

ATTACHMENT 1**CONTRACT****NEW YORK STATE DEPARTMENT OF TRANSPORTATION**

F. A. NO.:

P.I.N.:

COMPTROLLER'S CONTRACT NO. C031195**PROJECT: Construction Seat Management Initiative Services**

This Agreement dated **<MMDDYYYY>** pursuant to Transportation Law 14 is by and between the **New York State Department of Transportation** ("NYSDOT" and/or the "STATE"), with its Main Office located at 50 Wolf Road, Albany, New York 12232, and **<Consultant>**., with its principal office and place of business located at **<Address>** (the "Consultant").

WITNESSETH

WHEREAS, pursuant to a request for proposals dated **<MMDDYYYY>**, the STATE has selected the Consultant via a best value competitive RFP process to perform the scope of services and provide the work and deliverables more particularly described in the CSMIN RFP, the Consultant's proposal and Schedule A, Scope of Work Clarifications, annexed hereto, and Consultant agrees to provide the required work, licenses, and deliverables pursuant to the terms hereof.

NOW, THEREFORE, the parties agree as follows:

1.Documents Forming the Agreement. This Agreement entitled "Construction Seat Management Initiative (CSMIN) Services," consists of the following component documents:

- This Agreement, including signature and notary pages and Exhibit A (Consultant Employment Disclosure Form B)
- Appendix A, Appendix A-1, Appendix B and Appendix C (required State and Federal clauses)
- Schedule A: Scope of Work Clarifications
- Schedule B: Deliverables Schedule and Compensation, also referred to as the "Payment Schedule"
- Exhibit B: NYSDOT's Request for Proposals (dated **MONTH DD YEAR**), as Modified, added to the Agreement via reference
- Exhibit C: The Consultant's Proposal, dated **MONTH DD YEAR**, including clarification and possible Best and Final Offer, added to the Agreement via reference

- Exhibit D: Staffing Plan
- Exhibit E: System Requirements Traceability Matrix
- Exhibit F: Other Requirements
- Exhibit G: Glossary

2. *Order of Precedence.* In the event of any conflict, uncertainty or inconsistency in content, language or requirements within this Agreement, the meaning or interpretation of the Agreement shall be in accordance with following order of precedence:

- 1) Appendix A
- 2) Appendix A-1, Appendix B and Appendix C
- 3) This Agreement
- 4) Schedule A
- 5) Schedule B
- 6) Exhibit B
- 7) Exhibit C
- 8) Exhibit D
- 9) Exhibit E
- 10) Exhibit F
- 11) Exhibit G

Any conflict in quality or rigor related to the obligations of the Consultant hereunder shall be resolved in favor of the higher quality or more rigorous requirement.

3. *Definitions.* As used in any of the documents forming this Agreement, the following terms shall have the following meanings (bold font added here only for emphasis):

“CEES” A construction management program that tracks pay items, payments, inspection reports, change orders, and more. Typically used by NYSDOT or municipalities to manage State projects.

“Consultant-Owned Software” and/or **“Proprietary Software”** means Software developed and owned by the Consultant or its subcontractors which either pre-exists, or whose development is not funded by this Agreement.

“Commissioner” means the Commissioner of Transportation of the State of New York or their duly authorized representative.

“CSMIN” Construction Seat Management Initiative

“Developed Software” means any and all CSMIN Software and associated documentation that are specific to the Project Scope of Services and Deliverables developed under this Agreement.

“Enhancement” shall mean any changes or additions to Software, other than Maintenance Releases, New Versions, or modifications, tailoring and/or customizations resulting from Integration Services that improve features or functions, add new features or functions, or improve performance.

“Equipment” for Commercial-Off-the-Shelf Software or Consultant-Owned Software, Equipment consists of any computer or computer system on which such software may be

used pursuant to the relevant license; for Developed Software, Equipment consists of any computer or computer system.

"Error" shall mean any error, problem, or defect resulting from: (i) incorrect coding, or (ii) any failure of a deliverable to meet specifications.

"FHWA" means the Federal Highway Administration, an operating administration of the U.S. Department of Transportation.

"FO" NYSDOT staffed construction field office (a.k.a. an Engineer's Office)

"Government" means the U.S. Government acting through FHWA.

"Integration Services" shall mean the programming and technical support provided by the Consultant to develop modifications to the Software, including services to tailor and customize Software to the Project, as such services may be set forth in the Scope of Services.

"Intellectual Property" means all tangible and intangible property rights, including, but not limited to copyrights, patents, trademarks, trade secrets and any other form of intellectual property rights covering the source code, any databases, software, inventions, training manuals, content, menu structure, speech or sound files, vocabulary, HTML pages/code, graphics, data, look-and-feel, passwords, passwords, encryptions, phone numbers, domain names, systems design, formulas, methods, or other proprietary information in any form or medium..

"LAN" local area network

"Licensed Software" means any Consultant-Owned Software and any Third-Party Software provided by the Consultant pursuant to this Agreement.

"Maintenance Release" shall mean an error correction, maintenance or emergency release of Software, including any modifications or revisions to Software which correct errors in Software.

"New Version" shall mean a new release of Software, other than Enhancements, Maintenance Releases or modifications, tailoring and/or customization resulting from Integration Services, or a new option not previously available which add to any Software significant new features, functions or capabilities or significant improvements in performance. Such new Release/option shall be deemed a New Version rather than a Maintenance Release only if and so long as Consultant continues to maintain, enhance and market the Software without such new Release/option and generally charges its maintenance clients an additional charge.

"Open Source Software" shall mean any software obtained under a license that permits unrestricted use, modification, and redistribution in modified or unmodified form. A subset of open source licenses also require that redistribution (in modified or unmodified form) be accompanied by corresponding source code. Any Open Source Software and the license applicable to it shall be subject to the State's review and approval prior to use. Consultant-Owned or Developed Software shall not be deemed as Open Source Software under this Agreement.

"Payment Schedule" means the items, amounts associated therewith and the compensation method and compensation schedule set forth in **Schedule B**.

"Piggyback Contract" means a Contract let by any department, agency or instrumentality of the United States government, or any department, agency, authority, office, political subdivision or instrumentality of any state or state(s) which is adopted and extended for use by the OGS Commissioner in accordance with the requirements of the State Finance Law.

"Project" means the provision of Seat Management Services to staff in Field Offices across the State, as more fully described in the Scope of Services.

"Production System" means an automated application or process that is used by NYSDOT to conduct day-to-day business.

"Scope of Services" means Exhibit A – Scope of Service Clarifications, followed by NYSDOT's CSMIN RFP for C031195 (includes the RFP itself, the RFP Modifications, the written RFP evaluation clarification question requests, the Technical Demonstration instructions and clarification questions, and the Best and Final Offer [BAFO] request), followed by the Consultant's Proposal, which includes Part I - Technical and Management Proposal, Part II - Cost Proposal Contract: C031195, written RFP evaluation clarification question responses, Technical Demonstration clarification question responses and presentation, and any Consultant's BAFO response).

"SMS" Seat Management Services

"Software" means the computer programs (including any security devices) in object (and, in the case of Developed Software, also source code) form, in whole or part, provided by the Consultant under this Agreement, regardless of media type, including all or any portions of the Software incorporated in another program. Software shall, as appropriate, include Documentation and Maintenance Releases. This includes any software provided by NYSDOT for modification by the Consultant while under this Agreement per this Agreement's Scope of Services.

"Software Modification" shall mean any products resulting from Integration Services, modification, tailoring, and or customization of Software excluding Maintenance Releases, Enhancements or New Versions, performed to Software by or on behalf of the Consultant for the Project as set forth in the Scope of Services.

"Software Documentation" means the manuals, installation instructions and other materials which are provided with the Software whether in printed form or otherwise.

"Subsystem" means an automated application or process that incorporates the capabilities, features, data and/or reporting required of a specific business function or process and that may or may not integrate with other subsystems to serve an enterprise need. For example: General Ledger, Purchasing, Accounts Payable, Accounts Receivable, Inventory Accounting, etc., are all subsystems of an enterprise Finance Information System.

"Support Services" shall mean the support services provided by the Consultant per the Projects's Scope of Services and may include any support services provided in respect to Maintenance Releases, enhancements and/or new versions made to the Software.

"System Documentation" means any manuals, reports, instructions and other materials for design specifications, programming specifications operating and maintenance instructions acquired or developed by the Consultant for the Project.

"Third-Party Commercial-Off-The-Shelf Software" means Software that is ready-made and available for sale, lease, or license to the general public, with functionality and complexity defined by market need and which is not developed by the Consultant or its subcontractors for the Project, but which is acquired commercially and provided by the Consultant.

"Third-Party Software" means any Software provided by the Consultant as part of this Project which is not Consultant-Owned or Developed Software, including but not limited to, Third-Party Commercial-Off-The-Shelf software or Open Source Software.

"User Documentation" means manuals, instructions and other materials acquired, provided or developed by the Consultant for the Project per the Scope of Services.

4. *Performance of Work.* The Consultant shall assume responsibility for the cost and timely accomplishment of all obligations and duties required by this Agreement in an efficient, expeditious and competent manner, whether or not such obligations or duties are performed by the Consultant or its subconsultant(s). The Consultant shall be responsible for acceptable delivery of all subconsultant work under this Agreement.

4.1 *Notice to Proceed.* Consultant will commence the work of the Project upon NYSDOT's issuance of a Notice to Proceed, but in no event later than 14 work days from the approval of this Agreement by the State Comptroller and, if necessary, by the Federal Highway Administration.

4.2 *Consultant Project Management.* Consultant shall appoint a Project Manager who will be responsible for the overall management of Consultant's responsibilities hereunder.

4.3 *NYSDOT Project Management.* The work of the Project shall be performed under the direction and contract administration of NYSDOT and in accordance with the New York State Project Management Methodology, as defined in the New York State Project Management Guidebook. NYSDOT will have a Project Manager serving as the representative of NYSDOT. The Project Manager is the consultant's day-to-day contact for ensuring performance of the work within the Scope of Services and the Payment Schedule; processing payment requisitions; and the initiation and coordination of review of any changes to the Contract Documents. The Project Manager is not the NYSDOT contracting officer, and any amendment to the Contract Documents requires an amended or supplemental agreement signed by the NYSDOT contract officer and any necessary State officials and, if required, the Federal Highway Administration.

4.4 *Performance of Scope of Services.* Consultant shall perform all of the work required by and associated with the Scope of Services in this Agreement in an efficient and expeditious manner and in accordance with all of the terms and conditions of this contract. The consultant shall perform the work in accordance with professional standards and with the diligence and skill expected of a company with extensive experience in the performance of the work of the type described in this Agreement. The consultant shall furnish such personnel and shall procure such materials, machinery,

supplies, tools, equipment and other items, technology, and intellectual property as may reasonably be necessary or appropriate to perform the work in accordance with this Agreement.

4.4.1. *Scope Changes.* NYSDOT reserves the right, unilaterally, to require, by written order, changes by altering, adding to, or deducting from the Scope of Services, such changes to be within the general scope of the Contract. NYSDOT may make an equitable adjustment in the Contract price or delivery date if the change affects the cost or time of performance.

4.4.2. *Consultant Personnel Changes.* Any change of Consultant personnel by the CONSULTANT shall be subject to the prior written approval of the STATE and are subject to NYSDOT's Consultant personnel change process.

4.5 *Extra Work.* If the consultant believes that any work is or may be beyond the scope of the Agreement (extra work), the consultant shall notify the STATE, in writing, via a Project Change Request, of this fact prior to beginning any of the work. The Project Change Request shall contain all the information required by NYSDOT, including but not limited to the following: 1) a short description of the proposed change, 2) a short description of the proposed solution, and 3) the estimated hours to complete the change. The total cost of the change shall include both labor and material costs. The labor cost shall not exceed an amount calculated by multiplying the number of labor hours by the currently applicable hourly rate for each labor category as defined in the Agreement. The consultant shall provide the appropriate documentation to support all material costs stated in the Project Change Request. Detailed estimates for the Project Change Request may need to be developed through Joint Application Development sessions attended by both the consultant and NYSDOT before such a request for approval for extra work can be considered by the STATE.

No extra work shall be started prior to written authorization from the STATE. The STATE shall be the sole judge as to whether or not such work is, in fact, beyond the scope of this Agreement and constitutes extra work. If the STATE determines that extra work is warranted, and additional funds are needed, a Supplemental Agreement providing for compensation and describing the work authorized shall be issued by the STATE to the Consultant for execution after approvals have been obtained from NYSDOT, the NYS Attorney General office, the NYS Office of the State Comptroller and, if required, the Federal Highway Administration. The STATE shall determine the proper method and scheduling of payments for such approved extra work. Upon approval of extra work, the consultant will deliver the Project Change Request at the agreed-upon cost within reasonably close conformance with projected extra work delivery timeframes. The STATE shall be under no obligation to reimburse the Consultant for any extra work performed without the prescribed notification and authorization.

4.5.1 In the event of any claims being made or any actions being brought in connection with the PROJECT, the Consultant agrees to render to the STATE all assistance required by the STATE. Work that the Consultant is obligated to perform in accordance with the Scope of Services shall be performed without cost to the STATE. Compensation for other work performed and costs incurred by the

Consultant in connection with this requirement shall be made in a fair and equitable manner in accordance with Article 4.5, *Extra Work*.

4.6 Disputed Work. If Consultant is of the opinion that any work ordered by NYSDOT to be done as contract work is extra work and not contract work, or that any order of NYSDOT exceeds the work requirements of this Agreement, Consultant shall promptly, within ten (10) work days of receipt of the order or direction, so notify NYSDOT's Project Manager, in writing, explaining Consultant's contention. Consultant must progress the work as required and ordered. In the meantime, Consultant, if it considers the issue unresolved, shall promptly, within ten (10) work days of receipt of NYSDOT's written decision, notify the Commissioner, in writing with copies to the Project Manager, of its contentions relative to the dispute, indicating the substance of previous communication with the Project Manager on the issue and its rebuttal of the previous findings. The Commissioner or his/her designated representative shall make a finding thereon and notify Consultant of same in writing in a timely manner. If such work is determined by the Commissioner or his/her designee to be extra work pursuant to the provisions of this Article, NYSDOT will initiate a Supplemental Agreement.

