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STATE OF NEW YORK  
DEPARTMENT OF TRANSPORTATION  
ALBANY, N. Y. 12232

JOSEPH H. BOARDMAN  
COMMISSIONER

GEORGE E. PATAKI  
GOVERNOR

March 29, 2002

Mr. Robert D. Coffey  
***The Gordian Group***  
531 South Main Street  
Greenville, S.C. 29601

RE: Contract No. C012510, PIN A989.93.701, Job Order Contracting (JOC) System

Dear Mr. Coffey:

Enclosed is a fully executed copy of the Department's Agreement with your firm which has been approved by the State Comptroller. Please refer to the contract number, PIN number, and brief project description in all correspondence.

The Consultant Manager listed below will be responsible for administering this contract. The Consultant Manager will direct the start of the contract work and be responsible for accepting the work performed in connection with this contract. Problems that may develop from time to time during the course of executing this contract should be directed to the Consultant Manager. A copy of all correspondence regarding this contract should be sent to the Contract Management Bureau for inclusion in the Department's official contract document files.

Sincerely,

  
REX GRATHWOL

Director, Contract Management Bureau

Enclosure

cc: Pete Weykamp, Transportation Maintenance Division, 5-217, MC 0337

CONTRACT C012510

Job Order Contracting System

New York State  
Department of Transportation  
("NYSDOT")

*and*

The Gordian Group  
("Consultant")

# NEW YORK STATE DEPARTMENT OF TRANSPORTATION

F. A. NO.:

P.I.N.: A989 93 701

## COMPTROLLER'S CONTRACT NO. C012510

**PROJECT:** Job Order Contracting (JOC) System

This Agreement dated Feb. 1, 2002 pursuant to Transportation Law §14 is by and between the New York State Department of Transportation ("NYSDOT"), with offices in the Administration and Engineering Building, State Campus, Albany, New York 12232, and **The Gordian Group**, 531 South Main Street, Suite M7, Greenville, S.C. 29601, (the "**Consultant**").

### WITNESSETH

**WHEREAS**, pursuant to a request for proposals the State has selected Consultant to perform the services and provide the work and system more particularly described in Schedule A annexed hereto, and Consultant agrees to provide the required work, licenses and system pursuant to the terms hereof,

**NOW, THEREFORE**, the parties agree as follows:

§ 1. *Documents Forming the Agreement.* This Agreement consists of the following component documents, of which those denominated as Schedules or Appendices are not subject to modification unless through full contract amendment procedures, while those denominated as Attachments (including any subschedules included therein) are subject to change procedures as provided for herein:

- This agreement entitled "Job Order Contracting (JOC) System";
- Schedule A - Project Scope and Deliverables;
- Schedule B - Deliverables and Compensation, also referred to as the "Project Budget";
- Appendix A - New York State and Federal required contract clauses;
- Appendix B - Procurement, Record Keeping and Accounting Requirements;
- Exhibit 1 - License Agreement;
- Exhibit 2 - Form of Software Escrow Agreement; and
- Exhibit 3 - Implementation Plan and Schedule.

§ 2. *Order of Precedence.* Unless completely mutually inconsistent, all contract requirements shall be given full effect. In the event of any conflict, uncertainty or inconsistency in content, language or requirements within this Agreement, the meaning or interpretation of the Agreement will be in accordance with following order of precedence:

2.1 Appendix A.

2.2 Unless more specific provisions of a Schedule, Appendix or Attachment pertain, the provisions of this core document and any Schedule govern;

2.3 Any conflict in quality or rigor 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):

"**JOC System**" means the job order contracting management information and support system developed for the Transportation Maintenance Division of the NYSDOT, inclusive of unit price books, technical specifications, training, and support to be provided or developed by Consultant, as more fully described in the Scope of Services annexed as **Schedule A** hereof, together with the Software licensing described in this Agreement.

"**Consultant-Owned 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.

"**Commercial-Off-The-Shelf Software**" or "COTS" means Software which is not developed by the Consultant or its subcontractors for the Project, but which is acquired commercially.

"**Commissioner**" means the Commissioner of Transportation of the State of New York or his duly authorized representative.

"**Developed Software**" means any JOC System Software and associated documentation covered by the

License Agreement, Exhibit 1 to this Agreement.

"**Enhancement**" shall mean changes or additions to Software, other than Maintenance Releases, new versions, or modifications, tailoring and/or customization 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) an incorrect functioning of code, 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.

"**Licensed Software**" means the Consultant-Owned Software licensed by the Consultant pursuant to this Agreement and the associated License Agreement.

"**Project**" means the provision or development of, testing, evaluation, deployment and support of the JOC System hereunder.

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

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

"**Integration Services**" shall mean the programming and technical support provided by 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 (**Schedule A**).

"**Intellectual Property**" means copyrights, patents, trademarks and any other form of intellectual property rights covering any data bases, Software, inventions, training manuals, systems design or other proprietary information in any form or medium.

"**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 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.

"**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 Consultant and whether provided on magnetic or optical disk, tape, firmware or otherwise, including all or any portions of the Software incorporated in another program. The Software shall, as appropriate, include Documentation and Maintenance Releases.

"**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 Consultant for the Project as set forth in the Scope of Services (**Schedule A**).

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

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

"**Support Services**" shall mean the support services provided by Consultant in respect to the Software and Maintenance Releases, enhancements and/or new versions made to the Software.

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

#### § 4. *Performance of Work.*

§ 4.1 Consultant will commence the work of the Project upon NYSDOT's issuance of a Notice to Proceed, but in no event later than fourteen (14) days from the date this Agreement is approved by the State Comptroller.

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

§ 4.3 *NYSDOT Project Management.* The work of the Project shall be performed under the program direction and

contract administration of NYSDOT. NYSDOT shall also have a Project Manager, who may be an employee of another public agency, acting as a representative of NYSDOT. Subject to the overall supervision of and accountability to the Program Manager, the Project Manager is Consultant's day to day contact for: ensuring performance of the work within the Scope of Services and the Project Budget; coordination with the Program Manager, processing of 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, however. Any amendment to the Contract Documents requires an amended or supplemental agreement signed by the NYSDOT contract officer.

§ 4.4 *Performance of Scope of Services.* Consultant shall perform all of the work required by and associated with the Scope of Services (Schedule A) 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 Schedule A. 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.

§ 4.5 *Extra Work.* If the Consultant believes that any work is or may be beyond the scope of the Agreement (extra work), or that additional work is necessary, the Consultant shall notify the State, in writing, of this fact prior to beginning any of the work. The notification shall include all information required by the NYSDOT. 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. No extra work shall be started prior to written authorization from the State. The State shall be under no obligation to reimburse the Consultant for any extra work performed without the prescribed notification and authorization. The State will not allow fee for any extra work undertaken without prescribed notification and authorization. In the event that the State determines that such work does constitute extra work, the State shall provide extra compensation to the Consultant in a fair and equitable manner. If necessary, a Supplemental Agreement providing the compensation and describing the work authorized shall be issued by the State to the Consultant for execution after approvals have been obtained from necessary State officials and, if required, from the FHWA.

§ 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 which 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 all cases provided for in this Agreement for the additional services above described, the State's directions shall be exercised by the issuance of a separate Agreement, if necessary.

§ 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 on the issue with the Project Manager 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 Section, NYSDOT will initiate an adjustment to the Scope of Services and the Project Budget.

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 Section for extra compensation will not be affected in any way by Consultant's complying with the directions of the Commissioner, the Program or 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 the Transportation Maintenance Division in Albany and the Regional Maintenance Engineers in Region 3 (Syracuse) and Region 11 (New York City).

§ 4.8 *Damages and Delays.* Consultant agrees that no charges or claim for damages shall be made by it 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 adjustment 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 Schedule.* A Schedule of Project Deliverables and Compensation for the entire Project is attached hereto as Schedule B (together with applicable subschedules, supporting documentation or requirements for such documentation, which may be collectively referred to herein as the "Project Budget"). Consultant shall maintain, and perform within, such Project Budget. If at any time the Project Budget is exceeded or likely to be exceeded, Consultant shall immediately inform NYSDOT's designated representative. NYSDOT shall determine whether a modification in the work or of the Project Budget may be made that is within Schedules A and B or, if not, whether NYSDOT will seek a modification of Schedules A or B, which is a contract amendment that requires further reviews and approvals, including by the State Comptroller.

§ 6. *Project Cost Compensation Methods.* Compensation under this Agreement shall be paid by one or more of the following methods as applied to this Project by, within and according to, the Project Budget (Schedule B):

§ 6.1 Cost Plus Fixed Fee method ("CPFF") - means compensation for actual, allowable, allocable and auditable direct salary charges, non-salary costs (including equipment, travel, subconsultants and other direct non-salary costs) and overhead costs incurred by Consultant for the work of the Project plus a fixed fee, for the Project phase(s) activated or triggered by this Agreement in the following categories, if and as set forth in Schedule B.

(i) Direct Salary Charges: Consist of the actual direct technical salaries, regular time plus straight time portion of overtime compensation paid to or incurred for all employees assigned to this Project on a full-time basis for all or part of any Project Phase, plus properly allocable partial salaries of all persons working part time on the Project, not to exceed the maximum allowable hourly rates of pay hereunder, all subject to audit. Overtime shall be subject to audit and prior approval of a protocol for the use of overtime by NYSDOT's representative.

The cost of principals', officers' and professional staffs' salaries (productive time) included in direct technical salaries is eligible for reimbursement if their comparable time is also charged directly to all other projects in the same manner. Otherwise, principals', officers' and professional staffs' salaries are only eligible as an overhead cost, subject to the

allowable overhead set forth in the Project Budget.

