



## Office of Temporary and Disability Assistance

**KATHY HOCHUL**  
Governor

**BARBARA C. GUINN**  
Acting Commissioner

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The following will serve as Announcement #1 to OTDA's Invitation for Bid (IFB) for Banking Services in Support of Centralized Collections and Enforcement, bid number 2023-03.

Although the formal Question & Answer period is closed, for the convenience of potential bidders and other interested parties, OTDA is providing this Revised Redlined Appendix B reflecting OTDA's answers in Amendment 4. Note: the redline Appendix B is for informational purposes only and is not deemed part of the IFB.

# **REVISED APPENDIX B**

## **OTDA TERMS AND CONDITIONS**

## Table of Contents

|  |           |
|--|-----------|
| <b>GENERAL</b> .....   | <b>4</b>  |
| 1. ETHICS COMPLIANCE .....   | 4         |
| 2. DEFINITIONS .....   | 4         |
| <b>BID SUBMISSION</b> .....  | <b>6</b>  |
| 3. BID SUBMISSION.....   | 6         |
| 4. FREEDOM OF INFORMATION LAW .....  | 6         |
| 5. PREVAILING WAGE RATES - PUBLIC WORKS AND BUILDING SERVICES CONTRACTS.....   | 6         |
| 6. TAXES.....  | 8         |
| 7. EXPENSES PRIOR TO CONTRACT EXECUTION .....  | 8         |
| 8. PRODUCT REFERENCES .....  | 8         |
| 9. REMANUFACTURED, RECYCLED, RECYCLABLE, OR RECOVERED MATERIALS.....   | 8         |
| 10. PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS .....   | 8         |
| 11. PRICING.....   | 8         |
| 12. SITE INSPECTION .....  | 9         |
| <b>BID EVALUATION</b> .....  | <b>9</b>  |
| 13. BID EVALUATION .....   | 9         |
| 14. QUANTITY CHANGES PRIOR TO AWARD.....   | 9         |
| 15. TIMEFRAME FOR OFFERS .....   | 10        |
| 16. DEBRIEFINGS.....   | 10        |
| 17. CONTRACT PUBLICITY .....   | 10        |
| <b>TERMS AND CONDITIONS</b> .....  | <b>10</b> |
| 18. PROCUREMENT RIGHTS.....  | 10        |
| 19. CONTRACT EFFECTIVE .....   | 10        |
| 20. OFFICIAL USE ONLY/NO PERSONAL USE.....   | 11        |
| 21. MODIFICATION OF CONTRACT TERMS.....  | 11        |
| 22. SCOPE CHANGES.....   | 11        |
| 23. ESTIMATED/SPECIFIC QUANTITY CONTRACTS .....  | 11        |
| 24. EMERGENCY CONTRACTS .....  | 11        |
| 25. PRODUCT DELIVERY.....  | 11        |
| 26. TITLE AND RISK OF LOSS FOR PRODUCTS OTHER THAN TECHNOLOGY PRODUCTS .....   | 12        |
| 27. PRODUCT SUBSTITUTION.....  | 12        |
| 28. REJECTED PRODUCT.....  | 12        |
| 29. INSTALLATION.....  | 12        |
| 30. REPAIRED OR REPLACED PRODUCTS, PARTS, OR COMPONENTS .....  | 12        |
| 31. EMPLOYEES, SUBCONTRACTORS AND AGENTS .....   | 12        |
| 32. ASSIGNMENT .....   | 13        |
| 33. SUBCONTRACTORS AND SUPPLIERS .....   | 14        |
| 34. SUSPENSION OF WORK.....  | 14        |
| 35. TERMINATION .....  | 14        |
| 36. SAVINGS/FORCE MAJEURE .....  | 15        |
| 37. CONTRACT INVOICING.....  | 16        |
| 38. PROMPT PAYMENTS .....  | 16        |
| 39. REMEDIES FOR BREACH .....  | 16        |
| 40. ASSIGNMENT OF CLAIM .....  | 17        |
| 41. TOXIC SUBSTANCES.....  | 17        |
| 42. INDEPENDENT CONTRACTOR.....  | 17        |
| 43. SECURITY.....  | 17        |
| 44. COOPERATION WITH THIRD PARTIES .....   | 17        |
| 45. WARRANTIES .....   | 17        |
| 46. LEGAL COMPLIANCE .....   | 19        |
| 47. INDEMNIFICATION .....  | 20        |
| 48. INDEMNIFICATION RELATING TO INFRINGEMENT .....   | 20        |
| 49. LIMITATION OF LIABILITY .....  | 21        |
| 50. DISPUTE RESOLUTION PROCEDURES.....   | 21        |
| 51. PROCEDURE FOR PROTESTS/APPEALS OF BID SPECIFICATIONS.....  | 22        |
| 52. NO PRESUMPTION AGAINST DRAFTER.....  | 24        |
| 53. NO CONFLICT.....   | 24        |
| 54. AVAILABILITY OF OTDA RESOURCES.....  | 24        |
| <b><u>To the extent the scope of the Solicitation or Contract includes the sale, development, maintenance, or use of Information Technology Products such as software, computer components, systems, or networks for the processing, distribution, or storage of data, the following clauses shall govern, as applicable</u></b> ..... | <b>24</b> |
| 55. SOFTWARE LICENSE GRANT.....  | 24        |
| 56. PRODUCT ACCEPTANCE .....   | 26        |

|     |   |    |
|-----|---|----|
| 57. | NO HARDSTOP OR PASSIVE LICENSE MONITORING ..... | 26 |
| 58. | OWNERSHIP/TITLE TO PROJECT DELIVERABLES .....   | 26 |
| 59. | CHANGES TO PRODUCT OR SERVICE OFFERINGS .....   | 27 |
| 60. | FEDERAL PROCUREMENT CLAUSES.....                | 28 |

The Terms and Conditions set forth in this APPENDIX B are made part of the Agreement between OTDA and the Contractor.

## **GENERAL**

### **1. ETHICS COMPLIANCE**

All Bidders/Contractors and their employees must comply with the requirements of Sections 73 and 74 of the Public Officers Law, other State codes, rules, regulations and executive orders establishing ethical standards for the conduct of business with New York State. In signing the Bid, Bidder certifies full compliance with those provisions for any present or future dealings, transactions, sales, contracts, services, offers, relationships, etc., involving New York State and/or its employees. Failure to comply with those provisions may result in disqualification from the bidding process, termination of contract, and/or other civil or criminal proceedings as required by law.

Contractors, consultants, vendors, and subcontractors may hire former State agency, OTDA or State authority employees. However, as a general rule and in accordance with New York Public Officers Law, former employees of OTDA may neither appear nor practice before OTDA, nor receive compensation for services rendered on a matter before OTDA, for a period of two years following their separation from OTDA service. In addition, former State and OTDA employees are subject to a "lifetime bar" from appearing before OTDA or receiving compensation for services regarding any transaction in which they personally participated, or which was under their active consideration during their tenure with the State or OTDA. The Offeror shall identify and provide OTDA with notice of any/all employees of the Offeror and its subcontractors who are former employees of the State, who will be assigned to perform services under an Agreement, resulting from this Solicitation, by completing the Offeror's Disclosure of Former State Employees form included in (APPENDIX E), as part of their bid proposal.

