to participants in the plan that seeks to provide book-value accounting, stability of principal and a low volatility total return.

(14) *State plan* means the Deferred Compensation Plan for Employees of the State of New York and Other Participating Public Jurisdictions established by the board, as such may be amended by the board from time to time. A copy of the State plan may be obtained from the board.

(15) *Trust* means a trust to hold the assets of a plan for the exclusive benefit of participants and their beneficiaries that meets the requirements of this Subtitle, including without limitation the requirements of section 9002.1(b), and section 457(g) of the Internal Revenue Code.

(16) *Trust Agreement* means an agreement evidencing a trust meeting the requirements of this Subtitle.

(17) *Trustee* means each person designated by the board or deferred compensation committee, as applicable, in accordance with the provisions of this Subtitle to hold in a trust any amounts under a plan.

(18) *Wrap contract* means a contract with a financial organization that provides for book-value accounting with respect to a designated portion of the assets of a stable income fund but that does not give the financial organization issuing the contract day-to-day investment authority with respect to such assets. Such term includes participating, non-participating and hybrid wrap contracts.

## PART 9001

### GENERAL PROVISIONS

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.	Sec.
9001.1 Application; Incorporation by Reference	9001.3 Ineligibility
9001.2 Establishment of plan by local employer	9001.4 Special provisions

**Section 9001.1 Application; Incorporation by Reference.** (a) This Subtitle shall be interpreted and applied so that any plan established hereunder shall be an eligible deferred compensation plan under section 457 of the Internal Revenue Code.

(b) The Board hereby adopts and incorporates by reference the provisions of Sections 457, 401(a)(9) and 72(p) of the Internal Revenue Code and the corresponding sections of title 26 of the Code of Federal Regulations and Section 203 of the Investment Advisers Act of 1940, effective as of the date of the adoption of these Regulations. Copies of said material may be obtained from the U.S. Government Printing Office, Washington D.C. 20402 and such material is available for public inspection and copying at the Offices of the New York State Deferred Compensation Board, Empire State Plaza Concourse – North, Room 124, Albany, NY 12223.

**9001.2 Establishment of plan by local employer.** (a) Except as specifically provided in this section 9001.2(a), a local employer may not establish or maintain more than one plan for its employees. A local employer may establish a plan for its employees:

- (1) by becoming a participating employer in the State plan as provided therein;
- (2) by adopting the model plan in accordance with the procedures prescribed in Part 9002 of this Subtitle; or
- (3) by adopting another plan which complies with all requirements of this Subtitle and section 457 of the Internal Revenue Code in accordance with the procedures prescribed in Part 9002 of this Subtitle.

A local employer which has previously established a plan may establish a plan in accordance with the requirements of this Subtitle so long as (i) all amounts held under the previously established plan have been distributed or otherwise paid out in accordance with the terms of such previously established plan and all other obligations of the previously established plan have been satisfied, or (ii) another local employer has been substituted as sponsor of the previously established plan.

(b) A deferred compensation committee shall be appointed by a local employer to act on behalf of the local employer under the model plan or a plan described in section 9001.2(a)(3) of this Subtitle to the extent permitted or required by this Subtitle and by such plan whenever such employer adopts such plan and shall continue in existence, as it may be reconstituted from time to time by the local employer in accordance with applicable law, for so long as such plan remains in existence.

**9001.3 Ineligibility.** Independent contractors shall not be eligible to participate in any plan.

**9001.4 Special provisions.** (a) Actuarial tables which distinguish on the basis of sex shall not be utilized for any purpose under any plan.

(b) Any installment distribution option permitted by any plan shall comply with all requirements of sections 457 and 401(a)(9) of the Internal Revenue Code and any treasury regulations promulgated thereunder.

(c) Any plan shall provide clear procedures for the review of domestic relations orders and shall require compliance with all domestic relations orders properly issued in accordance with such procedures and the requirements of applicable law in respect of amounts under the plan.

(d) Any plan established under this Subtitle may permit the loan of any amounts under such plan solely to a participant or beneficiary; *provided* that such plan establishes clear procedures for the administration of such loans and shall require compliance with sections 457 and 72(p) of the Internal Revenue Code and any treasury regulations promulgated thereunder and any other applicable laws.

## **PART 9002**

### **ESTABLISHMENT OF PLAN**

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9002.1 Assets held in trust

Sec.

9002.2 Documents to be filed

**Section 9002.1 Assets held in trust.** (a) A plan established by the board or a local employer shall require (i) that its assets be invested by one or more financial organizations selected by the board or deferred compensation committee, as applicable, and (ii) that, by January 1, 1999 or such other later date as may be permitted under section 457 of the Internal Revenue Code with respect to a plan in existence as of August 20, 1996 and immediately with respect to all other plans, all such assets shall be held in one or more trusts pursuant to one or more trust agreements.

(b) Each trustee designated by the board or deferred compensation committee must be authorized to act as a trustee under applicable law and shall be either a member of the board with respect to the State plan or a member of the relevant deferred compensation committee with respect to a model plan or other plan or a financial organization selected in accordance with the requirements of this Subtitle. A trust agreement between the board or deferred compensation committee and a trustee shall not meet the requirements of this section 9002.1(b) unless it satisfies each of the following requirements:

(1) the trust established by such agreement meets all of the requirements applicable to trusts described in section 457(g) of the Internal Revenue Code;

(2) such agreement provides that the assets of the plan to which such trust relates (i) are held in trust for the exclusive benefit of plan participants and their beneficiaries, (ii) may be used only to pay plan benefits and defray reasonable expenses of administering the plan and (iii) cannot revert to the State or local employer until all plan benefits have been paid to plan participants and beneficiaries in accordance with the terms of the plan;

(3) such agreement names the trustee and provides that, upon the trustee's appointment as such, the trustee shall have exclusive authority and direction to manage and control the assets of the plan, except to the extent that (i) such management and control has been delegated in accordance with the terms of the trust agreement to one or more financial organizations appointed in accordance with this Subtitle, (ii) the trust agreement provides that such trustee shall manage and control the assets of the plan at the direction of the board or deferred compensation committee or at the direction of one or more financial organizations appointed by the board or deferred compensation committee for this purpose, or (iii) the assets of the plan are to be allocated among the investment options available under the plan in accordance with the investment directions of plan participants, which investment directions may be communicated to the trustee by an administrative service agency appointed by the board or deferred compensation committee for this purpose;

(4) to the extent that the trustee performs the duties under this Subtitle of an administrative service agency, such agreement meets all of the requirements under this Subtitle applicable to contracts with administrative service agencies;

(5) to the extent that the trustee performs the duties under this Subtitle of a financial organization, such agreement meets all of the requirements under this Subtitle applicable to contracts with financial organizations; and

(6) such agreement satisfies the other applicable requirements of this Subtitle and any other applicable law.

**9002.2 Documents to be filed.** (a) Each local employer adopting the model plan or another plan shall file, prior to the acceptance of any deferrals under such plan, with the president for acknowledgment:

(1) a completed copy of the plan supplying all relevant information, including without limitation the information which is bracketed in the model plan;

(2) an executed copy of the trust agreement entered into with each trustee;

(3) a certification signed by its chief executive officer and chief legal officer stating (i) that the local employer is aware that there are three options for adopting a plan as described in section 9001.2(a) of this Subtitle, that the local employer has made an informed choice in determining to adopt the plan and that the local employer understands the ongoing responsibilities it is undertaking, including without limitation pursuant to this Subtitle, section 457 of the Internal Revenue Code and the plan, by adopting the plan; (ii) that the local employer's plan and trust agreement meet the requirements of section

457 of the Internal Revenue Code and of all other applicable State and local laws including this Subtitle; and (iii) that all required approvals of any local governing body or officer have been issued; provided, however, that in executing any such certification with respect to the adoption or amendment of the model plan, the chief executive officer and chief legal officer may rely on any ruling or determination issued by the Internal Revenue Service in respect of the model plan or any amendment to the model plan promulgated by the board;

(4) the name of each trustee, independent consultant, financial organization, firm of certified public accountants and administrative service agency which has been selected to provide services in respect of the plan and a certification signed by its chief executive officer and chief legal officer stating that each such trustee, independent consultant, financial organization, firm of certified public accountants and administrative service agency has been duly selected to provide services in accordance with the provisions of this Subtitle;

(5) evidence that bonds and insurance have been secured pursuant to the provisions of this Subtitle; and

(6) except to the extent that fiduciary acknowledgment is not required under section 9003.6 of this Subtitle, evidence that each trustee, independent consultant, administrative service agency and financial organization selected by the deferred compensation committee will act as a fiduciary under section 457(g) of the Internal Revenue Code and under State and common trust law principles with respect to all trusteeship, administrative or investment matters for which it has assumed responsibility and the plan will be indemnified as a result of any cause of action brought against it as a result of acts or omissions of the trustee, independent consultant, administrative service agency or financial organization together with the reasonable costs of litigation arising therefrom.

(b) No deferral may be accepted under any plan until the board has been furnished with a written acknowledgment by the president that all of the documents and materials required by subdivision (a) and, to the extent applicable, subdivision (d) of this section 9002.2 have been received.

(c) No amendment may be made to a model plan other than an authorized amendment promulgated by the Board; provided, however, that notwithstanding any other provision hereof, the requirements of the preceding sentence shall be effective as of January 1, 1997 and shall not affect the validity of any amendment to a model plan which was duly adopted in accordance with the then-effective requirements of this section 9002.2 prior to January 1, 1997. Any amendment to a model plan made by the local employer which maintains such model plan shall require the same proof and procedures contained in subdivisions (a) and (b) of this section. Where one or more of the documents and materials required by subdivision (a) of this section contains identical information as submitted on the most recent filing of such documents and materials, a local employer that has adopted an amendment authorized by the Board may submit an affidavit, on a form provided by the Board, attesting that the documents and materials required by subdivision (a) of this section have not changed since the local government last



submitted such documents and materials. In the event that one or more of the documents or materials required by subdivision (a) of this section has changed, such documents and materials are required to be submitted at the same time the affidavit is submitted to the president.

(d) Each local employer adopting or amending a plan other than the model plan or amending the model plan in a manner other than authorized by the board shall file, prior to the acceptance of any deferrals under such plan, with the president for acknowledgment (i) a ruling or determination issued by the Internal Revenue Service stating that such plan or form of plan meets the requirements of section 457 of the Internal Revenue Code applicable to eligible deferred compensation plans or (ii) an opinion of legal counsel that such plan meets the requirements of section 457 of the Internal Revenue Code applicable to eligible deferred compensation plans.

## **PART 9003**

### **SELECTION OF AND AGREEMENTS WITH TRUSTEES, INDEPENDENT CONSULTANTS, ADMINISTRATIVE SERVICE AGENCIES, FINANCIAL ORGANIZATIONS AND CERTIFIED PUBLIC ACCOUNTANTS**

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9003.1 Contracts or agreements

9003.2 Competitive proposals

9003.3 Criteria for selection

9003.4 Provision of diverse investments

Sec.

9003.5 Miscellaneous requirements

9003.6 Acknowledgment

9003.7 Precluded investments

9003.8 Transfer of assets

**Section 9003.1 Contracts or agreements.** (a) The contracts or agreements effecting the appointment of any trustee, independent consultant, administrative service agency, financial organization or firm of certified public accountants to provide services in respect of a plan shall be awarded pursuant to the procedures set forth in this Part 9003 and shall comply with the requirements of this Subtitle. Contracts or agreements with administrative service agencies shall not be required in whole or in part if an appointed trustee or financial organization, in the opinion of the board or of the deferred compensation committee, as applicable, is able to perform all or a portion of the required services as effectively. Contracts or agreements with independent consultants shall not be required in whole or in part if, in the opinion of the board or of the deferred compensation committee, as applicable, such board or deferred compensation committee is able to effectively make decisions with respect to the investment of plan assets, the allocation of plan assets among financial organizations and the selection of financial organizations to invest the assets of a plan without the advice of a consultant. Upon the expiration or termination of any contract or agreement entered into in accordance with this Subtitle, the board or deferred compensation committee, as applicable, shall follow the procedures set forth in this Part 9003 in awarding new contracts and entering into new agreements. Unless they are entered into in accordance with the procedures set forth in this Part 9003 and are in all other respects in substantial compliance with the requirements of this Subtitle,

all contracts or agreements entered into in respect of a plan shall be null and void and new competitive proposals shall be submitted pursuant to the procedures set forth in this Part 9003. Notwithstanding the previous sentence, no trustee who is the only trustee of a plan shall be forced to resign the position of trustee solely by operation of this section 9003.1 prior to the time such person's successor as trustee has been duly qualified and appointed.

(b) Notwithstanding section 9003.1(a) of this Subtitle, a committee may contract with a firm of certified public accountants selected as a result of a competitive proposal undertaken by the local employer that expressly included in the scope of services an audit of the deferred compensation plan sponsored by the local government to be conducted in compliance with section 9005.1 of this Subtitle. The competitive request for proposals must be in general compliance with section 9003.2 of this Subtitle, except for the requirement of notice in the *State Register*. The committee must adhere to the criteria contained in section 9003.3 of this Subtitle in the selection of such auditor made pursuant to this paragraph (b). A firm of certified public accountants selected by a committee pursuant to this paragraph (b) shall be subject to the provisions of section 9003.5 of this Subtitle. The firm of certified public accountants may be the same firm that is under contract with the local employer for other auditing services of the local employer.

**9003.2 Competitive proposals.** All contracts and agreements in respect of a plan shall be awarded only after receiving competitive proposals; provided, however, that no competitive proposal or bidding shall be necessary for the board or a deferred compensation committee to serve as the trustee of a plan under its authority. The board or deferred compensation committee, as applicable, shall cause to be published an announcement requesting competitive proposals. Such announcement shall be published in the *State Register* and in the official newspaper or newspapers, if any, or otherwise in an appropriate newspaper designated for such purposes, at least 90 days prior to the date on which the contract or agreement will be awarded, and shall request proposals within a specified time period from the date of publication.