If the Commissioner or his/her designated representative determines that the work in question is contract work and not extra work, or that the order complained of is proper, he/she shall again direct Consultant to continue the disputed work, and Consultant must promptly comply. Consultant's right to pursue a dispute under this Article for extra compensation will not be affected in any way by Consultant's complying with the directions of the Commissioner or the Project Manager to proceed with the work, provided Consultant continues to keep and furnish documentation of the extra work claimed.

4.7 Coordination with Other Consultants. As required or directed by NYSDOT, Consultant shall cooperate with, and coordinate its work with, any other consultants that may be involved with the PROJECT.

4.8 Damages and Delays. The Consultant agrees that no charges or claim for damages shall be made by the Consultant for any delays or hindrances from any cause whatsoever during the progress of any portion of the work required by this Agreement. Such delays or hindrances, if any, shall be compensated for by an amendment to the Project Schedule and, as applicable, the Budget, subject to the procedures otherwise applicable herein for changes to the Project Schedule and Budget.

5. Project Deliverables, Compensation, and Payment Schedule. A Schedule of Project Deliverables and Compensation for the entire Project is attached hereto as **Schedule B** (together with applicable sub schedules, supporting documentation, or requirements for such documentation, which may be collectively referred to herein as the "**Payment Schedule**"). Consultant shall maintain, and perform within, such Payment Schedule. If at any time the Payment Schedule is exceeded or likely to be exceeded, Consultant shall immediately inform NYSDOT's designated representative. NYSDOT shall determine whether a modification of the work or Payment Schedule may be made and, if not, whether NYSDOT will seek a modification of this Agreement in accordance with paragraphs 4.4.1 and 4.5, which may require a Supplemental Agreement that requires further reviews and approvals, including by NYSDOT, the NYS Attorney General's

office, the NYS Office of the State Comptroller and, if required, the Federal Highway Administration.

6. Project Cost Compensation Methods. Compensation under this Agreement shall be paid in the following manner, as applied to this Project by, within, and according to the Payment Schedule (**Schedule B**):

6.1 One-Time Costs. A total fixed lump-sum cost for One-Time Costs as set forth and according to the billing milestones identified in **Schedule B**.

6.2 Annual Maintenance & Support. Annual costs for maintenance and optional maintenance renewals are calculated based on the number of such items called for under this Agreement and the applicable item-based pricing level thereunder, to be paid for according to the schedule set forth in **Schedule B**.

6.3 Specific Hourly Rates. Item I. Specific Hourly Rates of pay shown in Schedule B for employees assigned to this PROJECT for the commission of Extra Work (per Article 4.5). The Specific Hourly Rates are not subject to audit; however, the number of hours charged is subject to audit. If the Agreement is extended beyond the Agreement's base-term end date, then all of the Specific Hourly Rates of pay shown in Schedule B may be adjusted annually by the lower of either the percent change for the Producer Price Index – Architectural, Engineering, and Related Services (Series ID: PCU5413--5413--) for the most recent 12-month period as calculated by the U.S. Department of Labor - Bureau of Labor Statistics, or 1.5%, subject to current market conditions. If the above Index Series ID is discontinued or becomes unavailable at any time, the STATE reserves the right to implement a comparable Index.

Item II. Actual Direct Non-Salary Costs incurred in fulfilling the terms of this Agreement are subject to audit. For future Extra Work, such costs are to be included in the Agreement via formal Supplemental Agreement. All reimbursement for travel, meals, and lodging shall be reasonably reimbursed, and such reimbursement shall not exceed the prevailing maximum rates established by the State Comptroller.

Item III. Items purchased under this PROJECT shall become the property of the STATE at the completion of the work, or at the option of the STATE, appropriate value shall be established as a credit to the STATE.

Item IV. The number of months of training provided under Training Special Provision 11 in Appendix C is _____.

7. Payment Process; Record Keeping; Audit.

7.1 Payment Requisitions. Consultant shall submit to NYSDOT's representative Project payment requisitions for the work performed by or through Consultant, in accordance with the Payment Schedule (**Schedule B**). Requests to NYSDOT for payment shall contain a complete summary statement of charges and costs and billing invoices for the Project and shall be submitted per NYSDOT's standard consultant reimbursement request (FIN421).

7.2 Payment. The STATE shall pay the Consultant in accordance with Article 11-A of the State Finance Law (Prompt Payment Statute), subject to a maximum NYSDOT obligation reflected in the Payment Schedule (**Schedule B**), the availability of funds, the

approval of NYSDOT, and audit by the State Comptroller. The maximum aggregate amount payable by the State to the Consultant hereunder for the performance and completion of the work under this Agreement is \$_____ unless increased by a supplemental agreement.

7.3 Estimated Quantity Contracts. All quantities or ranges of quantities for provision of goods and services under this Agreement are expressly agreed and understood to be estimates or projections. Payments under this estimated quantity contract are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Agreement term. No guarantee of any quantity(ies) is implied or given.

7.4 Periodic Payment. Payment to the Consultant for the One-time Cost portions of the Project will be made for work performed by Consultant upon acceptance by NYSDOT of deliverables in accordance with the payment milestones referenced in **Schedule B**. For recurring costs for specified items, payment to Consultant will be made on a pre-paid annual basis upon approved requisitions for items actually required by NYSDOT during the upcoming year, less any applicable credits. Additional payments for work added to this Agreement may be paid on a lump-sum basis or on a time and materials basis.

7.5. Final Payment. Section 179 of the State Finance Law requires the STATE to make final payment within thirty (30) calendar days after receipt of an invoice that is properly prepared and submitted. The STATE, in accordance with the provisions of the State Finance Law, has determined that the STATE will require a 60-calendar-day audit period for final payments, at which time the 30-calendar-day interest-free period will commence. The Consultant is required to make final payment to all Sub Contractors and Sub Consultants within ten (10) calendar days of receipt of final payment from the STATE.

7.6 Maintenance of Records. The Consultant shall maintain all books, documents, papers, accounting records, and other evidence pertaining to cost, charges, and fees incurred and make such materials available at its office at all reasonable times during the period of the AGREEMENT and for six years from the date of final payment under the AGREEMENT for inspection by NYSDOT or any authorized representative of the STATE. During the course of the Project, and for three (3) years thereafter, Consultant agrees to retain intact and to provide any data, documents, reports, records, contracts, and supporting materials relating to the Project as the STATE or FHWA may require and to comply with the audit requirements of 49 C.F.R. 18.26, OMB Circular A-128, and any revision or supplement thereto.

7.7 Audit: Completion Procedures.

7.7.1 State's Right to Audit. Upon reasonable notice, Consultant shall permit the Commissioner of Transportation, the State Comptroller, or any other duly authorized agent of the State or Federal Government to inspect all books, records, and accounts relating to the Project.

7.7.2 Inspection by Federal Officials. Consultant agrees to permit the Secretary of Transportation and the Comptroller General of the United States, or their

authorized representatives, to inspect all Project work, materials, payrolls, and other data, and to audit the books, records, and accounts of Consultant and its contractors pertaining to the Project. Consultant agrees to require each third-party contractor to allow the Secretary of Transportation and the Comptroller General of the United States, or their duly authorized representatives, to inspect all work, materials, payrolls, and other data and records involving that contract, and to audit the books, records, and accounts involving that contract as it affects the Project.

7.7.3 The application of the audit provisions herein to fixed-price work are not for the purposes of price adjustment to such fixed-price work, nor shall Consultant's cost information for such work be required to be reported. The STATE may, however, examine unpriced records related to such work for the purposes of verifying performance.

8. Consultant's Liability; Indemnification.

8.1 *Consultant's Liability.* Consultant shall be responsible for all damage to life and property due to intentional acts, negligent acts, errors or omissions of the Consultant, its sub-contractors, agents, or employees in the performance of its service under this Agreement. Further, it is expressly understood that the Consultant shall indemnify and save harmless the STATE from claims, suits, actions, damages, and costs of every name and description to the extent resulting from the negligent performance of the services or activities performed by or on behalf of Consultant under this Agreement, and such indemnity shall not be limited by reason of enumeration of any insurance coverage herein provided.

Negligent performance of service, within the meaning of this Article, shall include, in addition to negligence founded upon tort, negligence based upon Consultant's failure to meet professional standards and resulting in obvious or patent errors in the progression of its work.

Consultant's responsibility and indemnity shall also include but not be limited to liability resulting from any infringement violation by Consultant of proprietary rights, copyrights, trademarks, or right of privacy arising out of the intellectual property furnished by Consultant under this Agreement, except when attributable to the fault or negligence of the STATE, its officers, employees or agents.

Nothing in this Article or in this Agreement shall create or give to third parties any claim or right of action against Consultant or the STATE beyond such as may legally exist irrespective of this Article or this Agreement.

8.2 *Indemnification.* In case an action shall at any time be brought against the State, asserting a allegation or cause of action for which Consultant is putatively liable, the Consultant shall, at its own cost and expense, and without any cost or expense whatever to the STATE, defend such suit and indemnify and save harmless such parties against all costs and expenses thereof, including reasonable attorney fees and expenses, and promptly pay or cause to be paid any final judgment recovered against the STATE; provided, however, that the STATE gives notice to Consultant and thereafter provide all such information as may from time to time be requested by Consultant or its representatives. The STATE shall furnish to Consultant all such information relating to

claims made for injuries, deaths, losses, damages, or destruction of the type covered by this Article as Consultant may from time to time request. The provisions of this Article shall not impinge on the right of any of the State to pursue its own defense in any filed or threatened actions.

8.3 Third Party Claims. If a third-party claim causes NYSDOT's quiet enjoyment and use of the CSMIN Deliverable, including any aspect, functionality or component thereof (hereinafter, the "Deliverable"), to be seriously endangered or disrupted, and that claim is based on acts or omissions of the Consultant, its subcontractors, or the respective employees of agents of the aforesaid, the Consultant shall: 1) replace such Deliverable, without additional charge, by a compatible, functionally equivalent and non-infringing product; 2) modify such Deliverable to avoid the infringement; 3) obtain a license for NYSDOT to continue use of such Deliverable for the term of this Agreement and pay for any additional reasonable fee required for such license; or, 4) if none of the foregoing alternatives are possible even after the Consultant's best efforts, the Consultant shall require NYSDOT to return the infringing item and the Consultant shall issue a refund of the pro rata portion of the entire contract amount based on five years, according to the schedule set forth below, and discharge NYSDOT from its obligation to pay any further license or other fees under this Agreement.

Schedule of Refund	
Year 1	100%
Year 2	80%
Year 3	60%
Year 4	40%
Year 5	20%

8.4 Copyright and Patent Indemnity. The Consultant shall defend, indemnify and shall hold harmless (including reasonable attorneys' fees) the State, NYSDOT, and any employee or agent thereof (each of the foregoing being hereinafter referred to as the "Indemnified Party") against all liability to third parties (other than liability solely the fault of the Indemnified Party) arising from or attributable to a breach of warranty, negligent or intentional act or omission of the Consultant, its subcontractors, or the respective employees or agents of the aforesaid, or the possession or use by NYSDOT, of the Deliverable, including (but not limited to) for the violation of any third party's trade secrets, proprietary information, trademark, copyright, or patent rights in connection with such Deliverable. A party requesting such indemnification shall give the Consultant prompt notice of such a claim. Consultant shall conduct the defense in any such third party action arising as described herein and NYSDOT shall fully cooperate with such defense. This indemnification is limited to the Deliverable including modifications thereto made by the Consultant or with the Consultant's knowledge and consent and does not cover third party claims arising from modifications not authorized by or performed with the knowledge of the Consultant or the use of the Deliverable in a combination or manner not specified by the Consultant. The provisions of this Article shall not impinge

on the right of any of the State to pursue its own defense in any filed or threatened actions.

9. *Insurance.* The Consultant shall procure, at its own sole cost and expense, and shall maintain in force at all times during the term of this contract, including any extensions or renewals until Contract Final Acceptance, the policies of insurance covering all operations under the contract, whether performed by it or its subconsultants as herein below set forth, written by companies authorized by the New York State Insurance Department to issue insurance in the State of New York and that have an A.M. Best Company rating of A minus or better or approved by the Department. The Department may, at its sole discretion, permit the placement of policies with a non-authorized carrier or carriers upon request by the Consultant, accompanied by the documentation required by 11 NYCRR §27.0 *et seq.*; provided that nothing herein shall be construed to require the Department to accept insurance placed with a non-authorized carrier under any circumstances. The Consultant shall deliver to the Department evidence of such policies as the Department deems necessary to verify that the required insurance is in effect.

A. *Conditions Applicable to Insurance.* All policies of insurance required by this agreement must meet the following requirements:

1. *Coverage Types and Policy Limits.* The types of coverage and policy limits required from the Consultant are specified in subarticle B below. Insurance shall apply separately on a per-job or per-project basis.
2. *Policy Forms.* Except as may be otherwise specifically provided herein or agreed in writing by the Department, policies must be written on an **occurrence** basis. In the event that occurrence-based coverage is not commercially available, claims-made policy forms will be considered provided that, at minimum, they include provisions that allow for reporting circumstances or incidents that may give rise to future claims and for an extended reporting period of not less than three (3) years with respect to events that occurred but were not reported during the term of the policy.
3. *Certificates of Insurance/Notices.* Consultant shall provide a Certificate or Certificates of Insurance, in a form satisfactory to the Commissioner, before commencing any work under this contract. Certificates or transmittal correspondence shall reference NYSDOT Contract Number C031195. Certificates shall be mailed to the:

Contract Management Bureau, 6th Floor
New York State Department of Transportation
50 Wolf Rd.
Albany, NY 12232

Unless otherwise agreed, policies shall be written so as to require that the policy will not be (i) canceled; (ii) materially changed; or (iii) permitted to expire or lapse for any reason except upon thirty (30) work days' prior written notice to the Department by Certified Mail, return receipt requested, at the stated address. In addition, if required by the Department, the Consultant shall deliver to the Department, within Forty-Five (45) days of such request, a

copy of any or all policies of insurance not previously provided, certified by the insurance carrier as true and complete. Certificates of Insurance shall:

- a. Be in the form provided by the Department (C218 or successor) unless the Department specifically approves a different form. The ACORD forms of Certificate of Insurance are not acceptable.
 - b. Be signed by an authorized representative of the insurance carrier or producer and acknowledged before a notary public.
 - c. Disclose any deductible, self-insured retention, aggregate limit, or any exclusion to the policy that materially changes the coverage required by the contract.
 - d. Specify the Additional Insureds and Named Insureds as required herein.
 - e. Refer to this Contract by number on the face of the certificate.
 - f. Expressly reference the inclusion of all required endorsements.
 - g. If at any time during the term of this contract, it shall come to the attention of the Department that required insurance is not in effect or that adequate proof of insurance has not been provided, the Department may, at its option:
 - (1) Direct the Consultant to suspend work and not re-enter the premises; with no additional payment or extension of time due on account thereof
 - (2) Withhold further contract payments in accordance with Article 7 of this Agreement
 - (3) Treat such failure as a breach or default of the contract
4. *Additional Insureds.* All insurance policies required, by these specifications, except workers' compensation and professional liability, shall be endorsed to provide coverage to "**The State of New York/New York State Department of Transportation, its agents or employees**" with respect to any claim arising from the Consultant's Work under this contract or as a result of the Consultant's activities. The endorsement shall be effected by endorsement of the applicable policy using ISO form CG 20 10 11 85, CG 20 37 07 04, CG 20 33 07 98, when used in combination with CG 20 37 07 04, or CG 20 33 10 01 or a form (or forms) that provides equivalent coverage.
5. *Primary Coverage.* All insurance policies, excepting workers' compensation, shall provide that the required coverage be primary as to any other insurance that may be available to the Department for any claim arising from the Consultant's Work under this contract, or as a result of the Consultant's activities.
6. *Waiver of Subrogation.* As to every type and form of insurance coverage required from the Consultant, there shall be no right of subrogation against **the State of New York/New York State Department of Transportation, its agents or employees**. To the extent that any of Consultant's policies of insurance prohibit such a waiver of subrogation, Consultant shall secure the necessary permission to make this waiver.