### **2. DEFINITIONS**

Terms used in the Agreement shall have the following meanings:

- a. **ADMINISTRATIVE PROPOSAL** means the administrative portion of an Offeror's Proposal.
- b. **ATTORNEY GENERAL** or **AG** means the Attorney General of the State of New York.
- c. **BID** or **PROPOSAL** means a response to the Solicitation submitted by a Bidder to provide Products.
- d. **BID SPECIFICATIONS** means a written description drafted by OTDA setting forth the specific terms of the intended procurement, which may include: physical or functional characteristics, the nature of a Product, any description of the work to be performed, Products to be provided, the necessary qualifications of the Bidder, the capacity and capability of the Bidder to successfully carry out the proposed Contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform work.
- e. **BIDDER, OFFEROR, or PROPOSER** means any person or entity who submits a Bid in response to the Solicitation. At the time that a Bidder executes a Contract with OTDA, the Bidder shall become a "Contractor."
- f. **SPECIFICATIONS** mean the terms and conditions set forth in the negotiated Agreement and associated documents.
- g. **BUSINESS DAY** means any day which is neither a Saturday, Sunday, nor an official New York State or federal holiday.
- h. **CONTRACT** or **AGREEMENT** means the writings that contain the agreement of OTDA and the Contractor setting forth the total legal obligation between the parties as determined by applicable laws and regulations.
- i. **CONTRACT APPROVAL DATE** means the date upon which OSC approves the Contract.
- j. **CONTRACT TERM** or **TERM** means the period beginning on the date OSC approves the Contract and ending on the date the Contract expires or terminates, unless otherwise specified in the Solicitation.

- k. **CONTRACTOR** means the successful Bidder to whom a Contract has been awarded by OTDA.
- l. **COMMODITIES** means material goods, supplies, products, construction items or other standard articles of commerce (other than technology) that are the subject of any purchase or exchange.
- m. **DOCUMENTATION** means the complete set of manuals (e.g., user, installation, instruction or diagnostic manuals) in either hard or electronic copy, that are necessary to enable OTDA to properly test, install, operate and enjoy full use of the Product.
- n. **FINANCIAL PROPOSAL** means the financial portion of a Proposal.
- o. **INVITATION FOR BIDS** or **IFB** means a type of Solicitation that is most typically used for procurements where requirements can be stated, and award will be made based on lowest price to the responsive and responsible Bidder or Bidders.
- p. **OSC** means the Office of the Comptroller of New York State.
- q. **OTDA** means the New York State Office of Temporary and Disability Assistance.
- r. **PRODUCT(S)** means items or deliverables under a Solicitation or Contract which may include commodities, services and/or technology, as applicable.
- s. **REQUEST FOR PROPOSALS** or **RFP** means a type of Solicitation that is used for procurements where factors in addition to cost are considered and weighted in awarding the contract and where the award will be made based on “best value,” as defined by the State Finance Law, to one or more responsive and responsible Bidders, and as identified more specifically in the RFP issued herein (if any).
- t. **REQUEST FOR QUOTATION** or **RFQ** means a procurement method that can be used in situations such as single source, or emergency purchases.
- u. **RESPONSIBLE BIDDER** means a Bidder that is determined to have financial and organizational capacity, legal authority, satisfactory previous performance, skill, judgment and integrity, and that is found to be competent, reliable and experienced, as determined by OTDA. For purposes of being deemed responsible, a Bidder must also be determined to be in compliance with Sections 139-j and 139-k of the State Finance Law relative to restrictions on contacts during the procurement process and disclosure of contacts and prior findings of non-responsibility under these statutes.
- v. **RESPONSIVE BIDDER** means a Bidder meeting the specifications or requirements prescribed in the Solicitation, as determined by OTDA.
- w. **SERVICES** means the performance of a task or tasks as described in the Agreement.
- x. **SINGLE SOURCE** means a procurement where two or more Bidders can supply the required Product, and OTDA may award the contract to one Bidder over the other.
- y. **SITE** means the location (street address) where Product will be delivered or executed.
- z. **SOLE SOURCE** means a procurement where only one Bidder is capable of supplying the required Product.
- aa. **SOLICITATION** means writings by OTDA setting forth the scope, terms, conditions and technical specifications for a procurement of Product. Such writings typically include but are not limited to: Invitation for Bids (IFB), Request for Quotations (RFQ), Request for Proposals (RFP), addenda or amendments thereto, and terms and conditions that are incorporated by reference, including but not limited to APPENDIX A (Standard Clauses for NYS Contracts), APPENDIX B (General Specifications), and identified attachments. Where the procurement is undertaken on a non-competitive basis, the term “Solicitation” shall be deemed to refer to all the terms and conditions identified in the Contract.
- bb. **STATE** means the State of New York.
- cc. **SUBCONTRACTOR** means any individual or legal entity (including but not limited to sole proprietor, partnership, limited liability company, firm or corporation) who has entered into a contract, express or

implied, for the performance of a portion of the Contract with the Contractor, but does not include vendors of Contractor who are not retained by Contractor and do not perform any Service under the Agreement.

**dd. SUBMISSION DATE** means the date on which Proposals are due to OTDA.

**ee. TECHNICAL PROPOSAL** means the technical portion of a Bidder's Bid Proposal.

**ff. TECHNOLOGY** means a good, either new or used, or service, or a combination thereof, that results in a technical method of achieving a practical purpose or in improvements in productivity. Procurements of technology are conducted in the same manner as are procurements of services.

## **BID SUBMISSION**

### **3. BID SUBMISSION**

- a. BIDDING** All Bids, including all information and Product required by the Solicitation or provided as explanation thereof, shall be submitted in English. All prices shall be expressed, and all payments shall be made, in United States Dollars (US\$). Any Bids submitted which do not meet the above criteria may be rejected.
- b. BID OPENING** Bids may, as applicable, be opened publicly. OTDA reserves the right at any time to postpone or cancel a scheduled Bid opening.
- c. LATE BIDS** Bids must be received at the location designated in the Solicitation at or before the date and time established in the Solicitation for the receipt of Bids.

Any Bid received at the designated location after the established time will be considered a Late Bid. A Late Bid may be rejected and disqualified from award. Notwithstanding the foregoing, a Late Bid may be accepted in OTDA's sole discretion where (i) no timely Bids meeting the requirements of the Solicitation are received, (ii) in the case of a multiple award, an insufficient number of timely Bids are received to satisfy the multiple award, or (iii) the Bidder has demonstrated to the satisfaction of OTDA that the Late Bid was caused solely by factors outside the control of the Bidder. Furthermore, OTDA may choose to accept a Late Bid if OTDA determines, in its sole discretion, that doing so is in the best interests of the State. However, in no event shall OTDA be under any obligation to accept a Late Bid.

### **4. FREEDOM OF INFORMATION LAW**

All Proposals shall become the property of OTDA and may be disclosed or used by OTDA to the extent permitted by law. OTDA may disclose a Proposal to any person for the purpose of assisting in evaluating the Proposal or for any other lawful purpose. Information in Proposals relating to Offeror price submissions, including commercial, book or list pricing, applicable discounts or final bid price and like information, shall not be entitled to confidentiality protection whether or not submitted or designated as proprietary to Offeror. All proposals will become State agency records, which will be available to the public in accordance with the Freedom on Information Law. Any portion of its Proposal that an Offeror believes constitutes proprietary information entitled to confidential handling, as an exception to the Freedom of Information Law, must be clearly and specifically designated in the proposal. If OTDA agrees with the proprietary claim, the designated portion of the proposal will be withheld from public disclosure. Blanket assertions of proprietary material will not be accepted, and failure to specifically designate proprietary material will be deemed a waiver of any right to confidential handling of such material. OTDA's determination of whether the Offeror's claim of proprietary status of the designated information should be granted will be predicated in large measure upon the Offeror's written statement of the necessity for the exemption. Therefore, while not required, Offerors are advised to submit their written statements of the necessity for the claimed proprietary information exceptions at the time of the submission of their Proposals.

