

## **REQUEST FOR PROPOSALS**

NOTICE IS HEREBY GIVEN; that the Undersigned, on behalf of the Town of Lewis, will accept sealed proposals at the Office of the Purchasing Agent until March 6, 2020 at 2:00 P.M. for AUDITING SERVICES.

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/bidders/publicbids.aspx](http://www.co.essex.ny.us/bidders/publicbids.aspx).

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

Town of Lewis 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: February 14, 2020

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

## **A. General Information**

The Town of Lewis in Essex County New York is requesting proposals from qualified Certified Public Accounting firms to perform an audit and other services for the fiscal year ending 2019 2020 and 2021. The audit is to be performed in accordance with generally accepted auditing standards, the standard set forth for financial audits in the General Accounting Offices.

Proposal submissions must be received no later than 2:00 P.M. on March 6, 2020 and should be submitted to:

Linda M. Wolf, CPA  
Purchasing Agent  
Essex County Government Center  
7551 Court St – PO Box 217  
Elizabethtown, New York 12932

Three (3) copies of each proposal must be received in a sealed package with the designation "SEALED PROPOSAL – AUDITING" conspicuously marked on the outer envelope. All proposals will be opened and logged in on the above stated date and time. All proposals submitted will be a matter of public record.

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 bidder shall also submit an executed certificate of compliance with the Iran Divestment Act signed by the bidder or one of its officers as required by the General Municipal Law Sec. 103g.

During the evaluation process, the Town reserves the right, where it may serve the Town's best interest, to request additional information or clarifications from proposers, or to allow corrections of errors or omissions.

The Town will not be liable for any costs incurred by firms associated with the development or delivery of proposals.

Any questions concerning this Request for Proposals should be directed to Linda M. Wolf, CPA, Purchasing Agent at (518) 873-3332.

## **B. Term of Engagement**

The audit term will cover the fiscal years ending December 31, 2019, 2020 and 2021. The Town reserves the right to terminate the agreement at any time through the initial term (or thereafter) with appropriate notice to the audit firm.

### **C. Scope of Work to be performed**

The Town desires the Auditor to express an opinion on the fair presentation of its financial statements in conformity with generally accepted accounting principles.

The services shall include an audit of all funds and account groups. Audit of the Town's general purpose financial statements and the single audit of federal financial assistance programs for the years 2019, 2020 and 2021 and assistance in the compilation of the general-purpose financial statements.

The following reports will require an opinion letter:

General Purpose Financial Statements (Compiled by firm)

Single Audit Reports

In addition to the annual services noted above, other assistance to be included in the bid are:

- ❑ The auditor will also be required to provide assistance in compiling and performing the audit of the Town's Schedule of Expenditures of Federal Awards pursuant to guidelines with OMB Circular A-133 Audits of States, Local Governments, and Not-for-Profit Organizations. The auditor shall complete and sign one copy of the auditor's information section of the Data Collection Form. The Auditor shall provide the Town assistance on preparing the Single Audit package to be mailed to the Federal Audit Clearinghouse and any other agencies required.
- ❑ The auditor shall also be responsible for performing certain limited procedures involving required supplementary information required by the Governmental Accounting Standards Board as mandated by generally accepted auditing standards.

In addition, the auditor will conduct the following separate certifications/opinions:

- ❑ The auditor should also inform management of any new regulations.

Arrangements for these audits will be made with the respective Town Officials. Certifications or opinions are to be completed by the due date as outlined in the annual instructions of the applicable state or federal agency.

The following number of final reports will be turned over to the Town upon completion:

#### **D. Auditing Standards to be followed**

The audits will be conducted in accordance with generally accepted auditing standards (GAAS), government auditing standards (GAS), and the report on the general purpose financial statements shall state whether the general purpose financial statements are presented in accordance with generally accepted accounting principles (GAAP).