7. *Policy Renewal/Expiration.* At least thirty (30) days prior to the expiration of any policy required by this contract, evidence of renewal or replacement policies of insurance with terms no less favorable to the Department than the expiring policies shall be delivered to the Department in the manner required for service of notice in subdivision (A)(3) above.
8. *Self-Insured Retention/Deductibles.* Consultants utilizing self-insurance programs are required to provide a description of the program for Department approval. Collateralized deductible and self-insured retention programs administered by a third party may be approved. Except as may be specifically provided in the Contract Documents of a particular project, Consultant-administered insurance deductible shall be limited to the amount of the bid deposit or \$100,000, whichever is less. Security is not required if it is otherwise provided to an administrator for an approved risk management program. The Department will not accept a self-insured retention program without security being posted to assure payment of both the self-insured retention limit and the cost of adjusting claims. The Consultant shall be solely responsible for all claim expense and loss payments within any permitted deductible or self-insured retention. If the Consultant's deductible in a self-administered program exceeds the amount of the bid deposit, the Consultant shall furnish an irrevocable Letter of Credit as collateral to guarantee its obligations. Such Letter of Credit or other collateral as may be approved by Department must be issued by a guarantor or surety with an AM Best Company rating of "A minus" or higher. If, at any time during the term of this agreement, the Department, in its sole discretion, determines that the Consultant is not paying its deductible, it may require the Consultant to collateralize all or any part of the deductible or self-insured retention on any or all policies of insurance or, upon failure to promptly do so, the same may be withheld from payments due the Consultant.
9. *Waiver of Indemnities.* The Consultant waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss that is covered by a policy of insurance that is required by this contract. The Consultant waives any right of action it and/or its insurance carrier might have against the Department (including its employees, officers, commissioners, or agents) for any loss, whether or not such loss is insured.
10. *Subconsultants' Insurance.* In the event that any portion of the work described in this contract is performed by an approved subcontractor, the insurance requirements of this Article shall be incorporated into the subconsultant agreement. Subcontractor insurance requirements shall include the requirements for Workers' Compensation, Commercial General Liability, and, if applicable, Commercial Auto and/or Professional Liability. Excess or umbrella insurance is not required for subconsultants. Consultant shall require that Certificates of Insurance meeting the requirements of the Department be provided to the Department documenting the insurance

coverage for each and every subconsultant employed by them to perform work under this contract.

B. Insurance Requirements. The types of insurance and minimum policy limits shall be as follows:

1. *Workers' Compensation and Disability Insurance.* As required by State Finance Law §142, Consultant shall maintain in force Workers' Compensation insurance upon forms required by, or acceptable to, the Workers' Compensation Board for all of Consultant's employees. Consultant shall also maintain disability insurance as required by the Disability Benefits Law of the State of New York.
2. *Commercial General Liability Insurance.* Consultant shall maintain an occurrence form commercial general liability policy or policies insuring against liability arising from premises (including loss of use thereof), personal injury or death, advertising injury, liability insured under an insured contract (including the tort liability of another assumed in a business contract) occurring on, or in any way related to, the premises or occasioned by reason of the operations of Consultant. Such coverage shall be written on an ISO occurrence form (ISO Form CG 00 01 12 07 or a policy form providing equivalent coverage) in an amount of not less than \$1,000,000.00 per occurrence and not less than \$2,000,000.00 aggregate. Unless otherwise provided, the policy or policies of insurance providing the liability coverage shall include:
 - (1) Coverage for liability contractually assumed by the Consultant.
 - (2) All insurance policies required by these specifications, except Workers' Compensation and Professional Liability shall be endorsed to provide coverage to "**the State of New York/New York State Department of Transportation, its agents and employees,**" using ISO form CG 20 10 11 85, CG 20 37 07 04, CG 20 33 07 98, when used in combination with CG 20 37 07 04, or CG 20 33 10 01 or a policy form or forms providing equivalent coverage.
3. *Consultant's Risks.* The Consultant shall be responsible for obtaining any insurance it deems necessary to cover its own risks, including without limitation: 1) business interruption, such as gross earnings, extra expense, or similar coverage; 2) personal property; and/or 3) automobile physical damage and/or theft. In no event shall the NYSDOT be liable for any damage to, or loss of, personal property, or damage to, or loss of, an automobile that is covered by a policy of insurance that is required by this agreement, even if such loss is caused by the negligence of NYSDOT.

10. *Intellectual Property Rights to Licensed Software.* Intellectual property rights to the Software provided under this Agreement other than that governed by Article 11 hereof are as follows:

10.1 *Third-Party Software.* Third-Party Software utilized under this project will be provided on a royalty-free basis to NYSDOT with, as applicable, such other license

terms as negotiated between the Consultant and the third-party or for Commercial-Off-The-Shelf (COTS) software with such terms as provided under the relevant shrink-wrap license and as approved by NYSDOT.

10.2 *Consultant-Owned Software.* This Software is provided by Consultant to NYSDOT, in accordance with the following terms:

10.2.1 Consultant or its Licensors own and retain all rights, title and interests in the Consultant-Owned Software. This Agreement does not transfer ownership rights of any description in the Consultant-Owned Software to NYSDOT or any third party. Notwithstanding the foregoing, Consultant does however, grant a royalty-free, perpetual, transferable, nonexclusive and irrevocable license for all Intellectual Property related to the Licensed Consultant-owned Software for authorized users of the NYSDOT CSMIN Services to use, modify and reproduce the Consultant-Owned Software in connection with NYSDOT's authorized use of the NYSDOT CSMIN Services. This license grant also permits NYSDOT to distribute the Consultant-Owned Software provided under this Agreement to cities, counties, and municipalities and other governmental entities within the State of New York, for all NYSDOT-specific Consultant-Owned Software that is not incorporated into the currently-available version of Consultant's NYSDOT CSMIN Services software unless such other governmental agencies have acquired rights under separate agreement or other legally permissible manner to Consultant's CSMIN Services software.

10.2.2 Such Software licenses shall include in their meaning: 1) any Maintenance Releases, enhancements or New Versions of such Software developed by Consultant or its subcontractors during the term of this Agreement within the Scope of Services or otherwise provided by Consultant or its subcontractors to the CSMIN System and Enhancements related thereto; and 2) all materials, including but not limited to training materials, documentation, and technical information provided to NYSDOT in written form and for use in connection with such Software.

10.2.3 Consultant warrants that it has full power and authority to grant the rights granted by this subarticle to NYSDOT with respect to such Software without the consent of any other person and that neither the performance of services by Consultant nor the license to and use by NYSDOT of the Software, Software Modification, and Software documentation (including the copying and modifying thereof, exclusive of modifications not made by Consultant) will in any way constitute an infringement or violation of any copyright, trade secret, trademark, patent, invention, proprietary information, non-disclosure, contract or any other rights of any third party. In the event of an infringement claim, the Consultant's obligations shall be limited to those as specified in Article 8.3.

10.2.4 Consultant warrants such Software, Software Modification, its license as described herein, and the performance by Consultant of services, to be in compliance with all applicable laws, rules and regulations.

11. *Intellectual Property Developed Under This Agreement.* Rights to intellectual property developed under this Agreement shall be allocated and owned in accordance with the following:

11.1 *Federal Law.* The applicable provisions of Federal Law and regulation provide for the non-Federal parties of an agreement to retain all intellectual property rights developed under this Agreement, subject further to the provisions defining, identifying, allocating, or restricting such rights otherwise set forth herein.

11.2 *Identification of Intellectual Property.* Consultant is responsible for identifying and segregating, in advance, intellectual property that was or will be developed by Consultant or its subcontractors under this Agreement, solely with non-federal funding.

11.3 *Trade Secrets.* The parties shall not publicly disclose information they obtain as a result of this Agreement where such information is marked and identified as proprietary or confidential, and which consists of information such as trade secrets or commercial or financial information that is privileged or confidential within the meaning of §552(b)(4) of Title 5, U.S.C.

11.4 *FHWA License.* Under the FHWA Grant Agreement, the FHWA has reserved a royalty-free, perpetual, transferable, nonexclusive, and irrevocable license to reproduce, publish, modify, or otherwise use in any media which exists currently or in the future, and to authorize others to use any such copyrightable work produced under this Agreement with Federal funds, for Federal Government purposes.

11.5 *Patents.* Rights to inventions made under this Agreement shall be determined in accordance with 37 C.F.R. Part 401. The standard patent rights clause at 37 C.F.R. Section 401.14, as modified below, is hereby incorporated by reference.

- (i) The terms "to be performed by a small business firm or domestic nonprofit organization" shall be deleted from paragraph (g)(1) of the clause;
- (ii) Paragraphs (g)(2) and (g)(3) of the clause shall be deleted; and
- (iii) Paragraph (1) of the clause, entitled "Communications" shall read as follows: "(1) Communications. All notifications required by this clause shall be submitted to the FHWA Division Office."

11.6 *(Reserved) Ownership.*

11.6 *Developed Software* Except as provided above within this Section 11, Consultant or its Licensors own and retain all rights, title and interests in the Developed Software. This Agreement does not transfer ownership rights of any description in the Developed Software to NYSDOT or any third party. Consultant does however, grant a royalty-free, perpetual, transferable, nonexclusive and irrevocable license for all Intellectual Property related to the Licensed Developed Software provided under this Agreement for authorized users of the NYSDOT CSMIN System to use, modify and reproduce the Consultant-Owned Software in connection with NYSDOT's authorized use of the NYSDOT CSMIN Software. This license grant also permits NYSDOT to distribute the Consultant-Owned Software provided under this Agreement to cities, counties, and municipalities and other governmental entities within the State of New York, for all NYSDOT-specific Consultant-Owned Software that is not incorporated into the currently- available version of Consultant's NYSDOT CSMIN System software; unless such other governmental agencies have acquired rights under separate agreement or other legally permissible manner to Consultant's CSMIN System software.

11.7 *Backups.* Consultant shall maintain weekly backups of source code developed, content, and files free from passwords, encryption, or malicious or time-triggered code, and make such backups available upon NYSDOT request.

12. *Escrow and Modification of Source Code (Reserved).*

13. *Training, Support and Maintenance.* Consultant shall offer training in the use and implementation of the CSMIN and any COTS, Developed or Consultant-Owned Software, to NYSDOT staff, consultant, and other structure owners, including but not limited to municipalities, state and local authorities, commissions, and railroads that will be using the System, in accordance with the RFP and any other part of this Agreement.

13.1 *Scope and Duration of Consultant Maintenance and Support of Proprietary, Developed, and/or Licensed Third-Party Software and Systems.* Following initial installation and implementation of the proprietary, developed, or licensed third-party software and related systems involved in the project underlying this Agreement, Consultant shall provide ongoing maintenance and support during the term of this Agreement for such software and systems. Consultant shall, at a minimum, provide NYSDOT with the same level of maintenance and support for Consultant's proprietary, developed, and/or licensed software that Consultant provides to other institutional clients and customers.

13.1.1 *Terms and Conditions of Maintenance.* The maintenance to be provided by Consultant under §13.1 shall include, but not be limited to, providing new releases or updates if issued, and/or patches or bypasses, to address any known problem, i.e., any substantial deviation of unmodified software or systems from their then applicable specifications. Consultant shall provide access to the current version of such software and systems. Consultant's obligation to provide ongoing maintenance shall be limited to the then current version of such software and/or systems, and the immediately preceding version of same for a period of twelve (12) months after it is first superseded. Subject to such additional terms and conditions as may be set forth in Requirements of the RFP, and any other part of this Agreement, Consultant shall, at a minimum, provide NYSDOT with the same level of maintenance for Consultant's proprietary, developed, and/or licensed software that Consultant provides to other institutional clients and customers.

13.2 *Scope and Duration of Consultant Support for NYSDOT Usage of Proprietary, Developed, and/or Licensed Third-Party Software.* The Consultant shall provide technical support during NYSDOT's installation and implementation of the Developed or Consultant-Owned Software and Systems as set forth in Requirements of the RFP, and any other part of this Agreement. Following the initial installation and implementation of the proprietary, developed, or licensed third-party software and related systems involved in the project underlying this Agreement, Consultant shall provide ongoing technical support during the term of this Agreement for NYSDOT usage of such software and systems, which shall cover the software and systems, be of the scope and duration, include the types of support, and be conducted in accordance with the requirements set forth in Requirements of the RFP and any other part of this Agreement.