**9003.3 Criteria for selection.** (a) In reviewing competitive proposals and selecting a trustee, independent consultant, financial organization, administrative service agency or a firm of certified public accountants, the board or deferred compensation committee, as applicable, shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man or woman acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; provided, however, that the board or deferred compensation committee, as applicable, may reasonably rely on the evaluation of such competitive proposals made by its properly selected independent consultants in any case other than their own selection. The board or deferred compensation committee, as applicable, shall consider, as applicable, in selecting a trustee, independent consultant, financial organization, administrative service agency or firm of certified public accountants among other items, the following:

- (1) the stability of the independent consultant, administrative service agency, firm of certified public accountants or financial organization as evidenced by its experience or investment record over a substantial period of time;

(2) the ability of the trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization to meet its contractual obligations, provide the services set forth in the proposals, and to comply with the reporting requirements to the board or deferred compensation committee, as applicable, and participants, and with all requirements of the plan, section 457 of the Internal Revenue Code and this Subtitle;

(3) the variety and types of investment products offered by the financial organization, and the ability to transfer among such products offered by a different financial organization with which the board or deferred compensation committee may have a contract;

(4) the trustee's, independent consultant's, administrative service agency's, firm of certified public accountants' or financial organization's experience with plans that meet the requirements for qualification under the Internal Revenue Code, eligible deferred compensation plans under section 457 of the Internal Revenue Code, individual retirement accounts, tax-sheltered annuities under section 403(b) of the Internal Revenue Code, and the trustee's, independent consultant's, administrative service agency's, firm of certified public accountants' or financial organization's familiarity with public pension systems and the fiduciary obligations of administrators, investment managers and trustees under the Employee Retirement Income Security Act of 1974 and similar federal or State statutes;

(5) whether the trustee, investment, consulting, auditing or administrative products and services described in the proposal are of the highest quality and soundness in all respects;

(6) the overall cost efficiency of the proposal; and

(7) the overall quality and scope of the services to be provided to plan participants under the trustee's, independent consultant's, administrative service agency's, firm of certified public accountants' or financial organization's proposal.

All proposals shall be in writing, contain a representation that the proposal complies with all requirements of this Subtitle and clearly indicate all direct fees, indirect fees and charges. All brokerage fees and related charges shall be negotiated so that the best competitive rate under the circumstances is obtained.

(b) Each proposal submitted under this Part 9003 shall fully disclose any sponsorship or similar arrangement. Such arrangements shall be precluded unless it can be demonstrated by clear and convincing evidence that the arrangement is cost effective.

(c) Before a contract or agreement between a deferred compensation committee and a trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization may become effective, the deferred compensation committee must submit in writing to the president the name of such selected trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization and a certification signed by its chief executive officer and chief legal officer stating

that each such trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization has been duly selected to provide services in accordance with the provisions of this Subtitle.

**9003.4 Provision of diverse investments.** The board and each deferred compensation committee shall appoint, with respect to the plan under their control, in accordance with the requirements of this Subtitle, one or more financial organizations such that amounts held under the plan may be at all times invested in one or more of a broad range of investment alternatives, including without limitation a diverse selection of fixed income and equity investments.

**9003.5 Miscellaneous requirements.** (a) All contracts and agreements entered into with a trustee, an independent consultant, a financial organization, a firm of certified public accountants or an administrative service agency shall be in writing, shall be awarded on the basis of a competitive bid conducted in respect of the specific contract or agreement in accordance with this Part 9003, shall not exceed five years in duration, and shall impose no penalties or surrender charges for the transfer of assets or responsibilities on expiration of the contract or agreement. Notwithstanding the previous sentence, no trustee who is the only trustee of a plan shall be forced to resign the position of trustee solely by operation of this section 9003.5(a) prior to the time such person's successor as trustee has been duly qualified and appointed.

(b) Notwithstanding Section 9003.5(a), when the board or a deferred compensation committee deems it to be in the best interest of the plan, the board or any deferred compensation committee may extend, in writing, by vote duly taken, any contract or agreement entered into with a trustee, an independent consultant, a financial organization, a firm of certified public accountants or an administrative service agency for a duration not to exceed two consecutive one-year periods and with the consent of such party; *provided, however*, that any such one-year extension shall be implemented only upon (1) the expiration of the initial term of such contract or agreement in the case of the first one-year extension, or (2) the expiration of the first one-year extension in the case of the second one-year extension. In the event that the board or a deferred compensation committee implements such an extension, the board or the deferred compensation committee shall describe in writing the reasons for its determination that the extension is in the best interest of the plan.

(c) Neither the Board nor any deferred compensation committee may permit, nor enter into an agreement that permits, a trustee, financial organization, independent consultant, administrative service agency or any other person to select one or more other trustees, administrative service agencies, firms of certified public accountants, independent consultants, or financial organizations to provide services in respect of a plan. Notwithstanding the previous sentence, this section 9003.5(c) shall not prohibit the Board or any deferred compensation committee from entering into an agreement with

(1) a financial organization selected and retained by the Board or a deferred compensation committee, as applicable, in accordance with this Subtitle, that provides for self-directed investment services through a mutual fund or brokerage "window" arrangement sponsored by such financial organization with respect to a plan, *provided* that such self-directed investment services shall not be the sole investment alternative provided under a plan and that the Board and the deferred compensation committee shall

establish clear guidelines regarding participants' access to, and level of participation in, such self-directed investment services

(2) a financial organization selected and retained by the Board or a deferred compensation committee, as applicable, in accordance with this Subtitle, to manage the stable income fund of such plan which authorizes such financial organization to engage in one or more of the following fund management activities with respect to the assets of a stable income fund:

(i) the investment of the assets of the stable income fund in one or more guaranteed investment contracts, provided, however, that such guaranteed investment contract shall not exceed five years in duration;

(ii) the purchase of one or more wrap contracts with respect to the assets of the stable income fund; or,

(iii) the periodic allocation of the assets of the stable income fund between or among two or more other financial organizations selected and retained by the Board or deferred compensation committee, as applicable, in accordance with this Subtitle,

provided that, in each case,

(i) the written agreement between the Board or deferred compensation committee, as applicable, and the financial organization, expressly authorizes the applicable fund management activities and states that the financial organization is a fiduciary to the plan with respect to the fund management activities so authorized;

(ii) any such fund management activity is undertaken by the financial organization in accordance with reasonable practices of the financial organization applicable to its clients generally, and the financial organization receives no fee or other consideration from any person (other than the plan) related to such fund management activity;

(iii) the guaranteed investment contract or wrap contract, as applicable, imposes no penalties or surrender charges for the transfer of assets or responsibilities on expiration of the contract or agreement;

(iv) the trustee of the plan continues to be the owner on behalf of the plan of all of the assets of the stable income fund; and,

(v) any such fund management activity complies with the criteria for selection and reporting of section 9003.3 of this Subtitle and the then effective investment policies and guidelines of the Board or deferred compensation committee, as applicable, related to the stable income fund.

A financial organization engaged in the management activities described in paragraph (2) of this section 9003.5(c) shall do so in accordance with the procedures of this paragraph (2) and with other provisions of this Subtitle to the extent such other provisions are incorporated into this paragraph (2).

**9003.6 Acknowledgment.** Except as otherwise provided in this section 9003.6, each trustee, independent consultant, administrative service agency and financial organization so appointed shall acknowledge in writing that it is a fiduciary with respect to all administrative or investment matters for which it has assumed responsibility with respect to a plan. Notwithstanding the foregoing, no such fiduciary acknowledgment shall be required pursuant to this section 9003.6 from a financial organization (i) which issues a guaranteed investment contract, or (ii) which is the manager of an open-ended investment company registered under the Investment Company Act of 1940, as now in effect or as hereinafter amended, solely by reason of the investment, upon the specific direction of a trustee, another financial organization, the Board, a deferred compensation committee or an administrative service agency acting in accordance with the terms of the plan to implement the investment directions of one or more participants, of amounts held under the plan in shares of such open-ended investment company.

**9003.7 Precluded investments.** No contract or agreement entered into with a financial organization may provide for the investment of any amounts under a plan in any annuity contract providing for a term which could exceed five years or which is measured by one or more natural lives or any life insurance or other contract providing traditional death benefits.

**9003.8 Transfer of assets.** All amounts deferred under a plan, together with all necessary investment instructions, shall be paid by the State or local employer as promptly as possible, but in no event later than two business days from the applicable payroll date, to an appointed trustee which shall then pay such amounts as promptly as possible, but in no event later than one business day following receipt thereof by such trustee, to one or more appointed financial organizations for investment, and upon receipt thereof by each such financial organization shall, if not otherwise invested, be transferred to an interest-bearing account to hold such amounts in cash or cash equivalent investments within one business day, where such amounts may remain until the financial organization receives all necessary investment instructions or otherwise determines it prudent to transfer such amounts to another investment fund.

## PART 9004

### SOLICITATION AND EDUCATION

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9004.1 Provisions

**Section 9004.1 Provisions.** No trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency nor any of their agents shall use information obtained by reason of its appointment in respect of a plan as a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency to solicit or otherwise induce any person to invest in, purchase, utilize or act in any other manner regarding any products or services made available by such trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency. Educational materials designed to acquaint employees with the benefits of such plan may be provided by a financial organization or administrative service agency upon prior approval by the Board or deferred compensation committee, as applicable. All information obtained in connection with any services performed or proposed to be performed in respect of a plan shall be confidential and used exclusively for purposes relating to such plan and expressly contemplated by an agreement entered into with the Board or deferred compensation committee, as applicable, in accordance with the requirements of this Subtitle. Neither the Board nor any deferred compensation committee shall enter into any agreement in respect of a plan with a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency which permits the use of any information obtained by reason of appointment as a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency to solicit or otherwise induce any person to invest in, purchase, utilize or act in any other manner regarding any products or services made available by such trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency for any purpose not directly related to the administration of the plan and the investment of plan assets in accordance with the requirements of this Subtitle.

## PART 9005

### AUDITING, BONDING AND INSURANCE

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9005.1 Auditing

9005.2 Authority of board and committee

Sec.

9005.3 Statements

9005.4 Bonding and insurance

**Section 9005.1 Auditing.** The board or deferred compensation committee, as applicable, shall cause all amounts held under a plan to be audited by a firm of certified public accountants no less frequently than once per year, and the board or deferred compensation committee, as applicable, shall file the audit report with the president promptly but in no event later than by the close of the next succeeding fiscal year. Such firm of certified public accountants shall be appointed by the board or the deferred compensation committee, as applicable, in accordance with Part 9003 of this Subtitle.

**9005.2 Authority of board and committee.** The board and each deferred compensation committee shall receive reports from its agents and appointed trustees, independent consultants, administrative service agencies and financial organizations, and shall promptly terminate or amend such agency, arrangement, agreement or contract with such trustee, independent consultant, administrative service agency or financial organization if its obligations under this Subtitle or otherwise so require. To the extent necessary to comply with this section 9005.2 or section 9006.1, the board or deferred compensation committee, as applicable, shall have the authority to serve as a temporary or interim trustee until a successor trustee is appointed in accordance with this Subtitle.

**9005.3 Statements.** Each participant in a plan shall be furnished with a statement at least quarterly from the trustee or administrative service agency. Such statement shall indicate the balance of his or her account under the plan, the participant's interest in each investment option under the plan and any other data which the board or deferred compensation committee, as applicable, shall determine to be relevant. Each participant in a plan shall be furnished with clear and complete written disclosure no less frequently than annually (i) of all fees and expenses paid out of or charged against any assets of the plan, including all fees and expenses netted against any investment return on amounts held under the plan and (ii) of the allocation of all such fees and expenses to and among participants' accounts under the plan.

**9005.4 Bonding and insurance.** (a) Each person appointed in accordance with this Subtitle or outside agent which handles, holds, invests, maintains custody of or directs disbursement of funds or serves as a trustee shall be bonded with a customary or usual bond, obtained from an organization duly authorized and licensed to provide such bond in the State of New York, to protect against any loss resulting from fraud or dishonesty by such person or the employees, officers and agents thereof.

(b) The amount of the bond shall not be less than the lesser of:



(1) 100 percent of the amount under the plan managed or administered or held by such person; or

(2) \$25 million; provided, however, that the board or deferred compensation committee, as applicable, may, in its discretion, require a bond in a greater amount if the board or deferred compensation committee determines that such greater amount is necessary or advisable to adequately protect the plan from any loss resulting from fraud or dishonesty by such person.

The cost of any such bond for a trustee who is a member of the board or deferred compensation committee shall be treated as a reasonable and necessary expense of administering the plan and may be paid from the assets of the plan.

(c) Each trustee, independent consultant, administrative service agency and financial organization appointed in accordance with this Subtitle shall provide appropriate evidence of adequate insurance, and the cost of any such insurance for a trustee who is a member of the board or deferred compensation committee, as applicable, shall be treated as a reasonable and necessary expense of administering the plan and may be paid from the assets of the plan.

## **PART 9006**

### **COMPLIANCE**

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9006.1 Authority of board

9006.2 Documentary provisions

Sec.

9006.3 Exemptions

**Section 9006.1 Authority of board.** Upon notice that any plan or any contract or agreement or other arrangement entered into in respect of a plan does not substantially comply with this Subtitle or any other applicable federal, State or local law, or that a local employer is not ensuring substantial compliance with its plan, the board may investigate, hold hearings and take such action as it deems warranted or appropriate, including but not limited to termination of the plan, contract, agreement or other arrangement.

**9006.2 Documentary provisions.** Every contract or agreement entered into by the board or a deferred compensation committee in respect of a plan shall contain a provision that the agreement or contract is subject to the plan and to this Subtitle, and that such plan and this Subtitle are made a part thereof.

**9006.3 Exemptions.** In exceptional circumstances, and where the board deems it to be in the best interest of the plan, the board in its sole discretion may grant an exemption from the applicability of any of the rules and regulations set forth under this Subtitle; *provided, however*, that, any exemption granted hereunder must be in accordance with the requirements of the Internal Revenue Code, the plan and the board's fiduciary obligations. In the event that the board grants such an exemption, the board shall describe in writing the exceptional circumstances and explain the reasons for its determination that the exemption is in the best interests of the plan.

All requests for such exemption must be submitted to the board in writing and contain a detailed explanation of the reasons why an exemption has been requested.