The single audit of federal financial assistance will be performed in accordance with the following standards and guidelines:

The Single Audit Act

Circular A-133, revised

AICPA audit and accounting guide, Audits of State and Local Governmental Units

Generally accepted auditing standards (GAAS) established by the AICPA, including SAS No 74, "Compliance Auditing Considerations in Audits of Governmental Entities and Recipients of Governmental Financial Assistance"

Generally accepted government auditing standards (GAS)

Standards for financial audits contained in the "Government Auditing Standards", issued by the U.S. General Accounting Office

The following publications of the Federal Office of Management and Budget "OMB":

Circular A-87 Cost Principles

Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (Common Rule)

Compliance Supplement for Single Audits of State and Local Governments

#### **E. Reporting to the Town Board**

Auditors shall assure themselves that the Town is informed of each of the following:

1. The auditor's responsibility under generally accepted auditing standards.
2. Significant accounting policies.
3. Management judgments and accounting estimates.
4. Audit adjustments.
5. Other information in documents containing audited financial statements.
6. Disagreements with management.
7. Management consultation with other accountants.
8. Major issues discussed with management prior to retention.
9. Difficulties encountered in performing the audit.

## **F. Reports to be issued**

Following the completion of the audit of the fiscal years' financial statements, the auditor shall issue:

1. A report on the Financial Statements of the Town.
2. A report on Compliance and on Internal Control over Financial Reporting Based in an Audit of Financial Statements Performed in Accordance with Government Auditing Standards.
3. A report on Compliance and Internal Control over Compliance Applicable to each Major Federal Award Program and on the Schedule of Expenditures of Federal Awards.
4. A report on recommendations to Enhance Internal Accounting Control.
5. A report on matters required to be communicated under SAS 61 as amended by SAS's 89 and 90.

In the required report(s) on Internal Controls, the auditor shall communicate any reportable conditions found during the audit. A reportable condition shall be defined as a significant deficiency in the design or operation of the internal control structure, which could adversely affect the organization's ability to record, process, summarize and report financial data consistent with the assertions of management in the financial statements. In addition, the following conditions shall be considered reportable:

- Reportable conditions that are also material weaknesses shall be identified as such in the report.
- Non-reportable conditions discovered by the auditors shall be reported in a separate letter to management, which shall be referred to in the report(s) on internal controls.

## **G. Working Paper Retention and Access to Working Papers**

All working papers in reports must be retained, at the auditor's expense for a minimum of three (3) years unless the firm is notified in writing by the Town of the

need to extend the retention period. The auditor will be required to make working papers available, upon request, to the following parties or their designees:

- ❑ Town;
- ❑ U.S. General Accounting Office (GAO);
- ❑ Parties designated by the federal or state governments or by the County as part of an audit quality review process;
- ❑ Auditors of entities of which the County is a sub-recipient of grant funds; and other parties as deemed appropriate or necessary by the County.

In addition, the firm shall respond to the reasonable inquiries of successor auditors and allow successor auditors to review working papers relating to matters of continuing accounting significance.

## TIME REQUIREMENTS

### A. Proposal Calendar

The following is a list of key dates up to and including the date proposals are due to be submitted;

Request for proposals issued \_\_\_\_\_

Due date for proposals \_\_\_\_\_

### B. Notification and Contract Dates

Selection firm notified \_\_\_\_\_

Contract Date \_\_\_\_\_

### C. Date Audit may commence

The Town's management personnel will be available to meet with the firm's personnel to discuss specific scheduling of the 2019 and 2020 audit as soon as the contract is signed.

### D. Schedule for the December 31, 2019 Fiscal Year Audit

The auditor should complete a schedule and plan with estimated dates for the draft and final reports for the 2019 fiscal year.

### E. Schedule for the December 31, 2020 and 2021 Fiscal Year Audit

The auditor should complete each of the following no later than the dates indicated:

- 1) **Detailed Audit Plan** - The auditor shall provide the Town by March 31 of the corresponding fiscal year both a detailed audit plan and a list of all schedules to be prepared by the County.
- 2) **Fieldwork**- The auditor shall complete fieldwork for year-end on or before, but no later than July 31 of the corresponding fiscal year.
- 3) **Draft Reports**- The auditor shall have drafts of the audit report(s) and recommendations to management available for review by the Town by August 30 of the corresponding fiscal year.

**E. Date Final Report is due**

The final report for 2019, 2020, and 2021 due no later than September 15 of the fiscal year.