13.2.1 *Terms and Conditions of Support.*

- (a) Subject to such different or additional terms and conditions as may be set forth in Requirements of the RFP, and any other part of this Agreement, Consultant shall, at a minimum, provide support through a toll-free "800" telephone number connection to Consultant's technical support staff, and through an Internet website through which NYSDOT staff may contact Consultant's technical support staff, at least during the business hours of 7:30 am to 5:00 pm Eastern Standard Time, Monday through Friday, excluding state holidays, in order to present inquiries and/or requests for support and technical assistance, and to obtain such assistance.
- (b) In accordance with the provisions of the Requirements of the RFP, and any other part of this Agreement providing NYSDOT with access to the current version of the proprietary, developed, or licensed third-party software and related systems involved in the project underlying this Agreement, Consultant's obligation to provide ongoing support shall be limited to the then current version of such software and/or systems, and the immediately preceding version of same, for a period of twelve (12) months after it is first superseded.

14 System Acceptance. If NYSDOT determines that the CSMIN has not successfully completed the requirements of the system acceptance during the System Implementation Phase, NYSDOT shall promptly notify Consultant, in writing (hereinafter referred to as "notice of failure"), and shall specify with as much detail as possible in which respects the System does not perform properly. The Consultant shall respond within ten (10) business days with an action plan and schedule to address all issues related to the failure(s). NYSDOT may approve, require changes to, or reject the plan. If NYSDOT rejects the action plan provided by the Consultant in response to the notice of failure, NYSDOT may determine that such rejection means that the Consultant is in material default under this Agreement for the purposes of the default and termination provisions of this Agreement or may, at its sole discretion, afford the Consultant with additional opportunity to cure the default.

14.1 Repeated Failure Constituting Material Breach. If the Deliverable fails to perform properly in accordance with the system acceptance for a second time, NYSDOT may determine that such failure constitutes a material default under this Agreement for the purposes of the default and termination provisions of this Agreement or may afford the Consultant with additional opportunity to cure the default.

14.2 Correction Costs. The Consultant's correction of the product deficiency shall be at no additional cost to NYSDOT, unless the system acceptance failure(s) are the results of Disputed Work within the meaning of Article 4.6 of this Agreement (in which case the remedy within such section applies). The Consultant shall, however, bear sole responsibility for the costs of correction of product deficiencies revealed by such testing, including all previously unanticipated and unscheduled time and effort required for the development of corrective measures.

15. Warranty Provisions. Consultant warrants that, for 18 months from the acceptance of the system per the successful completion of the system acceptance, all CSMIN Software and Systems, including all Service Components, Developed Software, and Consultant-

Owned Software furnished hereunder, both as to each individual element and for the overall CSMIN System, shall be free from significant programming and operational errors which shall prevent it from operating in conformity with the standards set forth in this Agreement.

15.1 If NYSDOT notifies Consultant that any Software, System, or Service fails to conform to the requirements of this agreement during the Warranty period, Consultant shall remedy such failure at no cost to NYSDOT.

15.2 *Warranties for Third-Party Software.* Consultant's warranty obligations as stated in Article 15.0 shall apply to all Third-Party Software, excluding however such Third-Party Software that meets the definition of Third-Party Commercial-Off-The-Shelf Software as defined in this Agreement. Notwithstanding the foregoing, the Consultant shall also be required to provide a work-around solution to any Third-Party Commercial-Off-The-Shelf Software failures, to allow the system to function to the highest extent reasonably possible within a reasonable time frame. In addition, Manufacturer warranties and any other third-party warranties for any Third Party Software, including Third-Party Commercial-Off-The-Shelf Software, shall to the extent permissible, be passed through to NYSDOT.

15.3 *Correction of Defects.* If at any time during the Warranty Period Consultant or NYSDOT discovers one or more defects or errors in the CSMIN Software and Systems or any other respect in which such Software and Systems fail to conform to the provision of any warranty contained in the Agreement, Consultant shall, entirely at its own expense, correct such defect, error, or non-conformity by, among other things, supplying NYSDOT with such corrective codes and making such additions, modifications, or adjustments to the Software as may be necessary to keep all Software in operating order.

15.4 *Warranty Disclaimer.* Consultant disclaims any and all other promises, representations, or warranties not expressly provided for elsewhere in this Agreement, and its attachments and exhibits, to the maximum extent allowable by law, with respect to the software and systems, either express or implied, including but not limited to the implied warranties of merchantability and fitness for a specific purpose, and any warranties that the operation of the software will be uninterrupted or error free.

16. *Suspension and Termination; Bankruptcy.*

16.1 *Suspension or Termination for Convenience of NYSDOT.* NYSDOT may, without cause and for its convenience, upon not less than seven (7) days' written notice to Consultant, suspend Consultant's performance under this Agreement or terminate this Agreement.

16.1.1 Contracts between Consultant and its subconsultants shall provide for their suspension or termination, without cause and for the convenience of Consultant, upon not less than seven (7) days' written notice by Consultant to its contractor, and for closeout compensation in such event for work in progress and materials on order prior to termination, work performed, materials delivered, but not lost profit on the balance of contract work. NYSDOT may, without cause and for its convenience, upon not less than

seven (7) days' written notice to Consultant, require Consultant to suspend or terminate any or all of its contracts pursuant to such provisions.

16.2 Suspension or Termination for Cause. NYSDOT may for cause and, unless in NYSDOT's judgment the public interest requires earlier action, upon not less than seven (7) days' written notice to Consultant, suspend Consultant's performance under this Agreement or terminate this Agreement if Consultant breaches or is in default of any obligation hereunder, including those instances enumerated in the Escrow Agreement, which default is incapable of cure or which, being capable of cure, has not been cured within twenty (20) days after receipt of notice of such default from NYSDOT or within such additional cure period as NYSDOT may authorize. Consultant shall also be deemed in default if: 1) it fails to make reasonable progress as defined by NYSDOT on the CSMIN Services Project in accordance with this Agreement; 2) the CSMIN System does not perform in accordance with the requirements of this Agreement, notwithstanding Consultant's remedial or maintenance efforts; or 3) other material violation of this Agreement that significantly endangers substantial performance of the Project.

16.2.1 In the event of the termination of this Agreement for failure of a Project element or component, or in the performance of the CSMIN Software or Services during the Warranty Period as stated in Article 15.1 above, NYSDOT may: 1) recover from Consultant all costs, fees, and expenses incurred by NYSDOT to remedy such failure, including for elements which are rendered substantially useless as a result of such failure, up to the amount paid to Consultant for the Project element that has so failed; and 2) if such failure is integral to the entire CSMIN Software and Systems, all money paid for the CSMIN Software and Systems, as well as associated services.

16.2.2 In the event of the failure of a Project element or component, or in the performance of the CSMIN Software, Systems, or Services during the Warranty Period as stated in Article 15.1 above, NYSDOT may suspend Consultant's performance, in whole or in part, without terminating this Agreement, and contractually or otherwise remedy the failure at costs to be charged to Consultant or offset against Consultant's compensation under this Agreement. In the event of such suspension or other remedy, Consultant's aggregate liability shall not exceed two hundred percent (200%) of the amount stated in 16.2.1 above.

16.2.3 If a termination is brought about for the convenience of the STATE and not as a result of unsatisfactory performance on the part of the Consultant, final payment shall be made based on the percentage of work satisfactorily completed by the Consultant, as determined by the STATE.

16.2.4 The New York State Department of Transportation reserves the right to terminate this contract in the event it is found that the certification filed by the Consultant in accordance with the requirements contained in State Finance Law §§ 139j & 139k was intentionally false or intentionally incomplete. Upon such finding, the New York State Department of Transportation may exercise its termination right by providing written notification to the Consultant in accordance with the written notification terms of the contract.

16.3 Delivery of Documentation. In the event of suspension or termination pursuant to this Article, Consultant shall secure for and deliver to NYSDOT all

documentation relating to the contracts terminated thereby, including but not limited to any designs, plans or specifications, contract and subcontract documents, tapes or discs, or software.

16.4 *Impact on Project Schedule.* In the event such suspension or termination affects project duration, the impact will be reflected in the project schedule.

16.5 *Suspension or Termination Payments.* In general, suspension of performance or termination of any financial assistance under this Agreement will not invalidate the State's obligation to reimburse Consultant for costs and expenses properly incurred by Consultant and concurred in by the State before the suspension or termination date, to the extent those obligations cannot be canceled. However, if the State determines that Consultant has willfully misused State or Federal assistance funds by the gross negligence or willful failure to make adequate progress; make reasonable use of the Project property, facilities, or equipment; or adhere to the terms of this Agreement, the State reserves the right to require Consultant to refund the entire amount of State funding received by Consultant under this Agreement.

16.6. *Bankruptcy.* Should a petition for bankruptcy be filed by Consultant pursuant to Title 11 USC or its successor statute:

16.6.1 Consultant shall comply with all requirements set forth in 11 USC §365 or any successor statute regarding the assumption, assignment, or rejection of this Agreement. Consultant shall either cure all defaults, compensate actual losses, give adequate assurance of future performance and fulfill all obligations pursuant to 11 USC §365(b)(1) or other applicable law and assume the obligation; or shall reject this Agreement as provided by Bankruptcy Law. If this Agreement is rejected, possession of or rights to contract property, including subcontracts required for the performance of the Project (which is in the public interest), equipment, and deliverables, shall be immediately returned to or transferred and assigned to the State. No sale or assignment of this Agreement shall be permitted without the consent of the State or without compliance with the assumption and assignment provisions under Bankruptcy Law pursuant to 11 USC §365 or its successor statute.

16.6.2 The Debtor may not assume or assign this Agreement if it has been terminated pursuant to the terms hereof prior to the filing for a petition for relief in bankruptcy.

16.7 *Reserved.*

16.8 *Consultant Warranties Surviving Suspension, Termination, or Bankruptcy.* Following a suspension or termination of this Agreement, and/or a Chapter 11 reorganization bankruptcy of Consultant, Consultant's obligations to have provided properly performing software and/or systems as required under this Agreement, and the warranties provided by Consultant to NYSDOT under this Agreement, shall continue in effect for the remainder of the term of this Agreement, without regard to such suspension or termination, and to the fullest extent allowed by federal bankruptcy statutes and case law. Consultant shall not avoid responsibility for failure to provide properly performing software and/or systems as required under this Agreement by asserting that the

suspension or termination of this Agreement, or Consultant's Chapter 11 bankruptcy, has voided the obligations of Consultant's contractual warranties under this Agreement.

16.9 Limitation of Liability/Exclusion of Damages. Except for Licensee's breach of confidentiality obligations hereunder, in no event shall either party be liable to the other for any incidental, indirect, special, consequential or punitive damages related to the software that is not expressly provided for elsewhere in this Agreement and its attachments and exhibits, including without limitation lost profits, costs of delay, any failure of delivery, business interruption, costs of lost or damaged data or documentation, or liabilities to third parties arising from the software's use, even if the party from which such damages are sought has been advised of the possibility of such damages.

17. Reserved (Title to Equipment).

18. Independent Contractors.

18.1 Purpose. The purpose of this Agreement is to promote economic and technical cooperation and efficiency among the Government, State, Consultant, and private entities in pursuing mutually advantageous goals. The relationship of the parties to the Agreement is that of independent contractors and not joint venturers, partners, or agents.

18.2 Officer or Employee of State. Consultant agrees that it will neither hold itself out as nor claim to be an officer or employee of the State and that it will not, by reason hereof, make any claim, demand, or application to or for any right or privilege applicable to an officer or employee of the State, including but not limited to Worker's Compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit.

19. Taxes. The following paragraph 60 of General Specifications by the New York State Office of General Services applies:

19.1. Tax Provisions. Purchases made by the State of New York are not subject to State or Local taxes or Federal Excise taxes. To satisfy the requirements of the New York State sales tax, either the purchase order issued by an agency or institution of New York State for supplies or equipment, or the voucher forwarded to authorize payment for such supplies and equipment, will be sufficient evidence that the sale by a contractor or Consultant was made to the State of New York, an exempt organization under Section 1116(a)(1) of the Tax Law. Exemption certificates for Federal Excise taxes will be furnished upon request by the Office of General Services, Standards and Purchase. No person, firm or corporation is, however, exempt from paying New York State Truck Mileage and Unemployment Insurance or Federal Social Security Taxes.

The address of the Office of General Services, Standards and Purchases is:

Tower Building
38th Floor
Empire State Plaza
Albany, New York 12242

In lieu of NYSDOT furnishing an exemption certificate for excise taxes, Consultant is advised that New York Registration Number 14740026K covers tax-free transactions under the Internal Revenue Code.

20. *Entire Agreement.* This Agreement, together with the Appendices and Exhibits hereto, constitutes the entire agreement between the parties with respect to the subject matter covered, and all prior representations or agreements have been merged into this document and superseded by it.

21. *Amendments.* Amendments to this Agreement, and amended or Supplemental Exhibits, may be made only in writing, signed by both parties and specifically referred to as an amendment to this Agreement or Supplemental Exhibit.

22. *Required Clauses.* Attached hereto and made part of this Agreement, as if set forth fully herein as **Appendix A**, Appendix A-1, Appendix B and Appendix C which cover the required standard clauses for all New York State contracts and federal clauses used in NYSDOT contracts.

23. *Executory Clause.* It is understood by and between the parties hereto that this Agreement shall be deemed executory only to the extent of the moneys available to the State, and no liability on account thereof shall be incurred by the State beyond moneys available for the purposes hereof.

24. *Effective Date.* This Agreement takes effect on the ____ day of _____, 2013.

25. *Successors and Assigns.* All the covenants and obligations of the parties hereunder shall bind their successors and assigns, whether or not expressly assumed by such successors and assigns.

26. *Interpretation.* All Article headings utilized in this Agreement are for convenience only and shall not affect the construction hereof. All Appendices attached hereto are integral parts of this Agreement, and the provisions set forth therein shall bind the parties hereto to the same extent as if such provision had been set forth in its entirety in the main body of this Agreement. Nothing expressed or implied herein shall give, or be construed to give, any person, firm, or corporation, other than the State or Consultant, any legal or equitable right, remedy, or claim under or in respect of this Agreement. Neither this Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified orally. Any supplement or amendment to this Agreement shall be in writing.

27. *Severability.* If any part of this Agreement is determined to be invalid, illegal, or unenforceable, such determination shall not affect the validity, legality, or enforceability of any other part of this Agreement, and the remaining parts of this Agreement shall be enforced as if such invalid, illegal, or unenforceable part were not contained herein.