**APPENDIX C**  
**INSURANCE REQUIREMENTS - PROFESSIONAL SERVICE PROVIDERS**

I. The Contractor shall procure and maintain during the entire term of the contract the following required insurance:

→ **Workers' Compensation**

Statutory Workers' Compensation and Employers' Liability Insurance for all employees, *except that in the event the Contractor has no employees and is exempt by law from having such insurance coverage the Contractor may provide an exemption statement.*

→ **Professional Liability Insurance**

\$1,000,000 per occurrence / \$2,000,000 aggregate for the negligent or wrongful professional acts of the Contractor.

→ **Commercial General Liability Insurance**

\$1,000,000 per occurrence/ \$2,000,000 aggregate.

II. Notwithstanding any terms, conditions or provisions, in any other writing between the parties, the Contractor hereby agrees (except as to workers' compensation insurance coverage) to either effectuate

- (a) the naming of the County as an "additional insured as funding source for contract services" on the contractor's insurance policies, or
- (b) the inclusion of a contractual liability endorsement covering the Contractor's contract with the County.

III. The policy/policies of insurance furnished by the Contractor shall:

- be from an A.M. Best rated "A" New York State licensed insurer;
- contain a 30-day notice of cancellation;

IV. In the event that the Contractor is unable to furnish professional liability insurance other than on a "claims made" basis, the Contractor shall procure and maintain a separate "tail" policy of such insurance providing the required coverage, or furnish proof of continuous coverage under the existing policy, for a period of one year and ninety days following the termination date of this contract.

V. The contractor agrees to indemnify the County for any applicable deductibles.

VI. Contractor acknowledges that failure to obtain such insurance on behalf of the County constitutes a material breach of contract and subjects it to liability for damages, indemnification and all other legal remedies available to the County. Prior to the commencement of work or use of facilities the Contractor shall provide to the County proof that such requirements have been met by furnishing certificate(s) of such insurance and the declarations pages from the policies of such insurance. The failure of the County to object to the contents of the certificate(s) and/or declarations pages, or the absence of same, shall not be deemed a waiver of any and all rights held by the County.

VII. All certificates of insurance will provide 30 days notice to the county of cancellation or non-renewal.

VIII. Contractor and subcontractor waives all rights of subrogation against the owner and will have the General Liability, Umbrella Liability Workers' Compensation policies endorsed setting forth this Waiver of Subrogation.

IX. All policies will also contain no exclusion with respect to Section 240 and 241 of the NYS Labor Law.

X. The County shall be listed as an additional insured on a primary and non-contributory basis.

## **APPENDIX D - STANDARD CLAUSES FOR ESSEX COUNTY CONTRACTS**

### **1. Independent Contractor Status**

The parties each acknowledge, covenant and agree that the relationship of the Contractor to the County shall be that of an independent contractor. The Contractor, in accordance with its status as an independent contractor, further covenants and agrees that it:

- (a) will conduct itself in accordance with its status as an independent contractor;
- (b) will neither hold itself out as nor claim to be an officer or employee of the County; and
- (c) will not make any claim, demand or application for any right or privilege applicable to an officer or employee of the County, including but not limited to workers' compensation benefits, unemployment insurance benefits, social security coverage or retirement membership or credits.

### **2. Contractor To Comply With Laws/Regulations**

The Contractor shall at all times comply with all applicable state and federal laws, rules and regulations governing the performance and rendition of the services to be furnished under this agreement.

### **3. Licenses, Permits, Etc.**

The Contractor shall, during the term of this agreement, obtain and keep in full force and effect any and all licenses, permits and certificates required by any governmental authority having jurisdiction over the rendition and performance of the services to be furnished by the Contractor under this agreement.

### **4. Termination**

This agreement may be terminated without cause by either party upon 30 days prior written notice, and upon such termination neither party shall have any claim or cause of action against the other except for services actually performed and mileage expenses actually incurred prior to such termination. Notwithstanding the foregoing, this agreement may be immediately terminated by the County:

- (a) for the Contractor's breach of this agreement, by serving written notice of such termination stating the nature of the breach upon the Contractor by personal delivery or by certified mail, return receipt requested, and upon such termination either party shall have such rights and remedies against the other as provided by law; or
- (b) upon the reduction or discontinuance of funding by the State or Federal governments to be used in furnishing some or all of the work, labor and/or services provided for under this agreement, and upon such termination neither party shall have any claim or cause of action against the other except for services actually performed and expenses (if the same are to be paid under this agreement) actually incurred prior to such termination.

### **5. Defense & Indemnification**

The Contractor shall defend, indemnify and hold harmless the County to the fullest extent allowed by law, and notwithstanding any insurance requirements, from and against any and all liability, losses, claims, actions, demands, damages, expenses, suits, judgments, orders, causes of action and claims, including but not limited to attorney's fees and all other costs of defense, by reason of any liability whatsoever imposed by law or otherwise upon the County for damages to person, property or of any other kind in nature, including but not limited to those for bodily injury, property damage, death arising out of or in connection with its officers, employees, agents, contractors, sub-contractors, guests or invitees negligence or

its/their performance or failure to perform this agreement.

6. **Discrimination Prohibited**

The services to be furnished and rendered under this agreement by the Contractor shall be available to any and all residents of Essex County without regard to race, color, creed, sex, religion, national or ethnic origin, handicap, or source of payment; and under no circumstances shall a resident's financial ability to pay for the services provided be considered unless such consideration is allowed by State and/or Federal law, rule or regulation.

7. **Non-Discrimination In Employment**

The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status. In the event that this is a contract to be performed in whole or in part within the State of New York for (a) the construction, alteration or repair of any public building or public work, (b) for the manufacture, sale or distribution of materials, equipment or supplies, (c) for building service, the Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex or national origin:

- (1) discriminate in hiring against any citizen who is qualified and available to perform the work; or
- (2) discriminate against or intimidate any employee hired for the performance of work under this contract.

The Contractor agrees to be subject to fines of \$50.00 per person per day for any violation of this paragraph, as well as to possible termination of this contract or forfeiture of all moneys due hereunder for a second or subsequent violation.

8. **Damage/Injury To Persons & Property**

The Contractor shall promptly advise the County of all damages to property of the County or of others, or of injuries incurred by persons other than employees of the Contractor, in any manner relating, either directly or indirectly, to the performance of this agreement.

9. **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") in accordance with the following requirements:

- (a) the Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter;
- (b) the County Auditor, State Comptroller, the Attorney General or 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 County 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 County official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified and designation of said records as exempt under the statute is reasonable. Nothing

contained herein shall diminish, or in any way adversely affect, the County's right to discovery in any pending or future litigation.

10. **Claims For Payment**

All invoices or claims for which payment is sought from the County must be submitted in accordance with the following:

- (a) each claim for payment must include
  - (1) an invoice detailing the claim,
  - (2) copies of all documentation supporting the claim,
  - (3) a properly completed County standard voucher, which includes
    - (i) the County contract number under which payment is being claimed, **AND**
    - (ii) the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. *[Failure to include this number or numbers will prevent and preclude payment by the County; except that where the payee does not have such number or numbers, the payee, on the invoice or County voucher, must give the reason or reasons why the payee does not have such number or numbers and such reasons constitute a valid excuse under law.]*
- (b) Unless otherwise provided in this agreement, each claim for payment must be submitted to the County no later than 30 days after the work, labor, materials, and/or services for which payment is claimed were rendered or furnished.
- (c) Notwithstanding any other provision of this agreement, no claim for payment shall be valid, and the County shall not be liable for payment thereof, unless it is submitted to the County within 30 days of the close of the calendar year in which the work, labor, materials, and/or services for which payment is claimed were rendered or furnished.
- (d) Unless otherwise provided in this agreement, the requirements of this paragraph 10, and/or of any other provisions of this agreement which supersede the same, shall constitute conditions precedent to the County's payment obligation, and failure to comply with any or all of said requirements shall entitle the County to deny payment.
- (e) As a further condition of payment, each claim of payment shall be accompanied by a Contractor and Sub-Contractor Progress Payment Waiver, Release and Discharge, and each Final Payment shall be accompanied by a Contractor and Sub-Contractor Final Payment, Waiver and Release form. As well as a Contractor Affidavit relative to Final Payment. Copies of these forms are attached and made a part hereof.

11. **Consent**

In the event that State or Federal law requires the recipient of services to be furnished and rendered under this agreement to give his/her prior consent thereto, the contractor shall obtain such person's consent and furnish proof thereof to the County.

12. **Executory Clause**

The County shall have no liability under this contract to the Contractor or to anyone else beyond the funds appropriated and available for this contract.

13. **Public Work & Building Service Contract Requirements**

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:

- (a) neither the 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; and

- (b) the 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.

14. **Public Work Contracts – Hazardous Substances**

If this is a contract for public work, the Contractor agrees as follows:

- (a) the Contractor acknowledges that the County uses and/or produces various substances which may be classified as hazardous under OSHA's Hazard Communication Standard;
- (b) the Contractor recognizes the use of said substances by the County and acknowledges that the County has provided, or upon request will provide, the Contractor with a description of such substances which may be present in the area of the County's facility/facilities to which the Contractor may have accessed during the performance of this contract;
- (c) the Contractor acknowledges that the County has provided, or upon request will provide, suggestions for appropriate protective measures which should be observed when the Contractor is in the area of any such hazardous substances;
- (d) the Contractor agrees to be solely responsible for providing training and information to its employees regarding any such hazardous substances, as well as of any protective measures suggested by the County;
- (e) the Contractor agrees to be solely responsible to ensure that the Contractor's employees observe protective measures during the performance of their duties in the performance of the contract, and that all such protective measures will be at least as stringent as those suggested or which would have been suggested by the County;
- (f) in the event that the Contractor's performance of the work under this contract requires the use of any hazardous substances, the Contractor shall notify the County in advance of bringing in and/or using such substances in or upon County property and suggest to the County appropriate measures to be observed by the County, its officers and employees, and/or the public; and
- (g) in the event the Contractor fails in whole or in part to comply with the terms of this paragraph, the County shall have the right to interrupt the Contractor's work and/or terminate this contract, and the Contractor shall be prohibited from renewing such work until all applicable safety and health procedures and practices are implemented by the Contractor.

15. **Disputes**

Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration, but must, instead, be heard in a court of competent jurisdiction within the State of New York.

16. **Non-Assignment**

This agreement may not be assigned, subcontracted, transferred, conveyed, sublet or otherwise disposed of in whole or in part, by the Contractor, without the prior written consent of the County, and any attempts to assign the contract without the County's written consent are null and void.

17. **No Collusion**

If this contract was awarded based upon the submission of bids, the Contractor

warrants, under penalty of perjury, that:

- (a) its bid was arrived at independently and without collusion aimed at restricting competition; and
- (b) at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the County a non-collusive bidding certification on Contractor's behalf.

18. **International Boycott**

In accordance with Section 220-f of the Labor Law, if this contract exceeds \$5,000.00, 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, 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 County Manager within five (5) business days of such conviction, determination or disposition of appeal.

19. **County's Rights of Set-Off**

The County shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the County's option to withhold for the purposes of set-off any moneys due to the Contractor under this agreement up to any amounts due and owing to the County with regard to this contract, any other contract with any County 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 County for any other reason, including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The County shall exercise its set-off rights in accordance with normal County practices, including, in cases of set-off pursuant to an audit, the acceptance of such audit by the County Board of Supervisors or its designated representative.

20. **Contractor Defined**

Whenever the term "Contractor" is used in this agreement, such term shall include and apply to all employees, all officers, directors and agents, if any, of the Contractor.

21. **Amendment**

This agreement may not be amended, modified or renewed except by written agreement signed by the Contractor and the County.

22. **Ownership Of Work Products**

All final and written or tangible work products completed by the Contractor shall belong to the County. In the event of premature discontinuance of performance, the Contractor agrees to deliver all existing products and data files to the County.

23. **Executive Order Debarment/Suspension**

In the event that this contract involves the Contractor furnishing goods and services in excess of \$100,000.00, or constitutes a subaward to subrecipients, under any Federal program, grant or other funding source, then by executing this agreement the Contractor certifies that neither it nor any of its principals are suspended or debarred within the scope or



meaning of Executive Orders 12549 and 12689, any Federal or State regulation implementing or codifying the same, or any other Federal or State law, rule or regulation.

24. **Health Insurance Portability and Accountability Act of 1996 (HIPAA)**

In the event that this contract involves the use or disclosure of protected health information within the meaning or application of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the regulations thereunder, the following provisions of this paragraph shall apply.

- (a) **Definitions.** The terms used, but not otherwise defined, in this Agreement shall have the same meaning as given such terms in 45 CFR §160.103 and §164.501, as the same may be amended from time to time, including but not limited to the following.
- (1) "Business Associate" shall mean the Contractor, its officers, employees, agents and subcontractors.
  - (2) "Covered Entity" shall mean Essex County (the "County"), its departments, agencies, officers and employees.
  - (3) "Individual" shall have the same meaning as given such term in 45 CFR §164.501 and shall also include a person who qualifies as a personal representative in accordance with 45 CFR §164.502(g).
  - (4) "Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, subparts A and E.
  - (5) "Protected Health Information" shall have the same meaning as given such term in 45 CFR §164.501, limited to the information created or received by Contractor from or on behalf of the County.
  - (6) "Required by law" shall have the same meaning as given such term in 45 CFR §164.501.
  - (7) "Secretary" shall mean the Secretary of the Department of Health and Human Services or his/her designee.
- (b) **Obligations and Activities of Contractor.** Contractor agrees to:
- (1) not use or disclose Protected Health Information other than as permitted or required by this Agreement or as required by law;
  - (2) use appropriate safeguards to prevent use or disclosure of the Protected Health Information other than as provided for by this Agreement;
  - (3) mitigate, to the extent practicable, any harmful effect that is known, should have been known, and/or discovered to/by Contractor of a use or disclosure of Protected Health Information by Contractor in violation of the requirements of this Agreement;
  - (4) report to the County any use or disclosure of the Protected Health Information not provided for by this Agreement of which it becomes aware;
  - (5) ensure that any agent, including a subcontractor, to whom it provides Protected Health Information received from, or created or received by Contractor on behalf of the County agrees to the same restrictions and conditions that apply through this Agreement to Contractor with respect to such information;
  - (6) provide access, at the request of the County, and in the time and manner designated by the County or the Secretary, to Protected Health Information in a Designated Record Set, to the County or, as directed by the County, to an Individual in order to meet the requirements under 45 CFR §164.524;
  - (7) make any amendment(s) to Protected Health Information in a Designated Record

Set that the County directs or agrees to pursuant to 45 CFR §164.526 at the request of the County or an Individual, and in the time and manner designated by the County or the Secretary;

(8) make internal practices, books, and records, including policies and procedures and Protected Health Information, relating to the use and disclosure of Protected Health Information received from, or created or received by Contractor on behalf of, the County available to the County, and/or to the Secretary, in a time and manner designated by the County or by the Secretary, for purposes of the Secretary determining the County's compliance with the Privacy Rule;

(9) document such disclosures of Protected Health Information and information related to such disclosures as would be required for the County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 CFR §164.528;

(10) provide to the County or an Individual, in time and manner designated by the County or the Secretary, information collected in accordance with the above subparagraph (b)(9) of this Agreement, to permit the County to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 CFR §164.528.