# PROPOSAL REQUIREMENTS

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## A. General Requirements

1. **Inquiries** – Inquiries concerning the request for proposals and the subject of the request for proposals must be made to:

Linda M. Wolf, Purchasing Agent  
7551 Court Street, P.O. Box 217  
Elizabethtown NY 12932  
518-873-3332

2. **Time and Acceptance** - Each proposal must state that it is a firm proposal that may be accepted within a period of sixty (60) days. Although the contract is expected to be awarded prior to that time, the sixty (60) day period is requested in order to allow for unforeseen delay.
3. **Safeguarding of "Confidential" Information** – Any trade secrets or other data which the proposer does not wish disclosed to other than County personnel involved in the evaluation or contract administration will be kept confidential if identified as follows: Each page shall be identified in boldface at the top and bottom as "Confidential"; and any section of the proposal, which is to remain confidential, should, in addition, be so marked in boldface on the title page of that section. Net cost information may not be deemed confidential.
4. **Cost for proposal preparation** – Any costs incurred by a firm in preparing or submitting proposals are the proposer's sole responsibility. The County will not reimburse any proposer for any costs incurred prior to award.
5. **Declination to Submit Proposal** – Any firm which receives a copy of this RFP but which declines to submit a proposal is requested to notify the County by phone or in writing of such declination.
6. **Exceptions** – Any exceptions to terms, conditions, or other requirements in any part of the RFP must be clearly pointed out in a distinct section of the appropriate cost proposal or technical proposal. Otherwise, the County will consider that all items proposed are in strict compliance with the RFP, and the successful proposer will be responsible for compliance.
7. **Advertising** – In submitting its proposal, the proposer agrees not to use the results there from as a part of any news release or commercial advertising without written approval of the County.

**8. Confidentiality of Proposals** – In submitting a proposal, the proposer agrees not to discuss or otherwise reveal his technical or cost information to any other sources, government or private, until after the award of the contract. Proposers not in compliance with this provision may be disqualified, at the option of the Town, from contract award. Only discussions authorized by the Town are exempt from this provision.

**9. Right to Submitted Materials** – All responses, inquiries, or correspondence relating to or in reference to this RFP, and all other reports, charts, display, schedules, exhibits and other documentation submitted by the proposers, will become the property of the Town when received.

**10. Legal Compliance** – Under penalty of perjury, the signer of any proposal submitted in response to this RFP thereby certifies that this proposal has not been arrived at collusively nor otherwise in violation of any Federal or State laws, rules or regulations.

**11. Proposer's Representatives** - Proposers shall submit the name, address, and telephone number of the person(s) with the authority to bind the firm and answer questions or provide clarification concerning the firm's proposal.

**12. Submission of Proposals** - The following material is required to be received by March 6, 2020 for a proposing firm to be considered:

**a.** Three (2) copies of the "Technical" proposal to include the following:

- (i) Title Page – Title page showing the request for proposals subject; the firm's name; the name, address, and telephone number of the contract person; and the date of the proposal.
- (ii) Table of Contents
- (iii) Transmittal Letter – A signed letter of transmittal briefly stating the proposer's understanding of the work to be done, the commitment to perform the work within the time period, a statement why the firm believes itself to be best qualified to perform the engagement, and a statement that the proposal is a firm and irrevocable offer.
- (iv) Detailed Proposal – The detailed proposal should follow the order set forth in Section B & C of this request for proposals.

**b.** The proposer should send three (2) copies of its "Cost" proposal. Such proposal should contain the estimated dollar cost for professional fees and out-of-pocket expenses for each of the fiscal years ending December 31, 2019, December 31, 2020, and December 31, 2021. The

dollar cost should be broken down between the general-purpose financial statement audit and the single audit,. In addition, the proposal should contain the estimated professional hours to complete each segment of the audit, detailed by partner, manager, supervisor, and staff.

- c. Proposer's should send the completed "Technical" and "Cost" proposals under separate cover to the following address:

Linda M. Wolf, Purchasing Agent, 7551 Court Street, P.O. Box 217  
Elizabethtown, NY  
12932

## **B. Technical Proposal**

1. **General Requirements** – The purpose of the proposal is to demonstrate the qualifications, competence and capacity of the firms seeking to undertake an independent audit of the County in conformity with the requirements of this request for proposals. As such, the substance of proposals will carry more weight than their form or manner of presentation. The proposal should demonstrate the qualifications of the firm and of the particular staff to be assigned to this engagement. It should also specify an audit approach that will meet the request for proposals requirements.

The proposal should address all the points outlined in the request for proposals. The proposal should be prepared simply and economically, providing a straightforward, concise description of the proposer's capabilities to satisfy the requirements of the request for proposals. While additional data may be presented, the following subjects, item Nos. 2 through 9, must be included. They represent the criteria against which the proposal will be evaluated.