28. *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall be an original.

29. *Term of Agreement.* The base term of this Agreement, including development, implementation, training, support, and maintenance, will be two (2) years or 24 months, starting from **MONTH DD, YEAR** to **MONTH DD, YEAR**, inclusive. In addition, there are three (3) 12-month optional term extensions, depending on performance, need and

availability of funds, subject to NYSDOT, Attorney General and Office of the State Comptroller approvals, and the Consultant shall be notified of the extension by the State via e-mail before the end of the existing contract term.

30. Assignment or Transfer of Agreement.

30.1 *Consent Required.* As required by the State Finance Law, Section 138, Consultant shall not assign, transfer, convey, sublet, or otherwise dispose of this Agreement or its right, title, or interest therein, or its power to execute such Agreement, to any other person, company, or corporation, without the previous consent, in writing, of NYSDOT.

30.2 *Violation.* If this restriction is violated, NYSDOT may revoke and annul the Agreement and, in that event, the State shall be relieved from any and all liability and obligations thereunder to the person, company, or corporation to whom the Consultant shall assign, transfer, convey, sublet, or otherwise dispose of the Agreement, and such transferee shall forfeit and lose all moneys therefore assigned under said Agreement.

31. *Certification Required by 49CFR, Part 29.* The signatory to this Agreement, being duly sworn, certifies that, EXCEPT AS NOTED BELOW, its company and any person associated therewith in the capacity of owner, partner, director, officer, or major stockholder (five percent or more ownership):

- 1) Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency
- 2) Has not been suspended, debarred, voluntarily excluded, or determined ineligible by any federal agency within the past three years
- 3) Does not have a proposed debarment pending
- 4) Has not been indicted, convicted, or had a civil judgment rendered against it by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past three years

32. *Certification for Federal-Aid Contracts.* The prospective participant certifies, by signing this Agreement to the best of his or her knowledge and belief, that:

- 1) No Federal appropriated funds have been paid, or will be paid, by or on behalf of the undersigned to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- 2) If any funds other than Federal appropriate funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall

complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The prospective participant also agrees, by submitting his or her bid or proposal, that he or she shall require that the language of this certification be included in all lower tier subcontracts which exceed \$100,000 and that all such sub-recipients certify and disclose accordingly.

33. *Application of Federal, State, and Local Laws and Regulations.* To achieve compliance with changing Federal requirements, Consultant agrees to include in all its subcontracts, and shall require its subcontractors to further contractually provide specific notice, that Federal and State requirements may change and that the changed requirements will apply to the Project as required.

34. *Subawards to Debarred Parties.* Consultant acknowledges that it must not make any award, or permit award of any contract or subcontract at any tier for work covered by this Agreement, to any party which is debarred or suspended or otherwise excluded from participation in Federal assistance programs under E.O. 12549, "Debarment and Suspension".

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The Consultant also shall require that the language of this certification be included in all subcontract and lower tier subcontracts which exceed \$100,000 and that all such sub-recipients shall certify and disclose accordingly.

35. *Governing Law.* The parties hereto agree that this Agreement shall be governed by the Laws of the State of New York.

36. *Security and Confidentiality of Information.* Insofar as its rights may be legally restricted, NYSDOT agrees not to reverse engineer or decompile Deliverables or Services outputs delivered only in object code, executable code, or formats subject to similar or greater means of access control (collectively "Secure formats"), nor shall NYSDOT authorize or assist other parties to reverse engineer or decompile Deliverables or Services. Information received as part of this contract shall be considered Confidential Information. The Consultant warrants that it will take the appropriate steps as to its personnel, agents, officers, and any Subcontractors/Subconsultants regarding the obligations arising under this clause to ensure such confidentiality. The Consultant shall have written policies and/or business procedures in place which will protect Confidential Information from unauthorized disclosure, use, access, loss, alteration, or destruction. The Consultant may disclose to other parties, as authorized by the NYSDOT Project

Manager, or as described in the scope of services, only the information necessary to perform services under this contract. However, under no circumstance shall the Consultant communicate with the public or news media without prior authorization from the State's designee. Neither shall the Consultant disclose information deemed confidential by the State nor disclose any other information obtained or developed in the performance of services under this agreement without the written authorization of the State. This warranty shall survive termination of this Contract.

The Consultant shall comply with the provisions of the New York State Information Security Breach and Notification Act, including General Business Law Section 889-aa and State Technology Law Section 208 as enacted by such Act or subsequently amended. In the event of an information security breach resulting in the unauthorized disclosure of personal information, Consultant shall be liable for the costs associated with such breach if caused by Consultant's negligent or willful acts or omissions, or the negligent or willful acts or omissions of the Consultant's agents, officers, employees, or Subconsultants.

36.1 *Non-Disclosure or Confidentiality Agreements.* Consultant shall agree to execute and be bound by any non-disclosure or confidentiality agreements that NYSDOT or any other agency, consortia, corporation, or other entity which requires such non-disclosure or confidentiality agreement to be executed before data, software, code, or other information shall be provided to the CSMIN System. The Consultant's acceptance and execution of such agreements shall not be unreasonably withheld.

37. *Responsibility of the Consultant.* (a) The CONSULTANT shall be responsible for the professional quality, technical accuracy, and the coordination of all services furnished by the CONSULTANT under this contract. The CONSULTANT shall, without additional compensation, correct or revise any errors or deficiencies in its services. However, the STATE may in certain circumstances, provide compensation for such work.

(b) Neither the STATE'S review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the CONSULTANT shall be and remain liable to the STATE in accordance with applicable law for all damages to the STATE caused by the CONSULTANT'S negligent performance or breach of contract of any of the services furnished under this contract.

(c) The rights and remedies of the STATE provided for under this contract are in addition to any other rights and remedies provided by law.

(d) If the CONSULTANT is comprised of more than one legal entity or any group of partners or joint venturers associated for the purposes of undertaking this agreement, each such entity acknowledges and hereby affirmatively represents and agrees that each has the power to bind the CONSULTANT and each of the others hereunder; and as such, each acts both as principal and agent of the CONSULTANT and of each of the others hereunder. Each further acknowledges and agrees that all such entities, partners or joint venturers associated for the purposes of undertaking this agreement shall be jointly and

severally liable to third parties, including but not limited to the STATE, for the acts or omissions of the CONSULTANT or any other entity, partner or joint venturer hereunder.

(e) If the CONSULTANT is comprised of more than one legal entity or any group of partners or joint venturers associated for the purposes of undertaking this agreement, each such entity acknowledges and hereby affirmatively represents and agrees that the respective rights, duties and liabilities of each hereunder shall be governed by the laws of the State of New York, including but not limited to the New York Partnership Law.

38. *Compliance with Consultant Disclosure Laws.* The Consultant shall timely, accurately, and properly comply with the reporting requirements of State Finance Law Subdivision 17 of Section 8 and Subdivision 14 of Section 163, as amended by Chapter 10 of the Laws of 2006, by submitting the New York State Office of the Comptroller's "Form A - State Consultant Services – Contractor's Planned Employment From Contract Start Date Through the End of the Contract Term" and "Form B - State Consultant Services – Contractor's Annual Employment Report" (available through the NYSDOT website under Consultant Contract Reporting Requirements at: <https://www.dot.ny.gov/main/business-center/consultants/forms-publications-and-instructions>).

Annual employment reports should be submitted to the following addresses. It is recommended, however, that consultants check the agency websites annually to confirm the addresses.

By mail:

NYS Office of the State Comptroller

Bureau of Contracts
110 State Street, 11th Floor
Albany, N. Y. 12236

Attn: Consultant Reporting

NYS Department of Civil Service

Alfred E. Smith Building
Albany, N. Y. 12239

Attn: Chapter 10

NYS Department of Transportation:

Reports that are submitted to the NYS Department of Transportation must be submitted electronically, preferably as a Word, Excel, or pdf file via email to: timothy.ameche@dot.ny.gov or his successor.

39. *Contract Migration.* In the event the Consultant is awarded a NYS Centralized Contract for the same products or services, NYSDOT shall be permitted to migrate to that Centralized Contract effective with its commencement date. Such migration shall not operate to diminish, alter, or eliminate any right that NYSDOT otherwise had under the terms and conditions of this Agreement.

39.1 *Extension of Use (Piggybacking).* Any Contract resulting from this bid solicitation may be extended to additional State or governmental jurisdictions or authority upon mutual written agreement between New York State (the lead contracting State) and the Consultant. Political subdivisions and other authorized entities within each

participating State or governmental jurisdiction may also participate in any resultant contract if such State normally allows participation by such entities. New York State reserves the right to negotiate additional discounts based on any increased volume generated by such extensions.

40. Notices.

40.1 All notices permitted or required under this agreement hereunder shall be in writing and shall be transmitted either:

- (a) Via certified or registered United States mail, return receipt requested
- (b) By facsimile transmission
- (c) By personal delivery
- (d) By expedited delivery service
- (e) By e-mail

Such notices shall be addressed as follows or to such different addresses as the parties may from time-to-time designate:

For the New York State Department of Transportation:

Contact Person's Name: William A. Howe, Contract C031195
Title: Director
Address: NYSDOT Contract Management Bureau
 50 Wolf Rd, 6th Fl, Albany, NY 12232
Telephone Number: 518-457-2600
Facsimile Number: 518-457-2875
E-Mail Address: bill.howe@dot.ny.gov

For the Consultant: _____(Name)

Contact Person's Name:
Title:
Address:
Telephone Number:
Facsimile Number:
E-Mail Address:

40.2 Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or e-mail, upon receipt.

40.3 The parties may, from time to time, specify any new or different address in the United States as their address for purposes of receiving notice under this Agreement by giving fifteen (15) days' written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purpose of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems, and/or for dispute resolution.

41. *Iran Divestment Act.* As a result of the Iran Divestment Act of 2012 (Act), Chapter 1 of the 2012 Laws of New York, a new provision has been added to the State Finance Law

(SFL) Section 165-a, effective April 12, 2012. This act may be viewed in its entirety at <http://www.ogs.ny.gov/about/regs/docs/ida2012.pdf>. Pursuant to SFL Section 165-a(3)(b), the Commissioner of the Office of General Services (OGS) has developed and maintains a list (prohibited entities list) of “persons” who are engaged in “investment activities in Iran” (both are defined terms in the law). The list may be found on the OGS website at: <http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf>.

By submitting a bid in response to this solicitation or by assuming the responsibility of a Contract awarded hereunder, Bidder/Contractor (or any assignee) certifies that, it will not utilize, on such Contract, any subcontractor that is identified on the prohibited entities list.

Additionally, any 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 New York State Department of Transportation (NYSDOT) receive information that a Bidder/Contractor (or any assignee) is in violation of the above-referenced certification, NYSDOT will offer the Bidder/Contractor (or any assignee) an opportunity to respond. If the Bidder/Contractor (or any assignee) fails to demonstrate that it has ceased its engagement in the investment which is in violation of the Act within 90 days after the determination of such violation, then NYSDOT shall take such action as may be appropriate including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

NYSDOT reserves the right to reject any bid or request for assignment for an entity that appears on the prohibited entities list prior to the award of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the prohibited entities list after contract award.

42. *TITLE VI Assurance.* During the performance of this contract, the consultant or contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

42.1 *Compliance with Regulations.* The Consultant shall comply with the Regulation relative to nondiscrimination in Federally-assisted programs of the Department of Transportation of the United States, Title 49, Code of Federal Regulations, Part 21, and the Federal Highway Administration (hereinafter “FHWA”) Title 23, Code of Federal Regulations, Part 200 as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

42.2 *Nondiscrimination.* The Consultant, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color, or national origin, sex, age, and disability/handicap in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR,

section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.

42.3 Solicitations for Subcontractors, Including Procurements of Materials and Equipment. In all solicitations either by competitive bidding or negotiation made by the Consultant for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Consultant of the Consultant's obligations under this contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin, sex, age, and disability/handicap.

42.4 Information and Reports. The Consultant shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by NYSDOT or the FHWA to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a Consultant is in the exclusive possession of another who fails or refuses to furnish this information the Consultant shall so certify to NYSDOT's Office of Civil Rights or FHWA, as appropriate, and shall set forth what efforts it has made to obtain the information.

42.5 Sanctions for Noncompliance. In the event of the Consultant's noncompliance with the nondiscrimination provisions of this contract, NYSDOT shall impose such contract sanctions as it or the FHWA may determine to be appropriate, including, but not limited to:

- (a.) withholding of payments to the Consultant under the contract until the Consultant complies, and/or
- (b.) cancellation, termination or suspension of the contract, in whole or in part.

42.6 Incorporation of Provisions. The Consultant shall include the provisions of paragraphs 42.1 through 42.6 in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.

42.7 The Consultant shall take such action with respect to any subcontract or procurement as NYSDOT or the FHWA may direct as a means of enforcing such provisions including sanctions for non-compliance: Provided, however, that, in the event a Consultant becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Consultant may request NYSDOT to enter into such litigation to protect the interests of NYSDOT, and, in addition, the Consultant may request the United States to enter into such litigation to protect the interests of the United States.

43. Vendor Responsibility. The Department of Transportation has undertaken an affirmative review of the proposed consultant's responsibility in accordance with the applicable standards outlined in Comptroller's Bulletin No. G-221, and based upon such review, reasonable assurance that the proposed Consultant is responsible has been determined.

44. *Subcontractors/Subconsultants.* All subcontractors and subconsultants performing work on this project shall be bound by the same required contract provisions as the prime consultant. All agreements between the prime consultant and a subcontractor or subconsultant shall include all standard required contract provisions, and such agreements shall be subject to review by the State.

45. *Covenant Against Contingent Fees.* The CONSULTANT warrants that they have not employed or retained any company or person, other than a bona fide employee working for the CONSULTANT, to solicit or secure this AGREEMENT, and that they have not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this AGREEMENT. For breach or violation of this warranty, the STATE shall have the right to annul this AGREEMENT without liability, or, in its discretion, to deduct from the AGREEMENT price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

46. *Code of Ethics.* The CONSULTANT specifically agrees that this AGREEMENT may be canceled or terminated if any work under this AGREEMENT is in conflict with the provisions of Section 74 of the New York State Public Officer's Law, as amended, establishing a Code of Ethics for State officers and employees. The CONSULTANT shall not engage, on a full or part-time or other basis any professional or technical personnel who are or have been at any time during the period of this AGREEMENT in the employ of the Federal Highway Administration or the highway organizations of any public employer, except regularly retired employees, without the consent of the public employer of such person.