(c) Permitted Uses and Disclosures by Contractor.

Except as otherwise limited in this Agreement, Contractor may use or disclose Protected Health Information on behalf of, or to provide services to, the persons entitled to services under this Agreement:

(1) solely for the purposes of performing Contractor's obligations under this Agreement, if such use or disclosure of Protected Health Information would not violate the Privacy Rule if done by the County or the minimum necessary policies and procedures of the County; or

(2) provided that such use or disclosures are required by law; or

(3) Contractor

(A) obtains written authorization(s) from the individual to which the information pertains permitting the specific uses or disclosures of such information to third persons,

(B) represents and agrees in writing with such individual that the information to be used and/or disclosed will remain confidential and used or further disclosed only as required by law or for the purposes specified in the written authorization(s), and

(C) such third persons agree in writing to notify the County as soon as practicable and in writing of any instances of which such third person(s) is/are aware in which the confidentiality of the information has been breached; or

(4) provide Data Aggregation services to the County as permitted by 42 CFR §164.504(e)(2)(i)(B); or

(5) report violations of law to appropriate Federal and State authorities, consistent with §164.502(j)(1).

(d) County To Inform Contractor of Privacy Practices and Restrictions.

The County agrees to notify the Contractor of any

(1) limitation(s) in its notice of privacy practices of the County in accordance with 45 CFR §164.520, to the extent that such limitation may affect the Contractor's use or disclosure of Protected Health Information;

- (2) changes in, or revocation of, permission by Individual to use or disclose Protected Health Information, to the extent that such changes may affect the Contractor's use or disclosure of Protected Health Information; and/or
- (3) restriction to the use or disclosure of Protected Health Information that the County has agreed to in accordance with 45 CFR §164.522, to the extent that such restriction may affect Contractor's use or disclosure of Protected Health Information.

(e) Permissible Requests by County.

The County shall not request Contractor to use or disclose Protected Health Information in any manner that would not be permissible under the Privacy Rule if done by the County; except that in the event that the services to be furnished by the Contractor under this Agreement requires data aggregation by the Contractor, the Contractor may use or disclose protected health information for such data aggregation or management and administrative activities of Contractor.

(f) Survival of Provisions.

The obligations of the Contractor under this paragraph 24 shall survive the expiration of the term of this Agreement and/or the termination of this Agreement, and said obligations shall remain effective and shall not terminate until all of the Protected Health Information provided by the County to Contractor, or created or received by Contractor on behalf of the County, is destroyed or returned to the County, or, if it is infeasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in subparagraph (g) below.

(g) Return or Destruction of Protected Health Information.

Except as otherwise provided below, upon termination of this Agreement for any reason, Contractor shall return or destroy all Protected Health Information received from the County, or created or received by Contractor on behalf of the County. This provision shall apply to Protected Health Information that is in the possession of subcontractors or agents of Contractor. Contractor shall retain no copies of the Protected Health Information.

In the event that Contractor determines that returning or destroying the Protected Health Information is infeasible, Contractor shall provide to the County notification of the conditions that make return or destruction infeasible. Upon determination by the County that return or destruction of Protected Health Information is infeasible, Contractor shall extend the protections of this Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Contractor maintains such Protected Health Information.

(h) Termination for Cause.

Upon the County's knowledge of a material breach of this paragraph by Contractor, the County shall:

- (1) either:
  - (A) provide an opportunity for Contractor to cure the breach or end the violation and terminate this Agreement within the time specified by the County, or
  - (B) immediately terminate this Agreement if cure is not possible; and
- (2) report the violation to the Secretary.

(i) Miscellaneous.

- (1) Regulatory References. A reference in this Agreement to a section in the Privacy

Rule means the section as in effect or as amended.

(2) Amendment. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for the County to comply with the requirements of the Privacy Rule and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.

(3) Survival. The respective rights and obligations of Contractor under this paragraph 24 of this Agreement shall survive the termination of this Agreement.

(4) Interpretation. Any ambiguity in this Agreement shall be resolved to permit the County to comply with the Privacy Rule.

25. **Severability**

If any term or provision of this agreement or the application thereof to any person or circumstance shall to any extent be held invalid or unenforceable, the remainder of this agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and every other term and provision of this agreement shall be valid and be enforced to the fullest extent permitted by law.

26. **Entire Agreement**

This agreement is the entire agreement between the parties, and the same shall be construed in accordance with the laws of the State of New York.

27. **For Medicaid/Federal Health Care Related Work**

**Excluded/Debarred Party Clause**

The Vendor/Contractor represents and warrants that it, nor its employees or contractors, are not excluded from participation, and is not otherwise ineligible to participate, in a "federal health care program" as defined in 42 U.S.C. § 1320a-7b(f) or in any other government payment program.

In the event Vendor/Contractor, or one of its employees or contractors, is excluded from participation, or becomes otherwise ineligible to participate in any such program during the Term, Vendor/Contractor will notify Essex County in writing within three (3) days after such event. Upon the occurrence of such event, whether or not such notice is given to the Vendor/Contractor, Essex County reserves the right to immediately cease contracting with the Vendor/Contractor.

If Vendor/Contractor is an Employment Agency, the Vendor/Contractor represents and warrants that its employees and contractors are not excluded from participation in a "federal health care program" as defined in 42 U.S.C. § 1320a-7b(f) or debarred from participation in any federal or other program.

The Vendor/Contractor further represents and warrants it will, at a minimum, check monthly all of its employees and subcontractors against:

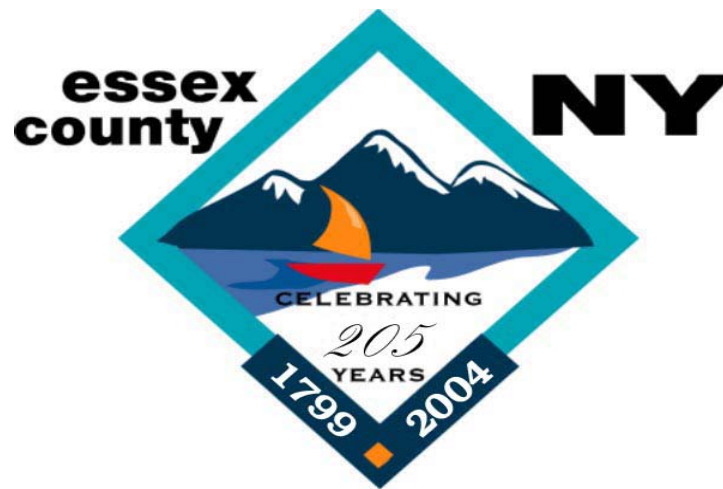
The General Services Administration's Federal Excluded Party List System (or any successor system,

The United States Department of Health and Human Services's Office of the Inspector General's Lists of Excluded Individuals and Entities or any successor list,

The New York State Department of Health's Office of the Medicaid Inspector General's

list of Restricted, Terminated or Excluded Individuals or Entities.

In the event an excluded party is discovered the Vendor/Contractor will notify Essex County in writing within three (3) days after such event. Upon the occurrence of such event, whether or not such notice is given to the Vendor/Contractor, Essex County reserves the right to immediately cease contracting with the Vendor/Contractor.



***ESSEX COUNTY***  
***Office of the Purchasing Agent***  
7551 Court Street, P.O. Box 217  
Elizabethtown, NY 12932  
518-873-3330/Fax 518-873-3339

**GENERAL SPECIFICATIONS  
FOR PROCUREMENT CONTRACTS**

Adopted May 20, 1999.

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**PART I**  
***General Provisions***

**1. APPLICABILITY** The terms and conditions set forth herein are expressly incorporated in and applicable to all procurements and resulting procurement contracts let by the Office of the Essex County Purchasing Agent where incorporated by reference in its Bid Documents. The provisions herein shall govern such procurement or contract unless expressly modified or amended by the terms of a Bid Specifications, or a negotiated Contract/Clarification document, if any. Captions are intended as descriptive and are not intended to limit or otherwise restrict the terms and conditions set forth herein.

**2. GOVERNING LAW** The laws of the State of New York shall govern and apply to the procurement, any resulting contract and for determinations in a court of competent jurisdiction in New York of any and all disputes, litigation or interpretations arising from or connected with the procurement or contract, except where expressly superseded in a specific contract letting or where the Federal supremacy clause requires otherwise. These specifications are modeled after and upon the specifications developed and used by the New York State Office of General Services for procurements by New York State.

**3. APPENDIX A / INSURANCE** The mandatory terms for all Essex County contracts are expressly incorporated herein and in all bid documents and/or resulting contracts, such terms being set forth in Appendix A (*Standard Clauses for Essex County Contracts*). Insurance requirements are also attached and incorporated herein.

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

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

(a) **Appendix A** (*Standard Clauses for Essex County Contracts*)

(b) **Contract/Clarification Documents** Writing(s) setting forth the final agreements, clarifications, terms, statement of work and/or modifications between the Bid Documents and Contractors Bid or Mini-bid.

(c) **Bid Documents** - Bid Specifications prepared by Essex County

(d) **Contractors Bid or Proposal**

**6. DEFINITIONS**

Terms used in this document shall have the following meanings:

**AGENCY OR AGENCIES** Essex County, New York, acting by or through one or more departments, boards, commissions, offices or institutions of Essex County.

**ANCILLARY PRODUCT:** Product which is purchased or licensed on a restricted use basis in conjunction with the principal manufacturers Product being acquired (e.g. may be used only in combination, or by educational institutions for research use).

**AUTHORIZED USER(S)** Agencies, or any other entity authorized by Essex County to participate in Essex County procurement contracts (including but not limited to political subdivisions, public authorities, school districts and public benefit corporations), provided that each such Agency or other entity shall be held solely responsible for liabilities or payments due as a result of its participation. The term "Authorized User" shall include "Licensees."

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

**BIDDER** Any individual or other legal entity, (including but not limited to partnership, firm or corporation) which submits a bid in response to a Bid Solicitation. The term Bidder shall also include "offeror" and/or "contractor".

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

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

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

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

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

**CONTRACTOR** Any successful Bidder(s) to whom a contract has been awarded by the Purchasing Agent. The term "Contractor" includes Licensors.

**COUNTY** Essex County, New York.

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

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

**GROUP** A classification of Product (commodities, services or technology).

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

**LATE BID** For purposes of bid openings held and conducted by the Essex County Purchasing Agent, a bid not received in such place as may be designated on the Bid Specifications or in the Office of the Essex County Purchasing Agent, at or before the date and time established in the Bid Specifications for the bid opening.

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

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

**LICENSEE** The County, or one or more Agencies or Authorized Users who acquire Product from Contractor by execution of a license in accordance with the terms and conditions of the Contract; provided that, for purposes of compliance with an individual license, the term "Licensee" shall be deemed to refer separately to the individual Authorized User(s) on whose behalf the license was executed who took receipt of the Product, and who shall be solely responsible for performance and liabilities incurred.

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

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

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

**PROCUREMENT RECORD** Documentation by the Essex County Purchasing Agent of the decisions made and approach taken during the procurement process.

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

**PURCHASE ORDER** The County's fiscal form or format which is used when making a purchase.

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

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

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

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

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

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

### ***Bid Submission***

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

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

**9. BID SUBMISSION** The submission of a bid will be construed to mean that the bidder is fully informed as to the extent and character of the supplies, material, or equipment required and a representation that the bidder can furnish the supplies, materials, or equipment satisfactorily in complete compliance with the specifications.

All bids shall comply with the following:

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

**(b)** A bid return envelope, if provided with the Bid Specifications, should be used with the bid sealed inside. If the bid response does not fit into the envelope, the bid envelope should be taped onto the outside of the sealed box or package with the bid inside. If using a commercial delivery company which requires use of their shipping package or envelope, Bidders sealed bid, labeled as detailed below, should be placed within the shippers sealed envelope to ensure that the bid is not prematurely opened. All bids must have a label on the outside of the package or shipping container outlining the following information:

**“BID ENCLOSED”** (bold print, all capitals)  
IFB or RFP Number  
Bid Submission date and time

In the event that a Bidder fails to provide such information on the return bid envelope or shipping material, the County reserves the right to open the shipping package or envelope to determine the proper bid number or Product group, and the date and time of bid opening. Bidder shall have no claim against the receiving entity arising from such opening and such opening shall not affect the validity of the bid or the procurement. Notwithstanding the County's right to open a bid to ascertain the foregoing information, Bidder assumes all risk of late delivery associated with the bid not being identified, packaged or labeled in accordance with the foregoing requirements.

