December 11, 2014

REQUEST FOR PROPOSALS
AIR QUALITY ANALYSIS AND RELATED SERVICES FOR NYSDOT
Contract #C031294

Dear Sir or Madam:

SUBJECT: MODIFICATION #4 TO REQUEST FOR PROPOSALS – Contract #C031294

Reference is made to the subject solicitation wherein the following clarifications are hereby incorporated:

1. The following change is being made to Attachment 1 “Draft Contract:”

Delete Article 12 in its entirety and Replace it with the following revised Article 12 in its entirety:

“Article 12. 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-) 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 Section B Insurance Requirements below. General liability 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, it includes provisions that allow for (a) reporting circumstances or incidents that may give rise to future claims and (b) 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 the NYSDOT Contract C Number. Certificates shall be mailed to the:

   NYS Department of Transportation  
   Contract Management, 6th Floor  
   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 ten (10) days’ prior written notice to the Department by Certified Mail, Return Receipt Requested at the address stated above. In addition, if required by the Department, the Consultant shall deliver to the Department within ten (10) business 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 be 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, and
   f. Expressly reference the inclusion of all required endorsements.

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:

   a. Direct the Consultant to suspend work and not re-enter the premises with no additional payment or extension of time due on account thereof, or
   b. May withhold further contract payments in accordance with Article 8 No Payment Due to Consultant’s Non-Compliance of the contract agreement, or
   c. 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, any municipality in which the work is being performed, any public benefit
corporation, railroad, or public utility whose property or facilities are affected by the work, and any consultants working for or on the project, and their 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(s) that provides equivalent coverage.

5. **Primary Coverage.** All insurance policies, excepting workers’ compensation, shall provide that the required coverage shall 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 ten (10) calendar 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 Paragraph A.3. Certificates of Insurance/Notices 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 or third-party-administered insurance deductible shall be limited to the amount of the bid deposit or $100,000.00, 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-) or better. 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. **Subconsultant’s Liability Insurance.** In the event that any portion of the work
described in this contract is performed by an approved subconsultant, the insurance
requirements of this Article shall be incorporated into the subcontract agreement.
Subconsultant 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 are provided to the Department documenting the
insurance coverage for each and every subconsultant employed by them to do 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, the 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.** The 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:

a. Coverage for contractual liability assumed by the Consultant insured under an
insured contract (including the tort liability of another assumed in a business
contract).

b. 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, any
municipality in which the work is being performed, any public benefit
corporation, railroad, or public utility whose property or facilities are affected
by the work, or any consultant inspecting engineer or inspector working for or
on the project, and their agents or 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.
c. Products-Completed Operations Coverage, as provided in the General Liability Policy, or in certain instances through ISO form CG 26 11 09 99 or suitable equivalent.

d. Where contract work will be performed by unregistered off-road equipment, Consultant shall provide documentation of a blanket Pollution Liability policy, or an endorsement to cover short-term pollution events, ISO form CG 04 33 10 01 or equivalent.

e. Coverage for claims for bodily injury asserted by an employee of an additional insured and any Employer Liability Exclusion which may otherwise operate to exclude such coverage shall be voided in this respect.

f. For contracts that call for the performance of excavating, underground work, and/or the use of blasting equipment, Explosion, Collapse and Underground Hazards coverage ("XCU") (for contracts that call for the performance of excavating, underground work, and/or the use of blasting equipment).

3. Consultant’s Risks. The Consultant shall be responsible for obtaining any insurance it deems necessary to cover its own risks, including without limitation: (a) business interruption, such as gross earnings, extra expense, or similar coverage, (b) personal property, and/or (c) automobile physical damage and/or theft. In no event shall the Department 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 the Department.

4. Professional Liability/Errors and Omissions The Consultant shall maintain at its own expense or shall require to be maintained, such insurance as is customary to compensate Department for any claims or losses that occur because of Consultant’s errors, omissions malpractice or breach of professional obligations. Such policy or policies may be written on a claims-made form so long as coverage is maintained to be in effect to cover claims arising from the performance of services under this contract. Said coverage may be subject to a deductible or self-insured retention level of no more than $250,000.00 subject to approval by Department, such approval not to be unreasonably withheld, except that it is also agreed that Department may withhold payment for services rendered under this contract in the event, and to the extent of any deductible in the event that a claim is asserted. Such coverage shall be written on a claims-made basis (or a policy form providing equivalent coverage) in an amount of no less than $1,000,000.00 per claim and $1,000,000.00 in the aggregate.