Consultant represents and warrants to NYSDOT that such rates are, and during the period of performance of this Agreement shall remain, the lowest rates hereafter being offered or charged by Consultant to others for the performance of comparable services. In the event that any of Consultant's rates for comparable services are reduced to the benefit of any client of Consultant as a result of any audit or for any other reason, Consultant shall so notify NYSDOT, which may elect as a result thereof to perform its audit to determine if reductions to the rates hereunder are appropriate.

(ii) Overhead: Means an allowance consistent with Federal and State regulations, policy and guidelines governing allowable overhead expenses incurred during the term of this Agreement, all subject to audit. The overhead allowance shall be established as a percentage of Direct Salary Charges only, not to exceed [N/A] %. Overhead shall not include any factor or element for the cost of money advanced by Consultant under this Agreement.

(iii) Direct Non-Salary Costs: Consist of actual direct non-salary costs incurred in performing the Project; all subject to audit. Such costs may include, but are not necessarily limited to, those shown in the Project Budget. All reimbursement for travel, meals and lodging shall be made for actual costs paid or incurred, but reimbursement of such costs shall not exceed the prevailing maximum rates established by the New York State Office of the State Comptroller.

(iv) Fixed Fee: Means a negotiated lump sum fee in addition to the cost reimbursable compensation elements, if and as set forth in Schedule B. The amount of the fixed fee is not subject to audit and is not subject to modification provided that, in connection with a substantial change in the scope, complexity or character of the work that is deemed to be extra work in accordance with this Agreement, a modification of the fixed fee may be justified, and can only be accomplished by amendment to this Agreement.

§ 6.2 Fixed Price method - A total fixed price for line items to which this method applies, as set forth, and accordingly to the billing milestones identified, in Schedule B.

§ 6.3 Unit Price Method - subject to an upset amount set forth in Schedule B an amount based on unit costs for specified items, calculated on the basis of the number of such items called for under this Agreement, to be paid for according to the billing milestones set forth in Schedule B.

§ 6.4 Percentage of Use Method - Means compensation, calculated as a percentage of the value of the job orders issued, in accordance with Article 7 below; Schedule B, "Deliverables and Compensation"; and Appendix B, "Procurement, Record Keeping and Accounting Requirements."

*§ 7. Payment Process; Record Keeping; Audit*

§ 7.1 Consultant shall submit to NYSDOT's representative Project payment requisitions for the work performed by or through Consultant, in accordance with the Project Budget (Schedule B). Requests for payment to NYSDOT shall contain a complete summary statement of charges and costs and billing invoices for the Project.

§ 7.2 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 Project Budget (Schedule B), subject to the availability of funds, the approval of NYSDOT and audit by the State Comptroller.

*§ 7.3 (Reserved number).*

§ 7.4 *Periodic Payment* - Payment to the Consultant will be made for monthly periods for Job Order Contracting (JOC) System usage, on a percentage of use basis, in accordance with the terms and conditions set forth below and in Schedule B and Appendix B, and upon approved requisitions for periods up to and including the last day of the previous month. The terms and conditions for such percentage of use compensation for JOC System usage shall include the following.

§ 7.4.1 The Consultant may request, and NYSDOT shall arrange for the State to pay, monthly payments of fees for usage of the JOC System, including usage of Consultant's proprietary PROGEN® software, usage of the Unit Price Books provided by Consultant, and any additional service and support provided by the Consultant for usage of the system. Such payments shall be calculated on the basis of the dollar amounts of maintenance work orders generated by NYSDOT using the JOC System, multiplied by the applicable usage fee percentages

set forth in Schedule B. Consultant shall, on a monthly basis, obtain from NYSDOT computers made available for use by the JOC system, and/or computers furnished by Consultant as part of the system, records and statements listing all such previously unbilled maintenance work orders generated by NYSDOT using the JOC System, in accordance with Appendix B.

§ 7.4.2 Should a work order issued by NYSDOT to a JOC contractor be reduced in scope or cancelled in whole or in part by a subsequent work order issued by NYSDOT, Consultant shall include a corresponding credit in Consultant's next monthly billing to NYSDOT for percentage of use compensation under this Agreement.

§ 7.4.3 The State shall not have any obligation to the Consultant to make any minimum level of usage of the JOC system, either monthly or otherwise; and, in the absence of such usage, shall have no obligation to compensate the Consultant for work performed on development of the JOC System. The extent of use of the JOC system, and resulting obligation to pay compensation to the Consultant on a percentage of use basis on the terms set forth above and in Schedule B and Appendix B, shall be within NYSDOT's sole discretion, based upon factors including but not limited to NYSDOT's assessment of transportation maintenance needs, experience with the usefulness and effectiveness of the JOC system, allocation of work between capital and maintenance programs, and State budgetary and fiscal constraints.

§ 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 which 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 sixty (60) calendar day audit period for final payments at which time the thirty (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.

§ 7.5.1 The Consultant is required, if it is a "foreign" (Out of State) corporation or entity, to obtain and submit the required "Tax Clearance" certificate to the State to enable the processing of the final payment. It should be noted that any time taken to satisfy or furnish this Tax Clearance certificate shall extend the required payment date by an equal period of time.

§ 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 seven (7) years from the date of final payment under the Agreement for inspection by the NYSDOT or any authorized representative of the State.

#### § 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. The State agrees to complete any audit or review within three (3) years following the date of final payment.

§ 7.7.2 *Record Retention.* Subject to any higher standard elsewhere in this Agreement, 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 and OMB Circular A-128 and any revision or supplement thereto.

§ 7.7.3 *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.

§ 7.7.4 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 negligent acts, errors or omissions of the Consultant, its subcontractors, 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 reasons 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 section 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 section or this Agreement.

§ 8.2 *Indemnification.* In case suit shall at any time be brought against the State, asserting a liability against which Consultant is obligated to indemnify and save harmless the State, 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 judgement 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, damage, or destruction of the type covered by this Section as Consultant may from time to time request.

§ 8.3 If a third party claim causes NYSDOT's quiet enjoyment and use of the Licensed Software to be seriously endangered or disrupted, the Consultant shall: (1) replace such Software, without additional charge, by a compatible, functionally equivalent and non-infringing product; (2) modify such Software to avoid the infringement; (3) obtain a license for NYSDOT to continue use of such Software 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 refund a pro rata portion of the entire JOC System fee based on five years according to the



schedule set forth below, and discharge the NYSDOT from its obligation to pay any 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.* 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 and attributable to a breach of warranty, or negligent or intentional act or omissions of Consultant, its subcontractors, or the respective employees or agents of the aforesaid, or the possession or use by NYSDOT, of the Licensed Software, including (but not limited to) the violation of any third party's trade secrets, proprietary information, trademark, copyright, or patent rights in connection with such Software. A party requesting such indemnification shall give 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 Licensed Software, including modifications thereto made by Consultant or with Consultant's knowledge and consent and does not cover third party claims arising from modifications not authorized by or performed with the knowledge of Consultant or the use of the Licensed Software in a combination or manner not specified by the Consultant.

§ 9. *Insurance.* Consultant agrees to procure and maintain without direct cost to the State except as noted during the pendency of this Agreement, insurance of the kinds and in amounts hereinafter provided by insurance companies authorized to do business in the State of New York, covering all operations under this Agreement whether performed by it or subcontractors. Before commencing the work, Consultant shall furnish to NYSDOT a certificate or certificates, in a form satisfactory to NYSDOT, showing that he has complied with this Article, which certificate or certificates, shall provide that the policies shall not be changed or canceled until thirty (30) days written notice has been given to NYSDOT. The kinds and amounts of insurance required are as follows:

§ 9.1 Policy covering the obligations of Consultant in accordance with the provisions of Chapter 41, Laws

of 1914, as amended, known as the Worker's Compensation Law, and also by the provisions of Article 9 of the Worker's Compensation Law known as the Disability Benefits Law, and this Agreement shall be void and of no effect unless Consultant procures such policy and maintains it until final acceptance of all work described herein;

§ 9.2 Comprehensive General Liability Insurance insuring the Consultant and, as additional insureds, the People of the State of New York, the Commissioner of Transportation, NYSDOT, and all officers and employees of NYSDOT, both officially and personally (excluding lawsuits involving employee actions outside their scope of employment) with respect to the Consultant's performance under this Agreement for which the Consultant may be legally liable, including in such coverage any omissions and supervisory acts. Policies of personal injury liability insurance of the types hereinafter specified, each with limits of liability of not less than \$500,000 for all damages arising out of personal injury, including death at any time resulting therefrom, sustained by one person in any one accident and, subject to that limit for each person, not less than \$1,000,000 for all damage arising out of bodily injury, including death at any time arising therefrom, sustained by two or more persons in any one accident, and not less than \$500,000 in damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, not less than \$1,000,000 for all damages arising out of injury to or destruction of property during the policy period.

§ 9.3 Automobile Liability and Property Damage Insurance. As applicable, a policy covering the use in connection with the work covered by the Agreement of all owned, not owned and hired vehicles bearing, or under the circumstances under which they are being used, required by the Motor Vehicle Laws of the State of New York to bear, license plates.

§ 9.4 Additionally, if the Consultant engages a professional engineer or engineering firm to provide engineering services, then the Consultant shall require such engineer or firm to maintain for the duration of the work, Professional Liability Insurance in the amount of at least \$1,000,000 covering damage for liability arising out of any negligent act, error, or omission in the rendering of or failure to render such professional services. The Consultant shall provide NYSDOT with a certificate of insurance documenting such coverage prior to the professional engineer or engineering firm commencing the provision of such services.

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

§ 10.1 *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.

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

§ 10.3 *Trade Secrets.* The parties shall not publicly disclose information they obtain as a result of this Agreement which 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.

§ 10.4 *Copyright to Authors.* In accordance with Federal Government policy, the copyright of work produced under this Agreement, the copyrights to which are not otherwise acknowledged or provided for in this Agreement, shall remain with the authors. Under the FHWA Grant Agreement FHWA has reserved a royalty-free, perpetual, transferrable, 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.