**10. FACSIMILE SUBMISSIONS** Unless specifically authorized by the terms of the Bid Specifications,

facsimile bids ARE PROHIBITED AND SHALL NOT BE ACCEPTED. Where the bid specifications are silent as to the submission of bids by facsimile, no fax bids shall be permitted or accepted. Where specifically authorized, the following rules and conditions apply:

- (a) FAX number(s) indicated in the Bid Specifications must be used.
- (b) Access to the facsimile machine(s) is on a "first come, first serve" basis, and the Purchasing Agent bears no liability or responsibility and makes no guarantee whatsoever with respect to the Bidders access to such equipment at any specific time.
- (c) Bidders are solely responsible for submission and receipt of the entire facsimile bid by the Essex County Purchasing Agent prior to bid opening and must include on the first page of the transmission the total number of pages transmitted in the bid, including the cover page. Incomplete, ambiguous or unreadable transmissions in whole or in part may be rejected at the sole discretion of the Purchasing Agent.
- (d) Facsimile bids are fully governed by all conditions outlined in the Bid Documents and must be submitted on forms or in the format required in the Bid Specifications, including the executed signature page and acknowledgment.

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

**12. LATE BIDS** Any bid received at the specified location after the time specified will be considered a late bid. A late bid shall not be considered for award unless acceptance of the late bid is in the best interests of Essex County and either (a) no timely bids meeting the requirements of the Bid Documents are received, or (b) in the case of a multiple award, an insufficient number of timely bids were received to satisfy the multiple award. Delays in United States mail deliveries or any other means of transmittal, including couriers or agents of Essex County, shall not excuse late bid submissions. Otherwise, all late bids will not be considered and will be returned unopened to the bidder. The bidder assumes the risk of any delay in the mail or in the handling of the mail by employees of the County. Whether sent by mail or by means of personal delivery, the bidder assumes responsibility for having his bid deposited on time at the place specified.

**13. BID CONTENTS** Bids must be complete and legible. All bids must be signed. All information required by the Bid Specifications must be supplied by the Bidder on the forms or in the format specified in the Bid Specifications. No alteration, erasure or addition is to be made to the Bid Documents. Changes may be ignored by the Purchasing Agent or may be grounds for rejection of the bid. Changes, corrections and/or use of white-out in the bid or Bidders response portion of the Bid Document must be initialed by an authorized representative of the Bidder. Bidders are cautioned to verify their bids before submission, as amendments to bids or requests for withdrawal of bids received by the Purchasing Agent after the time specified for the bid opening, may not be considered. All lines must have an indication of bidders response whether it be "o", "N/A" or a dollar figure. All lines must be filled in to indicate bidder acknowledgment of the request. Bids that do not have all applicable lines filled in on bid sheet may be disqualified as a non-responsive bid. The Purchasing Agent shall not assume there is "no charge" when lines are left empty.

Bidders must submit with bid detailed specifications, circulars, warranties and all necessary data on items he proposes to furnish. This information must show clearly that the item offered meets all detailed specifications herein. The Purchasing Agent reserves the right to reject any bid if its compliance with the specifications is not clearly evident. If item offered differs from the provisions contained in these specifications such differences must be explained in detail, and bid will receive careful consideration if such deviations do not depart from the intent of these specifications and are to the best interests of Essex County as interpreted by the Purchasing Agent of Essex County.

It is the responsibility of the bidder to offer a product that meets the specifications of the manufacturer model as listed.

All stock electrical items must be listed and approved by Underwriters' Laboratories, Inc.

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

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

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

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

No extraneous term(s), whether or not deemed "material," shall be incorporated into a contract unless the Purchasing Agent expressly accepts each such term(s) in writing. Acceptance and/or processing of the Bid shall not constitute such written acceptance of Extraneous Term(s).

**15. CONFIDENTIAL / TRADE SECRET MATERIALS** Confidential, trade secret or proprietary materials as defined by the laws of the State of New York must be clearly marked and identified as such upon submission. Bidders/Contractors intending to seek an exemption from disclosure of these materials under the *Freedom of Information Law* must request the exemption in writing, setting forth the reasons for the claimed exemption, at the time of submission. Acceptance of the claimed materials does not constitute a determination on the exemption request, which determination will be made in accordance with statutory procedures.

**16. PREVAILING WAGE RATES - Public Works and Building Services Contracts** If any portion of work being bid is subject to the prevailing wage rate provisions of Labor Law, the following shall apply:

**(a) "Public Works" and "Building Services" – Definitions**

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

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

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

**(c) Wage Rate Payments / Changes During Contract Term** The wages to be paid under any resulting contract shall not be less than the prevailing rate of wages and supplements as set forth by law. It is required that the Contractor keep informed of all changes in the Prevailing Wage Rates during the contract term that apply to the classes of individuals supplied by the contractor on any projects which result from this contract which are subject to the provisions of the *Labor Law*. Contractor is solely liable for and must pay such required prevailing wage adjustments during the contract term as required by law.

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

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

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

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

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

**(e) Days Labor - Defined for Article 8, Public Works (For Purposes of Article 8 of the Labor Law)** No laborer, worker or mechanic in the employ of the contractor, subcontractor or other person doing or contracting to do all or part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day or more than five days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. "Extraordinary emergency" shall be deemed to include situations in which sufficient laborers, workers and mechanics cannot be employed to carry on public work expeditiously as a result of such



restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the Essex County Purchasing Agent for the preservation of the contract site or for the protection of the life and limb of the persons using the contract site.

## **17. TAXES**

(a) Unless otherwise specified in the Bid Specifications or set forth in this clause, the quoted bid price includes all taxes applicable to the transaction.

(b) Purchases made by Essex County and certain non-County Authorized Users are exempt from New York State and local sales taxes and, with certain exceptions, federal excise taxes. To satisfy the requirements of the New York State Sales tax exemption, either the Purchase Order issued by a County Agency or the invoice forwarded to authorize payment for such items will be sufficient evidence that the sale by the Contractor was made to the County, an exempt organization under Section 1116 (a) (1) of the *Tax Law*. Non-County Authorized Users must offer their own proof of exemption where required. No person, firm or corporation is, however, exempt from paying the State Truck Mileage and Unemployment Insurance or Federal Social Security taxes, which remain the sole responsibility of the Bidder/Contractor. For tax free transactions under the Internal Revenue Code, the Essex County Registration Number is 14 6002889.

(c) Purchases by Authorized Users other than Essex County may be subject to such taxes, and in those instances the tax should be computed based on the bid price and added to the invoice submitted to such entity for payment.

**18. EXPENSES PRIOR TO AWARD** Essex County is not liable for any costs incurred by a Bidder in the preparation and production of a bid or for any work performed prior to contract award and/or issuance of an approved Purchase Order.

**19. ADVERTISING BID RESULTS** A Bidder in submitting a bid agrees not to use the results therefrom as a part of any commercial advertising without the prior written approval of the Purchasing Agent. In addition to any other sanctions or remedies available to it in law or equity, the Purchasing Agent may suspend from bidding on its requirements or terminate a contract of any Bidder/Contractor who violates the terms of this clause.

## **20. PRODUCT REFERENCES**

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

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

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

Specifications. Where such use is not practical, suitable, or permitted by the Bid Specifications, Contractor shall deliver new materials in accordance with the "Warranties & Guaranties" set forth below.

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

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

**22. PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS** Bids offering Products which are manufactured or produced in public institutions will be rejected.

## **23. PRICING**

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

**(b) Net Pricing** Prices must be net, including transportation, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination(s) indicated in the Bid Specifications, subject only to the cash discount. If the award is to be made on another basis, transportation and other charges must be prepaid by the Contractor and added to the invoice as a separate item, unless otherwise required in the Bid Specifications.

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

If a price is written in numbers and alpha, the alpha will govern.

Prices shall be net FOB any point in Essex County, New York. Price quoted shall include all delivery costs. Prices shall be net, including transportation and delivery charges fully prepaid by the successful bidder to destination indicated in the proposal. If award is made on any other basis, transportation charges must be prepaid by the successful bidder and added to the invoice as a separate item. In any case, title shall not pass until items have been delivered and accepted by the County.

## **24. DRAWINGS**

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

**(b) Drawings Submitted During the Contract Term** Where required by the Bid Specifications to develop, maintain and deliver diagrams or other technical schematics regarding the scope of work, Contractor shall be required to develop, maintain, deliver and update such drawings on an ongoing basis at no additional charge. Contractor shall be responsible for updating drawings and plans during the contract term to reflect additions, alterations, and deletions. Such drawings and diagrams shall be delivered to the Authorized

Users representative as required by the Bid Specifications. Where required, Contractor shall furnish to Authorized User in a timely manner the required drawings representing the then current, "as modified" condition of all product included in the scope of work.

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

**25. SITE INSPECTION** Where Bidder is required by the Bid Specifications to deliver or install Product, or to service installed product(s) or equipment, Bidder shall be given an opportunity and shall be required to inspect the site prior to submission of the Bid, including environmental or other conditions or pre-existing deficiencies in the installed product, equipment or environment, which may affect Bidders ability to deliver, install or otherwise provide the required product. All inquiries regarding such conditions may only be made in writing. Bidder shall be deemed to have knowledge of any deficiencies or conditions which such inspection or inquiry might have disclosed, and to have included the costs of repair in its bid. Bidder must provide a detailed explanation of work intended to be performed under this clause. Bidder shall be required to remedy any pre-existing deficiencies or conditions at the commencement of the contract term. Reimbursement for the cost of repairing the conditions or deficiencies shall be separately enumerated in the bid.

## **26. SAMPLES**

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

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

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

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

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

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

**27. ADDENDA / INTERPRETATION** No verbal interpretation of the intent of any of the specifications or other Contract Documents will be made before receipt of bids. Requests for interpretations prior to receipt of bids must be presented, in writing, to the Purchasing Agent, 100 Court Street, P.O. Box 217, Elizabethtown, NY 12932, and to be given consideration must be received by the Purchasing Agent at least seven (7) days prior to the date set for the opening of bids.

Any interpretation, and any additional information or instruction will, if issued, be in the form of a written Addendum or Addenda sent to all holders of Contract Documents at the addresses furnished therefor, at least five (5) days prior to the date of the opening of bids.

Failure of any bidder to receive any Addenda shall not relieve such bidder from any obligation under this bid as submitted. All Addenda so issued shall become a part of the Contract Documents.

### ***Bid Evaluation***

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

Where a bidder is requested to submit a bid on individual items and/or on a total sum or sums, the right is reserved to award bids on individual items or on total sums. The County reserves the right to award in whole or in part based on the lowest responsible bid.

The following three items will automatically render a bid unacceptable to Essex County:

- a. Failure to sign bid proposal page.
- b. Failure to include necessary bid deposit (as required).
- c. Failure to sign and submit non-collusive bidding certificate.

It shall be fully understood that any deviations from the inclusion of the above items will be grounds to see the bid as non-compliant and will not be considered for award.

The Purchasing Agent reserves the right to reject such bids, as in his opinion, are incomplete, conditional, obscure, or which contain irregularities of any kind including unbalanced bids. One in which the amount bid for one or more separate items is substantially out of line with the current market prices for the materials and/or work covered thereby.

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

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

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

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

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

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

**35. QUANTITY CHANGES PRIOR TO AWARD** The Purchasing Agent reserves the right, at any time prior to the award of a specific quantity contract, to alter in good faith the quantities listed in the Bid Specifications to conform with requirements. In the event such right is exercised, the lowest responsible Bidder meeting specifications will be advised of the revised requirements and afforded an opportunity to extend or reduce its bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its bid price may result in the rejection of its bid and the award of such contract to the lowest responsible Bidder who accepts the revised requirements.

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

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

## **TERMS & CONDITIONS**

**38. CONTRACT CREATION / EXECUTION** Except as may be otherwise provided by law or by the Purchasing Agent, upon receipt of all required approvals a Contract shall be deemed executed and created with the successful Bidder(s) upon the Purchasing Agent's mailing or electronic communication to the address on the bid of (a) a Letter of Acceptance, (b) a fully executed contract, or (c) a Purchase Order authorized by the Purchasing Agent.

**39. COMPLIANCE WITH LAWS, ETC.** The Bidder shall comply with all the provisions of the laws of the State of New York and of the United States of America which affect municipalities and municipal contracts, and any and all State and Federal rules and regulation, and of amendments and additions thereto, insofar as the same shall be applicable to any contract awarded hereunder with the same force and effect as if set forth at length herein. The Bidder's special attention is called to the following laws: *General Municipal Law* Section 1-03-d, *State Finance Law* Section 167-b prohibiting the purchase of tropical hardwood products, and the New York State Public Employee Safety & Health Act of 1980.

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

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

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

**41. SCOPE CHANGES** The Purchasing Agent reserves the right, unilaterally, to require, by written order, changes by altering, adding to or deducting from the contract specifications, such changes to be within the general scope of the contract. The Purchasing Agent may make an equitable adjustment in the contract price or delivery date if the change affects the cost or time of performance.

With respect to any specific quantity stated in the contract, the Purchasing Agent reserves the right after award to order up to 20% more or less (rounded to the next highest whole number) than the specific quantities called for in the contract. Notwithstanding the foregoing, the Purchasing Agent may purchase greater or lesser percentages of contract quantities should the Purchasing Agent and Contractor so agree.

**42. ESTIMATED QUANTITY CONTRACTS** Estimated quantity contracts are expressly agreed and

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

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

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

All Purchase Orders issued pursuant to contracts let by the Purchasing Agent must bear the appropriate contract number and, if necessary, required State approvals. Unless otherwise specified, all Purchase Orders against centralized contracts will be placed by Authorized Users directly with the Contractor and any discrepancy between the terms stated on the vendors order form, confirmation or acknowledgment, and the contract terms shall be resolved in favor of the terms most favorable to the Authorized User.

If, with respect to an agency specific contract, a Purchase Order is not received within two weeks after the issuance of a Contract Award Notification, it is the responsibility of the Contractor to request in writing that the appropriate Authorized User forward a Purchase Order. If, thereafter, a Purchase Order is not received within a reasonable period of time, the Contractor shall promptly notify the appropriate purchasing officer in Essex County. Failure to timely notify such officer may, in the discretion of the Purchasing Agent and without cost to the State, result in the canceling of such requirement by the Purchasing Agent with, at the Purchasing Agents discretion, a corresponding reduction in the contract quantity and price.

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

The County must be notified twenty-four (24) hours in advance of delivery. The County reserves the right to deny acceptance of delivery if this notice is not given, at no cost to the County.