### **5. ~~PREVAILING WAGE RATES - PUBLIC WORKS AND BUILDING SERVICES CONTRACTS~~RESERVED**

If any portion of work being solicited is subject to the prevailing wage rate provisions of the Labor Law, then this Section shall apply:

- a. PREVAILING WAGE RATE APPLICABLE TO BIDS** A copy of the applicable prevailing wage rate schedule is incorporated into the Solicitation and may also be obtained by visiting [www.labor.ny.gov](http://www.labor.ny.gov) and

typing in the search box: Prevailing Wage Schedule Request. Bidders must submit Bids which are based upon the prevailing hourly wages, and supplements in cash or equivalent benefits (e.g., fringe benefits and any cash or non-cash compensation which are not wages, as defined by law) that equal or exceed the applicable prevailing wage rates for the location where the work is to be performed. Bidders may not submit Bids based upon hourly wage rates and supplements below the applicable prevailing wage rates as established by the New York State Department of Labor. Bids that fail to comply with this requirement will be disqualified.

**b. WAGE RATE PAYMENTS/CHANGES DURING CONTRACT TERM** The wages to be paid under any resulting Contract shall not be less than the prevailing rate of wages and supplements as set forth by law. It is required that the Contractor keep informed of all changes in the prevailing wage rates during the Contract term that apply to the classes of individuals supplied by the Contractor on any projects resulting from this Contract, subject to the provisions of the Labor Law. Contractor is solely liable for and must pay such required prevailing wage adjustments during the Contract term for its employees as required by law and is responsible for ensuring any Subcontractors utilized on the Contract also comply with the prevailing wage provisions of the New York State Labor Law.

**c. ARTICLE 8 CONSTRUCTION/PUBLIC WORKS CONTRACTS** In compliance with Article 8, Section 220 of the New York State Labor Law:

- i. Posting** The Contractor must publicly post on the work Site, in a prominent and accessible place, a legible schedule of the prevailing wage rates and supplements.
- ii. Payroll Records** Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. For public works contracts over \$25,000 where the Contractor maintains no regular place of business in the State, such records must be kept at the work Site. For building services contracts, such records must be kept at the work Site while work is being performed.
- iii. Submission of Certified Payroll Transcripts for Public Works Contracts Only** Contractors and Subcontractors on public works Contracts must submit monthly payroll transcripts to OTDA issuing the Purchase Order for the work. This provision does not apply to Article 9 of the Labor Law building services contracts.
- iv. Day's Labor** No laborers, workmen or mechanics in the employ of the Contractor, Subcontractor or other person doing or contracting to do all or part of the work contemplated by the Contract shall be permitted or required to work more than eight hours in any one calendar day or more than 5 calendar days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. "Extraordinary emergency" shall be deemed to include situations in which sufficient laborers, workers and mechanics cannot be employed to carry on public work expeditiously as a result of such restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the NYS Commissioner of Labor for the preservation of the Contract Site or for the protection of the life and limb of the persons using the Contract Site.

**d. ARTICLE 9 BUILDING SERVICES CONTRACTS** In compliance with Article 9, Section 230 of the New York State Labor Law:

- i. Payroll Records** Contractors and Subcontractors must keep original payrolls or transcripts subscribed and affirmed as true under the penalties of perjury as required by law. Where the Contractor or Subcontractor maintains no regular place of business in New York State, such records must be kept at the work Site while work is being performed.
- ii. Overtime** Employees of Contractors and Subcontractors who work in excess of eight hours in a day or forty hours in a week shall be paid at the overtime rate identified by the New York State Department of Labor.



## 6. TAXES

- a. Unless otherwise specified in the Solicitation, Bid Specifications or Contract, the quoted Bid price includes all taxes applicable to the transaction.
- b. Purchases made by the State of New York are exempt from New York State and local sales taxes and, with certain exceptions, federal excise taxes. To satisfy the requirements of the New York State sales tax exemption, either the Purchase Order issued by a State Agency, or the invoice forwarded to authorize payment for such purchases will be sufficient evidence that the sale by the Contractor was made to the State, an exempt organization under Section 1116(a)(1) of the Tax Law.

## 7. EXPENSES PRIOR TO CONTRACT EXECUTION

OTDA is not liable for any costs incurred by a Bidder or Contractor in the preparation and production of a Bid.

## 8. PRODUCT REFERENCES

- a. **“Or Equal”** In all Solicitations or Bid Specifications, the words “or equal” are understood to apply where a copyrighted, brand name, trade name, catalog reference, or patented Product is referenced. References to such specific Product are intended as descriptive, not restrictive, unless otherwise stated. Comparable Product will be considered if proof of compatibility is provided, including appropriate catalog excerpts, descriptive literature, specifications and test data, etc. OTDA’s decision as to acceptance of the Product as equal shall be final.
- b. **Discrepancies in References** In the event of a discrepancy between the model number referenced in the Solicitation or Bid Specifications and the written description of the Products that cannot be reconciled, then the written description shall prevail.

## 9. REMANUFACTURED, RECYCLED, RECYCLABLE, OR RECOVERED MATERIALS

Upon the conditions specified in the Solicitation and in accordance with the laws of the State of New York, Contractors are encouraged to use recycled, recyclable, or recovered materials in the manufacture of Products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the Product or packaging unless such use is precluded due to health, welfare, safety requirements, or in the Solicitation. Contractors are further encouraged to offer remanufactured Products to the maximum extent practicable without jeopardizing the performance or intended end use of the Product unless such use is precluded due to health, welfare, safety requirements, or by the Solicitation. Where such use is not practical, suitable, or permitted by the Solicitation, Contractor shall deliver new materials in accordance with the “Warranties” set forth below.

Items with recycled, recyclable, recovered, refurbished, or remanufactured content must be identified in the Bid or Bidder will be deemed to be offering new Product.

## 10. PRODUCTS MANUFACTURED IN PUBLIC INSTITUTIONS

Bids offering Products that are manufactured or produced in public institutions will be rejected.

## 11. PRICING

- a. **Unit Pricing** If required by the Solicitation, the Bidder should insert the price per unit specified, for each item unless otherwise specified in the Solicitation.
- b. **Net Pricing** Unless otherwise required by the Solicitation, prices shall be net, including transportation, travel, customs, tariff, delivery and other charges fully prepaid by the Contractor to the destination indicated in the Solicitation.
- c. **“No Charge” Bid** When Bids are requested on a number of Products as a lot, a Bidder desiring to Bid “no charge” on a Product in the lot must clearly indicate such. Otherwise, such Bid may be considered incomplete and be rejected, in whole or in part, at the discretion of OTDA.
- d. **Specific price decreases:**

- i. **GSA Changes:** Where net pricing under the Contract is based on an approved General Services Administration (GSA) schedule, price decreases shall take effect automatically during the Contract term and apply to on or after the date the approved GSA schedule pricing decreases during the Contract term; or
- ii. **Commercial Price List Reductions:** Where net pricing under the Contract is based on a discount from Contractor's list prices, price decreases shall take effect automatically during the Contract term and apply to on or after the date Contractor lowers its pricing on its commercial price lists during the Contract term; or
- iii. **Special Offers/Promotions Generally:** Where Contractor generally offers more advantageous special price promotions or special discount pricing to other customers during the Contract term for a similar quantity, and the maximum price or discount associated with such offer or promotion is better than the discount or net pricing otherwise available under this Contract, such better price or discount shall apply for similar quantity transactions under this Contract for the life of such general offer or promotion; and
- iv. **Special Offers/Promotions to Authorized Users:** Contractor may offer other State agencies under another contracting vehicle, competitive pricing which is lower than the net pricing set forth herein at any time during the Contract term and such lower pricing shall not be applied as a global price reduction under the Contract pursuant to the foregoing paragraph (iii).