§ 10.5 *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. §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."

§ 10.6 *NYSDOT Ownership.* All tangible and intangible property rights, including the source codes, all patent rights and copyrights arising out of the design and creation of Developed Software shall be the exclusive property of NYSDOT, who shall have the sole rights to seek patent, copyright, registered design or other protection in connection therewith.

§ 11. *Intellectual Property Rights to Other Software.* Intellectual property rights to Software other than that governed by section 10 hereof, are as follows:

§ 11.1 *Commercial-Off-The-Shelf (COTS) Software.* COTS Software utilized under this project will be provided to NYSDOT with, as applicable, the relevant shrink wrap license or license as negotiated.

§ 11.2 *Consultant-Owned Software.* This Software is provided by Consultant to NYSDOT, in accordance with the terms of a License Agreement attached hereto as Exhibit 1 and the Software Escrow Agreement attached hereto as Exhibit 2.

§ 11.2.1 Such Software licenses shall include in their meaning: (i) any Maintenance Releases, enhancements or New Version 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 JOC System) and Enhancements related thereto; (ii) and all materials, documentation and technical information provided to NYSDOT in written form and for use in connection with such Software; and (iii). If at any time after the acceptance date, Consultant shall develop any changes in the Licensed Software which change the basic program functions of the Software or add one or more new ones, the State shall retain the right to obtain such program changes at no cost.

§ 11.2.2 Consultant warrants that it has full power and authority to grant the rights granted by this subsection 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.

§ 11.2.3 Consultant warrants that 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.

§ 12. *Escrow and Modification of Source Code.* Consultant shall place a copy of the source codes of the Consultant-Owned Software and any proprietary or custom developed (for the JOC System) Consultant -- or subcontractor-Owned Software into escrow with an escrow agent in accordance with the form and substance of the Escrow Agreement annexed as Exhibit 2 whose terms, even prior to the execution of Exhibit 2 by all of the parties thereto, are incorporated herein as between the parties to this agreement. The parties agree to use joint best efforts to negotiate such agreement with such third party escrow agent.

§ 13. *Training.* Consultant shall offer training in the use and implementation of the Developed or Consultant-Owned Software to NYSDOT and selected JOC contractor employees who will be using the System. Consultant shall submit a training plan to NYSDOT's Project Manager for approval. Said training plan shall include Consultant's proposal for providing user and JOC System training, determinations regarding the needs of the target audience, develop lesson plans and prepare visual aids. The NYSDOT will identify candidates for training courses and the Consultant shall arrange schedules and locations, which shall be at or proximate to the Project. Consultant shall also evaluate feedback on training sessions to enhance future sessions.

§ 14. *Confidential Information.* Each party shall keep confidential the business information, data and specifications, relating to the Developed Software or business information which is disclosed and designated in writing and confidential by one party to the other. It being understood that NYSDOT's actions are subject to the Freedom of Information Law ("FOIL"). Both parties agree not to disclose or make available the confidential information to a third party without the prior written consent of the other party subject to FOIL. Confidential information is not meant to include any information which, at the time of disclosure, is generally known to the public and any competitors of Consultant.

#### § 15. *System Acceptance Tests.*

§ 15.1 *Acceptance Tests.* All acceptance testing shall be performed on the actual Software or system

operating environment. Acceptance testing shall be performed by NYSDOT for each JOC Project component or Subsystem, the JOC System, and any necessary interfaces with the NYSDOT AS-400 accounting system and other NYSDOT systems used for processing payments to contractors, vendors and consultants, to determine whether the JOC Project Software and JOC System meet the specifications, performance and testing standards. Before completion of the Final Subsystem Acceptance an acceptance test shall be performed on the JOC System in order to determine whether the integration of all Software and any necessary hardware or other equipment provided by the Consultant meets the specifications for the JOC Project and operates with internal consistency and without failure for a period of thirty (30) consecutive days (the "System Test Period").

Consultant shall advise NYSDOT's representative in writing as the JOC Subsystems are ready to be tested. Prior to the conduct of any acceptance testing, Consultant at no additional expense to NYSDOT, shall provide the training requirements therefor described in the Scope of Services.

Commencement of Subsystem Acceptance Tests; Acceptance Dates. Within five (5) business days of Consultant's written notification to NYSDOT that the JOC Subsystem has been installed and that NYSDOT has been trained to permit use and operation of the Subsystem being tested, the Licensed Software will be available for non-productive use for testing for a period of thirty (30) days.

Such Subsystem Acceptance Tests shall be conducted in the actual operating environment and in order to determine whether the relevant Licensed Software, hardware or other equipment for the relevant JOC Project component performs according to the requirements of this Agreement and to ensure that the relevant Software, hardware or other equipment can be effectively utilized in the operating and field environment, is capable of running on a variety of data without material failure for a period of thirty (30) consecutive days, and meets the performance requirements. If and when the Subsystem Acceptance Tests establish that the JOC Subsystems are performing properly, alone and in conjunction with all relevant components of previously accepted JOC Subsystems, NYSDOT shall notify Consultant in writing of its acceptance; upon NYSDOT acceptance of each of the Final JOC Subsystem Tests NYSDOT shall sign the Final Subsystem Acceptance Certificate for each Subsystem and the date of execution of each such Final Acceptance Certificate shall be the date on which the term of each Warranty Period shall begin (hereinafter, the "Final Acceptance Date") for each Subsystem.

§ 15.2 *Acceptance Test Failures.* If NYSDOT determines that the Licensed Software has not successfully completed the Subsystem Acceptance Test Plan(s), NYSDOT shall promptly notify Consultant in writing

(hereinafter referred to as "first notice of failure") and shall specify with as much detail as possible in which respects such Software does not perform properly. Consultant will respond within ten (10) business days with an action plan and schedule to address all issues related to the failure(s).

§15.3 *Correction Costs.* Unless the Acceptance Test failure(s) are the results of Disputed Work within the meaning of §4.6 of this Agreement (in which case the remedy within such section applies) Consultant's correction of the product deficiency shall be at no additional cost to NYSDOT.

§ 15.4 *Repeated Failure Constituting Material Breach.* If the Licensed Software for each Subsystem fails to perform properly in accordance with the Subsystem Acceptance Test Criteria after three (3) Subsystem Acceptance Tests, 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 afford Consultant with additional opportunity to cure the default.

#### §16. *Consultant Warranties*

§ 16.1 *Warranty Provisions.* Consultant warrants that, for a period of 90 days after the Final Acceptance Date, all Developed Software, Consultant-Owned Software furnished hereunder, both as to each individual element and for the overall JOC System, shall be free from significant programming errors which shall prevent it from operating in conformity with the JOC System documentation and/or user documentation, whichever is applicable.

§ 16.1.1 If NYSDOT notifies Consultant that any Software fails to conform to the JOC System requirements during the Warranty period, Consultant shall remedy such failure at no cost to NYSDOT.

§ 16.2 *Exclusive Warranty for COTS or Third Party Software.* Consultant's warranties do not apply to COTS Software. COTS manufacturer and any third party warranties shall, to the extent permissible, be passed through to NYSDOT.

§ 16.3 *Correction of Defects.* If at any time during the Warranty Period Consultant or NYSDOT discovers one or more defects or errors in the Licensed Software or any other respect in which such Software fails to conform to the provision of any warranty contained in the Agreement, Consultant shall, entirely at its own expense, within one day for failures which impact overall or major subsystem System performance and three days for less severe failures, unless a different period is mutually agreed to, 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 Licensed Software or hardware as may be necessary to keep all Software and hardware in operating order in conformity with

the warranties herein.

#### § 17. *Suspension And Termination; Bankruptcy*

§ 17.1 *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. In the event that NYSDOT terminates this Agreement for convenience prior to completion of the contemplated term of this Agreement, including any available option period, then NYSDOT agrees that it shall not use the JOC System developed by Consultant. In such event, NYSDOT shall be entitled to retain as state contract records all of Consultant's proposal(s) to NYSDOT, this Agreement, and all contract documents developed by Consultant; but shall return to Consultant all of Consultant's other Proprietary Information then in NYSDOT's possession, including PROGEN® software and support documentation, Unit Price Books, training materials, and other support materials developed by the Consultant.

§ 17.1.1 Contracts between Consultant and its contractors shall provide for their suspension or termination without cause and for the convenience of Consultant upon not less than 7 day 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.

§ 17.2 *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: (i) it fails to make reasonable progress on the Project in accordance with this Agreement; or (ii) the JOC System does not perform in accordance with the requirements of this Agreement, notwithstanding Consultant's remedial or maintenance efforts; or, (iii) other material violation of this Agreement that significantly endangers substantial performance of the Project.

§ 17.2.1 In the event of the termination of this Agreement for failure of a Project element or in the

performance of the JOC System, NYSDOT may: (i) 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, (ii) if such failure is integral to the entire JOC System, all money paid for the JOC System.

§ 17.2.2 In the event of an unremedied failure of a major Project element, or of a major and unremedied failure in the performance of the JOC System, NYSDOT may in its discretion suspend Consultant's performance in whole or in part without terminating this Agreement, until such time as Consultant remedies such failure to NYSDOT's satisfaction. During such a suspension, and following any termination for cause, NYSDOT agrees that it shall not use the JOC System developed by Consultant. During such a suspension, and following any termination for cause, NYSDOT and Consultant further agree that NYSDOT shall be entitled to retain as state contract records all of Consultant's proposal(s) to NYSDOT, this Agreement, and all contract documents developed by Consultant; but shall return to Consultant all of Consultant's other Proprietary Information then in NYSDOT's possession, including PROGEN software and support documentation, Unit Price Books, training materials, and other support materials developed by the Consultant.