The successful bidder shall be responsible for delivery of items in good condition at point of destination, and shall file with the carrier all claims for breakage, imperfections, and other losses, which will be deducted from invoices. The Purchasing Agent will note for the benefit of successful bidder when packages are not received in good condition. Carton shall be labeled with purchase order or contract number, successful bidders name and general statement of contents. Failure to comply with this condition shall be considered sufficient reason for refusal to accept the goods.

Unless otherwise stated in the specifications, all items must be delivered into and placed at a point within the building as directed by the shipping instructions or the Purchasing Agent. The successful bidder will be required to furnish proof of delivery in every instance.

Unloading and placing of equipment and furniture is the responsibility of the successful bidder, and the County accepts no responsibility for unloading and placing of equipment. Any costs incurred due to the failure of the successful bidder to comply with this requirement will be charged to him. No help for unloading will be provided by the County, and suppliers should notify their truckers accordingly.

All deliveries shall be accompanied by delivery tickets or packing slips. Ticket shall contain the following information for each item delivered:

Contract Number and/or Purchase Order Number  
Name of Article  
Item Number (if applicable)  
Quantity  
Name of the Successful Bidder

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

#### **47. SHIPPING / RECEIPT OF PRODUCT**

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

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

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

**48. TITLE AND RISK OF LOSS** Notwithstanding the form of shipment, title and risk of loss shall not pass from the Contractor to the Authorized User until the Products have been received, inspected and accepted by the receiving entity. Acceptance shall occur within a reasonable time or in accordance with such other defined acceptance period as may be specified in the Bid Specifications. Mere acknowledgment by Authorized User personnel of the delivery or receipt of goods (e.g. signed bill of lading) shall not be deemed or construed as acceptance of the Products received. Any delivery of Product which is substandard or does not comply with the Contract terms, may be rejected or accepted on an adjusted price basis, as determined by the Purchasing Agent.

**49. RE-WEIGHING PRODUCT** Deliveries are subject to re-weighing at the point of destination by the receiving entity. If shrinkage occurs which exceeds that normally allowable in the trade, the receiving



entity shall have the option to require delivery of the difference in quantity, or to reduce the payment accordingly.

**50. PRODUCT SUBSTITUTION** In the event a specified manufacturers Product listed in the Contractors Bid becomes unavailable or cannot be supplied by the Contractor for any reason (except as provided for in the Force Majeure Clause below) a Product deemed by the Purchasing Agent to be the equal or better of the specified commodity or service must be substituted by the Contractor at no additional cost or expense to the Authorized User. Unless otherwise specified, any substitution of Product prior to the Purchasing Agents approval may be cause for cancellation of contract.

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

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

**53. REPAIRED OR REPLACED PRODUCT / COMPONENTS** Where the Contractor is required to repair, replace or substitute Product or components under the Contract, the repaired, replaced or substituted Product shall be subject to all terms and conditions for new Product set forth in the contract, including product warranties.

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

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

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

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

**57. PERFORMANCE / BID BOND** Essex County reserves the right to require the Bidder/Contractor to furnish without additional cost, a performance, payment or bid bond or negotiable irrevocable letter of credit or other form of security for the faithful performance of the contract, whenever the Purchasing Agent in his/her sole discretion deems such bond or security to be in Essex County's best interest. Where required, such bond or other security shall be in the form prescribed by the Purchasing Agent.

#### **58. STOP / SUSPENSION OF WORK**

(a) **Stop Work Order** The Purchasing Agent reserves the right to stop the work covered by this contract at any time that the successful Contractor becomes unable or incapable of performing the work or meeting any requirements or qualifications set forth in the contract. In the event of such stopping, the Purchasing Agent shall have the right to arrange for the completion of the work in such manner as it may deem advisable and if the cost thereof exceeds the amount of the bid, the successful Contractor shall be liable for any such cost on account thereof.

(b) **Suspension of Work Order** The Purchasing Agent, in his/her sole discretion, reserves the right to suspend any or all activities under this contract, at anytime, in the best interests of the State or Issuing Entity. In the event of such suspension, the contractor will be given a formal written notice outlining the particulars of such suspension. Examples of the reason for such suspension include, but are not limited to, a budget freeze on County spending, declaration of emergency, or other such circumstances. Upon issuance of such suspension of work, the Contractor is not to accept any purchase orders, as specified in the Suspension Order. Activity may resume at such time as the Purchasing Agent issues a formal written notice authorizing a resumption of work.

**59. CANCELLATION** A contract may be canceled by the Purchasing Agent, and/or an Authorized User may cancel its participation, license or service order under the contract, at the Contractors expense upon non-performance, or upon a determination that Contractor is non-responsive, or non-responsible.

**60. FORCE MAJEURE** The Contractor shall not be responsible for delay resulting from its failure to perform if neither the fault nor negligence of the Contractor, its officers, employees or agents contributed to such delay and the delay is due directly to acts of God, wars, acts of public enemies, strikes, fires or floods, or other similar cause beyond the control of the Contractor, or for any of the foregoing which affect subcontractors or suppliers and no alternate source of supply is available to the Contractor. In such event, Contractor shall notify the Purchasing Agent, by certified or registered mail, of the delay or potential delay and the cause(s) thereof either (a) within ten (10) calendar days after the cause which creates or will create the delay first arose if the Contractor could reasonably foresee that a delay could occur by reason thereof, or (b), if delay is not reasonably foreseeable, within five (5) calendar days after the date the Contractor first had reason to believe a delay could result. The foregoing shall constitute the Contractors sole remedy or excuse with respect to such delay. In the

event performance is suspended or delayed, in whole or in part, by reason of any of the aforesaid causes or occurrences and proper notification is given the Purchasing Agent, any performance so suspended or delayed shall be performed by the Contractor at no increased cost, promptly after such disabilities have ceased to exist unless it is determined in the sole discretion of the Purchasing Agent that the delay will significantly impair the value of the contract to the County or to Authorized Users, whereupon the Purchasing Agent may:

- (a) Accept allocated performance or deliveries from the Contractor. The Contractor, however, hereby agrees to grant preferential treatment to County Agencies with respect to Product subjected to allocation; and/or
- (b) Purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which purchases may be deducted from the contract quantity; or
- (c) Terminate the contract or the portion thereof which is subject to delivery delays, and thereby discharge any unexecuted portion of the contract or the relative part thereof.

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

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

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

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

### **63. INTEREST ON LATE PAYMENTS**

- (a) **County Agencies** The payment of interest on certain payments due and owed by a County agency may be made in accordance with Section 3-a of the *General Municipal Law* at the rate of three percent (3%) per annum.
- (b) **By Non-County Agencies** The terms of Article 11-A apply only to procurements by and the consequent payment obligations of the County. Neither expressly nor by any implication is the County responsible for payments on any purchases made by a Non-County Agency

Authorized User.

**(c) By Contractor** Should the Contractor be liable for any payments to the County hereunder, interest, late payment charges and collection fee charges will be determined and assessed pursuant to Section 18 of the *State Finance Law* to the same extent as though the contract was with the State of New York rather than the County.

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

**(a) Cover / Substitute Performance** Upon the failure of the Contractor to properly perform within the time specified, failure to provide acceptable service, to make immediate replacement of rejected Product when so requested, or upon the revocation of the Contract by the Purchasing Agent for cause, or upon repudiation of the contract by the Contractor, the Purchasing Agent may, with or without formally bidding same:

i. Purchase from other sources to replace the Product rejected, revoked, not timely delivered or repudiated; or

ii. If after making reasonable attempts, under the circumstances then existing, to timely provide acceptable service or acquire replacement product of equal or comparable quality, the Purchasing Agent is unsuccessful, the Purchasing Agent may acquire acceptable service or replacement product of lesser or greater quality.

Such purchases may, in the discretion of the Purchasing Agent, be deducted from the contract quantity.

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

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

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

**(d) Deduction / Credit** Sums due as a result of these remedies may be deducted or offset by the County or Authorized User from payments due, or to become due, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the County or Authorized User the amount of such claim or portion of the claim still outstanding, on demand. The Purchasing Agent reserves the right to determine the disposition of any rebates, settlements, restitution, liquidated damages, etc. which arise from the administration of the contract.

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

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

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

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

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

Contractor further warrants, covenants and represents that any confidential information obtained by Contractor, its agents, subcontractors, officers, or employees in the course of performing its obligations, including without limitation, security procedures, business operations information, or commercial proprietary information in the possession of the County or any Authorized User hereunder or received from another third party, will not be divulged to any third parties. Contractor shall not be required to keep confidential any such confidential material which is publicly available through no fault of Contractor, independently developed by Contractor without reliance on confidential information of the County or Authorized User, or otherwise obtained under the Freedom of Information Act or other applicable New York State Laws and Regulations. This warranty shall survive termination of this Contract for a period of five (5) years. Contractor further agrees to take appropriate steps to instruct its personnel, agents, officers and any subcontractors regarding the obligations arising under this clause to insure such confidentiality.

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

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

**71. WARRANTIES & GUARANTEES** Contractor hereby warrants and guarantees:

- (a) To fully defend, indemnify and save harmless the County, Authorized Users and their respective officers, agents and employees from suits, actions, damages and costs of every name and description arising out of the acts or omissions of Contractor, its officers, employees,

subcontractors, partners, or agents, in any performance under this contract including: i) personal injury, damage to real or personal tangible or intangible property, without limitation; ii) negligence, either active or passive, without limitation, or iii) infringement of any law or of a United States Letter Patent with respect to the Products furnished, or of any copyright, trademark, trade secret or other third party intellectual proprietary rights, without limitation, provided that the County or Authorized User shall give Contractor: (a) prompt written notice of any action, claim or threat of infringement suit, or other suit, promptness of which shall be established by Authorized User upon the furnishing of written notice and verified receipt, (b) the opportunity to take over, settle or defend such action, claim or suit at Bidders sole expense, and (c) assistance in the defense of any such action at the expense of Contractor. Where a dispute or claim arises relative to a real or anticipated infringement, the County or Authorized User may require Bidder/Contractor, at its sole expense, to submit such information and documentation, including formal patent attorney opinions, as the Purchasing Agent shall require.

**(b)** Contractor warrants full ownership, clear title free of all liens, or perpetual license rights to any Products transferred to Authorized User under this Contract, and Contractor shall be solely liable for any costs of acquisition associated therewith without limitation. Contractor warrants that Authorized User will have undisturbed, peaceful use of the Products, including, without limitation, software, object or source codes, custom programming or third party intellectual property rights incorporated or embedded therein, and training modules or Documentation. Contractor fully indemnifies the County and Authorized User for any loss, damages or actions arising from a breach of said warranty without limitation.

**(c)** To pay, at its sole expense, all applicable permits, licenses, tariffs, tolls and fees and give all notices and comply with all laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the contract.

**(d)** Unless recycled or recovered materials are available in accordance with the "Recycled & Recovered Materials" clause, Product offered shall be standard new equipment, current model of regular stock product with all parts regularly used with the type of equipment offered; and no attachment or part has been substituted or applied contrary to the manufacturers recommendations and standard practice. Every Product, including any substituted or replacement unit delivered, must be guaranteed against faulty material and workmanship for a period of one year from and after the date the unit is accepted unless otherwise specified by the County or Authorized User. Notwithstanding the foregoing, when the manufacturers standard guarantee for Product or any component thereof exceeds one year, the longer guarantee period shall apply to such unit or component thereof delivered under this contract. Furthermore, the Contractor agrees to extend its warranty period with regard to any Product delivered by the cumulative periods of time, after notification, during which the Product requires servicing or replacement (down time) or is in the possession of the Contractor, its agents, officers or employees. If during the regular or extended warranty periods faults develop, the Contractor shall promptly repair or, upon demand, replace the defective unit or component part affected. All costs for labor and material and transportation incurred to repair or replace defective goods during the warranty periods shall be borne solely by the Contractor, and the County or Authorized User shall in no event be liable or responsible therefore. This warranty shall survive any termination of the contract in accordance with the warranty term.

**(e)** Where the provision of services requires the replacement or repair of Product, any replaced or repaired component, part or Product shall be new and shall, if available, be replaced by the original manufacturers component, part or Product. All proposed substitutes for the original manufacturers installed Product must be approved by the Authorized User before installation. The Product or part shall be equal to or of better quality than the original Product being replaced. Any Product replaced by the Contractor under the contract shall be guaranteed for one (1) year from the date of replacement and replaced at no cost to the Authorized User if found defective during that time.

(f) Prior to award and during the Contract term and any renewals thereof, Contractor must establish to the satisfaction of the Purchasing Agent that it meets or exceeds all requirements of the bid and any applicable laws, including but not limited to, permits, insurance coverage, licensing, proof of coverage for workman's compensation, and shall provide such proof as required by the Purchasing Agent. Failure to do so may constitute grounds for the County to cancel or suspend this contract, in whole or in part, or to take any other action deemed necessary by the Purchasing Agent.

The Contractor further warrants and guarantees:

- i. His/Her/Its products against defective material or workmanship and to repair or replace any damages or marring occasioned in transit.
- ii. To furnish adequate protection from damage for all work and repair damages of any kind for which he or his workmen are responsible, to the building or equipment, to his own work, or to the work of other successful bidders.
- iii. To carry adequate insurance to protect the County from loss in case of accident, fire, theft, etc.
- iv. That all deliveries will be equal to the accepted bid sample.
- v. That the equipment delivered is standard, new, latest model of regular stock product or as required by the specifications; also that no attachment or part has been substituted or applied contrary to manufacturer's recommendations and standard practice. Every unit delivered must be guaranteed against faulty material and workmanship for a period of at least one year from date of delivery. If during this period such faults develop, the successful bidder agrees to replace the unit or the part affected without cost to the County. Any merchandise provided under the contract which is or becomes defective during the guarantee period shall be replaced by the successful bidder free of charge with the specific understanding that all replacements shall carry the same guarantee as the original equipment. The successful bidder shall make any such replacement immediately upon receiving notice from the County.
- vi. That all manufacturers product warranties and guarantees shall be furnished to the County, and that the County's rights thereunder shall not be in any way impaired or limited.