Unless otherwise specified in the Solicitation, Contractor may offer lower prices or better terms (see Modification of Contract Terms) on any specific purchase order from another State agency without being in conflict with, or having any obligation to comply on a global basis with, the terms of this clause.

- e. **Cost Proposal Revisions** A Contractor may be solicited prior to Contract award to propose the best possible offer for the Product being bid on, in accordance with State Finance Law Section 163(9)(c). A cost proposal revision must be a lower price than the initial price.

## 12. SITE INSPECTION RESERVED

Where a Site inspection is required, Bidder shall be required to inspect the Site, including environmental or other conditions, for pre-existing deficiencies that may affect the installed Product or that may affect Bidder's ability to properly deliver, install or otherwise provide the required Product. All inquiries regarding such conditions shall be made in writing. Bidder shall be deemed to have knowledge of any deficiencies or conditions that such inspection or inquiry might have disclosed. Bidder must provide a detailed explanation with its Bid if additional work is required under this clause in order to properly provide the required Product.

## BID EVALUATION

### 13. BID EVALUATION

OTDA reserves the right to accept or reject any and all Bids, or separable portions of Bids, and waive technicalities, irregularities, and omissions if OTDA determines the best interests of the State will be served. OTDA, in its sole discretion, may accept or reject illegible, incomplete or vague Bids. Bid evaluation criteria for a Solicitation is set forth therein.

In the event two Bids are found to be substantially equivalent, price shall be the basis for determining the award recipient. If two or more Bidders submit substantially equivalent Bids as to pricing, OTDA may determine another criterion to evaluate tie bids.

### 14. QUANTITY CHANGES PRIOR TO AWARD

OTDA reserves the right, at any time prior to the award of a specific quantity Contract, to alter in good faith the quantities listed in the Solicitation. In the event such right is exercised, the lowest responsible Bidder meeting the Solicitation requirements will be advised of the revised quantities and afforded an opportunity to extend or reduce its Bid price in relation to the changed quantities. Refusal by the low Bidder to so extend or reduce its Bid price

may result in the rejection of its Bid and the award of such Contract to the lowest responsible Bidder who accepts the revised qualifications.

#### **15. TIMEFRAME FOR OFFERS**

Bids must remain firm for 365 days, or such other period set forth in a Solicitation, from the date the Bid is due in the Solicitation.

#### **16. DEBRIEFINGS**

Pursuant to Section 163(9)(c) of the State Finance Law, any unsuccessful Bidder may request a debriefing regarding the reasons that the Bid submitted by the Bidder was not selected for award. Requests for a debriefing must be made within 15 calendar days of notification by OTDA that the Bid submitted by the Bidder was not selected for award. Requests should be submitted in writing to a designated contact identified in the Solicitation.

#### **17. CONTRACT PUBLICITY**

Any Contractor press or media releases, advertisements, or promotional literature, regardless of the medium, referring to an awarded Contract must be reviewed and approved by OTDA prior to issuance. In addition, Contractor shall not use, for any purpose, the New York State of Opportunity registered trademark or the New York State coat of arms without prior written approval from the State.

### **TERMS AND CONDITIONS**

#### **18. PROCUREMENT RIGHTS**

OTDA reserves the right to:

- a. Reject any and all Proposals received in response to this Solicitation.
- b. Correct Proposers' mathematical errors and waive or modify other minor irregularities in proposals received, after prior notification to the Proposer.
- c. Utilize any and all ideas submitted in the proposals received.
- d. Negotiate with Proposers responding to this Solicitation within the Solicitation requirements to serve the best interests of the State.
- e. Begin contract negotiations with another bidding Contractor(s) in order to serve the best interests of the State of New York should OTDA be unsuccessful in negotiating a contract with the selected Contractor.
- f. Waive any non-material requirement not met by all Proposers.
- g. Not make an award from this Solicitation.
- h. Make an award under this Solicitation in whole or in part.
- i. Make multiple contract awards pursuant to this Solicitation.
- j. Have any service completed via separate competitive bid or other means, as determined to be in the best interest of the State.
- k. Seek clarifications or revisions of proposals of Bids.
- l. Disqualify any bidder whose conduct and/or Proposal fails to conform to the requirements of the Solicitation.
- m. Prior to the bid opening, amend the Solicitation specifications to correct errors or oversights, or to supply additional information, as it becomes available.

#### **19. CONTRACT EFFECTIVE**

The Contract shall be deemed effective upon its approval by the New York State Attorney General and the State Comptroller.

## **20. OFFICIAL USE ONLY/NO PERSONAL USE**

The Contract is only for official use. Use of the Contract for personal or private purposes is strictly prohibited.

## **21. MODIFICATION OF CONTRACT TERMS**

The Contract may only be modified or amended upon mutual written agreement of OTDA and the Contractor, and approved by OSC and the AG as necessary.

The Contractor may, however, offer OTDA more advantageous pricing, payment, or other terms and conditions than those set forth in the Contract. In such event, a copy of such terms shall be furnished to OTDA by the Contractor at the time of such offer.

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

## **22. SCOPE CHANGES**

Prior to the Contractor implementing any change in the Services, it shall obtain the consent and approval of OTDA. The Contractor shall, prior to implementation of any such change, give written notice to OTDA of the service affected, a description of the change, why it is needed, a suggested implementation approach (and testing if necessary), the cost to OTDA if any, and any other information requested by OTDA. The approval, prior to implementation, of any requested change is in the sole discretion of OTDA.

In the event that OTDA proposes a change in technology or Services, it shall, prior to implementation of any such change, give written notice to the Contractor with a description of the change, why it is needed, a suggested implementation approach (and testing if necessary), and the Contractor shall have a reasonable time to analyze the cost, if any, to the Contractor. The final determination for implementation of any requested change pursuant to this section is in the sole discretion of OTDA.

OTDA reserves the right to direct operating changes to the Contractor based on its own observations or based on suggestions made by the Contractor.

Work performed outside the scope of the Agreement or without the approval of OTDA shall not be subject to charge by the Contractor.

## **23. ESTIMATED/SPECIFIC QUANTITY CONTRACTS**

Estimated quantity contracts, also referred to as indefinite delivery/indefinite quantity contracts, are expressly agreed and understood to be made for only the quantities, if any, actually ordered during the Contract term. No guarantee of any quantity is implied or given.

## **24. EMERGENCY CONTRACTS RESERVED**

In the event that a disaster emergency is declared by Executive Order under Section 28 of Article 2-B of the Executive Law, OTDA reserves the right to obtain the Product from any source, including but not limited to this Contract, as OTDA, in its sole discretion, determines will meet the needs of such emergency. Contractor shall not be entitled to any claim for lost profits for Product procured from other sources pursuant to this clause. The reasons underlying the finding that an emergency exists shall be included in the procurement record.

## **25. PRODUCT DELIVERY RESERVED**

Delivery must be made, if required, in accordance with the terms of the Contract. The decision of OTDA as to compliance with delivery terms shall be final. In all instances of a potential or actual delay in delivery, the Contractor shall immediately notify OTDA, and confirm in writing the explanation of the delay, and take

appropriate action to avoid any subsequent late deliveries. Any extension of time for delivery must be requested in writing by the Contractor and approved by OTDA in writing.