2. **Independence** – The firm should provide an affirmative statement that it is independent of the County as defined by generally accepted auditing standards, U.S. General Accounting Office's Government Auditing Standards (1994).
3. **License to Practice in New York State** – An affirmative statement should be included that the firm and all assigned key professional staff are properly licensed to practice in New York State.
4. **Firm Qualifications and Experience** – The proposer should state the size of the firm's governmental audit staff, the location of the office from which the work on this engagement is to be performed and the number and nature of the professional staff to be employed in this engagement on

a full-time basis and the number and nature of the staff to be so employed on a part-time basis.

The firm is also required to submit a copy of the report on its most recent external quality control review, with a statement whether that quality control review included a review of specific governmental engagements.

The firm shall also provide information on the results of any federal or state desk reviews or field reviews of its audits during the past three (3) years. In addition, the firm shall provide information on the circumstances and status of any disciplinary action taken or pending against the firm during the past three

(3) years with state regulatory bodies or professional organizations.

**5. Partner, Manager and Supervisory Staff Qualifications and Experience**

– Identify the principal supervisory and management staff, including engagement partners, managers, other supervisors and specialists who would be assigned to the engagement. Indicate whether each such person is registered or licensed to practice as a certified public accountant in New York State. Provide information on the government auditing experience of each person education for the past three (3) and membership in professional organizations relevant to the performance of this audit. The firm shall provide a schedule for each staff member outlining compliance with CPE requirements. The schedule shall list courses, hours and dates for all professional staff assigned to the audit.

The proposer should identify the extent to which staff to be assigned to the audit reflect the County's commitment to Affirmative Action.

Indicate how the quality of staff over the term of the agreement will be assured. Engagement partners, managers, other supervisory staff and specialists may be changed if those personnel leave the firm, are promoted or are assigned to another office. These personnel may also be changed for other reasons with the express prior written permission of the County. However, in either case, the County retains the right to approve or reject replacements.

Consultants and firm specialists mentioned in response to this request for proposals can only be changed with the express prior written permission of the Town, which retains the right to approve or reject replacements.

Other audit personnel may be changed at the discretion of the proposer provided that replacements have substantially the same or better qualifications or experience.

- 6. Prior Engagements with the Town** List separately all engagements within the last three (3) years, ranked on the basis of total staff hours, for the Town by type of engagement (i.e., audit, management advisory services, other). Indicate the scope of work, date, engagement partners, total hours, the location of the firm's office from which the engagement was performed, and the name and telephone number of the principal client contact.
- 7. Similar Engagements with other Government Entities** – For the firm's office that will be assigned responsibility for the audit, list the most significant engagements (maximum – 5) performed in the last two (2) years that are similar to the engagement described in this request for proposal. These engagements should be ranked on the basis of total entity annual revenue as defined in paragraph 143 of GASB 34. Indicate the scope of work, date, engagement partners, total hours, and the name and telephone number of the principal client contact.
- 8. Specific audit approach** – The proposal should set forth a work plan, including an explanation of the audit methodology to be followed, to perform the services required in this request for proposals. In developing the work plan, reference should be made to such sources of information as the government's budget and related materials, organizational charts, manuals and programs, and financial and other management information systems.

Proposers will be required to provide the following information on their audit approach:

- a. Level of staff and number of hours to be assigned to each proposed segment of the engagement.
- b. Sample size and the extent to which statistical sampling is to be used in the engagement.
- c. Extent of use of EDP software in the engagement.
- d. Type and extent of analytical procedures to be used in the engagement.
- e. Approach to be taken to gain and document an understanding of the Town's internal control structure.
- f. Approach to be taken in determining laws and regulations that will be subject to audit test work.
- g. Approach to be taken in drawing audit samples for purposes of tests of compliance.

**9. Identification of anticipated potential audit problems –**

The proposal should identify and describe any anticipated potential audit problems, the firm’s approach to resolving these problems and any special assistance that will be requested from the Town.

**10.**

**NO DOLLARS SHOULD BE INCLUDED IN THE TECHNICAL PROPOSAL**

**C. Sealed Dollar Cost Bid**

- 1. Total All-Inclusive Maximum Price** – The dollar cost bid should contain all pricing information relative to performing the audit engagements as described in the request for proposals. The total all-inclusive maximum price to be bid for each engagement is to contain all direct and indirect costs, including all out-of-pocket expenses.