§ 17.3 *Delivery of Documentation.* In the event of suspension or termination pursuant to this section the Consultant shall secure for and deliver to the NYSDOT all documentation relating to the contracts suspended or terminated thereby, including any designs, plans or specifications, contract and subcontract documents, tapes or disks. As provided by article 17.1, NYSDOT shall be entitled to retain as state contract records all of Consultant's proposal(s) to NYSDOT, this Agreement, and all contract documents developed by Consultant; but shall return to Consultant all of Consultant's other Proprietary Information then in NYSDOT's possession, including PROGEN® software and support documentation, Unit Price Books, training materials, and other support materials developed by the Consultant.

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

§ 17.5 *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 wilfully misused State or Federal assistance funds by the gross negligence or wilful 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.

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

§ 17.6.1 Consultant shall comply with all requirements as 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.

§ 17.6.2 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.

§ 17.7 *Impact of Termination on Software Licensing.* Any suspension or termination under this section shall specify whether the Consultant's provision of Consultant - or Subcontractor - Owned and Licensed Software is to be affected. The terms of the Licensing Agreement associated with such software may not be terminated by NYSDOT without the return of such software to the Consultant, or the destruction of such software. In the event such Software licensing is terminated hereunder an authorized representative of Consultant shall be afforded sufficient access to NYSDOT facilities in which the Licensed Software has previously been installed or used to verify that all use of such License Software has been discontinued.

§ 18. *Title to Equipment.* Title shall vest in NYSDOT to all Equipment purchased or provided for the JOC Project by Consultant or its subcontractors. Consultant shall

execute, acknowledge, deliver and perform, or cause to be executed, acknowledged, delivered or performed, all such bills of sale, assignments, conveyances or other documents or acts as NYSDOT may reasonably request in order to assure the better vesting in and confirming to NYSDOT, its successor and assigns, of title to and possession of such Equipment upon completion of the term of the Agreement or earlier termination thereof. In the event Consultant or its subcontractors lease Equipment for the JOC Project, Consultant or its subcontractors shall assure that the agreement for such Equipment provides for a lease transfer option to NYSDOT. For the purposes of this subsection, Equipment shall be deemed to include, but not be limited to, computers, computer hardware, monitors, consoles, cameras, video and other surveillance equipment, telephones, and furniture.

§ 19. *Independent Contractors.*

§ 19.1 The purpose of this Agreement is to promote economic and technical cooperation and efficiencies among the Government, the 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.

§ 19.2 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.

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

"60. 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 the Federal Social Security Taxes.

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

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

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

§ 21. *Entire Agreement.* This Agreement, together with the Attachments hereto, constitute 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.

§ 22. *Amendments.* Amendments to this Agreement and amended or Supplemental Schedules or attachments may be made only in writing signed by both parties and specifically referred to as an amendment to this Agreement or amended or Supplemental Schedule or attachment.

§ 23. *Required Clauses.* Attached hereto and made part of this Agreement, as if set forth fully herein as Appendix A, is standard clauses for all New York State contracts.

§ 24. *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.

§ 25. *Effective Date.* This Agreement takes effect as of the date hereof first mentioned.

§ 26. *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.

§ 27. *Interpretation.* All Section 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 their 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.

§ 28. *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.

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

§ 30. *Term of Agreement.* The term of this Agreement begins on the effective date first stated and shall continue for five years. The parties also acknowledge that this Agreement may be extended for up to five additional years if it is determined that the program is successful and should be extended to other regions of the State.

§ 31. *Assignment or Transfer of Agreement*

§ 31.1 As required by the State Finance Law, Section 138, Consultant shall not assign, transfer, convey, sublet or otherwise dispose of this Agreement or of 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.

§ 31.2 If this restriction be 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.

§ 32. *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 (3) years;

- 3) does not have a proposed debarment pending; and
- 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 (3) three years.

EXCEPTIONS -

§ 33. *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 subrecipients shall certify and disclose accordingly.

§ 34. *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 the changed requirements will apply to the Project as required.

§ 35. *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 shall also require that the language of this certification be included in all subcontract and lower tier subcontracts, which exceed \$100,000 and that all such subrecipients shall certify and disclose accordingly.

§ 36. *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 FHWA or the highway organizations of any public employer, except regularly retired employees, without the consent of the public employer of such person.

§ 37. *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 sixty (60) days to the state or its 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 last survivor.

§ 38. *Subcontractors/Subconsultants.* All subcontractors and subconsultants performing work on this project shall be bound by the same required contract provisions as the prime consultants. 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.

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



IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their duly authorized officials as of the date first above written.

Consultant

NYSDOT

BY:

Robert D. Coffey

By:

Neil Fe

for

**The Gordian Group**

For

Commissioner of Transportation

Title:

Vice President

Agency Certification: In addition to the acceptance of this contract I also certify the original copies of this signature page will be attached to all other exact copies of this contract.

APPROVED AS TO FORM:

STATE OF NEW YORK ATTORNEY GENERAL

Date:

APPROVED AS TO FORM  
NYS ATTORNEY GENERAL

BY:

DEC 21 2001

Assistant Attorney General

PETER FAVRETTO  
ASSOCIATE ATTORNEY

COMPTROLLER'S APPROVAL:

MAR 27 2002

Date:

BY:

For the New York State Comptroller Pursuant to State Finance Law §112.

**Acknowledgment**

State of SC )

County of Greenville ) ss.:

On the 29<sup>th</sup> day of November in the year 2001, before me, the undersigned, personally appeared Robert D. Coffey, 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 upon behalf of which the individual(s) acted, executed the instrument.

Neil Fe

Notary Public, State of South Carolina

My Commission Expires:

3/8/2001

# **NYSDOT CONTRACT C012510**

## **SCHEDULE A**

### **Project Scope and Deliverables**

## **CONTRACT C012510 -- SCOPE OF WORK**

### **DUTIES AND RESPONSIBILITIES - Consultant**

The Gordian Group (the "Consultant") will assume the following duties and responsibilities as described herein and in accordance with their proposal dated January 9, 2001:

1. Consultant will provide experienced staff who will be responsible for the Job Order Contracting (JOC) development and implementation program. This staff will report directly to the Department and will be available to assist the Department with any JOC related issues.
2. Consultant will be responsible for the development of JOC documents including unit price books containing location specific pricing information as required, technical specifications for all maintenance related activities except those involving snow and ice removal, and contract terms, conditions, and bid documents for JOC contracts to be let as required. Each unit price shall be developed using specific local labor, equipment, and material rates. Direct labor costs will be developed using local prevailing wage rate tables. The direct material and equipment costs will be determined by conducting a pricing survey of the local market. The use of factors for localizing prices will not be acceptable.
3. Consultant will be responsible to update the Unit Price Books to reflect periodic changes in labor, equipment, or material prices or to amend, add, or edit items listed in the Unit Price Books during the course of the contract.
4. The Unit Price Books must be able to be stored electronically on an IBM compatible PC and operate in a Microsoft Windows operating system. The system must be capable of transferring data into Microsoft Access and be operable in a Microsoft Windows environment on IBM compatible PCs.
5. Technical specifications shall correspond to the activities listed in the Unit Price Books and incorporate the NYSDOT Standard Specifications and Transportation Maintenance Division practices. The technical specifications are to be compiled, published and stored electronically using Corel Word Perfect, version 8.0 or later, and NYSDOT shall have a copy.
6. Consultant will be responsible for providing a site license for Consultant's proprietary software, PROGEN®, and for the development of custom interfaces, reports and agreed upon enhancements, including development as requested by NYSDOT of any necessary interfaces with the NYSDOT AS-400 accounting system and other NYSDOT systems used for processing payments to contractors, vendors and consultants. Consultant will also be responsible, on a monthly basis, for obtaining from the NYSDOT computers made available for use by the JOC System, and/or computers furnished by Consultant as part of the System, the data concerning issuance of job orders necessary to determine the monthly amounts which Consultant is to be paid on a percentage of use basis; and for the calculation and submission to NYSDOT of monthly billings based in such data. Consultant shall maintain and on NYSDOT request provide, itemized monthly billings identifying each job order by NYSDOT region, number, summary description and amount. Such data, its collection, and such calculations and billings shall, along with other project activities and records, be subject to audit by NYSDOT and/or the Office of the State Comptroller (OSC) on the same basis as provided by the Agreement for audit of all project

activities.

7. Consultant will be responsible for installing and pre-testing PROGEN® on both Department's and the JOC contractor's hardware systems. The Department will have no restrictions on the number of PROGEN® installations. The selected Job Order contractors must be furnished with an automated system capable of generating complete JOC cost proposals. Acceptance testing of software developed or provided under this Agreement shall remain NYSDOT's responsibility as provided in paragraphs 15, 15.2, 15.3, 15.4, 16, 16.1, 16.2 and 16.3 of the Agreement.
8. Consultant will be responsible for pre-testing/debugging PROGEN® under actual field conditions prior to the implementation of JOC.
9. The Contract Development Phase incorporates the activities necessary to establish the structure of the Department's JOC program, inform the internal Department staff as well as the contracting community about JOC, assist with procurement of the actual JOC contractors and the development of the actual execution procedures that the Department will use in executing the JOC concept. Specific services will include:
  - a. Development of the JOC Program Structure/Bidding Strategy,
  - b. Prepare and Conduct Pre-Bid Seminars,
  - c. Prepare and Conduct an External Marketing Program,
  - d. Prepare and Conduct an Internal Marketing Program, and
  - e. Coordinate and Develop the JOC Execution Procedures
10. Consultant is responsible for a comprehensive JOC training program which will include different course modules for Department and construction contractor staff to receive specialized training. Training is to be hand-on and include a comprehensive training/reference manual with sample Work Orders, flow charts, and forms to be available as reference tools.
11. Consultant staff will assist in the actual execution and use of the maintenance contracts by helping Department staff develop the initial Job Orders. Consultant staff will attend and monitor initial site visits, proposal development and negotiation sessions. Consultant will remain on-site with the Department for at least ninety (90) days after the first JOC contract has been awarded to provide this assistance.
12. Consultant will be responsible for providing comprehensive JOC support to the Department. Consultant will also monitor the overall program and prepare any status reports required by the Department. As provided in paragraph 6 of this Schedule A, Scope of Work above, Consultant will further have an ongoing obligation for monthly collection of data on system usage, and calculation and submission of monthly billings based on such data.
13. The Consultant shall provide an evaluation of the JOC program in NYSDOT at the end of the third year of the contract. The Evaluative Report is to include a review of the design and implementation phase, providing details on the obstacles encountered in both Regions. The report is to provide summary reports on the JOC system usage, work order types, project cost comparisons relating contract bid prices to those

prices incurred through JOC, and a review of project completion time frames. The report is also to include recommendations on the expanded use of JOC and other types of flexible, indefinite quantity contracts suitable for a wide variety of transportation maintenance activities in NYSDOT. The report is further to include an evaluation of what, if any, additions to NYSDOT hardware, software, network configurations and/or staffing would be required to convert the JOC System, including Consultant's collection of usage data for billing purposes, from a stand-alone system to one that is either integrated into or interfaced with NYSDOT's computer networks so as to automate data collection on JOC System usage. Consultant shall be required to submit this report, and approval of this report both by NYSDOT and by the Office of the State Comptroller (OSC), shall be required prior to any determination by NYSDOT to proceed with any broader implementation of the JOC Program in other regions under item 14 below.