#### **26. TITLE AND RISK OF LOSS FOR PRODUCTS OTHER THAN TECHNOLOGY PRODUCTS RESERVED**

Notwithstanding the form of shipment, title or other property interest, risk of loss for Products other than technology Products shall not pass from the Contractor to OTDA until the Products have been received, inspected and accepted by OTDA. Acceptance shall occur within a reasonable time or in accordance with such other defined acceptance period as may be specified in the Contract. Mere acknowledgment by OTDA of the delivery or receipt of goods (e.g., signed bill of lading) shall not be deemed or construed as acceptance of the Products received. Any delivery of Product that is substandard or does not comply with the Contract may be rejected or accepted on an adjusted price basis, as determined by OTDA. Title, risk of loss, and acceptance for technology Products shall be governed by the Contract.

#### **27. PRODUCT SUBSTITUTION RESERVED**

In the event a specified Product listed in the Contract becomes unavailable or cannot be supplied by the Contractor for any reason (except as provided for in the Savings/Force Majeure clause), a Product deemed in writing by OTDA to be equal to or better than the specified Product must be substituted by the Contractor at no additional cost or expense to OTDA. Unless otherwise specified, any substitution of Product shall require OTDA's written approval.

#### **28. REJECTED PRODUCT RESERVED**

When Product is rejected, it must be removed by the Contractor from OTDA's premises within 10 calendar days of notification of rejection by OTDA. Upon notification of rejection, risk of loss of rejected or non-conforming Product shall remain with Contractor.

#### **29. INSTALLATION RESERVED**

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

#### **30. REPAIRED OR REPLACED PRODUCTS, PARTS, OR COMPONENTS RESERVED**

Where the Contractor is required to repair, replace or substitute Product or parts or components of the Product under the Contract, the repaired, replaced or substituted Products shall be subject to all terms and conditions for new parts and components set forth in the Contract including warranties, as set forth in the Warranties clause herein. Replaced or repaired Product or parts and components of such Product shall be new and shall, if available, be replaced by the original manufacturer's component or part. Before installation, all proposed substitutes for the original manufacturers' installed parts or components must be approved by the Authorized User. The part or component shall be equal to or of better quality than the original part or component being replaced.

#### **31. EMPLOYEES, SUBCONTRACTORS AND AGENTS**

The Contractor ~~will conduct background checks on all employees working on this Agreement, and~~ shall retain only individuals with the moral fitness necessary to perform Services hereunder. If the Contractor is unable to determine an employee's fitness ~~due to the results of a background check~~, then it shall forward a description of

the results to the OTDA, for review and determination. If it is later determined that the Contractor knowingly rendered a false positive determination of an employee's fitness, ~~failed to conduct a background check,~~ or failed to reasonably interpret the results in confirming an employee's fitness to perform duties under the terms of this Agreement, in addition to any other remedies available to the OTDA, the OTDA may terminate this Agreement for cause. The Contractor shall provide immediate written notice to the OTDA if at any time the Contractor learns that its determination of an employee's fitness to perform duties under the terms of this Agreement was erroneous or has become erroneous because of changed circumstances. The Contractor will ensure that the provisions of this section are incorporated within all subcontracts, and acknowledges the responsibility for ensuring that these provisions are fully complied with by all Subcontractors. ~~The Contractor will be required to maintain records related to the background investigations performed for the term of this Agreement.~~ in accordance with Contractor's record retention policy and applicable law. All employees, Subcontractors, or agents of the Contractor performing work under the Contract must be trained staff or technicians who meet or exceed the professional, technical, and training qualifications set forth in the Contract, and must comply with all security and administrative requirements in the Contract. OTDA reserve the right to conduct a security background check or otherwise approve any employee, Subcontractor, or agent furnished by Contractor and to refuse access to or require replacement of any personnel for cause based on professional, technical or training qualifications, quality of work or change in security status or non-compliance with OTDA's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract. OTDA reserves the right to reject and/or bar from any OTDA facility for cause any employee, Subcontractor, or agent of the Contractor.

The Contractor certifies that all staff provided to perform Services possesses the necessary integrity and professional capacity to meet OTDA's reasonable expectations. Subsequent to the commencement of Services, whenever the Contractor becomes aware, or reasonably should have become aware, that any staff member(s) providing Services no longer possess the necessary integrity or professional capacity, the Contractor shall immediately discontinue the use of such staff and notify OTDA.

OTDA has final approval of any staff furnished to provide Services and may refuse to approve any staff member(s) based on its review of the staff member's integrity to perform the required Services. OTDA reserves the right to bar anyone from access to OTDA's premises and/or access to its information resources.

For the purposes of this Section, "staff" includes employees, owners, officers, directors, or agents of the Contractor and of any of the Contractor's subcontractors.

### **32. ASSIGNMENT**

In accordance with Section 138 of the State Finance Law, the Contractor shall not assign, transfer, convey, sublet, or otherwise dispose of the Contract or its right, title or interest therein, or its power to execute such Contract to any other person, company, firm or corporation in performance of the Contract without the prior written consent of OTDA; provided, however, any consent shall not be unreasonably withheld, conditioned, delayed or denied. OTDA may waive the requirement that such consent be obtained in advance where the Contractor verifies that the assignment, transfer, conveyance, sublease, or other disposition is due to, but not necessarily limited to, a reorganization, merger, or consolidation of the Contractor's business entity or enterprise.

Notwithstanding the foregoing, the State shall not hinder, prevent or affect assignment of money by a Contractor for the benefit of its creditors. Prior to a consent to assignment of monies becoming effective, the Contractor shall file a written notice of such monies assignments with the State Comptroller. Prior to a consent to assignment of a Contract, or portion thereof, becoming effective, the Contractor shall submit the request for assignment to OTDA and seek written agreement from OTDA which will be filed with the State Comptroller. OTDA shall use reasonable efforts to promptly respond to any request by Contractor for an assignment, provided that Contractor supplies sufficient information about the party to whom the Contractor proposes to assign the Contract.

Upon notice to the Contractor, the Contract may be assigned without the consent of the Contractor to another State Agency or subdivision of the State pursuant to a governmental reorganization or assignment of functions under which the functions are transferred to a successor Agency or to another Agency that assumes OTDA responsibilities for the Contract.

### 33. SUBCONTRACTORS ~~AND SUPPLIERS~~

OTDA reserves the right to reject any proposed Subcontractor ~~or supplier~~ for bona fide business reasons, including, but not limited to: the company failed to solicit New York State certified minority- and women-owned business enterprises as required in prior OTDA Contracts; the fact that such Subcontractor or supplier is on the New York State Department of Labor's list of companies with which New York State cannot do business; OTDA's determination that the company is not qualified or is not responsible; or the fact that the company has previously provided unsatisfactory work or services. OTDA reserves the right to approve contracts between the Contractor and Subcontractors.

### 34. SUSPENSION OF WORK

OTDA, in its sole discretion, reserves the right to suspend any or all activities under the Contract, at any time, due to a budget freeze or reduction in State spending, or declaration of emergency. Upon issuance of such notice, the Contractor shall comply with the suspension order. Activity may resume at such time as OTDA issues a formal written notice authorizing a resumption of performance under the Contract.