The Town will not be responsible for expenses incurred in preparing and submitting the technical proposal or the dollar cost bid. Such costs should not be included in the proposal.

The first page of the dollar cost bid should include the following information:

- a. Name of Firm.
- b. Certification that the person signing the proposal is entitled to represent the firm, empowered to submit the bid, and authorized to sign a contract with the Town.
- c. A Total All-Inclusive Maximum Price for each of the ensuing engagements with detail by report for the years ending December 31, 2019, 2020, and 2021. **Rates by Partner, Specialist, Supervisory and Staff Levels Times Hours Anticipated for Each** – The second page of the dollar cost bid should include a schedule of professional fees and expenses with total estimated hours that supports the total maximum price.

- 2. Out-of-Pocket Expenses Included in the Total All-Inclusive Maximum Price and Reimbursement Rates** – Out-of-pocket expenses for firm personnel (e.g., travel, lodging and subsistence) will be reimbursed at the rates used by the County for its employees. All estimated out-of-pocket expenses to be reimbursed should be presented on the second page of the dollar cost bid. All expense reimbursements will be charged against the total all-inclusive maximum price submitted by the firm.

3. **Rates for Additional Professional Services** – If it should become necessary for County to request the auditor to render any additional services to either supplement the services requested in this request for proposals or to perform additional work as a result of the specific recommendations included in any report issued on this engagement, then such additional work shall be performed only if set forth in an addendum to the contract between the County and the firm.
  
  4. **Manner of Payment** – Progress payments will be made on the basis of hours of work completed during the course of the engagement and out-of-pocket expenses incurred in accordance with the firm’s dollar cost bid proposal. Interim billing shall cover a period of not less than a calendar month.
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## EVALUATION PROCEDURES

### A. Review of Proposals

The Selection Committee will review qualifications of the proposals. Firms with unacceptably low technical qualifications will be eliminated from further consideration.

After the qualifications for each firm has been established, the dollar cost bid will be examined.

The Town reserves the rights to retain all proposals submitted and use any idea in a proposal regardless of whether that proposal is selected.

### B. Evaluation Criteria

Proposals will be evaluated using three sets of criteria. Firms meeting the mandatory criteria will have their proposals evaluated and scored for both technical qualifications and price. The following represent the principal selection criteria that will be considered during the evaluation process.

#### 1. Mandatory Elements

- a. The audit firm is independent and licensed to practice in New York State.
- b. The firm has no conflict of interest with regard to any other work performed by the firm for the Town.
- c. The firm adheres to the instructions in this request for proposal on preparing and submitting the proposal.
- d. The firm submits a copy of its last external quality control review report and the firm has a record of quality audit work.
- e. The audit firm's professional personnel are Certified Public Accountants and have received adequate continued professional education within the preceding two years.

#### 2. Technical Quality (Maximum Points – 60)

- a. Expertise and Experience (maximum points – 40)
  - (i) The firm's past experience and performance on comparable local governmental engagements.
  - (ii) The local firm's commitment to the government sector including professional memberships, assistance to clients in obtaining Certificates of Achievement for Excellence in



Financial reporting (CAFR), development of government practice, and commitment to staff development in governmental accounting and auditing.

- (iii) Single audit experience within the local office. Other specific experience and projects completed by the local firm to assist comparable governments to enhance operations and internal controls, and address current issues facing government including relevant experience related to accessing and implementing GASB 34.

b. Audit Approach (maximum points – 20)

- (i) Adequacy of proposed staffing plan for various segments of the engagement.
- (ii) Adequacy of sampling techniques.
- (iii) Adequacy of analytical procedures.
- (iv) Adequacy of audit plan for electronic data processing function.
- (v) Use of computer-aided audit techniques.

**3. Price (Maximum Points – 40)**

Cost will not be the primary factor in the selection of a firm. The proposed price will be graded based upon the following formula:

Average Bid/Your Bid = X (whereby X cannot exceed 100%)

$X * 20 \text{ points} = \text{Points awarded based on cost}$

**C. Oral Presentations**

During the evaluation process, the Selection Committee at their discretion may request any one or all firms to make oral presentations. Such presentations will provide firms with an opportunity to answer any questions that the Committee may have on a firm's proposal. Not all firms may be asked to make such oral presentations.