**72. YEAR 2000 WARRANTY** The following Year 2000 warranty applies to procurements of:

- A) Product**, including: i) equipment incorporating embedded software or other technology (e.g. copiers, elevators, security systems), ii) software, or iii) other technology; or
- B) Services** including: i) consulting, integration, code or data conversion ii) maintenance or support services, iii) data entry or processing, or iv) contract administration services (e.g. billing, invoicing, claim processing).

This Year 2000 Warranty shall survive beyond termination or expiration of the Contract through: a) one year, b) December 31, 2000, or c) the Contractor or Third Party Manufacturers stated Year 2000 warranty term, whichever is longer. Nothing in this warranty statement shall be construed to limit any rights or remedies otherwise available under this Contract for breach of warranty.

**(a) Definitions** For purposes of this warranty, the following definitions shall apply:

- i. **"Product"** shall include, without limitation: any piece or component of equipment, hardware, firmware, middleware, custom or commercial software, or internal

components or subroutines therein which perform any date/time data recognition function, calculation, comparing or sequencing. Where services are furnished (e.g., maintenance, consulting, systems integration, code or data conversion, data entry) the term "Product" shall include resulting deliverables.

ii. **"Contractors Product"** shall include all Product delivered under this Contract by Contractor other than Third Party Products.

iii. **"Third Party Product"** shall include product manufactured or developed by a corporate entity independent from Contractor and provided by Contractor on a non-exclusive licensing or other distribution agreement with the third party manufacturer. "Third Party Product" does not include product where Contractor is: (a) a corporate subsidiary or affiliate of the third party manufacturer/developer; and/or (b) the exclusive re-seller or distributor of product manufactured or developed by said corporate entity.

(b) **Warranty Disclosure** At the time of bid for individual or agency specific contracts, or at the time of ordering Product or Product quote for Essex County centralized contracts, Contractor must disclose in writing to Authorized User:

i. **For Contractor Product and Products (including, but not limited to, Contractor and/or Third Party Products and/or Authorized Users Installed Products) which have been specified to perform as a system:** Compliance or non-compliance of the Products individually and as a system with the Warranty set forth below; and

ii. **For Third Party Product not specified to perform as part of a system:** compliance on the grounds that the Contractor has passed-through the third party manufacturer Year 2000 Warranty or non-compliance based upon the fact that a) Contractor indicates that they can not pass through the third party manufacturers Year 2000 Warranty or b) there is no third party manufacturers Year 2000 Warranty to pass through.

**NOTE: AN ABSENCE OR FAILURE TO FURNISH THE REQUIRED WRITTEN WARRANTY DISCLOSURE SHALL BE DEEMED A STATEMENT OF COMPLIANCE BY THE CONTRACTOR OF THE PRODUCT(S) OR SYSTEM(S) IN QUESTION WITH THE YEAR 2000 WARRANTY STATEMENT SET FORTH BELOW.**

(c) **Year 2000 Warranty** Year 2000 Warranty "compliance" shall be defined in accordance with the following warranty statement:

**Warranty Statement:** Contractor warrants that Product(s) furnished pursuant to this Contract shall, when used in accordance with the Product documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000, including leap year calculations. Where a purchase requires that specific Products must perform as a package or system, this warranty shall apply to the Products as a system.

In the event of any breach of this warranty, Contractor shall restore the Product to the same level of performance as warranted herein, or repair or replace the Product with conforming Product so as to minimize interruption to Authorized Users ongoing business processes, time being of the essence, at Contractors sole cost and expense. This warranty does not extend to correction of Authorized Users errors in data entry or data conversion.

(d) **YEAR 2000 Warranty on Services** Where Contractor is providing ongoing services,



including but not limited to: i) consulting, integration, code or data conversion ii) maintenance or support services, iii) data entry or processing, or iv) contract administration services (e.g. billing, invoicing, claim processing), in addition to the foregoing Year 2000 warranty on service deliverables, Contractor warrants that services shall be provided in an accurate and timely manner without interruption, failure or error due to the inaccuracy of Contractor's business operations in processing date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000, including leap year calculations. Contractor shall be responsible for damages resulting from any delays, errors or untimely performance resulting therefrom, including but not limited to the failure or untimely performance of such services.

## **GENERAL**

**73. APPLICABILITY** In addition to the terms contained in **Part I (General - All Procurements)**, the terms contained in **Part II (Software & Technology Procurements)** apply to software and technology procurements.

### **74. DEFINITIONS - Part II**

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

**ENTERPRISE** The business operations in the United States of a Licensee or Enterprise Participant, without regard to geographic location where such operations are performed or the entity actually performing such operations on behalf of Licensee or Enterprise Participant. For the County of New York, "business operations" shall be defined as the business operations of all Agencies, as defined in Part I.

**ENTERPRISE LICENSE** A contract which grants Enterprise Participants unlimited license rights to access, use and/or execute Product within the Enterprise.

**ENTERPRISE PARTICIPANTS** One or more Licensees, as defined in Part I, participating in an Enterprise License.

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

**LOGICAL PARTITION** A subset of the processing power within a CEC which has been divided through hardware and/or software means (i.e. *Processor Resources/System Manager [PR/SM]*) so as to limit the total processing power which is accessible by an operating system image by individual users or individual software products.

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

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

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

**SOURCE CODE** The programming statements or instructions written and expressed in any language

understandable by a human being skilled in the art which are translated by a language compiler to produce executable machine Object Code.

**TERMS OF LICENSE** The terms and conditions set forth in the Contract which are in effect and applicable to a Product order at the time of order placement, and only such additional terms as are consistent therewith or more advantageous to the Authorized User as are set forth on the individual Product order form executed and approved by both Authorized User and Contractor.

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

## **TERMS AND CONDITIONS**

**75. SOFTWARE LICENSE GRANT** *Unless otherwise set forth in the Bid Specifications or Contract, where Product is acquired on a licensed basis the following shall constitute the license grant:*

(a) **License Scope** Licensee is granted a non-exclusive, perpetual license to use, execute, reproduce, display, perform, or merge the Product with other product within its business enterprise in the United States. Licensee shall have the right to use and distribute modifications or customizations of the Product to and for use by any Authorized Users otherwise licensed to use the product, provided that any modifications, however extensive, shall not diminish manufacturers proprietary title or interest. No license, right or interest in any trademark, trade name, or service mark is granted hereunder.

(b) **License Term** The license term shall commence upon the License Effective Date. Where the terms of license permit licensing on a non-perpetual basis, the license term stated in the Contract shall be extended by the time periods allowed for testing and acceptance.

(c) **Licensed Documentation** Contractor hereby grants to Licensee a perpetual license right to make, reproduce (including downloading electronic copies of the Product) and distribute, either electronically or otherwise, copies of Product Documentation as necessary to enjoy full use of the Product. If commercially available, Licensee shall have the option to require the Contractor to deliver, at Contractors expense: a) One (1) hard copy and One (1) Master Electronic Copy of the Documentation in diskette or CD-ROM format; or b) hard copies of the Product Documentation by type of license in the following amounts, unless otherwise mutually agreed:

- Individual/Named User License – 1 copy per License
- Concurrent Users – 8 copies per site
- Processing Capacity – 8 copies per site

(d) **Product Use** Product may be accessed, used, executed, reproduced, displayed, performed by Licensee to service all Authorized Users of the machine on which Product is installed, up to the capacity measured by the applicable licensing unit stated in the terms of license (i.e. payroll size, number of employees, CPU, MIPS, MSU, concurrent user, workstation).

(e) **Permitted License Transfers** As Licensee's business operations may be altered, expanded or diminished, licenses granted hereunder may be transferred or combined for use at an alternative or consolidated Authorized User site not originally specified in the license, including transfers between Agencies ("permitted license transfers"). Licensee(s) do not have to obtain the approval of Contractor for permitted license transfers, but must give thirty (30) days

prior written notice to Contractor of such move(s) and certify in writing that the Product is not in use at the prior site. There shall be no additional license or other transfer fees due Contractor, provided that: i) the maximum capacity of the consolidated machine is equal to the combined individual license capacity of all licenses running at the consolidated or transferred site. (e.g., named users, seats, or MIPS); and ii) that, if the maximum capacity of the consolidated machine is greater than the individual license capacity being transferred, a logical or physical partition or other means of restricting access will be maintained within the computer system so as to restrict use and access to the Product to that unit of licensed capacity solely dedicated to beneficial use for Licensee.

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

Any third party with whom a Licensee has a relationship for a state function or business operation, shall have the temporary right to use Product (using, for example, but not limited to, JAVA Applets), provided that such use shall be limited to the time period during which the third party is using the Product for the stated function or business activity.

**(g) Archival Back-Up and Disaster Recovery** Licensee may use and copy the Product and related Documentation in connection with: 1) reproducing a reasonable number of copies of the Product for archival backup and disaster recovery procedures in the event of destruction or corruption of the Product or disasters or emergencies which require Licensee to restore backup(s) or to initiate disaster recovery procedures for its platform or operating systems; 2) reproducing a reasonable number of copies of the Product and related documentation for cold site storage. "Cold Site" storage shall be defined as a restorable back-up copy of the Product not to be installed until and alter the declaration by the Licensee of a disaster; 3) reproducing a back-up copy of the Product to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed under paragraph (F) above. "Disaster Recovery" shall be defined as the installation and storage of Product in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development.

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

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

- a. Copy the Product;

- b. Cause or permit reverse compilation or reverse assembly of all or any portion of the Product;
- c. Distribute, disclose, market, rent, lease or transfer to any third party any portion of the Product or the Documentation, or use the Product or Documentation in any service bureau arrangement;
- d. Disclose the results of Product performance benchmarks to any third party who is not an Authorized User without prior notice to Contractor;
- e. Export the Licensed Software in violation of any U.S. Department of Commerce export administration regulations.

**76. ENTERPRISE LICENSE OPTION FOR SOFTWARE** Multiple Authorized Users may license any Product offered under the Contract on behalf of their collective business operations. An Enterprise License shall incorporate the terms set forth in this Part II and the pricing set forth in the Contract, and additionally the following terms:

**(a) Enterprise – Defined** Any Authorized User may be an Enterprise Participant. Enterprise Participants will be enumerated in the Enterprise License, including: i) contact name, ship to and main billing address of each Enterprise Participant, ii) street address of the included End User sites of each Enterprise Participant. The originally defined Enterprise may be modified at any time thereafter, including deletion or addition of Enterprise Participants, sites ownership to locations, provided that Contractor is given written notice and that any additional capacity required by such addition is licensed in accordance with the Enterprise License terms.

**(b) Product Use** Product licensed under this Enterprise Option shall be licensed with the rights set forth in this Part II, without reference to a specific designated system or Licensee, up to the maximum licensed capacity. Product may be used and freely transferable anywhere within the defined Enterprise, including higher or lower performance machines, and Enterprise Participants will not incur an increase in license, support or other charges provided that the aggregate utilization of the Product does not exceed the aggregate Enterprise Licensed capacity.

**(c) Submission of Orders, Billing and Usage Reporting** An Enterprise may be established for order placement and billing as either a “single” or “multiple” point of contact, at Licensees option. Where designated as a “single”, one Enterprise Participant shall be designated as the lead agency and central point for submission of Purchase Orders, usage reporting and billing. Where designated as “multiple” point of contact, each designated Enterprise Participant shall be responsible for submission of Purchase Orders, reporting and billing with regard to its use of Enterprise Licensed Product. For either single or multiple point of contact Enterprises, a) Contractor agrees to hold each Enterprise Participant solely responsible for payment and performance; and b) Contractor shall be responsible for furnishing an annual report to each designated point of contact summarizing overall Enterprise License activity for the preceding twelve months.

**(d) Shipping / Delivery** Contractor shall be responsible for delivery of Master Copies of Enterprise Licensed Product and documentation to Enterprise Participants. Within either “Single” or “Multiple” Enterprise Licenses, shipping and delivery of Master Copies of Product and Documentation shall be the responsibility of Contractor to each “ship to” location specified on the Purchase Order(s). Distribution and installation of Enterprise Licensed Product to End Users at a site shall be the responsibility of the Licensee.

**(e) Enterprise Operating Systems** Unless otherwise specified by the parties, up to ten (10) hardware/operating system combinations for Product shall be included at no additional charge.

The initial ten hardware/operating systems may be specified at any time within five (5) years of the Enterprise License effective date. Additional hardware/operating systems beyond the initial ten (10) may be specified at anytime by the Enterprise, however if additional copies of Product are required for hardware/operating systems beyond the initial ten, the cost for such systems will be as mutually agreed between the parties.

**(f) Product Acceptance** Each Enterprise Participant shall have a right of acceptance, as set forth above in this Part II, only for the first copy of Product for its site(s).

**(g) Enterprise Fees** Enterprise License Fees shall be set forth in the Contract. Notwithstanding the foregoing, the Product license fees for additional copies or units of capacity for Enterprise licensed Product shall not increase by more than six percent (6%) annually each year during the Enterprise License term. Contractor may offer additional discounts/incentives for Enterprise Participants as may be mutually agreed between the parties. Enterprise Participants shall be entitled to aggregate the volume of all Enterprise Participants for purposes of establishing any applicable discounts under the Contract, and Enterprise Licensed Volume shall be aggregated with volume of non-Enterprise Licensed Product otherwise purchased under the centralized Contract. Upon termination of the Enterprise, Enterprise Participants have the right to acquire additional capacity or users at the Enterprise License price for twelve months after the termination of the Enterprise License.

**(h) Technical Support** Unless otherwise mutually agreed, technical support is optional and may be elected individually by Product by each Enterprise Participant. Where an Enterprise Participant is under a current maintenance or technical support contract, such Enterprise Participant shall be entitled to credit any support paid covering any portion of the Enterprise License Term to the fees due under the Enterprise license.

Enterprise Participants shall have the right to partially or wholly de-support a subset of unused Enterprise licensed capacity upon written notice to Contractor at the end of any then - current technical support term without penalty or charge. The capacity for a Program license which has been de-supported must remain inactive and may not be used within the Enterprise unless technical support for such capacity has been reinstated. In the event of de-support, Contractor reserves the right to reasonably determine compatibility of future releases or new programs prior to shipment.