47. *Death or Disability of the Consultant.* In case of the death or disability of one or more but not all the persons herein referred to as CONSULTANT, the rights and duties of the CONSULTANT shall devolve upon the survivors of them, who shall be obligated to perform the services required under this AGREEMENT, and the STATE shall make all payments due to them.

In case of the death or disability of all the persons herein referred to as CONSULTANT, all data and records pertaining to the PROJECT shall be delivered within (60) days to the STATE or their duly authorized representative. In case of the failure of the CONSULTANT'S successors or personal representatives to make such delivery on demand, then in that event the representatives of the CONSULTANT shall be liable to the STATE for any damages it may sustain by reason thereof. Upon the delivery of all such data to the STATE, the STATE will pay to the representatives of the CONSULTANT all amounts due the CONSULTANT, including retained percentages to the date of the death of the last survivor.

48. *Disposition of Data.* At the time of completion of the work, the CONSULTANT shall make available to the STATE all documents and data pertaining to the work or to the PROJECT which materials at all times shall be the property of the STATE. It is agreed that the CONSULTANT may maintain copies of all documents and data. Or in the event that this Agreement is terminated for any reason, then, within ten (10) days after such termination, the CONSULTANT shall make available to the STATE the

aforementioned data and material. All technical data in regard to the PROJECT existing in the office of the STATE or existing in the offices of the CONSULTANT shall be made available to the other party to this Agreement without expense to such other party.

49. Responsibility Provisions.

49.1 General Responsibility. The Consultant shall, at all times during the Agreement, remain responsible. The Consultant agrees, if requested by the Commissioner of NYSDOT or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

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

49.3 Termination (for Non-Responsibility). Upon written notice to the Consultant, and a reasonable opportunity to be heard with appropriate NYSDOT or staff, the Agreement may be terminated by Commissioner of NYSDOT (or his or her designee) at the Consultant's expense where the Consultant is determined by the Commissioner of NYSDOT (or his or her designee) to be non-responsible. In such event, the Commissioner of NYSDOT (or his or her designee) may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.

IN WITNESS WHEREOF, this **Contract #C031195** has been executed by the STATE, acting by and through the Commissioner of Transportation, and the Consultant has duly executed this Agreement effective the day and year first above written.

In addition to the acceptance of this Agreement, the Department certifies that original copies of this signature page will be attached to all other exact copies of this Agreement.

RECOMMENDED BY

FOR THE PEOPLE OF THE STATE OF NEW YORK

_____		By _____
CONTRACT MANAGEMENT	DATE	DEPARTMENT OF TRANSPORTATION DATE

Consultant Certification: I certify that all the information with respect to the “Proposer Responsibility Questionnaire” submitted by **<FIRM NAME>** on the **<DATE>** pursuant to the requirements set forth in OSC Bulletin G-221 is complete true and accurate. I additionally certify that nothing has occurred since the date of that submission that would result in requiring a change or alteration to any of the answers provided on the “Proposer Responsibility Questionnaire” submitted that date.

Procurement Certification: Consultant certifies that all information provided to NYSDOT with respect to the requirements contained in State Finance Law Sections 139j & 139k is complete, true, and accurate.

By _____
<FIRM NAME>.

Date: _____

Construction Seat Management Initiative (CSMIN) Services for NYSDOT

APPROVALS

ATTORNEY GENERAL

THOMAS P. DiNAPOLI
 STATE COMPTROLLER

By: _____

Date: _____

Acknowledgement for Contract #C031195

For contracts signed in New York State

State of New York)

County of) ss.:

On the _____ day of _____ in the year 2013, before me the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies) and that by his/her/their signature(s) on the instrument, the individual(s), or the person(s) on behalf of whom the individual(s) acted, executed the instrument.

NOTARY PUBLIC

My Commission Expires: _____

For contracts signed **outside** New York State

State of)

County of) ss.:

On the _____ day of _____ in the year 2013 before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies) and that by his/her/their signature(s) on the instrument, the individual(s), or the person(s) on behalf of whom the individual(s) acted, executed the instrument and that such individual made such appearance before the undersigned in _____ (insert the city or other political subdivision and the state or country or other place the acknowledgement was taken).

NOTARY PUBLIC

(Signature and office of individual taking acknowledgement.)

My Commission Expires: _____

APPENDIX A

STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS

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

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

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

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

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

5. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, sexual orientation, age, disability, genetic predisposition or carrier status, or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

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

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

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

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

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

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.

- (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.
- (b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NYS Department of Economic Development
Division for Small Business
Albany, New York 12245
Telephone: 518-292-5100
Fax: 518-292-5884
Email: opa@esd.ny.gov

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

NYS Department of Economic Development
Division of Minority and Women's Business Development
633 Third Avenue
New York, NY 10017
Telephone: 212-803-2414
Email: mwbecertification@esd.ny.gov
<http://esd.ny.gov/MWBE/directorySearch.html>

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

- (a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;
- (b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

- (c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and
- (d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

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

22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW. If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

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

25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS. To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

Updated December 2012

APPENDIX A-1

SUPPLEMENTAL TITLE VI PROVISIONS (CIVIL RIGHTS ACT)

During the performance of this contract, the contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

- (1) **Compliance with Regulations:** The contractor shall comply with the Regulation relative to nondiscrimination in Federally-assisted programs of the Department of Transportation of the United States, Title 49, Code of Federal Regulations, Part 21, and the Federal Highway Administration (hereinafter "FHWA") Title 23, Code of Federal Regulations, Part 200 as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.
- (2) **Nondiscrimination:** The Contractor, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color, or national origin, sex, age, and disability/handicap in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR, section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.
- (3) **Solicitations for Subcontractors, Including Procurements of Materials and Equipment:** In all solicitations either by competitive bidding or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the contractor of the contractor's obligations under this contract and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin, sex, age, and disability/handicap.
- (4) **Information and Reports:** The contractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by NYSDOT or the FHWA to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information the contractor shall so certify to NYSDOT's Office of Civil Rights or FHWA, as appropriate, and shall set forth what efforts it has made to obtain the information.
- (5) **Sanctions for Noncompliance:** In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, NYSDOT shall impose such contract sanctions as it or the FHWA may determine to be appropriate, including, but not limited to:
 - (a.) withholding of payments to the contractor under the contract until the contractor complies, and/or
 - (b.) cancellation, termination or suspension of the contract, in whole or in part.
- (6) **Incorporation of Provisions:** The contractor shall include the provisions of paragraphs (1) through (6) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.

The contractor shall take such action with respect to any subcontract or procurement as NYSDOT or the FHWA may direct as a means of enforcing such provisions including sanctions for non-compliance: Provided, however, that, in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the contractor may request NYSDOT to enter into such litigation to protect the interests of NYSDOT, and, in addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

APPENDIX B

REQUIREMENTS FOR FEDERALLY AIDED TRANSPORTATION PROJECTS

There is a substantial body of requirements attached to the use of Federal highway or transportation aid. These requirements create or overlay processes, procedures, documentation requirements, authorizations, approvals and certifications that may be substantially greater or different from those that are not funded with Federal-aid and proceed under applicable State and local laws, customs and practices. Under Title 23 of the United States Code, the New York State Department of Transportation (NYSDOT) is responsible for the administration of transportation projects in New York State to which NYSDOT provides Federal highway or transportation-related aid. Through this Agreement, which provides or is associated with such funding, NYSDOT delegates various elements of project and funding administration as described elsewhere in this Agreement. In undertaking a Federally-aided project, the Municipality/Sponsor, Authority or Project Manager designated under this Agreement with Federal-aid funding or project administration agrees to proceed in compliance with all the applicable Federal-aid requirements.

NYSDOT, in cooperation with FHWA, has assembled the body of Federal-aid requirements, procedures and practices in its "Procedures for Locally Administered Federal-Aid Projects" (available through NYSDOT's web site at: www.dot.ny.gov/plafap). In addition, the Municipality/Sponsor, Authority or Project Manager designated under this Agreement for Federal-aid funding or project administration that enters into Federally aided project construction contracts is required to physically incorporate into all its Federally aided construction contracts and subcontracts there under the provisions that are contained in Form FHWA-1273 (available from NYSDOT or electronically at: www.fhwa.dot.gov/programadmin/contracts/1273.htm).

In addition to the referenced requirements, the attention of Municipality/Sponsor hereunder is directed to the following requirements and information:

NON DISCRIMINATION/EEO/DBE REQUIREMENTS

The Municipality/Sponsor and its contractors agree to comply with Executive Order 11246, entitled "Equal Employment Opportunity" and United States Department of Transportation (USDOT) regulations (49 CFR Parts 21, 23, 25, 26 and 27) and the following:

1. **NON DISCRIMINATION**. No person shall, on the ground of race, color, creed, national origin, sex, age or handicap, be excluded from participation in, or denied the benefits of, or be subject to, discrimination under the Project funded through this Agreement.
2. **EQUAL EMPLOYMENT OPPORTUNITY**. In connection with the execution of this Agreement, the Municipality/Sponsor's contractors or subcontractors shall not discriminate against any employee or applicant for employment because of race, religion, age, color, sex or national origin. Such contractors shall take affirmative actions to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, national origin or age. Such actions shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
3. **DISADVANTAGED BUSINESS ENTERPRISES**. In connection with the performance of this Agreement, the Municipality/Sponsor shall cause its contractors to cooperate with the State in meeting its commitments and goals with regard to the utilization of Disadvantaged Business Enterprises (DBEs) and will use its best efforts to ensure that DBEs will have opportunity to compete for subcontract work under this Agreement. Also, in this connection the Municipality or Municipality/Sponsor shall cause its contractors to undertake such actions as may be necessary to comply with 49 CFR Part 26.

As a sub-recipient under 49 CFR Part 26.13, the Municipality/Sponsor hereby makes the following assurance.

The Municipality/Sponsor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any United States Department of Transportation (USDOT)-assisted contract or in the administration of its Disadvantaged Business Enterprise (DBE) program or the requirements of 49 CFR Part 26. The Municipality/Sponsor shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of the United States Department of Transportation-assisted contracts. The New York State Department of Transportation's DBE program, as required by 49 CFR Part 26 and as approved by the United States Department of Transportation, is incorporated by reference in this

agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under [18 U.S.C. 1001](#) and/or the Program Fraud Civil Remedies Act of 1986 ([31 U.S.C. 3801](#) et seq.).

FEDERAL SINGLE AUDIT REQUIREMENTS

Non-Federal entities that expend \$500,000 or more in a year in Federal awards from all sources are required to comply with the Federal Single Audit Act provisions contained in U.S. Office of Management and Budget (OMB) Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations". Non-Federal entities that expend Federal awards from a single source may provide a program specific audit, as defined in the Circular. Non-Federal entities that expend less than \$500,000 in a year in Federal awards from all sources are exempt from Federal audit requirements for that year, except as noted in Sec. 215 (a) of OMB Circular A-133 Subpart B--Audits, records must be available for review or audit by appropriate officials of the cognizant Federal agency¹ the New York State Department of Transportation, the New York State Comptroller's Office and the U.S. Governmental Accountability Office (GAO).

Non-Federal entities are required to submit a copy of all audits, as described above, within 30 days of issuance of audit report, but no later than 9 months after the end of the entity's fiscal year, to the New York State Department of Transportation, Contract Audit Bureau, 50 Wolf Road, Albany, NY 12232. Unless a time extension has been granted by the cognizant Federal Agency and has been filed with the New York State Department of Transportation's Contract Audit Bureau, failure to comply with the requirements of OMB Circular A-133 may result in suspension or termination of Federal award payments.

THE CATALOG OF FEDERAL DOMESTIC ASSISTANCE

The Catalog of Federal Domestic Assistance ([CFDA](#)²), is an on-line database of all Federally-aided programs available to State and local governments (including the District of Columbia); Federally recognized Indian tribal governments; Territories (and possessions) of the United States; domestic public, quasi-public, and private profit and nonprofit organizations and institutions; specialized groups; and individuals.

THE CFDA IDENTIFICATION NUMBER

OMB Circular A-133 requires all Federal-aid recipients to identify and account for awards and expenditures by CFDA Number. The Municipality/Sponsor is required to identify in its accounts all Federal awards received and expended, and the Federal programs under which they were received. Federal program and award identification shall include, as applicable, the CFDA title and number, award number and year, name of the Federal agency, and name of the pass-through entity.

The most commonly used CFDA number for the Federal Aid Highway Planning and Construction program is 20.205.

Additional CFDA numbers for other transportation and non-transportation related programs are:

20.215	Highway Training and Education
20.219	Recreational Trails Program
20.XXX	Highway Planning and Construction - Highways for LIFE;
20.XXX	Surface Transportation Research and Development;
20.500	Federal Transit-Capital Investment Grants
20.505	Federal Transit-Metropolitan Planning Grants
20.507	Federal Transit-Formula Grants
20.509	Formula Grants for Other Than Urbanized Areas
20.600	State and Community Highway Safety
23.003	Appalachian Development Highway System
23.008	Appalachian Local Access Roads

PROMPT PAYMENT MECHANISMS

In accordance with 49 CFR 26.29, and NY State Finance Law 139-f or NY General Municipal Law 106-b(2) as applicable:

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 7 calendar days from receipt of each payment you make to the prime contractor.

¹ The designated cognizant agency for audit shall be the federal awarding agency that provides the predominant amount of direct funding to a recipient unless OMB changes it.

² www.cfda.gov/

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 7 calendar days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 7 calendar days after the subcontractor's work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 7 calendar days after your payment to the prime contractor.

(c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

(d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(e) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

March 2013

APPENDIX C

SPECIAL EQUAL EMPLOYMENT OPPORTUNITY PROVISIONS

Specific Equal Employment Opportunity Responsibilities

1. GENERAL (a) Equal employment opportunity requirements not to discriminate and to take affirmative action to assure equal employment opportunity, as required by Federal Executive Order 11246, Federal Executive Order 11375, and NYS Executive Order 45, are set forth in required Contract Provisions (Form PR-1273 or 1316, as appropriate) and those Special Provisions which are imposed pursuant to Section 140 of Title 23, U.S.C., as established by Section 22 of the Federal-Aid Highway Act of 1968. Non-discrimination and affirmative action are also required by the State Labor Law, Section 220-e, as amended, and the Regulations of the NYS Department of Transportation relative to federally-assisted programs (Title 49, Code of Federal Regulations, Part 21 and Section 21.5), including employment practices when the agreement covers a program set forth in Appendix B of the Regulations. The requirements set forth in these Special Provisions shall constitute the specific affirmative action requirements for projects activities under this contract.