**D. Final Selection**

The Town will select a firm based upon the recommendation of the Selection Committee. It is anticipated that a firm will be selected by August 1, 2016.

Following notification of the firm selected, it is expected that a contract will be executed between both parties by August 5, 2016.

### **E. Right to Reject Proposals**

Submission of a Proposal indicates acceptance by the firm of the conditions contained in this request for proposal unless clearly and specifically noted in the proposal submitted and confirmed in the contract between the Town and the firm selected.

The Town reserves the right without prejudice to reject any or all proposals.

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

## **APPENDIX D - STANDARD CLAUSES FOR TOWN CONTRACTS**

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

The parties each acknowledge, covenant and agree that the relationship of the Contractor to the Town 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 Town; and (c) will not make any claim, demand or application for any right or privilege applicable to an officer or employee of the Town, 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 Town:

- (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 Town to the fullest extent allowed by law from and against any and all liability, suits, judgments, orders, causes of action and claims, including but not limited to those for bodily injury, property damage, death, and reasonable attorney's fees, arising out of or in connection with the Contractor's negligence and/or its 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 the Town 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 Town of all damages to property of the Town 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 Town 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 Town 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 Town 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 Town'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 Town 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 Town standard voucher, which includes
    - (i) the Town 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 Town; except that where the payee does not have such number or numbers, the payee, on the invoice or Town 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 Town 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 Town shall not be liable for payment thereof, unless it is submitted to the Town 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 Town's payment obligation, and failure to comply with any or all of said requirements shall entitle the Town 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 Town.

12. **Executory Clause**

The Town 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 Town 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 Town and acknowledges that the Town has provided, or upon request will provide, the Contractor with a description of such substances which may be present in the area of the Town's facility/facilities to which the Contractor may have accessed during the performance of this contract;
- (c) the Contractor acknowledges that the Town 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 Town;
- (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 Town;
- (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 Town in advance of bringing in and/or using such substances in or upon Town property and suggest to the Town appropriate measures to be observed by the Town, 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 Town 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 Town, and any attempts to assign the contract without the Town'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 Town 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 Town Manager within five (5) business days of such conviction, determination or disposition of appeal.

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

The Town shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the Town'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 Town with regard to this contract, any other contract with any Town 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 Town for any other reason, including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The Town shall exercise its set-off rights in accordance with normal Town practices, including, in cases of setoff pursuant to an audit, the acceptance of such audit by the Town 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 Town.

22. **Ownership Of Work Products**



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

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 Town (the "Town"), 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 Town.
- (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 Town 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 Town 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 Town, and in the time and manner designated by the Town or the Secretary, to Protected Health Information in a Designated Record Set, to the Town or, as directed by the Town, 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 Town directs or agrees to pursuant to 45 CFR §164.526 at the request of the Town or an Individual, and in the time and manner designated by the Town 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 Town available to the Town, and/or to the Secretary, in a time and manner designated by the Town or by the Secretary, for purposes of the Secretary determining the Town'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 Town 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 Town or an Individual, in time and manner designated by the Town or the Secretary, information collected in accordance with the above subparagraph (b)(9) of this Agreement, to permit the Town 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 Town or the minimum necessary policies and procedures of the Town; 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 Town 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 Town 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) Town to Inform Contractor of Privacy Practices and Restrictions.

The Town agrees to notify the Contractor of any

- (1) limitation(s) in its notice of privacy practices of the Town 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 Town 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 Town.

The Town 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 Town; 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 Town to Contractor, or created or received by Contractor on behalf of the Town, is destroyed or returned to the Town, 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 Town, or created or received by Contractor on behalf of the Town. 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 Town notification of the

conditions that make return or destruction infeasible. Upon determination by the Town 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 Town's knowledge of a material breach of this paragraph by Contractor, the Town 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 Town, 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 Town 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 Town 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. In addition to those items required at Paragraph 10 of this Appendix, as conditions for payment, each claim of payment shall be accompanied by a Contractor and Sub-Contractor Progress Payment Waiver, Release and Discharge form in the form attached hereto and made a part hereof. All final accompanied by a Contractor and Sub-Contractor Final Payment Waiver, Release and Discharge as in the form attached hereto and made a part hereof. As well as a Contractor Affidavit relative to final payment, a copy of which is attached hereto and made a part of this contract.