The Contractor may suspend a portion of the Service harmfully impacted by fraudulent or illegal activity (the Impacted Service), upon the delivery or transmission of a written notice to OTDA which describes the Impacted Service and steps taken or immediately to be taken by the Contractor to resolve and reinstate such Service. In addition, such notification shall set forth the Contractor's diligent efforts taken or to be taken to avoid the suspension of the non-Impacted Service during such resolution period. If the Impacted Service is not resolved and reinstated within five (5) business days after such suspension, then the matter shall immediately be subject to the Dispute Resolution Process set forth in Sections 50 and 51 of Appendix B. The Contractor acknowledges that due to the critical nature of the Services to OTDA and the State's operations, the Contractor may not terminate or suspend the provisioning of any other non-impacted Services under the Agreement at any time during the Contract term.

### 35. TERMINATION

- a. **Mutual Agreement** All or any part of this Agreement may be terminated by mutual written agreement of OTDA and the Contractor.
- b. **For Cause** For a material breach that remains uncured for more than 30 calendar days or other longer period as specified by written notice to the Contractor, the Contract may be terminated by OTDA for cause. Neither the State nor OTDA shall be liable for any of Contractor's costs arising from the failure to perform or the termination, including without limitation costs incurred after the date of termination. Such termination shall be upon written notice to the Contractor. In such event, OTDA may complete the contractual requirements in any manner it may deem advisable and pursue available legal or equitable remedies for breach.

A material breach means a significant and/or repeated failure(s) to deliver a Product in accordance with the timetable, price or performance standards applicable thereto, or when a material term of the Contract is breached.

- c. **For Convenience** This Contract may be terminated at any time by OTDA for convenience upon 60 calendar days or other longer period as specified by written notice, without penalty or other early termination charges due. If the Contract is terminated pursuant to this subdivision, OTDA shall remain liable for all accrued but unpaid charges incurred through the date of the termination.
- d. **For Violation of Sections 139-j and 139-k of the State Finance Law** OTDA reserves the right to terminate the Contract in the event it is found that the certification filed by the Bidder in accordance with Section 139-k of the State Finance Law was intentionally false or intentionally incomplete. Upon such finding, OTDA may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms of the Contract.

- e. **For Violation of Section 5-a of the New York State Tax Law** OTDA reserves the right to terminate the Contract in the event it is found that the certification filed by the Contractor in accordance with Section 5-a of the Tax Law is not timely filed during the term of the Contract or the certification furnished was intentionally false or intentionally incomplete. Upon such finding, OTDA may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms of the Contract.
- f. **For Non-Responsibility** The Contractor agrees that if it is found by the State that its responses to the Vendor Responsibility Questionnaire were intentionally false or intentionally incomplete, then OTDA may terminate the Contract.

Upon written notice to the Contractor, and a reasonable opportunity to be heard with appropriate OTDA officials or staff, the Contract may be terminated by OTDA at the Contractor's expense where the Contractor is determined by OTDA to be non-responsible. In such event, OTDA may complete the contractual requirements in any manner it may deem advisable and pursue available legal or equitable remedies for breach.

In no case shall such termination of the Contract by the State be deemed a breach thereof, nor shall the State be liable for any damages for lost profits or otherwise, which may be sustained by the Contractor as a result of such termination.

- g. **Upon Conviction of Certain Crimes** OTDA reserves the right to terminate the Contract in the event it is found that a member, partner, director or officer of Contractor is convicted of one or more of the following: Bribery Involving Public Servants and Related Offenses as defined in Article 200 of the New York State Penal Law; Corrupting the Government as defined in Article 496 of the New York State Penal Law; or Defrauding the Government as defined in Section 195.20 of the New York State Penal Law.
- h. **Mitigation of Costs** The Contractor shall not undertake any additional or new contractual obligations on or after the receipt of notice of termination without the prior written approval of OTDA. On or after the receipt of notice of termination and during the termination notice period, the Contractor shall take all commercially reasonable and prudent actions to close out unnecessary outstanding, existing obligation as economically as possible for OTDA.
- h.i. Notwithstanding any termination, the terms of this Agreement shall apply to all transactions which have been initiated prior to termination.

## 36. SAVINGS/FORCE MAJEURE

A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled and is not due to the negligence or willful misconduct of the affected party. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, terrorism, strikes, fires, explosions, actions of the elements, floods, pandemics, or other similar causes beyond the control of the Contractor or OTDA in the performance of the Contract where non-performance, by exercise of reasonable diligence, cannot be prevented.

The affected party shall provide the other party with written notice of any force majeure occurrence as soon as the delay is known and provide the other party with a written contingency plan to address the force majeure occurrence, including, but not limited to, specificity on quantities of materials, tooling, people, and other resources that will need to be redirected to another facility and the process of redirecting them. Furthermore, the affected party shall use its commercially reasonable efforts to resume proper performance within an appropriate period of time. Notwithstanding the foregoing, if the force majeure condition continues beyond 30 calendar days, the parties to the Contract shall jointly decide on an appropriate course of action that will permit fulfillment of the parties' objectives under the Contract.

The Contractor agrees that in the event of a delay or failure of performance by the Contractor under the Contract due to a force majeure occurrence:

- a. OTDA may purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Products which are the subject of the delay, which



purchases may be deducted from the Contract quantities without penalty or liability to the State, or

- b. The Contractor will provide OTDA with access to Products first in order to fulfill orders placed before the force majeure event occurred. OTDA agrees to accept allocated performance or deliveries during the occurrence of the force majeure event.

Neither the Contractor nor OTDA shall be liable to the other for any delay in or failure of performance under the Contract due to a force majeure occurrence. Any such delay in or failure of performance shall not constitute default or give rise to any liability for damages. The existence of such causes of such delay or failure shall extend the period for performance to such extent as determined by the Contractor and OTDA to be necessary to enable complete performance by the Contractor if reasonable diligence is exercised after the cause of delay or failure has been removed.

Notwithstanding the above, at the discretion of OTDA where the delay or failure will significantly impair the value of the Contract to the State or OTDA, OTDA may terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or the relative part thereof.

~~In addition, OTDA reserves the right, in its sole discretion, to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (i) the volatility is due to causes outside the control of Contractor; (ii) the volatility affects the marketplace or industry, not just the particular Contract source of supply; (iii) the effect on pricing or availability of supply is substantial; and (iv) the volatility so affects Contractor's performance that continued performance of the Contract would result in a substantial loss to the Contractor.~~ In the event of a dispute between the Contractor and OTDA, such dispute shall be resolved in accordance with OTDA Dispute Resolution Procedures; provided, however, that nothing in this clause shall excuse the Contractor from performing in accordance with the Contract as changed.

### 37. CONTRACT INVOICING

- a. **Invoicing** Contractor shall provide complete and accurate billing invoices to OTDA in order to receive payment. Billing invoices submitted to OTDA must contain all information required by the Contract and the State Comptroller or other appropriate fiscal officer.

Contractor shall provide, upon request of OTDA, any and all information necessary to verify the accuracy of the billings. Such information shall be provided in a commercially reasonable manner as requested by OTDA. OTDA may direct the Contractor to provide the information to the State Comptroller.

- b. **Method of Payment** OTDA and Contractor agree that payments for invoices submitted by the Contractor shall only be rendered electronically unless payment by paper check is expressly authorized by OTDA, in OTDA's sole discretion, due to extenuating circumstances. Such electronic payments shall be made in accordance with ordinary State procedures and practices. The Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller website at [www.osc.state.ny.us](http://www.osc.state.ny.us), by e-mail at [HelpDesk@sfs.ny.gov](mailto:HelpDesk@sfs.ny.gov), or by telephone at (518) 457-7737 or toll free (877) 737-4185. Contractor acknowledges that it will not receive payment on any invoices submitted under this Contract that are payable by the State Comptroller if it does not comply with the State Comptroller's electronic payment procedures, except where OTDA has expressly authorized payment by paper check as set forth above.