14. Implementation of JOC Program in Other NYSDOT Regions or Statewide (Optional) - During the first five years of the contract, NYSDOT will evaluate the JOC system and determine if it will be implemented in other regions of the State. JOC systems developed for and implemented in other NYSDOT Regions will be similar in scope and function to the system developed for Region 3. All facets of highway and bridge maintenance along with facility maintenance will be included for any or all of the other nine NYSDOT Regions. In accordance with the position of OSC, NYSDOT and Consultant shall be required to enter into a Supplemental Agreement, reviewed and approved by the State Attorney General and OSC, before proceeding with implementation of the JOC Program in any Regions other than Regions 3 and 11, the two Pilot Project Regions contemplated by the initial Agreement.
15. In working on the develop and implementation of the JOC system for NYSDOT, the Consultant shall organize and manage its efforts according to Exhibit 3, Implementation Plan and Schedule, to this Agreement.

## **DELIVERABLES**

1. Automated System components:
  - a. Unit Price Books
  - b. Technical Specifications, including Contractual Terms and Conditions
  - c. Management Information and Support System (PROGEN® software plus custom developed enhancements)
2. Technical Training and Manuals
3. Technical Support (4 Years)
4. Evaluative Report
5. Implementation of JOC System in Other NYSDOT Regions (Optional)

## **DUTIES AND RESPONSIBILITIES - The Department**

The Department will assume the following duties and responsibilities:

1. Review all documentation and requests for information submitted by Consultant in a timely manner.

2. Provide available information regarding requirements for the JOC Program, including but not limited to maintenance activities, facilities lists, current Department procedures, programs, technical specifications and bidding information; and including information on the NYSDOT AS-400 accounting system and other NYSDOT systems used for processing payments to contractors, vendors and consultants.
3. Designate, in writing, a representative who shall render or obtain decisions in a timely manner pertaining to the JOC Program.
4. Provide at the Department's location, a working space with desks, networked personal computers with e-mail and system access privileges, fixtures, telephones, equipment and supplies for Consultant's JOC development team. Also provide individual members of Gordian's JOC development team with I.D. badges to allow normal access to NYSDOT offices, and parking permits and/or decals to prevent towing of consultant vehicle(s).
5. Provide reproduction services for all draft and final versions of the Unit Price Book, Technical Specifications, Contract Terms and Conditions, Instructions to Bidders and Proposal Forms, Execution Procedures and Training Materials.

**NYSDOT CONTRACT  
C012510**

**SCHEDULE B**

**Deliverables and Compensation  
("PROJECT BUDGET")**

# Schedule "B"

Job Order Contracting ("JOC") System – Summary Budget

Item	Chargeable unit	Amounts Subject to Percentage of Use Compensation	Percentage Fee	Compensation Method	Maximum Amount
System Development <ul style="list-style-type: none"> <li>■ Program Development</li> <li>■ Document Development</li> <li>■ Procurement Support</li> <li>■ Software Development and Testing</li> <li>■ Program Implementation and Training</li> </ul>			N/A	No cost to NYSDOT	\$ 0
JOC System Use	Dollar amount of previously unbilled maintenance job order work generated by NYSDOT using the JOC system to construction contractors selected by NYSDOT through competitive public bidding to perform maintenance job orders. Billings for such chargeable units shall be submitted on a monthly basis.	For amounts of maintenance job orders up to one-time total of \$3,000,000 of such orders over the life of this Contract	8.5% of total amounts issued to contractors for job order work	Extension of percentage fee to applicable amount based on orders issued for the applicable month.	<b>\$255,000</b> (i.e. 8.5% of \$3,000,000)
		For amounts of maintenance job orders between one-time total of \$3,000,000 and one-time total of \$8,000,000 of such orders over the life of this Contract. Supplemental Agreements, entered into by contract amendment approved by the AG and OSC, shall be required prior to the expenditure of any contract amounts exceeding a one-time total of \$505,000; and prior to any implementation of the JOC Program beyond the two Pilot Project Regions, 3 and 11.	5.0% of total amounts issued to contractors for job order work		<b>\$250,000</b> (i.e. 5.0% of \$5,000,000 between \$3M and \$8M)



Item	Chargeable unit	Amounts Subject to Percentage of Use Compensation	Percentage Fee	Compensation Method	Maximum Amount
		For amounts of maintenance job orders in excess of one-time total of \$8,000,000 of such orders over the life of this Contract, up to one-time total of \$140,000,000 over the life of this contract	1.5% of total amounts issued to contractors for job order work		<b>\$1,980,000</b> (i.e. 1.5% of amounts over \$8M and less than \$140 M)
<b>Total Budget</b>		In addition to the Supplemental Agreements referenced above required for any expenditures in excess of a one-time total of \$505,000, and for any expansion of the JOC Program beyond the Pilot Project Regions, 3 and 11, authorization for any payments to Consultant for amounts of maintenance job orders in excess of one-time total of \$140,000,000 of such orders over the life of this Contract shall require an additional Supplemental Agreement approved by the AG and OSC.			<b>\$2,485,000</b> Supplemental Agreement required for any payments above this amount.

**NYSDOT CONTRACT  
C012510**

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**APPENDIX A**

**NYS REQUIRED  
CONTRACT CLAUSES**

## APPENDIX A

### STANDARD CLAUSES FOR ALL 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, licensor, licensee, lessor, lessee or any other party) :

1. **EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.
2. **NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent, in writing, of the State and any attempts to assign the contract without the State's written consent are null and void. The Contractor may, however, assign its right to receive payment 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 \$15,000 (\$20,000 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, 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.
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.** The contractor agrees to comply with all applicable Federal, State and local Civil Rights and Human Rights laws with reference to equal employment opportunities and the provision of services. In accordance with 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, age, disability 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.
7. **NON-COLLUSIVE BIDDING REQUIREMENTS.** In accordance with Section 139-d of the State Finance Law. If this contract was awarded based upon the submission of bids, Contractor warrants, under penalty of perjury, that its bid

was arrived at independently and without collusion aimed at restricting competition. Contractor further warrants 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 (2 NYCRR 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 be 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 a minimum of six (6) years or three (3) years after final payment, whichever is later. 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) **FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER.**

All invoices or New York State standard vouchers submitted for payment for the sale of goods or services or the lease of real or personal property to a New York State agency must include the payee's identification number, i.e., the seller's or lessor's identification number. The number is either the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. Failure to include this number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on his invoice or New York State standard voucher, 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 New York State's Central Accounting System by the Director of State Accounts, Office of the State Comptroller, AESOB, Albany, New York 12236.

12. **EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN:** In accordance with Section 312 of the Executive Law, 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:

(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, 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, upgrading, 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; or (iii) banking services, insurance policies or the sale of securities. 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 Governor's Office 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 XI-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 be 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. **MACBRIDE PRINCIPLES.** Chapter 807 of the Laws of 1992 subjects all non-federally aided State Contracts to certain requirements regarding the MacBride Principles of Fair Employment in Northern Ireland. Pursuant to its terms, the Chapter requires the inclusion of the following Certification of Nondiscrimination in all contracts:

**"NONDISCRIMINATION IN EMPLOYMENT IN NORTHERN IRELAND:  
MACBRIDE FAIR EMPLOYMENT PRINCIPLES"**

In accordance with Chapter 807 of the Laws of 1992 the Consultant, by signing this agreement, certifies that is or any individual or legal entity in which the Consultant holds a 10% or greater ownership interest, or any individual or legal entity that holds a 10% or greater ownership interest in the Consultant, either (1) have no business operations in Northern Ireland, or (2) shall take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the MacBride Fair Employment Principles relating to nondiscrimination in employment and freedom of workplace opportunity regarding such operations in Northern Ireland, and shall permit independent monitoring of their compliance with such Principles.

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

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

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

1. **Definitions** For purposes of this warranty, the following definitions shall apply:

- i. "Product" shall include, without limitation: any piece or component of equipment, hardware, firmware, middleware, custom or commercial software, or internal components or subroutines therein which perform any date/time data recognition function, calculation, comparing or sequencing. Where services are being furnished, e.g. consulting, systems integration, code or data conversion or data entry, the term "Product" shall include resulting deliverables.
- ii. "Contractor's Product" shall include all Product delivered under this Agreement by Vendor other than Third Party Product.
- iii. "Third Party Product" shall include product manufactured or developed by a corporate entity independent from Vendor and provided by Vendor on a non-exclusive licensing or other distribution Agreement with the third party manufacturer. "Third Party Product" does not include product where Vendor is: a) a corporate subsidiary or affiliate of the third party manufacturer/developer; and/or b) the exclusive re-seller or distributor of product manufactured or developed by said corporate entity.