28. **Cooperative Purchasing (Piggybacking)**

Pursuant to General Municipal Law §103 and County Law §408-a, any political subdivision or fire company (as both are defined in Section 100 of the GML) or district authorized to make purchases of apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment and supplies may make said purchases under this existing contract (Piggybacking) provided, and on condition that this present contract was **LET TO THE LOWEST RESPONSIBLE BIDDER**. Therefore all terms and condition under this contract are extended to other political subdivisions and governmental entities.

Purchases under this contract by any other political sub-division other than \_\_\_\_\_ shall be pursuant to the terms and conditions of Resolution No. \_\_\_\_ of \_\_\_\_\_ dated \_\_\_\_\_.

29. **New York State Sexual Harassment Laws**

Contractor certifies as to its self or its own organization, under penalty of perjury, that Contractor has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees. Such policy shall, at a minimum, meet the requirements of Section 201-g of the New York State Labor Law. A model policy and training has been created by the New York State Department of Labor and can be found here: <https://www.ny.gov/programs/combating-sexual-harassment-workplace>

## APPENDIX E

### GENERAL SPECIFICATIONS FOR PROCUREMENT CONTRACTS

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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 Town 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 Town 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 Town 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 the Town 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 Town 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 the Town

(d) **Contractors Bid or Proposal**

## 6. DEFINITIONS

Terms used in this document shall have the following meanings:

**AGENCY OR AGENCIES** The Town, acting by or through one or more departments, boards, commissions, offices or institutions of the Town.

**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 the Town to participate in Town 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 the Town 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.

**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 Town Purchasing Agent, a bid not received in such place as may be designated on the Bid Specifications or in the Office of the Town 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 Town, 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 Town 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 Town’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 Town’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 Town 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 Town 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 Town’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 Town 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 the Town 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 the Town, 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 Town. 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 the Town as interpreted by the Town.

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 the Town 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 Town 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 the Town, 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 Town 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 the Town and certain non-Town 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 Town 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 Town, an exempt organization under Section 1116 (a) (1) of the *Tax Law*. Non-Town 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 Town Registration Number is \_\_\_\_\_.

(c) Purchases by Authorized Users other than the Town 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** The Town 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 the Town, 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 Town.

## 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 the Town 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 Town 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 Town 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 the Town:

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

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 Town 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 Town, 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 Town/s or Authorized User's site at the Contractors sole risk and only with the approval of, as the case may be, the Town 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 Town. Prior to an assignment of the right to receive moneys becoming effective, Contractor shall file a written notice of such assignment simultaneously with the Town 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** The Town 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 the Towns 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 Town 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 Town 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 Town 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 Town Treasurer and/or Auditor. The Town Treasurer shall render payment for Agency purchases, and such payment shall be made in accordance with ordinary Town 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 Town or Authorized User may thereafter utilize any remedy available at law or equity.

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

**(a) Town Agencies** The payment of interest on certain payments due and owed by a Town 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-Town Agencies** The terms of Article 11-A apply only to procurements by and the consequent payment obligations of the Town. Neither expressly nor by any implication is the Town responsible for payments on any purchases made by a Non-Town Agency Authorized User.

**(c) By Contractor** Should the Contractor be liable for any payments to the Town 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 Town.

**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 Town 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 Town 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 Town 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 Town 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 Town 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 Town 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 Town 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 Town 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 Town 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 Town, 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 Town 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 Town 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 Town 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 Town 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 Town 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 Town 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 Town 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 Town. 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 Town.

vi. That all manufacturers product warranties and guarantees shall be furnished to the Town, and that the Town's rights thereunder shall not be in any way impaired or limited.

## GENERAL

**72. 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.

### 73. 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 Town, "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 computers 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**

**74. SOFTWARE LICENSE GRANT** *Unless otherwise set forth in the Bid Specifications or Contract, where Product is acquired on a licensed based 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 Town 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.

**75. 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.

**76. PRODUCT ACCEPTANCE** Unless otherwise provided in the Bid Specifications, the Town 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 Town or Authorized User(s) as of the expiration of that period.

Unless otherwise provided in the Bid Specifications, The Town 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 Town 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 Town or Authorized User, and shall be made part of the Contractors standard documentation. The test data shall remain accessible to the Town 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 Town 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 Town 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 Town 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 Town 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.