(b) The CONSULTANT will work with the STATE and the Federal Government in carrying out equal employment opportunity obligations and in their review of their activities under this contract.

(c) The CONSULTANT and all their sub-consultants and/or sub-contractors holding sub-contracts of \$10,000 or more will comply with the following minimum specific requirements of equal employment opportunity: (The equal employment opportunity requirements of Executive Order 11246, as set forth in Volume 6, Chapter 4, Section 1, Subsection 1 of the Federal-Aid Highway Program Manual, are applicable to contractors and sub-contractors.) The CONSULTANT will include these requirements in every sub-contract with such modification of language as is necessary to make them binding on the sub-contractor.

2. EQUAL EMPLOYMENT OPPORTUNITY POLICY The CONSULTANT, their sub-consultant and/or sub-contractor or any person acting on behalf of the CONSULTANT or sub-consultant and/or sub-contractor will accept as their operating policy the following statement which is designed to further the provision of equal employment opportunity to all persons without regard to their race, color, religion, sex, national origin, age, disability or marital status, and to promote the full realization of equal employment opportunity through a positive continuing program. "It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, or during consideration for employment, without regard to their race, religion, sex, or color, national origin, age, disability or marital status. Such non-discriminatory action shall include, but not be limited to: employment, job assignment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."

3. EQUAL EMPLOYMENT OPPORTUNITY OFFICER The CONSULTANT will designate and make known to the New York State Department of Transportation contracting officers an Equal Employment Opportunity Officer and a Minority Business Enterprise officer (hereinafter referred to as the EEO Officer and M.B.E. Officer) who will have the responsibility for and must be capable of effectively administering and promoting an active equal employment opportunity program and who must be assigned adequate authority and responsibility to do so.

4. DISSEMINATION OF POLICY (a) All members of the CONSULTANT's staff who are authorized to hire, supervise, promote, and discharge employees, or who recommend such action, or who are substantially involved in such action, will be made fully cognizant of, and will implement, the CONSULTANT's equal employment opportunity policy and contractual responsibilities to provide equal employment opportunity in each grade and classification of employment. To insure that the above agreement will be met, the following actions will be taken as a minimum:

- (1) Periodic meetings of supervisory and personnel office employees will be conducted before the start of work and then not less than once every six months, at which time the CONSULTANT's equal employment opportunity policy and its implementation will be reviewed and explained. The meetings will be conducted by the EEO Officer or other knowledgeable company official.
- (2) All new supervisory (first level of supervision and above) or personnel office employees will be given a thorough indoctrination by the EEO Officer or other knowledgeable company official covering all major aspects of the CONSULTANT's equal employment opportunity obligations within thirty days following their reporting for duty with the CONSULTANT.

(3) All personnel who are engaged in direct recruitment for the project will be instructed in the CONSULTANT's procedures for locating and hiring minority group employees by the EEO Officer or appropriate company official. (Minority group referred to herein shall mean Black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan.)

(b) In order to make the CONSULTANT's equal employment opportunity policy known to all employees, prospective employees and potential sources or employees, i.e., schools, employment agencies, labor unions (where appropriate), college placement officers, etc., the CONSULTANT will take the following actions:

(1) Notices and posters setting forth the CONSULTANT'S equal employment opportunity policy will be placed in areas readily accessible to employees, applicants for employment and potential employees.

(2) The CONSULTANT's equal employment opportunity policy and the procedures to implement such policy will be brought to the attention of employees by means of meetings, employee handbooks, or other appropriate means.

(c) In all solicitations either by competitive bidding or negotiation made by the CONSULTANT for work to be performed under a sub-contract, including procurements of materials or equipment, each potential sub-contractor or supplier shall be notified by the CONSULTANT of the CONSULTANT's obligations under this agreement and the Regulations relative to non-discrimination.

5. RECRUITMENT (a) When advertising for employees, the CONSULTANT will include in all advertisements for employees the notation: "An Equal Opportunity Employer." All such advertisements will be published in newspapers or other publications having a large circulation among minority groups in the area from which the project work force would normally be derived. These advertisements shall state that all qualified applicants will be afforded equal employment opportunity without regard to race, religion, sex, color, national origin, age, disability or marital status.

(b) The CONSULTANT will, unless precluded by a valid bargaining agreement, conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minority group applicants, including, but not limited to, State employment agencies, schools, colleges and minority group organizations. To meet this requirement, the CONSULTANT's EEO Officer will identify sources of potential minority group employees, and establish with such identified sources procedures whereby minority group applicants may be referred to the CONSULTANT for employment consideration. In the event the CONSULTANT has a valid bargaining agreement providing for exclusive hiring hall referrals, the CONSULTANT is expected to observe the provisions of that agreement to the extent that the system permits the CONSULTANT's compliance with equal employment opportunity contract provisions. (The U.S. Department of Labor has held that where implementation of such agreements have the effect of discriminating against minorities or women, or obligates the CONSULTANT to do the same, such implementation violates Executive Order 11246.

(c) The CONSULTANT will encourage present employees to refer minority group applicants for employment by posting appropriate notices or bulletins in areas accessible to all such employees. In addition, information and procedures with regard to referring minority group applicants will be discussed with employees.

6. PERSONNEL ACTIONS Wages, working conditions, and employee benefits shall be established and administered, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be taken without regard to race, color, religion, sex, national origin, age, disability or marital status. The following procedures shall be followed:

(a) The CONSULTANT will conduct periodic inspections of project sites to insure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.

(b) The CONSULTANT will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory practices.

(c) The CONSULTANT will periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the CONSULTANT will promptly take corrective action. If the review indicated that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons.

(d) The CONSULTANT will promptly investigate all complaints of alleged discrimination made in connection with obligations under this agreement, will attempt to resolve such complaints, and will take appropriate corrective action within 15 days. All subsequent corrective actions or decisions will also be documented and forwarded to the NYS Department of Transportation Compliance Officer within 7 days after such action has taken place. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include

such other persons. Upon completion of each investigation, the CONSULTANT will inform every complainant of the results and all of their avenues of appeal should the complaint be denied.

7. TRAINING AND PROMOTION (a) The CONSULTANT will assist in locating, qualifying and increasing the skills of minority group and women employees, and applicants for employment.

(b) Consistent with the CONSULTANT's work force requirements and as permissible under the Federal and State regulations, the CONSULTANT shall make full use of training programs; i.e., apprenticeship and on-the-job training programs for the geographical area of contract performance. In the event the Training Special Provision is provided under this contract, this subparagraph is superseded thereby.

(c) The CONSULTANT will advise employees and applicants for employment of available training programs and entrance requirements for each.

(d) The CONSULTANT will periodically review the training and promotion potential of minority group and women employees and will encourage eligible employees to apply for such training and promotion.

8. UNIONS If the CONSULTANT relies in whole or in part upon unions as a source of employees, the CONSULTANT will use their best effort to obtain the cooperation of such unions to increase opportunities for minority groups and women within the unions, and, to effect referrals by such unions of minority and female employees. The CONSULTANT will send to each labor union or representative of workers with which he has or is bound by a collective bargaining or other agreement or understanding, a notice to be provided by the State Division of Human Rights, advising such labor union or representative of the CONSULTANT's compliance and with the non-discrimination clauses. Actions by the CONSULTANT, either directly or through a CONSULTANT's association acting as agent, will include the procedures set forth below:

(a) The CONSULTANT will use their best efforts to develop, in cooperation with the unions, joint training programs aimed toward qualifying more minority group members and women for membership in the unions and increasing the skills of minority group employees and women so that they may qualify for higher paying employment.

(b) The CONSULTANT will use their best efforts to incorporate an equal employment opportunity clause into each union agreement to the end that such union will be contractually bound to refer applicants without regard to their race, color, religion, sex, national origin, age, disability or marital status.

(c) The CONSULTANT is to obtain information as to the referral practices and policies of the labor union except that to the extent such information is within the exclusive possession of the labor union, and such labor union refuses to furnish such information to the CONSULTANT. The CONSULTANT shall so certify to the STATE and shall set forth what efforts have been made to obtain such information. Further, if the CONSULTANT was directed to do so by the contracting agency as part of the bid or negotiations of this contract, the CONSULTANT shall request such labor union or representative to furnish him with a written statement that such labor union or representative accepts the non-discrimination clauses and will affirmatively cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of these non-discrimination clauses or that it consents and agrees that recruitment, employment and the terms and conditions of employment under this contract shall be in accordance with the purposes and provisions of these non-discrimination clauses. If such labor union or representative fails or refuses to comply with such a request that it furnish such a statement, the CONSULTANT shall promptly notify the State Division of Human Rights and set forth what efforts have been made to obtain such information.

(d) In the event the union is unable to provide the CONSULTANT with a reasonable flow of minority and women referrals within the time limit set forth in the collective bargaining agreement, the CONSULTANT will, through independent recruitment efforts, fill the employment vacancies without regard to race, color, religion, sex, national origin, age, disability or marital status, making full efforts to obtain qualified and/or qualifiable minority group persons and women. (The U.S. Department of Labor has held that it shall be no excuse that the union with which the CONSULTANT has a collective bargaining agreement providing for exclusive referral failed to refer minority employees.) In the event the union referral practice prevents the CONSULTANT from meeting the obligations pursuant to Executive Order 11246, as amended, and these special provisions, such CONSULTANT shall immediately notify the New York State Department of Transportation.

9. AFFIRMATIVE ACTION IN SUBCONTRACTING (a) The CONSULTANT will not discriminate on the grounds of race, religion, sex, color, national origin, age, disability or marital status in the selection of subcontractors, including procurements and leases of equipment.

(b) If the CONSULTANT determines to use a subcontractor as part of this agreement, affirmative action shall be taken to increase the participation of minority business firms in that work. As part of that affirmative action, the CONSULTANT will identify and contact minority business firms and solicit proposals for the work to be subcontracted. The STATE will provide a list of names of minority business firms to the CONSULTANT. Another source that should be contacted for a list of minority business firms is the Governor's Office of Minority & Women's Business Development (GOMWBD).

(c) The CONSULTANT will document the affirmative action steps taken to comply with paragraph 9b. Such documentation will be provided at the time or submittal of a formal proposal to the State's Contracts Bureau.

(d) By execution of this agreement, the CONSULTANT certifies that the affirmative action steps in 9a, 9b & 9c above were taken when soliciting proposals for the work in this agreement indicated to be subcontracted and that these steps will be taken should any work be subcontracted in the future.

(e) The CONSULTANT will insure binding subcontractor and vendor compliance with their EEO obligations. The CONSULTANT will take such actions in enforcing such provisions of such subcontract or purchase order as the contracting agency may direct, including sanctions or remedies for non-compliance. If the CONSULTANT becomes involved in or is threatened with litigation with a subcontractor or a vendor as a result of such direction by the contracting agency, the CONSULTANT shall promptly so notify the Attorney General, requesting him to intervene and protect the interest of the State of New York.

10. RECORDS AND REPORTS (a) The CONSULTANT will keep such records as are necessary to determine compliance with the CONSULTANT's equal employment opportunity obligations. The records kept by the CONSULTANT will be designed to indicate:

- (1) The number of minority and non-minority group members and women employed in each work classification on the project, where required by the NYS D.O.T Compliance Officer.
- (2) The progress and efforts being made in cooperation with unions to increase employment opportunities for minorities and women (applicable only to CONSULTANTS who rely in whole or in part on unions as a source of their work force).
- (3) The progress and efforts being made in locating, hiring, training, qualifying, and upgrading minority and female employees.
- (4) The progress and efforts being made in securing the services of minority group subcontractors or subcontractors with meaningful minority and female representation among their employees.
- (5) Compliance with all other requirements in these provisions such as meetings, instructions, employment efforts, etc.

(b) The CONSULTANT will comply with Sections 291-299 of the Executive Law and Civil Rights Law and will provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts other sources of information, and its facilities as may be determined by State or Federal officials to be pertinent to ascertain compliance with such Regulations, orders and instructions. All such records must be retained for a period of three years following completion of the contract work and shall be available at reasonable times and places for inspection by authorized representatives of the State and the Federal Highway Administration.

(c) Failure to comply with these Special EEO Provisions may be considered unsatisfactory performance and may subject the agreement to termination under the termination article of this agreement. Non-compliance may result in the CONSULTANT's being declared ineligible for future agreements made by or on behalf of the STATE or a public authority or agency of the STATE, until he satisfies the State Commissioner of Human Rights that he has established and is carrying out a program in conformity with the provisions of these non-discrimination clauses. Such finding shall be made by the State Commissioner of Human Rights after conciliation efforts by the State Division of Human Rights have failed to achieve compliance with these non-discrimination clauses and after a verified complaint has been filed with the State Division of Human Rights, notice thereof has been given to the CONSULTANT and an opportunity has been afforded them to be heard publicly before the State Commissioner of Human Rights or official designee. Such sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided for by law. These may include, but are not limited to:

- (1) withholding of payments to the CONSULTANT under the agreement until the CONSULTANT complies, and/or
- (2) cancellation, termination or suspensions of the agreement in whole or in part.

11. TRAINING SPECIAL PROVISIONS This Training Special Provision supersedes paragraph 7.b above and is in implementation of 23 CFR Subpart A, Section 230.111 & Executive Order 11246.

As part of the CONSULTANT's equal employment opportunity affirmative action program training shall be provided as follows:

The CONSULTANT shall provide on-the-job training aimed at developing full competence in the job classification involved.

The number of months of training to be provided under these special provisions is previously stated in this Agreement.

In the event that the CONSULTANT subcontracts a portion of the contract work, it shall be determined how many, if any, of the trainees are to be trained by the subcontractor, provided however, that the CONSULTANT shall retain the primary responsibility for meeting the training requirements imposed by this special provision. The CONSULTANT shall also insure that this training special provision is made applicable to such subcontract.