**(i) Merger of Two or More Enterprises** Two or more Enterprises may be merged to form a larger Enterprise for the purpose of sharing and exchanging data at no additional license fee provided that participants give Contractor notice of such merger and that the combined capacity does not exceed the maximum capacity of the individual licenses.

**(j) "Nested" Enterprises** Individual Enterprise License participant(s) may license additional capacity or products for the specific use of a subset of the larger enterprise. Said participant(s) must certify in writing to Contractor that such use is only by the enumerated subset of participants.

**(k) Default** A default by any Enterprise Participant shall entitle the Contractor to the remedies against such participant under the Contract, but shall not be deemed a default by the remaining non-defaulting Enterprise Participants.

**77. PRODUCT ACCEPTANCE** Unless otherwise provided in the Bid Specifications, the County and/or Authorized User(s) shall have sixty (60) days from delivery to accept Product. Failure to provide notice of acceptance or rejection by the end of the period provided for under this clause would constitute acceptance by the County or Authorized User(s) as of the expiration of that period.

Unless otherwise provided in the Bid Specifications, The County or Authorized User shall have

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

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

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

**78. AUDIT OF LICENSED PRODUCT USAGE** Contractor shall have the right to periodically audit, at its expense, use of licensed Product at any site where a copy of the Product resides provided that: i) Contractor gives Licensee or Enterprise Participants at least thirty (30) days advance notice, ii) such audit is conducted during such party's normal business hours iii) each Licensee or Enterprise Participant is entitled to designate a representative who shall be entitled to participant and simultaneously review all information obtained by the audit, and shall be entitled to copies of all reports, data or information obtained by the Contractor; and iv) if the audit shows that such party is not in compliance such party shall be liable for the unlicensed capacity and shall be required to purchase the additional units or rights necessary to bring it into compliance.

**79. OWNERSHIP / TITLE TO CUSTOM PRODUCTS OR PROGRAMMING** Where contract deliverables include custom products or programming, title, rights and interests to such Product(s) shall be determined as follows:

**(a) Definitions**

**Product** For purposes of this section, the term "Product" shall have the meaning set forth in Part I of these *General Specifications*, which includes, but is not limited to: software applications or programming, programming tools, documentation ~including user or training manuals), modules, interfaces, templates, and other elements such as utilities, subroutines, algorithms, formulas, source code, object code, reports, drawings, or data.

**"Existing Product"** is defined as any proprietary material(s) existing or developed independently and not at the expense of Licensee.

**"Custom Product"** is defined as any material(s), exclusive of Existing Product, created, prepared, written, compiled or developed by Contractor, or anyone acting on his behalf for The County or Authorized User pursuant to the Contract.

**(b) Contractor or Third Party Manufacturers Title to Existing Product** Title to Existing Product(s) does not transfer. With respect to such Existing Product(s), whether embedded in or operating in conjunction with Custom Product, Contractor warrants: a) all right, title and interest in Contractors Existing Product(s); or b) all license rights, title and interest in third party Existing

Product(s), which include the right to grant to The County or Authorized User an irrevocable, non-exclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute Existing Product(s). Contractor hereby grants a irrevocable, non-exclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute Existing Product(s) embedded in or transferred for use in conjunction with Custom Product(s). The Licensee agrees to reproduce the copyright notice and any other legend of ownership on any copies made under the license granted under this paragraph prior to distribution or use.

**(c) Title to Custom Product** Title to Custom Product(s), excluding Existing Product, shall be deemed the sole and exclusive property of the County or Authorized User, who shall have all right, title and interest (including ownership and copyrights). For the purposes of the federal copyright law, execution of this contract shall constitute an assignment of all right, title and interest in the Custom Product(s) by Contractor to the County or Authorized User. The County or Authorized User, in its sole discretion, reserves the right to sell Custom Product or to license them on an exclusive or non-exclusive basis to Contractor or other Third Parties. Contractor hereby agrees to take all necessary and appropriate steps to ensure that Custom Product is protected against unauthorized use, execution, reproduction, display, performance, or distribution by or through Contractor, its partners or agents. Notwithstanding this reservation of title, Contractor shall not be precluded from using the related or underlying general knowledge, skills and experience developed in the course of providing the Custom Product in the course of Contractor's business.

**(d) Acquisitions Funded By Tax Exempt Financing** In addition to the foregoing rights under a, b and c, the sale or licensing of Custom Product or rights therein shall not occur until such Product or rights are or become useable, and shall be at fair market value which shall be determined at the time of sale or licensing. Any such transfer shall be pursuant to a separate written agreement. If the Contract deliverables are to be funded through tax exempt financing, the County or Authorized User may assign to a Trustee or other entity for security purposes County or Authorized Users ownership and license rights in Custom and Existing Products. Contractor will cooperate with the County or Authorized User to execute such other documents as may be appropriate to achieve the objectives of this paragraph.

**(e) Other Acquisitions (Not Funded by Tax Exempt Financing)** In addition to the rights set forth above (paragraphs "a", "b" and "c"), the County or Authorized User reserves the right to transfer any or all rights to Custom Materials on an exclusive or non-exclusive basis. Where such transfer (sale or licensing) is provided in the Bid Specifications, Contractor shall include a purchase price for such rights in its bid. Such price shall be offered as a deduction from Contractor's overall Bid or Project Bid price, and shall be weighted as set forth in the bid evaluation criteria, if any. Such rights shall transfer to the successful Bidder/Contractor upon successful completion and acceptance by the County or Authorized User of all contract deliverables. Contractor will cooperate with the County or Authorized User to execute such other documents as may be appropriate to achieve the objectives of this paragraph.

**80. PROOF OF LICENSE** The Contractor must provide to each Licensee who places a Product order either: a) the Product manufacturer's certified License Confirmation Certificates in the name of each such Licensee; or b) a written confirmation from the Product manufacturer accepting Contractors Product invoice as proof of license. Bidder or Contractor shall submit a sample manufacturers certificate, or alternatively such written confirmation from the manufacturer, with the Bid or Contract. Such certificates must be in a form acceptable to the Licensee.

**81. PRODUCT VERSION** Product orders shall be deemed to reference Manufacturers most recently released model or version of the Product at time of delivery, unless an earlier model or version is specifically requested in writing by the County or Authorized User and Contractor is willing to provide such version.

**82. MIGRATION TO CENTRALIZED CONTRACT** The County or Authorized User may obtain

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

**83. NOTICE OF PRODUCT DISCONTINUANCE** In the event that a Product manufacturer proposes to discontinue maintenance or support for Product, Contractor shall (1) notify the County and each Authorized User in writing of the intended discontinuance, and (2) continue to provide maintenance and support for the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than eighteen (18) months from the date of notice, and (3) at The County or Authorized Users option, either a) provided that the County or Authorized User is under maintenance, provide the County or Authorized User with either a Product replacement with equivalent functionality at no additional charge, or b) provide County or Authorized User with the source code for Licensed Product at no additional charge to enable it to continue use and maintenance of the Product.

**84. REINSTATEMENT OF MAINTENANCE** The County or Authorized User shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon written notice to Contractor. In the event that The County or Authorized User discontinues maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product without any additional penalties or other charges, by paying Contractor at rates which would have been due under the contract for the period of time that such maintenance had lapsed, or for twelve months, whichever is less.

**85. NO HARDSTOP / PASSIVE LICENSE MONITORING** Contractor hereby represents, warrants and covenants that the Product and all Upgrades do not and will not contain any computer code that would disable the Product or Upgrades or impair in any way its operation based on the elapsing of a period of time, exceeding an authorized number of copies, advancement to a particular date or other numeral, or other similar self-destruct mechanisms (sometimes referred to as "time bombs", "time locks", or "drop dead" devices) or that would permit Contractor to access the Product to cause such disablement or impairment (sometimes referred to as a "trap door" device). Contractor agrees that in the event of a breach or alleged breach of this provision that The County or Authorized User shall not have an adequate remedy at law, including monetary damages, and that The County or Authorized User shall consequently be entitled to seek a temporary restraining order, injunction, or other form of equitable relief against the continuance of such breach, in addition to any and all remedies to which The County or Authorized User shall be entitled.

**86. ADDITIONAL WARRANTIES / GUARANTEES** Where Contractor or Product manufacturer offers additional or more advantageous warranties than set forth herein, Contractor shall offer or pass through any additional or more advantageous warranties to The County or Authorized Users. In addition to the "Warranties/Guarantees" set forth in Part I, Contractor makes the following warranties.

**(a) Product Performance Warranty** Contractor represents and warrants that the Products delivered pursuant to this contract conform to the manufacturers specifications, performance standards, and documentation and that the documentation fully describes the proper procedure for using the Products in an efficient manner. Contractor does not warrant that software is error-free.

In the event that Contractor does not remedy a substantial breach of this warranty within the cure period, Licensee shall also have the right to terminate any payments due Contractor, with a refund of the any fees prospectively paid from the date of breach.

**(b) Year 2000 Warranty** For all procurements of Product, Contractor must furnish a warranty statement in accordance with the NYS Standard Year 2000 Warranty Compliance Statement set forth in Part I at the time of bid for agency specific contracts or product order for centralized contracts.



**(c) Virus Warranty** Contractor represents and warrants that Licensed Software contains no known viruses. Bidder is not responsible for viruses introduced at Licensees site. For purposes of this provision, "Virus" shall have the meaning set forth in Part II, "Definitions".

A breach of any of the foregoing shall be deemed a material breach of the Contract or any License granted thereunder. The defaulting party shall be given written notice of a warranty breach under this section and shall have a thirty (30) day period to cure such breach.

**87. INDEMINIFICATION THE WARRANTIES SET FORTH IN THESE *GENERAL SPECIFICATIONS* (PARTS I and II) ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

Contractor shall defend, indemnify and save harmless the County and Authorized Users from suits, actions, claims, damages and costs arising under or connected to Contractors actions, and except where express loss liabilities set forth elsewhere in the Contract provide for a higher loss limitation liability than as set forth in this paragraph, or where such express provisions impose Contractor liability on "without limitation", the total liability of Contractor for such claim(s), regardless of the nature and basis for the claim, shall not exceed two (2) times the fees paid for the applicable Product. For any suit, action, claim, damages or costs arising under or are connected to personal injury or property damage, or breach of the title, patent and copyright warranties, Contractor shall be fully liable without limitation.

The County or Authorized User may retain such moneys from the amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted by or against the County or Authorized User, provided however, that Contractor shall not indemnify each such entity to the extent that any claim, loss or damages arising hereunder is caused by the negligence act or failure to act of said entity.

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

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

**NON-COLLUSIVE BIDDING CERTIFICATION**

1. By submission of this bid, the undersigned bidder and each person signing on behalf of such bidder certifies and in the case of a joint bid each party thereto certifies as to its own organization — UNDER PENALTY OF PERJURY, that to the best of the undersigned's knowledge and belief:

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

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

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

2. The undersigned acknowledges and agrees that a bid shall not be considered for award nor shall any award be made where any of the above have not been complied with; provided however, that if in any case the bidder cannot make the foregoing certification, the bidder shall so state and shall furnish with the bid a signed statement which sets forth in detail the reasons therefor. Where one or more of the above has/have not been complied with, the bid shall not be considered for award nor shall any award be made unless the political subdivision, public department, agency or official thereof to which the bid is made, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

3. The undersigned also acknowledges and agrees that the fact that a bidder (a) has published price lists, rates, or tariffs covering items being procured, (b) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (c) has sold the same items to other customers at the same prices being bid, does not constitute, without more, a disclosure within the meaning of paragraph 1 above.

4. The undersigned further acknowledges and agrees that any bid hereafter made to any political subdivision of the state or any public department, agency or official thereof by a bidder which is a corporation or a limited liability company for work or services performed or to be performed or goods sold or to be sold, where competitive bidding is required by statute, rule, regulation, or local law, and where such bid contains the certification referred to in paragraph 1 of this certificate, shall be deemed to have been authorized by the board of directors of the bidder, and such authorization shall be deemed to include the signing and submission of the bid and the inclusion therein of the certificate as to non-collusion as the act and deed of the corporation or limited liability company.

Name of Bidder: \_\_\_\_\_  
(print full legal name)

Date Signed: \_\_\_\_\_ Signature: \_\_\_\_\_

Name of Person Signing Certificate: \_\_\_\_\_  
(print full legal name of signer)

Bidder is (check one): ☐ an individual, ☐ a limited liability partnership, ☐ a limited liability company,  
☐ other entity (specify): \_\_\_\_\_

CONTRACTOR'S ACKNOWLEDGEMENT

(If Corporation)

STATE OF NEW YORK) SS:  
COUNTY OF ESSEX)

On this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, before me personally came \_\_\_\_\_  
\_\_\_\_\_ to me known, and known to me to be the  
\_\_\_\_\_ of the Corporation described in and which executed the within instrument,  
who being duly sworn did depose and say that he, the said \_\_\_\_\_ reside at  
\_\_\_\_\_ and that he is \_\_\_\_\_ of said  
corporation and knows the corporate seal of the said corporation; that the seal affixed to the within  
instrument is such corporate seal and that it was so affixed by order of the Board of Directors of said  
corporation, and that he signed his name thereto by like order.

\_\_\_\_\_  
Notary Public

CONTRACTOR'S ACKNOWLEDGEMENT

(If Individual)

STATE OF NEW YORK) SS:  
COUNTY OF ESSEX)

On this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, before me personally came  
\_\_\_\_\_ to me known, and known to me to be  
the same person described in and who executed the within instrument and he duly acknowledged to  
me that he executed the same for the purpose herein mentioned and, if operating under and trade  
name, that the certificate required by the New York State Penal Law, Sections 440 and 440-b has been  
filed with the County Clerk of Essex County.

\_\_\_\_\_  
Notary Public

CONTRACTOR'S ACKNOWLEDGEMENT

(If Co-Partnership)

STATE OF NEW YORK) SS:  
COUNTY OF ESSEX)

On this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, before me personally came  
\_\_\_\_\_ to me known, and known to me to be a member of the  
firm of and the person described in, and who executed the within instrument in behalf of said firm for  
the purposes herein mentioned and that the certificate required by the New York State Penal Law,  
Sections 440 and 440-b has been filed with the County Clerk of Essex County.

\_\_\_\_\_  
Notary Public