**77. 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.

**78. OWNERSHIP / TITLE TO CUSTOM PRODUCTS OR PROGRAMMING** Where contract deliverables include custom products or programming, title, rlgths 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 Town 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 Town 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 Town 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 Town or Authorized User. The Town 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 Town or Authorized User may assign to a Trustee or other entity for security purposes Town or Authorized Users ownership and license rights in Custom and Existing Products. Contractor will cooperate with the Town 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 Town 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 Town or Authorized User of all contract deliverables. Contractor will cooperate with the Town or Authorized User to execute such other documents as may be appropriate to achieve the objectives of this paragraph.

**79. 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.

**80. 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 Town or Authorized User and Contractor is willing to provide such version.

**81. MIGRATION TO CENTRALIZED CONTRACT** The Town 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 Town or Authorized Users election to obtain additional Product shall not operate to diminish, alter or extinguish rights previously granted.

**82. NOTICE OF PRODUCT DISCONTINUANCE** In the event that a Product manufacturer proposes to discontinue maintenance or support for Product, Contractor shall (1) notify the Town 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 Town or Authorized Users option, either a) provided that the Town or Authorized User is under maintenance, provide the Town or Authorized User with either a Product replacement with equivalent functionality at no additional charge, or b) provide Town 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.

**83. REINSTATEMENT OF MAINTENANCE** The Town 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 Town 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.

**84. 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 Town or Authorized User shall not have an adequate remedy at law, including monetary damages, and that The Town 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 Town or Authorized User shall be entitled.

**85. 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 Town 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.

**86. 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 Town 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 Town 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 Town 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.

**87. 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 Town, and who shall be directed to release the deposited Source Code in accordance with a standard escrow agreement acceptable to the Town, or iii) will certify to the Town that the Product manufacturer/developer has named the Town, 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 Town 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 Town 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.

**CERTIFICATION OF COMPLIANCE WITH THE IRAN DIVESTMENT ACT**

As a result of the Iran Divestment Act of 2012 (the "Act"), Chapter 1 of the 2012 Laws of New York, a new provision has been added to State Finance Law (SFL) § 165-a and New York General Municipal Law § 103-g, both effective April 12, 2012. Under the Act, the Commissioner of the Office of General Services (OGS) will be developing a list of "persons" who are engaged in "investment activities in Iran" (both are defined terms in the law) (the "Prohibited Entities List"). Pursuant to SFL § 165-a(3)(b), the initial list is expected to be issued no later than 120 days after the Act's effective date at which time it will be posted on the OGS website.

By submitting a bid in response to this solicitation or by assuming the responsibility of a Contract awarded hereunder, each Bidder/Contractor, any person signing on behalf of any Bidder/Contractor and any assignee or subcontractor and, in the case of a joint bid, each party thereto, certifies, under penalty of perjury, that once the Prohibited Entities List is posted on the OGS website, that to the best of its knowledge and belief, that each Bidder/Contractor and any subcontractor or assignee is not identified on the Prohibited Entities List created pursuant to SFL § 165-a(3)(b).

Additionally, Bidder/Contractor is advised that once the Prohibited Entities List is posted on the OGS Website, any Bidder/Contractor seeking to renew or extend a Contract or assume the responsibility of a Contract awarded in response to this solicitation must certify at the time the Contract is renewed, extended or assigned that it is not included on the Prohibited Entities List.

During the term of the Contract, should the County receive information that a Bidder/Contractor is in violation of the above-referenced certification, the County will offer the person or entity an opportunity to respond. If the person or entity fails to demonstrate that he/she/it has ceased engagement in the investment which is in violation of the Act within 90 days after the determination of such violation, then the County shall take such action as may be appropriate including, but not limited to, imposing sanctions, seeking compliance, recovering damages or declaring the Bidder/Contractor in default.

The County reserves the right to reject any bid or request for assignment for a Bidder/Contractor that appears on the Prohibited Entities List prior to the award of a contract and to pursue a responsibility review with respect to any Bidder/Contractor that is awarded a contract and subsequently appears on the Prohibited Entities List.

I, \_\_\_\_\_, being duly sworn, deposes and says that he/she is the \_\_\_\_\_ of the \_\_\_\_\_ Corporation and that neither the Bidder/Contractor nor any proposed subcontractor is identified on the Prohibited Entities List.

\_\_\_\_\_  
SIGNED

SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

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

**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