2. **Warranty Disclosure** At the time of bid, for individual or agency specific contracts, or at the time of ordering Product order or Product quote for OGS centralized contracts, Contractor must disclose in writing to Authorized User:

- a) *For Contractor Product and for Products (including, but not limited to, Contractor and/or Third Party Products and/or Authorized User's Installed Product) which have been specified to perform as a system:* Compliance or non-compliance of the Products individually or as a system with the Warranty Statement set forth below; and
- b) *For Third Party Product Not Specified as Part of a System:* Compliance on the grounds that the Contractor has passed through the third party manufacturer Year 2000 warranty or non-compliance based upon the fact that
  - a) Contractor indicates that they can not pass through the third party manufacturer's Year 2000 Warranty or b) there is no third party manufacturer's Year 2000 Warranty to pass through.

**NOTE:** AN ABSENCE OR FAILURE TO FURNISH THE REQUIRED WRITTEN WARRANTY DISCLOSURE SHALL BE DEEMED A STATEMENT OF COMPLIANCE BY THE CONTRACTOR OF THE PRODUCT(S) OR SYSTEM(S) IN

QUESTION WITH THE YEAR 2000 WARRANTY STATEMENT SET FORTH BELOW.

3. Year 2000 Warranty Year 2000 warranty "compliance" shall be defined in accordance with the following warranty statement:

Warranty Statement Consultant warrants that Product(s) furnished pursuant to this Agreement shall, when used in accordance with the Product documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000, including leap year calculations. Where a purchase requires that specific Products must perform as a package or system, this warranty shall apply to the Products as a system. In the event of any breach of this warranty, Vendor shall restore the Product to the same level of performance as warranted herein, or repair or replace the Product with conforming Product so as to minimize interruption to Authorized User's ongoing business processes, time being of the essence, at Vendor's sole cost and expense. This warranty does not extend to correction of Authorized User's errors in data entry or data conversion.

4. YEAR 2000 Warranty on Services Where Contractor is providing ongoing services, including but not limited to: 1) consulting, integration, code or data conversion, ii) maintenance or support services, iii) data entry or processing, or iv) contract administration services (e.g. billing, invoicing, claim processing), in addition to the foregoing Year 2000 warranty on service deliverables, Contractor warrants that services shall be provided in an accurate and timely manner without interruption, failure or error to the inaccuracy of Contractor's business operations in processing data/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000, including leap year calculations. Contractor shall be responsible for damages resulting from any delays, errors or untimely performance resulting therefrom, including but not limited to the failure or untimely performance of such services.

## 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 and Equal Employment Opportunity Officer and a Minority Business Enterprise officer (hereinafter referred to as the EEO Office 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 procedure 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 of 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) The CONSULTANT will submit to the New York State Department of Transportation, a monthly report for the first three months after beginning work, thereafter upon request, and each month of July following the initial submission for the duration of the project indicating the number of minority, women and non-minority group employees currently engaged in each work classification required by the contract work. This information is to be reported on Form PR-1391, Federal-Aid Highway Construction Contractor's Monthly EEO Report. If on-the-job training is being required by "Training Special Provision", the CONSULTANT will be required to furnish Form FHWA-1409, Federal-Aid Highway Construction Contractor's Semi-Annual Training Report.

(d) 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:

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

**NYSDOT CONTRACT  
C012510**

**APPENDIX B**

**Procurement, Record Keeping and  
Accounting Requirements**

APPENDIX B  
PROCUREMENT, RECORD KEEPING AND ACCOUNTING 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, or 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 Components*

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

2.1 *Progress Billings.* 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 utilizes 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 amount 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 amount of computed Federal Share payments, with Line 8 containing only the amount currently being claimed for reimbursement of the federal share.

2.2 *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 ledger will identify the source document for the transaction by referencing contract/estimate numbers, social security numbers (for time sheets and employee reimbursements), vendor or payee numbers for vouchers, etc. The applicable accounting system record date will also be included for each transactions, i.e. - pay period dates for time sheets, or 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) for the Project life to date.

2.3 *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.

2.4 *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, 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.

#### *For Fixed Price Compensation*

2.5. *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.

*Percentage of Use Compensation Based Upon JOC  
System Usage*

2.6. Percentage of Use (JOC System Fee) Payments. In accordance with sections 7.4, 7.4.1, and 7.4.2, of the Agreement and with Schedule B, Consultant may request, and NYSDOT shall arrange for the State to pay, monthly payments of fees for usage of the JOC System, including Consultant's proprietary PROGEN ® software, other JOC System elements, and any additional service and support provided by the Consultant. Consultant shall, on a monthly basis, obtain from NYSDOT computers made available for use by the JOC System, and/or computers furnished by the Consultant as part of the system, records and statements listing all such previously unbilled maintenance work orders generated by NYSDOT using the JOC System. NYSDOT shall make appropriate administrative arrangements through NYSDOT's Accounting and Fiscal Services Bureau to submit the Consultant's monthly requests for payments, and NYSDOT's statements of the monthly amounts owed to the Consultant on the percentage of use basis, to the Office of the State Comptroller and/or other State officials and agencies as necessary to arrange for payment to the Consultant. Consultant shall preserve the business records of such data, calculations and statements for a minimum of seven years, and shall provide NYSDOT and /or the Office of the State Comptroller with access to such records for examination and review upon reasonable prior request.



**NYSDOT  
CONTRACT  
C012510**

**Exhibit 1**

**Software License Agreement**

# NYSDOT CONTRACT C012510 SOFTWARE LICENSE AGREEMENT

This Agreement dated \_\_\_\_\_ is by and between

the New York State Department of Transportation ("NYSDOT"), with offices in the Administration and Engineering Building, State Campus, Albany, New York 12232,

and

*The Gordian Group*, 531 South Main Street, Suite M7, Greenville, S.C. 29601, (the "Licensor" or "Consultant").

## WITNESSETH:

WHEREAS, NYSDOT and the Licensor have executed a certain contract titled "Job Order Contracting (JOC) System" dated..... (the "JOC Contract"), that includes the issuance by the Contractor therein of a license for certain Contractor-Owned Software; and

WHEREAS, the terms and conditions of this license are referenced in and constitute an Exhibit to such JOC Contract and, in addition, the parties intend this license to be separately enforceable and not be merged with the JOC Contract; and

WHEREAS, the parties have provided for a certain escrow agreement that provides for the release of the source code to certain software licensed hereunder upon the happening of certain events (the "Software Escrow Agreement"),

NOW THEREFORE, in consideration of and as a condition to the entry by NYSDOT and *The Gordian Group* into such JOC Contract, and other good and valuable consideration, the parties agree to the terms and conditions below as and for a licensing agreement.

Consultant hereby grants to NYSDOT, and NYSDOT hereby accepts from Consultant, a non-exclusive right, license and privilege to use Consultant's Job Order Contracting (JOC) System other related Proprietary Information in connection with the terms and conditions set forth in this Agreement. The parties hereby agree that "Proprietary Information" shall include, but is not limited to, Consultant's PROGEN® software and support documentation, Unit Price Books, training materials and other support materials developed by Consultant. Consistent with Articles 17.1 and 17.3 of the Agreement, "Proprietary Information" shall not include Consultant's proposal(s) to NYSDOT, this Agreement, and all contract documents developed by Consultant, with the exception of those items specifically listed as "Proprietary Information" above. "Proprietary Information" also shall not include any information which is generally known to the public and to any competitors of the Consultant.

During the term of the above-referenced JOC Contract, this license shall allow NYSDOT to provide NYSDOT units, offices, and staff with the distribution, installation and use of as many copies of the JOC System, Consultant's PROGEN® software, training materials, support documentation and other materials as NYSDOT may consider necessary or appropriate for effective development, implementation and use of the JOC System, without restriction as to work locations or numbers of users. NYSDOT shall make information concerning such distribution, installation and use available to Consultant upon request, consistent with the other terms and conditions of this license and the JOC Contract. NYSDOT shall take all reasonable steps necessary to assure that such distribution, installation and use is consistent with the terms and conditions of this license and the JOC Contract, including but not limited to provisions for the recognition and protection of Consultant's Proprietary Information.

NYSDOT acknowledges that disclosure of Proprietary Information will result in irreparable harm to Consultant for which monetary damages would be an inadequate remedy and agrees that no disclosure shall be made to anyone without first receiving the written consent of the consultant, except as required by law or court order pursuant to the Freedom Of Information Law (Article 6 of the Public Officers Law), court-ordered subpoena, or other compulsory legal process. NYSDOT agrees to make its best efforts to use the trade secrets exemption under Public Officers Law Section 87(2)(d) to protect the confidentiality of the Consultant's Proprietary Information against Freedom Of Information requests to the greatest extent possible. NYSDOT further acknowledges and agrees to respect the copyrights, registrations, trade secrets and other proprietary rights of the Consultant in the Proprietary Information during and after the term of this Agreement

and shall at all times maintain complete confidentiality with regard to the Proprietary Information provided to NYSDOT.

In the event that this Agreement expires or is terminated prior to completion of the term of this Agreement, including all available option periods, NYSDOT shall return to Consultant all Proprietary Information in NYSDOT's possession. As provided by Articles 17.1, 17.3 and 17.7 of the Agreement, in the event this Agreement expires or is terminated, then NYSDOT agrees that it shall not use the JOC System developed by the Consultant. In such event NYSDOT shall be entitled to retain as state contract records all of Consultant's proposal(s) to NYSDOT, the Agreement, and all contract documents developed by Consultant; but shall return to Consultant, or with Consultant's written consent destroy, all items identified above as Consultant's Proprietary Information then in NYSDOT's possession, including Consultant's PROGEN® software and support documentation, Unit Price Books, training manuals and other support materials developed by Consultant.