### 38. PROMPT PAYMENTS

- a. **By State Agencies** The required payment date by the State shall be 30 calendar days, excluding legal holidays, from the receipt of a proper invoice, as determined in accordance with State Finance Law Section 179-f(2) and 2 NYCRR Part 18. The payment of interest on certain payments due and owed may be made in accordance with State Finance Law Sections 179-d et seq. and the implementing regulations (2 NYCRR § 18.1 et seq.).
- b. **By Contractor** Should the Contractor be liable for any payments to the State hereunder, interest, late payment charges and collection fee charges will be determined and assessed pursuant to Section 18 of

the State Finance Law.

### 39. REMEDIES FOR BREACH

In the event that Contractor fails to observe or perform any material term or condition of the Contract and such failure remains uncured after 30 calendar days following written notice by OTDA, then OTDA may exercise all rights and remedies available under the Contract, and those available at law or in equity. Notwithstanding the foregoing, if such failure is of a nature that it cannot be cured completely within 30 calendar days and Contractor shall have commenced its cure of such failure within such period and shall thereafter diligently prosecute all steps necessary to cure such failure, such 30-day period may, in the sole discretion of OTDA, be extended for a reasonable period. It is understood and agreed that the rights and remedies available to the OTDA in the event of breach shall include but not be limited to the following:

- a. **Cover/Substitute Performance** In the event of Contractor's material, uncured breach, OTDA may, with or without issuing a formal Solicitation: (i) purchase from other sources; or (ii) if OTDA is unsuccessful after making reasonable attempts, under the circumstances then-existing, to timely obtain acceptable replacement Product of equal or comparable quality, acquire acceptable replacement Product of lesser or greater quality. Such purchases may be deducted from the Contract quantity without penalty or liability to the State.
- b. **Withhold Payment** In any case where a reasonable question of material, uncured non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of OTDA.
- c. ~~Reimbursement of Costs Incurred Contractor agrees to reimburse OTDA promptly for any and all additional costs and expenses incurred for acquiring acceptable replacement Product. Should the cost of cover be less than the Contract price, the Contractor shall have no claim to the difference. The Contractor covenants and agrees that in the event suit is successfully prosecuted for any default on the part of the Contractor, all costs and expenses, including reasonable attorney's fees, shall be paid by the Contractor. Where the Contractor fails to timely deliver pursuant to the guaranteed delivery terms of the Contract, OTDA may obtain replacement Product temporarily and the cost of the replacement Product shall be deducted from the Contract quantity without penalty or liability to the State. OMITTED~~
- d. **Deduction/Credit** Sums due as a result of these remedies may be deducted or offset by OTDA from payments due, or to become due, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to OTDA the amount of such claim or portion of the claim still outstanding, on demand. OTDA reserves the right to determine the disposition of any rebates, settlements, restitution, damages, etc., that arise from the administration of the Contract.

### 40. ASSIGNMENT OF CLAIM RESERVED

Contractor hereby assigns to the State any and all claims for overcharges associated with this Contract that may arise under the antitrust laws of the United States, 15 USC Section 1, et seq. and the antitrust laws of the State of New York, General Business Law Section 340, et seq.

### 41. TOXIC SUBSTANCES RESERVED

Each Contractor furnishing a toxic substance, as defined by Section 875 of the Labor Law, shall provide OTDA with not less than two copies of a Safety Data Sheet, which sheet shall include for each such substance the information outlined in Section 876 of the Labor Law.

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

### 42. INDEPENDENT CONTRACTOR

It is understood and agreed that the legal status of the Contractor, its Subcontractors, agents, officers and employees under this Contract is that of an independent contractor, and in no manner shall they be deemed employees of OTDA, and therefore are not entitled to any of the benefits associated with such employment.

#### 43. SECURITYRESERVED

Contractor warrants, covenants and represents that, in the performance of the Contract, Contractor, its agents, Subcontractors, officers, distributors, resellers and employees will comply fully with all security procedures of OTDA set forth in the Contract or otherwise communicated in advance to the Contractor including but not limited to physical, facility, documentary and cyber security rules, procedures and protocols.

#### 44. COOPERATION WITH THIRD PARTIES

The Contractor shall be responsible for fully cooperating with any third party, including but not limited to other Contractors or Subcontractors of OTDA, as necessary to ensure delivery or performance of Product.

#### 45. WARRANTIES

- a. ~~Product Performance~~ Contractor hereby warrants and represents that the Products acquired by OTDA under this Contract conform to the manufacturer's specifications, performance standards and Documentation and that the Documentation fully describes the proper procedure for using the Products. OMITTED
- b. **Title and Ownership** Contractor warrants and represents that it has (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver specified license rights to any Products acquired by OTDA under this Contract. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor shall indemnify OTDA and hold OTDA harmless from any damages and liabilities (including reasonable attorneys' fees and costs) arising from any breach of Contractor's warranties as set forth herein. Contractor shall provide OTDA with appropriate documentation indicating the vesting of such rights in Contractor, and/or the right to transfer such rights, as requested by OTDA.
- c. ~~Product Warranty~~ Contractor further warrants and represents that Products, components or parts specified and furnished by or through Contractor, whether specified and furnished individually or as a system, shall be substantially free from defects in material and workmanship and will conform to all requirements of the Contract for the manufacturer's standard commercial warranty period, if applicable, or for a minimum of one year from the date of acceptance, whichever is longer (the "Product warranty period").

~~During the Product warranty period, defects in the materials or workmanship of Products, components, or parts specified and furnished by or through Contractor, whether specified and furnished individually or as a system, shall be repaired or replaced by Contractor at no cost or expense to OTDA. Contractor shall extend the Product warranty period for individual Products, or for the system as a whole, as applicable, by the cumulative periods of time, after notification, during which an individual Product, or the system as a whole, requires repairs or replacement resulting in down time or is in the possession of the Contractor, its agents, officers, Subcontractors, distributors, resellers or employees ("extended warranty").~~

~~Any component or part replaced by the Contractor under the Contract warranties shall be guaranteed for the greater of: (i) the Product warranty period set forth herein; or (ii) the manufacturer's standard commercial warranty period offered for the component or part, if applicable.~~

~~All costs for materials, labor, and transportation incurred to repair or replace Products, parts, components, or systems as a whole during the warranty period shall be borne solely by the Contractor, and the State or OTDA shall in no event be liable or responsible therefor.~~

~~Where Contractor, the Third-Party Software vendor, or other third-party manufacturer markets any Product delivered by or through Contractor with a standard commercial warranty, such standard warranty shall be in addition to, and not relieve the Contractor from, Contractor's warranty obligations during the Product warranty and extended warranty periods. Where such standard commercial warranty covers all or some of the Product warranty or extended warranty periods, Contractor shall be responsible for the coordination during the Product warranty or extended warranty periods with Third-Party Software vendor or other third-party manufacturers for warranty repair or replacement of Third-Party Software vendor or other third-party manufacturer's Product.~~

~~Where Contractor, Third-Party Software vendor, or other third-party manufacturer markets any Product with a standard commercial warranty that goes beyond the Product warranty or extended warranty periods, Contractor shall notify OTDA and pass through the standard commercial warranty to OTDA at no additional charge; provided, however, that Contractor shall not be responsible for coordinating services under the standard commercial warranty after expiration of the Product warranty and extended warranty periods.~~

~~Unless recycled, recyclable, or recovered materials are available in accordance with the Remanufactured, Recycled, Recyclable, or Recovered Materials clause, Product offered shall be standard new equipment, current model or most recent release of regular stock product with all parts regularly used with the type of equipment offered. Contractor further warrants and represents that no component or part has been substituted or applied contrary to the manufacturer's recommendations and standard practice.~~

~~Contractor shall not be responsible for any modification of the Products made by OTDA without Contractor's approval.~~ **OMITTED**

**d. Virus Warranty** Contractor represents and warrants that any Product acquired under the Contract by OTDA does not contain any known Viruses. Contractor is not responsible for Viruses introduced at OTDA's Site. **OMITTED**

**e. Date/Time Warranty** Contractor warrants that Product furnished pursuant to this Contract shall, when used in accordance with the Product Documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) transitions, including leap year calculations. Where a Contractor proposes or an acquisition requires that specific Products must perform as a package or system, this warranty shall apply to the Products as a system.