The number of trainees shall be distributed among the work classifications on the basis of the CONSULTANT's needs. Along with their proposal, the CONSULTANT shall submit to the New York State Department of Transportation for approval the proposed number of trainees to be trained in each selected classification, their estimated salaries and a training schedule. The salaries to be paid trainees shall not be less than 75 percent of the average hourly rate approved in the agreement for the classification to be trained. During the period from the beginning of the project to its completion, the trainee shall receive reasonable salary increases commensurate to the abilities and effort exerted by the trainee. The training schedule required should indicate the start of work and appropriate incremental salary steps in accord with the above.

Training and upgrading the proficiency of minorities and women is a primary objective of this Training Special Provision. Accordingly, the CONSULTANT shall make every effort to enroll minority trainees and women (e.g., by conducting systematic and direct recruitment through public and private sources likely to yield minority and women trainees) to the extent that such persons are available within a reasonable area of recruitment. The CONSULTANT will be responsible for demonstrating the steps that have been taken in pursuance thereof, prior to a determination as to whether the CONSULTANT is in compliance with this Training Special Provision. This training commitment is not intended, and shall not be used, to discriminate against any applicant for training, whether a member of a minority group or not.

No employee shall be employed as a trainee in any classification in which they have successfully completed a training program or in a classification in which they have been employed. The CONSULTANT should satisfy this requirement by including appropriate questions in the employee application or by other suitable means. Regardless of the method used, the CONSULTANT's records should document the findings in each case.

The minimum length and type of training for each classification will be as established in the training schedule developed by the CONSULTANT and approved by the State and Federal Highway Administration. The State and the Federal Highway Administration shall approve a program if it reasonably calculated to meet the equal employment opportunity obligations of the CONSULTANT and to assist in qualifying the average trainee toward proficiency in the classification concerned by the end of the training period. Approval of a training program shall be obtained from the State prior to commencing work on the classification covered by the program. Training is permissible in lower level management positions. Some offsite training is permissible as long as the training is an integral part of an approved training program and does not comprise a significant part of the overall training.

The CONSULTANT will be reimbursed for the cost of any and all training under the payment terms of this agreement. This can include offsite training cost as discussed above. All offsite training must be defined in the training schedule. All costs claimed or calculated for training must be directly related to the work defined in the scope of this agreement and/or added by supplemental agreement.

The CONSULTANT must demonstrate their best efforts and evidence good faith in hiring trainees for positions in the classification in which they have completed training.

The CONSULTANT shall furnish the trainee a copy of the program they will follow in the training. The CONSULTANT shall provide each trainee with a certification showing the type and length of training satisfactorily completed.

The CONSULTANT will provide for the maintenance of records and furnish periodic reports documenting their performance under this Training Special Provision.

Updated December 2012

EXHIBIT A

CDL FORM B

FORM B

OSC Use Only:

Reporting Code:

Category Code:

**State Consultant Services
Contractor's Annual Employment Report**

Report Period: April 1, to March 31,

Contracting State Agency Name: Transportation

Agency Code: 3900283

Contract Number: C031195

Contract Term to

Contractor Name:

Contractor Address:

Description of Services Being Provided: Construction Seat Management Initiative (CSMIN)
Services for NYSDOT

Scope of Contract (Choose one that best fits):

Analysis ☐ Evaluation ☐ Research ☐ Training ☐

Data Processing ☐ Computer Programming ☐ Other IT consulting ☒

Engineering ☐ Architect Services ☐ Surveying ☐ Environmental Services ☐

Health Services ☐ Mental Health Services ☐

Accounting ☐ Auditing ☐ Paralegal ☐ Legal ☐ Other Consulting ☐

O*NET Employment Category Number and O*NET Job Title	Number of Employees	Number of Hours Worked	Amount Payable Under the Contract
Total this page	0	0	\$ 0.00
Grand Total			

Name of person who prepared this report:

Preparer's Signature: _____

Title: _____ Phone #: _____

Date Prepared: / /

Use additional pages if necessary)

Page of

Schedule A

SCOPE OF SERVICE

CLARIFICATIONS

(IF ANY)

Leave Blank

**(Details of clarifications to be finalized after
apparent best value bidder is selected)**

Schedule B

DELIVERABLES SCHEDULE AND COMPENSATION

Leave Blank

**(Payment Clarifications/Details (if any) and “Best and
Final Pricing” to be documented and finalized)**

Exhibit B: NYSDOT's Request for Proposals, as Modified
(Added via Reference)

Exhibit C: The Consultant's Proposal, as clarified
(Added via Reference)

Exhibit D

Staffing Plan

Exhibit E

System Requirements Traceability Matrix

EXHIBIT F

OTHER REQUIREMENTS:

PROCUREMENT, RECORD KEEPING, ACCOUNTING, ELECTRONIC PAYMENT & BILLING, AND NOTICE REQUIREMENTS

1. Subcontractors

The work of the project shall be performed in accordance with the following Subcontract Procedures:

1.1 Without relieving it of, or in any way limiting its obligations under the Agreement, the Consultant may enter into subcontracts for the performance of the Project or for the purchase of materials and equipment. The Consultant shall select all subcontractors or suppliers through a process of competitive bidding or multi-source price review. In the event that competitive bidding or multi-source price review is not feasible, the Consultant shall document an explanation for, and justification of, a sole-source selection.

1.2 The Consultant shall document the process by which a subcontractor or supplier is selected by making a record summarizing the nature and scope of work, equipment, supplies or materials sought, basis for establishing the source list, the name of each person or organization submitting or requested to submit a bid or proposal, the price or fee bid, and the basis for selection of the subcontractor or supplier. An explanation for, and justification of, a sole source selection must identify why the work, equipment, supplies, or materials involved are obtainable from or require a subcontractor with unique or exceptionally scarce qualifications or experience, specialized equipment, or facilities not readily available from other sources, patents, copyrights, or proprietary data.

1.3 All subcontracts for the performance of work of the Project shall be in writing and subject to the prior approval of NYSDOT and shall contain provisions required by this Agreement for such subcontract, those provisions required by Appendix A, and all other provisions now or hereafter required by law to be contained therein.

2. Accounting and Record Keeping For the Cost Reimbursement Compensable Component

The following are the record-keeping requirements for State reimbursement payable under the Cost Reimbursement compensation method:

2.1. *Fixed-Price (Lump Sum) Milestone Payments.* Consultant may request payment for fixed-price work in accordance with approved milestone payment schedules. Milestone payments shall be subject to NYSDOT receipt and acceptance of identified deliverables. Upon the submission of invoices, NYSDOT will make payments to the Consultant in accordance with the terms of the Agreement. Consultant will submit requests for milestone payments using the form FIN 110 (NYSDOT standard state voucher or current procedure). The Consultant shall complete the FIN 110 in accordance with the form instructions and shall specify the milestone and accompanying milestone amount for which payment is being requested.

2.2 *Progress Billings.* In the event the Extra Work is authorized under 4.3 of Attachment A Contract Provision, Extra Work and the STATE determines such payments are to be made, the following requirements apply.

After approval of the Agreement, the Consultant may submit progress billings to NYSDOT for the Federal share, to be supported as follows:

- (a) Contracts/Consultant Agreements - Separate invoices or billings are required for each subcontract, each subconsultant agreement, and for work performed by employees. Billings for payments made on contracts or consultant agreements will be made on NYSDOT's Form FIN 421, as it may be amended, and supported by a copy of the applicable payment estimate(s) for contracts or consultant agreements.

- (b) Work by Employees - Billings for employees will be on NYSDOT's Form FIN 421, supported by an Engineer's Payroll Abstract for the period(s) covered by the billings, copies of payroll time sheets for the applicable billing period, and copies of paid invoices or supporting documents for all non-personal service cost items in excess of \$250. Only those direct Project costs as defined in applicable Federal regulations and incurred subsequent to the date of Federal Highway Administration authorization can be included in billings. The supporting documents for personal service and non-personal service costs are to include the following:
- (1) Payroll Time Sheets - The signature of the employee and approval of the employee's supervisor, or other verification acceptable to NYSDOT, is required on each time sheet. These signatures attest to the employee's assignment and hours worked on the Projects indicated and demonstrate that periods of paid leave are charged to appropriate leave categories or accounts. Employee time for such leave, holidays, vacation, or other paid leave cannot be charged directly to Projects on time sheets since such costs must be allocated to Projects by using an approved percentage additive rate applied to direct payroll costs. Time sheets must correspond with applicable payroll records and amount paid for each employee based on a comprehensive payroll/labor cost distribution system.
 - (2) Engineer's Payroll Abstract - Leave and fringe benefit additives are to be calculated and charged to Projects at percentage rates previously approved by NYSDOT for provisional billing purposes, subject to final audit.
 - (3) Non-Personal Service Costs - Copies of invoices or documentation showing amounts and notations as may be required to clearly identify the purpose of each item. Copies of employee reimbursement vouchers for travel or similar costs are not required with progress billings but must be retained by the Consultant for subsequent audit.
- (d) Applicable to the Cost Reimbursement compensation method, NYSDOT will reimburse personal service, fringe benefits, non-personal service, and related costs which are clearly identifiable to a specific project. Local claims for reimbursement of such expenditures utilize the same Form "FIN 421" processing procedure as is routinely used for reporting Consultant Payment Requests. Municipal claims for reimbursing preliminary engineering, construction engineering, or other approved work -- whether performed by Municipal employees or by a Consultant -- requires only the completion of a single column of Total Costs which pertain solely to eligibility for the Federal Aid component.

Completing FIN 421: The amounts listed on lines 1-3 of the Work Performed Section of the FIN 421, and the supporting documentation, should be for 100% of the share of participating costs eligible for federal aid. However, since the amount shown on line 3 of the FIN 421 is applicable to calculating the Federal share only, a notation after that amount is required to indicate the Total Costs reported times a "Federal Aid Percentage" (e.g., "\$____X____%"). For example, "\$100,000 X 80%" (with "80%" being the federal aid percent). On the other hand, lines 7 and 8 for such billings should reflect only the amounts of computed Federal Share payments, with Line 8 containing only the amount currently being claimed for reimbursement of the federal share.

2.3 *Project Detail Ledgers.* For audit purposes, a Project Detail Ledger is required as the official accounting record of the Consultant to record and accumulate all cost transactions applicable to the Project. All costs recorded on the Project Detail Ledger should be for 100% of such costs, with reduction for the non-Federal share, and for any applicable State share.

Every transaction listed on the Project Detail Ledger will be recorded in the same level of detail as the total from each supporting source document (no summarization of source documents amounts). All transactions listed on the detail ledgers will identify the source documents for the transactions by referencing contract/estimate numbers, social security numbers (for time sheets and employee reimbursements), proposer or payee numbers for vouchers, etc. The applicable accounting-system record date will also be included for each transaction; i.e., pay period dates for time sheets, voucher approval, or date paid for payments to the consultant, employee reimbursements, etc.

The ledgers for the Project will include totals for all transactions recorded during: 1) each accounting month; 2) the fiscal year of the Sponsor; and 3) the Project life to date.

2.4 *Source Documents.* The Consultant will retain an official copy of consultant estimates, payroll time sheets, employee travel claims, and all other original source documents for transactions listed on the Project Detail Ledger. These will be systematically filed in an order that will facilitate retrieval. All expenditure vouchers or other cost documents must also be traceable through the Consultant's disbursement process to copies of warrants or checks issued and to corresponding documentation maintained in the official accounting records of the Consultant's central finance office.

2.5 *Audit/Disallowances.* The Consultant shall cause a Certified Public Accountant to audit the performance of any consultant contract entered for the Project and retain the results thereof for State or federal audit of this agreement. Costs claimed or previously reimbursed that cannot be supported as outlined herein are subject to audit disallowance by NYSDOT, the State Comptroller, the Federal Highway Administration, and/or the U.S. Department of Transportation, Officer of the Inspector General. Amounts paid to the Consultant by NYSDOT that are subsequently disallowed by the Federal Government are subject to recovery by NYSDOT from the Consultant, or at the option of the State, will be offset or reduced against current or future reimbursement claims on the same or other Projects.

3.0. Contract Payment - Electronic payment requirement

CONSULTANT shall provide complete and accurate billing invoices to the STATE in order to receive payment. Billing invoices submitted to the STATE must contain all information and supporting documentation required by the Contract, the STATE and the State Comptroller. Payment for invoices submitted by the CONSULTANT shall only be rendered electronically, unless payment by paper check is expressly authorized by the New York State Department of Transportation Commissioner (hereinafter referred to as "COMMISSIONER"), in the COMMISSIONER'S sole discretion, due to extenuating circumstances. Such electronic payment shall be made in accordance with ordinary State procedures and practices. The CONSULTANT shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller's website at www.osc.state.ny.us/epay/index.htm, by e-mail at epunit@osc.state.ny.us, or by telephone at 518-474-4032. CONSULTANT acknowledges that it will not receive payment on any invoice submitted under this contract if it does not comply with the State Comptroller's electronic payment procedures, except where the COMMISSIONER has expressly authorized payment by paper check as set forth above.

4.0 Submittal of Excel Spreadsheet with Billings

Due to a need for improved electronic tracking of consultant billings and payments, including payments to subconsultants, NYSDOT requires that all billings include an Excel spreadsheet. This can either be submitted on acceptable electronic media with the billing package, or e-mailed separately to NYSDOT's Project Manager. A model spreadsheet is posted on NYSDOT's website on the Consultant Forms, Publications, and Instructions page: <https://www.dot.ny.gov/main/business-center/consultants/forms-publications-and-instructions>. To download the spreadsheet, scroll approximately 2/3 of the way down the page to the section titled PAYMENT AND INVOICE FORMS, and click on the link labeled Consultant Billing Spreadsheet. Consultants are welcome to customize this spreadsheet for their convenience or as requested by the Project Manager, as long as the basic functionality is maintained. Note that the spreadsheet is a supplement, not a replacement, to the hard copy billing forms and backup. The information submitted in the spreadsheet must match the hard copy exactly, with the exception of the signature block on the FIN 421. **All billings must include an Excel spreadsheet, and the spreadsheet must include a completed AAP7 tab for each subconsultant.** The billing will not be considered complete, and the Merchandise Invoice Received (MIR) date will not be established, until NYSDOT receives an appropriately completed spreadsheet. The file name should start with the contract number, followed by the date.

Exhibit G

Glossary