Notwithstanding the foregoing, NYSDOT shall be allowed to distribute materials as required for the proper performance of JOC.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their duly authorized officials as of the date first above written.

Consultant

NYSDOT

BY:

Robert D. Coffey

BY:

M. Se

FOR:

The Gordian Group

FOR:

Commissioner of Transportation

Title:

Vice President

Title:

First Deputy Commissioner

#### Acknowledgment

State of SC )

County of Greenville ) ss.:

On the 29<sup>th</sup> day of November in the year 2001, before me, the undersigned, personally appeared Robert D. Coffey, 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 upon behalf of which the individual(s) acted, executed the instrument.

Nel Tull

Notary Public, State of South Carolina

My Commission Expires: 3/8/2001

*State of South Carolina*

*County of Greenville*



I, Paul B. Wickensimer, Clerk of the Circuit Court for the said County and State, being a Court of Record with a Seal, do certify that

Neil Tuck

whose name is subscribed to the attached acknowledgment was at the time of taking said acknowledgment a Notary Public in and for Greenville County, State of South Carolina, duly commissioned and residing in said County and was as such officer of said County and State duly authorized by the laws thereof to take acknowledgments of deeds and other instruments in writing to be recorded therein, and that full faith and credit are and ought to be given to his official acts and I further certify that I am well acquainted with the handwriting of the said

Neil Tuck

said Notary Public, and verily believe that the signature to the attached acknowledgment is his genuine signature.

In WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said Court.

Done at Greenville, South Carolina, this 30th day of November 20 01

Paul B. Wick

*Clerk of Circuit Court  
for Greenville County, South Carolina*

**NYSDOT CONTRACT  
C012510**

**Exhibit 2**

**Form of Software Escrow Agreement**

## EXHIBIT 2

### FORM OF ESCROW AGREEMENT

ESCROW AGREEMENT dated as of \_\_\_\_\_, 2001 by and among:

the New York State Department of Transportation  
whose office is in Building 5, State Office Campus, 1220 Washington Avenue, Albany, New York 12232  
referred to herein as NYSDOT, the Department, or Licensee;

and,

The Gordian Group, a South Carolina corporation with its principal office and place of business at  
531 Main Street, Suite M7, Greenville, South Carolina 29601,  
referred to herein as Gordian, the Consultant, Contractor, Producer, Licensor, or Depositor;

and,

[Name], a [name of state] corporation with its principal office and place of business at  
[address],  
referred to herein as the Escrow Agent,

#### WITNESSETH:

WHEREAS, NYSDOT and Gordian have executed a certain contract, C012510, as supplemented, amended or superseded, which involves Gordian's development for NYSDOT of a Job Order Contracting System that includes Gordian's issuance to NYSDOT of a non-exclusive license for a customized version of Gordian's PROGEN® proprietary software, together with user documentation and support materials; and

WHEREAS, it is the policy of Gordian not to disclose the source code and related programming documentation for its PROGEN® proprietary software to its customers, competitors or the public, except as provided in an applicable escrow agreement; and

WHEREAS, Gordian agrees to deposit copies of the source code and related programming documentation for its PROGEN® proprietary software to the Escrow Agent, for secure and confidential safekeeping, and to update such deposits from time to time as the software is updated and upgraded; and Gordian and NYSDOT agree that upon the occurrence of certain limited events and circumstances as described in this escrow agreement, and subject to the limitations herein applicable, the Escrow Agent shall release to NYSDOT upon request the source code and all revisions, maintenance releases, enhancements and new versions thereof,

NOW, THEREFORE, in consideration of the mutual covenants exchanged herein and for other valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Producer, the Licensee and the Escrow Agent hereby act and agree as follows:

*Article 1. Deposits.* Gordian agrees to deposit with the Escrow Agent, and the Escrow Agent agrees to accept from Gordian for deposit, the source code and programming and maintenance documentation for the Job Order Contracting System software, PROGEN® ("JOC source code"), provided to NYSDOT under contract C012510; and all revisions, maintenance releases, enhancements and new versions thereof. Gordian shall conspicuously label for identification, and provide the Escrow Agent with a signed list of, the electronic, optical, printed, or other media upon which the deposit materials are stored or written. The Escrow Agent will verify upon delivery that all listed materials have been received, and issue to Gordian a receipt for the JOC source code. Gordian considers its PROGEN® software and the JOC software and JOC source code to be proprietary

information, which the Escrow Agent commits to protect. The JOC source code held by the Escrow Agent shall remain the exclusive property of Gordian, subject to limited rights specified by Article 4 of this escrow agreement, and the Escrow Agent shall not use the JOC source code or disclose it to NYSDOT or any other third party except as specifically provided for herein. The Escrow Agent will hold the JOC source code in safekeeping unless and until the Escrow Agent receives notice pursuant to the terms of this escrow agreement that the Escrow Agent is to deliver the JOC source code to NYSDOT, Gordian, or such third party as is designated by them or authorized by law, in which case the Escrow Agent shall deliver the JOC source code to the appropriate party subject to this escrow agreement.

*Article 2. Representations by Gordian.* Gordian represents and warrants to NYSDOT and the Escrow Agent that (i) the material deposited with the Escrow Agent pursuant to this escrow agreement shall constitute the JOC source code, i.e., the source code and programming and maintenance documentation for the customized version of Gordian's proprietary PROGEN® software which is licensed to NYSDOT as the JOC System pursuant to the software license agreement; ii) the JOC source code delivered to the Escrow Agent shall be in a form suitable for reproduction by computer and/or photocopy equipment, and shall consist of a full source language statement of the program or programs comprising the program and complete available programming and maintenance documentation, including all flow charts, schematics and annotations which comprise the detailed design specifications, and all other material available to allow a skilled programmer or analyst to maintain or enhance such software, without encountering any intentional "bugs," "viruses," or "bombs;" (iii) provided NYSDOT has contracted for support and maintenance services, Gordian will promptly supplement the JOC source code delivered hereunder with all applicable revisions, corrections, enhancements, new versions or other changes so that the JOC source code constitutes a humanly readable program for such software; (iv) the JOC source code deposit materials shall be readable and useable in the form in which they are deposited or, if the deposit materials are encrypted, the decryption tools and decryption keys have also been deposited with the Escrow Agent subject to this escrow agreement; and (v) that Gordian lawfully owns and possesses the JOC source code, and that it is not subject to any liens or other encumbrances at the time of deposit.

*Article 3. Confidentiality and Record Keeping.* The Escrow Agent shall maintain the JOC source code escrow deposit materials in a secure, environmentally safe, locked facility which is accessible only to authorized representatives of the Escrow Agent. The Escrow Agent shall have the obligation to protect reasonably the confidentiality of such deposit materials. Except as provided in this escrow agreement, the Escrow Agent shall not disclose the content of this agreement to any third party and shall not disclose, transfer, make available, or use such deposit materials. If the Escrow Agent receives a subpoena or other order of a court or other judicial tribunal pertaining to the disclosure or release of such deposit materials, the Escrow Agent shall immediately notify Gordian. It shall be the responsibility of Gordian to challenge any such subpoena or order; provided, however, that the Escrow Agent does not waive its rights to present its position with respect to any such subpoena or order. The Escrow Agent shall not be required to disobey any court or other judicial tribunal order.

*Article 4. Rights of Escrow Agent.* Gordian hereby transfers to the Escrow Agent title to the electronic, optical, printed, or other media upon which the JOC source code escrow deposit materials are stored or written. This transfer is, however, limited to the media, and does not include the ownership of Gordian's proprietary information and materials contained on the media, such as any copyright, trade secret, patent, or other intellectual property right. The Escrow Agent shall have the right to make copies of such deposit materials as reasonably necessary to perform this escrow agreement. The Escrow Agent shall copy all copyright, nondisclosure, and other proprietary notices and titles contained in such deposit materials onto any copies made by the Escrow Agent. With all deposit materials submitted to the Escrow Agent, Gordian shall provide any and all instructions as may be necessary to duplicate the deposit materials, including but not limited to the hardware and/or software needed. Gordian hereby grants to the Escrow Agent the right to transfer such deposit materials to a bankruptcy or other trustee or receiver, or to NYSDOT, upon any release of such deposit materials in accordance with Article 5. Except upon such a release or as otherwise provided in this escrow agreement, the Escrow Agent shall not transfer such deposit materials.

#### *5. Disposition of Escrow*

*5.1 Release Event.* A "Release Event" shall mean any of the following: (a) Gordian's becoming subject to bankruptcy, receivership, liquidation, insolvency or any similar proceeding, permitting the appointment of a receiver for its business or assets, making a general assignment for the benefit of creditors, or otherwise becoming insolvent; (b) NYSDOT's exercising its rights pursuant to 11 USC 365(n)(1); (c) the commencement of an insolvency, dissolution or similar proceeding under New York State law by or against Gordian or an affected subcontractor; (d) the sale, assignment, or other transfer by Gordian, without the prior written consent of NYSDOT, of such of Gordian's rights in the JOC System and JOC software as would prevent Gordian or Gordian's transferee from the discharge of its obligations with respect to the performance of the JOC System and JOC software under the software license agreement during the period specified therein, or from the discharge of its maintenance obligations with respect to the JOC system or JOC software under any software maintenance agreement from time to time in effect between Gordian and NYSDOT; or (e) a substantial and prolonged failure by Gordian, despite demand by NYSDOT, to meet the warranty, support and/or maintenance obligations set forth in or established pursuant to contract and/or the software license agreement. Gordian and NYSDOT expressly contemplate, however, that neither a termination of contract C012510 for the convenience of the State, nor a termination of that contract for cause, for any reason other than those set forth above, shall be

considered to be a release event within the meaning of this software escrow agreement.