2. NYSDOT is hereby publishing the remaining questions received by the RFP question submission deadline of November 6th along with the answers to those questions:

A. Question: “Regarding Article 11 in the Draft Contract included as Attachment 1 of the RFP, in the first paragraph, is it possible to insert in the fifth and ninth line before “work” the word “negligent”?

Answer: No. New York laws allow employees of contractors to assert claims against owners of property such at the State for purported violation of certain Labor Laws that allegedly result in accidents. NYSDOT requires that, as a party in
a better position to manage such risks, contractors/consultants take responsibility for such claims and agree to indemnify the State. “Negligence” is not an element of such claims.

**B. Question:** “Regarding Article 11 in Attachment 1 of the RFP Draft Contract, in the second paragraph, at the end of the first sentence, after “specified in this Section” would NYSDOT insert “for other than professional services.”

**Answer:** No. Indemnification for claims related to work by consultant employees cannot be limited.

**C. Question:** Regarding Article 12, A. 1, our insurance carriers have informed us that while general liability and automobile liability insurance is available on a per job and project basis, it is not available for professional liability insurance. Professional liability insurance is written on a practice year basis. Would NYSDOT after “Insurance” insert “except professional liability insurance.”

**Answer:** We understand the coverage situation. We will not change the specification, but as for professional liability insurance, to the extent that it may be a required coverage, we agree that the coverage is not written on a per-job or per-project basis.

Additionally, please reference the revised language of Article 12, A. 1 included with this Modification #4.

**D. Question:** Regarding Article 12, one of our potential subs has informed us that it is not customary for them to provide a waiver of subrogation on its professional liability insurance. There is an annual project premium assessed that is generally not de minimis. This subconsultant is therefore requesting an exemption from this requirement. This firm requests that NYSDOT be willing to exempt the subconsultant from this requirement.

**Answer:** No waiver of subrogation is required for professional liability insurance to the extent that such insurance is required.

**E. Question:** Larger firms have relatively large deductibles. Is it possible in Article 12, B. to delete “$250,000” and insert “$500,000”?

**Answer:** The limitation on deductibles and self-insured retention is designed to assure that consultants can bear the risk of potential losses. If a consultant desires to self-insure levels of risk over $250,000 they may do so subject to satisfactory proof that the consultant is prepared to pay for a potential loss. A description of a self insurance plan and proof of adequate equity to bear this risk will be sufficient.

**F. Question:** In Article 19, the second paragraph prohibits the engagement of Federal Highway Administration or other highway organization employees without the consent of the relevant public employer. Please confirm that this prohibition applies only to the engagement of personnel to provide services on or be involved in any way with this project.
Answer: The Draft Contract included as Attachment 1 to RFP for C031294 applies to the potential contract award as a result of the RFP for Air Quality Analysis and Related Services for NYSDOT.

3. If a firm believes its question submitted by the November 6th deadline was not addressed or answered in Modification #4, or any of the previous Modifications, the firm should notify NYSDOT by 8 a.m. on Monday, December 15th.

4. The deadline for submitting proposals in response to C031294 Air Quality Analysis and Related Services for NYSDOT RFP is NOON on Wednesday, December 17, 2014.

No other provision of the solicitation is otherwise changed or modified. Please update your records accordingly.
An authorized representative of your firm or organization MUST acknowledge receipt and acceptance of this Modification #4 by including a signed copy of this form with the Part II Cost and Contract Submission as a separate tab item.

ACKNOWLEDGED AND ACCEPTED:

BY: _____________________________
NAME: __________________________
TITLE: ___________________________
FIRM: ___________________________

NYS DEPARTMENT OF TRANSPORTATION

William A. Howe

BY: _____________________________
William A. Howe
Director, Contract Management

RFP:  Air Quality Analysis and Related Services for NYSDOT– C031294 - Modification #4