**5.2 Filing For Release of Product by Licensee** Upon notice to Escrow Agent by NYSDOT that a Release Event has occurred and payment by NYSDOT of any supplementary fee which may be applicable, the Escrow Agent shall provide Gordian with notice including a copy of the notice from Licensee. Such notices shall be communicated in accordance with Article 10 of this escrow agreement.

**5.3 Contrary Instruction by Gordian in certain Cases.** As used herein, "Contrary Instruction" is the filing of an instruction with the Escrow Agent by an officer of Gordian in good faith stating and warranting that a Release Event has not occurred, or has been cured in accordance with applicable contract terms. In connection with a Release Event, if Gordian provides the Escrow Agent with a Contrary Instruction within ten (10) days after the receipt of the notice to Gordian, the Escrow Agent shall not deliver the Product to NYSDOT, except as further provided herein.

**5.4 Procedure in the Event of Contrary Instruction.** In the event a Contrary Instruction is filed in accordance with 5.3 hereof, the Escrow Agent shall send notice and a copy of the Contrary Instruction to NYSDOT per Article 10 of this escrow agreement. The Escrow Agent shall notify both Gordian and NYSDOT that there is a dispute to be resolved. Upon receipt of the Contrary Instruction, the Escrow Agent shall continue to store the JOC source code pending: Gordian's and NYSDOT's joint instruction; contractual resolution of the dispute; an order of a court of competent jurisdiction; or termination by non-renewal of this escrow agreement.

**5.5 Release of Product to Licensee.** Unless the Contrary Instruction procedure described in 5.3 and 5.4 apply and restrain release of the Product, and subject to the limitations of section 5.5.1 hereof, the Escrow Agent shall release the JOC source code as provided in Section 5.5.1 below within 10 days of the Notice of Release Event, for use in accordance with the terms and restrictions of the software license agreement (without the exclusion of the source code therefrom).

**5.5.1 Release of source code dependent on type of release event.** Release of the JOC source code by the Escrow Agent will be contingent upon receipt by the Escrow Agent of a written demand, accompanied by a copy of a current, valid software license agreement, a signed written statement that the JOC source code will be used only in accordance with the terms of contract C012510 and the software license agreement, a statement (if applicable) that the release is pursuant to the provisions of 11 USC §365(n), and specific delivery instructions. Release of the

JOC source code will further be made only in accordance with the following table of conditions:

Type of Release Event	Source Code Recipient
§5.1(a), (b) or (c)	If contract C012510 is assumed and performed by a bankruptcy or insolvency trustee, then to such trustee. If such agreement is not assumed and performed by any such trustee, then to NYSDOT.
§5.1(d) or (e)	To NYSDOT

**5.6 Bankruptcy.** Gordian and NYSDOT acknowledge that this Agreement is an "agreement supplementary to" the software license agreement as provided in 11 USC §365(n) (the "Bankruptcy Code"). Gordian acknowledges that if Gordian as a debtor in possession or a trustee in Bankruptcy in a case under the Bankruptcy Code rejects the software license agreement or this escrow agreement, NYSDOT may elect to retain its rights under the software license agreement and this escrow agreement as provided in Bankruptcy Code §365(n) and, upon written request of NYSDOT to Gordian or the Bankruptcy Trustee, Gordian or such Bankruptcy Trustee shall not interfere with the rights of NYSDOT as provided in the software license agreement and this escrow agreement, including the right to obtain release of the escrowed JOC source code as provided for herein.

**Article 6. Waiver, Amendment or Modification; Severability; Successors.** This escrow agreement shall not be waived, amended, or modified except by written agreement of all the parties hereto. Any invalidity, in whole or in part, of any provision of this escrow agreement shall not affect the validity of any other of its provisions. This escrow agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties. The Escrow Agent shall not, however, have any obligation in performing this escrow agreement to recognize any successor or assignee of Gordian unless the Escrow Agent receives clear, authoritative and conclusive written evidence of the change of parties.

#### **7. Limitation on Escrow Agent's Responsibility and Liability.**

**7.1** The Escrow Agent shall not be obligated or required to examine or inspect the JOC source code, or any of the revisions, updates or additions to it, other than verifying receipt at the time of deposit. The Escrow Agent's obligation for safekeeping shall be limited to providing the same degree of care for the JOC source code as it



maintains for its valuable documents and those of other customers lodged in the same location with appropriate atmospheric or other safeguards. However, the parties agree and acknowledge that the Escrow Agent shall not be responsible for any loss or damage to any of the JOC source code due to changes in such atmospheric conditions (including, but not limited to, failure of the air conditioning system), unless such changes are proximately caused by the gross negligence or malfeasance of the Escrow Agent.

7.2 The Escrow Agent shall be protected in acting upon any written notice, request, waiver, consent, receipt or other paper or document furnished to it, not only in assuming its due execution and the validity and effectiveness of its provisions but also as to the truth and acceptability of any information therein contained, which it in good faith believes to be genuine and what it purports to be.

7.3 In no event shall the Escrow Agent be liable for any act or failure to act under the provisions of this Escrow Agreement except where its acts are the result of gross negligence or malfeasance. The Escrow Agent shall have no duties except those which are expressly set forth herein, and it shall not be bound by any notice of a claim, or demand with respect thereto, or any waiver, modification, amendment, termination or recession of this Escrow Agreement, unless such has been received in writing, and if its duties herein are affected, unless it shall have given its prior written consent thereto.

7.4 Gordian agrees to indemnify the Escrow Agent against any loss, liability or damage (other than any caused by gross negligence or malfeasance of the Escrow Agent), including reasonable costs of litigation and counsel fees, arising from and in connection with the performance of Gordian's duties under this Agreement.

8. *Payment of Escrow Agent.* Except where this escrow agreement expressly provides otherwise, Gordian shall be responsible for paying all fees and expenses of the Escrow Agent due under this escrow agreement. In the event of the nonpayment of fees owed to Escrow Agent, Escrow Agent shall provide written notice of delinquency to all parties to the agreement. Any party to the agreement shall have the right to make the payment to Escrow Agent to cure the default. If the payment default is not cured, Escrow Agent shall terminate this escrow agreement and return the escrowed JOC source code to Gordian.

#### 9. *Term of the Escrow Agreement*

9.1 This Escrow Agreement shall commence as of the date first above mentioned and shall remain in effect for as

long as the software license agreement remains in effect or until sooner terminated by the release of the escrowed JOC source code hereunder or other earlier termination by joint contract between, or written instruction to the Escrow Agent by, NYSDOT and Gordian.

9.2 Except where a release of the escrowed JOC source code to NYSDOT is required hereunder, upon the termination of this escrow agreement the Escrow Agent shall deliver to Gordian any and all JOC source code escrowed hereunder.

9.3 Notwithstanding any other provision contained herein, this escrow agreement shall terminate if NYSDOT determines that the need for the JOC source code no longer exists, as evidenced by written notice from NYSDOT to the Escrow Agent. In such event, the Escrow Agent shall deliver the JOC source code to Gordian, which deposited it, as if this escrow agreement period had naturally expired.

10. *Notices.* All notices required to be given hereunder shall be in writing and shall be transmitted by Federal Express or other comparable express courier service, to the parties at their respective addresses as shown in this escrow agreement, or at such other address as may have been communicated in writing to all parties subsequent to the date of this escrow agreement. ~~Such notice shall be followed by confirmation transmitted by certified or registered mail, return receipt requested.~~

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Agreement to be duly executed as of the year and date first above written.

<b>Gordian</b>	<b>NYSDOT</b>	<b>ESCROW AGENT</b>
By:	By:	By:

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) ss.:  
MUNICIPALITY OF \_\_\_\_\_ )

On the \_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_ 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 capacities, and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before the undersigned in the municipality of \_\_\_\_\_ in the State of \_\_\_\_\_.

\_\_\_\_\_  
Notary Public (or other official title: \_\_\_\_\_)

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) ss.:  
MUNICIPALITY OF \_\_\_\_\_ )

On the \_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_ 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 capacities, and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before the undersigned in the municipality of \_\_\_\_\_ in the State of \_\_\_\_\_.

\_\_\_\_\_  
Notary Public (or other official title: \_\_\_\_\_)

**NYSDOT CONTRACT  
C012510**

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**Exhibit 3**

**Implementation Plan  
and Schedule**

# Implementation Plan and Schedule

The Gordian Group is proposing to develop and implement the Job Order Contracting system for the New York State Department of Transportation within 37 weeks of the receipt of a notice to proceed.

The Gordian Group has an excellent track record in developing Job Order Contracting systems within or ahead of the established schedule. For example, the JOC system for Dade County Public Schools was developed and implemented 17 days ahead of schedule and the Richmond Redevelopment and Housing Authority was 14 days ahead of schedule.

**The key events for the proposed NYSDOT JOC program are shown below:**

<b>Schedule Item</b>	<b>Elapsed Time (weeks)</b>
<b>Orientation Meeting with NYSDOT staff .....</b>	<b>1</b>
<b>Program Development .....</b>	<b>12</b>
<b>JOC Document Development .....</b>	<b>20</b>
<b>Public Advertisements .....</b>	<b>20</b>
<b>Software Applications .....</b>	<b>25</b>
<b>Pre-bid Meeting I .....</b>	<b>27</b>
<b>Pre-bid Meeting II .....</b>	<b>28</b>
<b>Bid Opening.....</b>	<b>30</b>
<b>Training Sessions for NYSDOT Staff .....</b>	<b>32</b>
<b>NYSDOT Approval of Contracts* .....</b>	<b>35</b>
<b>Training Sessions for Contractors .....</b>	<b>36</b>
<b>Begin Scoping Work .....</b>	<b>37</b>

\* Contingent upon NYSDOT contract approval process

On the following page is a copy of The Gordian Group's proposed Implementation Plan and Schedule for NYSDOT showing key activities, staffing and time schedule.