~~Where Contractor is providing ongoing services, including but not limited to: (i) consulting, integration, code or data conversion, (ii) maintenance or support services, (iii) data entry or processing, or (iv) contract administration services (e.g., billing, invoicing, claim processing), Contractor warrants that services shall be provided in an accurate and timely manner without interruption, failure or error due to the inaccuracy of Contractor's business operations in processing date/time data (including, but not limited to, calculating, comparing, and sequencing) various date/time transitions, 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.~~ **OMITTED**

**f. Qualification Warranty** Contractor warrants that it and any subcontractors it utilizes in the performance of the services is qualified and licensed to do business in the State of New York.

**g. Administration Warranty** Contractor warrants that it shall Maintain an adequate administrative organizational structure sufficient to discharge its contractual responsibilities. ~~Contractor shall provide OTDA with advanced, written notification of all reductions in staff below the levels found in the Contractor's proposal.~~

**h. Price Protection Warranty** Contractor warrants that the Agreement's prices and warranties are comparable to or better than the equivalent terms being offered by the Contractor to other State government customers using similar scope and volume of services under like terms and conditions. If, during the Term of this Agreement, the Contractor enters into an agreement with any other State government customer that offers better prices and warranties for similar services, OTDA may amend the Agreement to reflect such superior pricing or warranty terms.

**i. Workmanship Warranty** Contractor warrants that the services acquired under this Contract will be provided in a professional and workmanlike manner in accordance with the applicable industry standards, if any. OTDA must notify Contractor of any services warranty deficiencies within 90 calendar days from performance of the services that gave rise to the warranty claim.

**j. Survival of Warranties** All warranties contained in this Contract shall survive the termination of this Contract.

**k. Prompt Notice of Breach** OTDA shall notify the Contractor in writing of any claim of breach of any

warranty provided herein.

**I. Additional Warranties** Where Contractor, Product manufacturer or service provider generally offers additional or more advantageous warranties than those set forth herein, Contractor shall offer or pass through any such warranties to OTDA.

**m. No Limitation of Rights** The rights and remedies of the State and OTDA provided in this clause are in addition to and do not limit any rights afforded to the State and OTDA by any other clause of the Contract.

#### **46. LEGAL COMPLIANCE**

Contractor represents and warrants that it shall secure all notices and comply with all applicable laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Contract. Prior to award and during the Contract term and any extensions thereof, Contractor must establish to the satisfaction of OTDA that it substantially meets or exceeds all requirements of the Solicitation and Contract and any applicable laws, including but not limited to, permits, licensing, and shall provide such proof as required by OTDA. Failure to comply or failure to provide proof may constitute grounds for OTDA to terminate or suspend the Contract, in whole or in part, or to take any other action deemed necessary by OTDA. Contractor also agrees to disclose information and provide affirmations and certifications to comply with Sections 139-j and 139-k of the State Finance Law.

#### **47. INDEMNIFICATION**

Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully defend, indemnify and hold OTDA harmless from suits, actions, proceedings, claims, losses, damages, and costs (including reasonable attorney fees) of every name and description relating to personal injury and damage to real or personal tangible property caused by any intentional act or negligence of Contractor, its agents, employees, partners or Subcontractors, which shall arise from or result directly or indirectly from this Contract, without limitation; provided, however, that the Contractor shall not be obligated to indemnify OTDA for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of OTDA.

OTDA shall give Contractor: (i) prompt written notice of any action, claim or threat of suit, or other suit for which Contractor is required to fully indemnify OTDA, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

In the event that an action or proceeding at law or in equity is commenced against OTDA arising out of a claim for death, personal injury or damage to real or personal tangible property caused by any intentional or willful act, gross negligence, or negligence of Contractor, its agents, employees, partners or Subcontractors, which shall arise from or result directly or indirectly from the Products supplied under this Contract, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify OTDA and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of OTDA and attempt to secure a continuance to permit the State and OTDA to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and OTDA may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters.

#### **48. INDEMNIFICATION RELATING TO INFRINGEMENT**

The Contractor shall defend, indemnify and hold OTDA harmless from all suits, actions, proceedings, claims, losses, damages, and costs of every name and description (including reasonable attorney fees), relating to a claim of infringement of a patent, copyright, trademark, trade secret or other proprietary right provided such claim arises solely out of the Products as supplied by the Contractor, and not out of any modification to the Products

made by OTDA or by someone other than Contractor at the direction of OTDA without Contractor's approval; provided, however, that the Contractor shall not be obligated to indemnify OTDA for any claim, loss or damage arising hereunder to the extent caused by the negligent act, gross negligence or willful misconduct of OTDA.

OTDA shall give Contractor: (i) prompt written notice of any action, claim or threat of suit alleging infringement, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

If usage of a Product shall be enjoined for any reason or if Contractor believes that it may be enjoined, Contractor shall have the right, at its own expense and sole discretion to take action in the following order of precedence: (i) to procure for OTDA the right to continue usage (ii) to modify the service or Product so that usage becomes non-infringing, and is of at least equal quality and performance; or (iii) to replace such Product or parts thereof, as applicable, with non-infringing Product of at least equal quality and performance. If the above remedies are not available, the parties shall terminate the Contract, in whole or in part as necessary and applicable, provided that OTDA is given a refund for any amounts paid for the period during which usage was not feasible.

In the event that an action or proceeding at law or in equity is commenced against OTDA arising out of a claim that OTDA's use of the Product under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify OTDA and the New York State Office of the Attorney General in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Contract and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of OTDA and attempt to secure a continuance to permit the State and OTDA to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and OTDA may have. In the event of a dispute regarding the defense, the Contractor and the Attorney General shall try to reach an amicable resolution, but the Attorney General shall have the final determination on such matters.

#### **49. LIMITATION OF LIABILITY**

Except as otherwise set forth in the Contract, the limit of liability shall be as follows:

- a. Contractor's liability for any claim, loss or liability arising out of, or connected with the Products provided, and whether based upon default, or other liability such as breach of contract, warranty, negligence, misrepresentation or otherwise, shall in no case exceed direct damages in an amount equal to two (2) times the total "not to exceed" value of the Contract.
- b. OTDA may retain such monies from any amount due Contractor as may be necessary to satisfy any claim for damages, costs and the like asserted by OTDA unless Contractor at the time of the presentation of claim shall demonstrate to OTDA's satisfaction that sufficient monies are set aside by the Contractor in the form of a bond or through insurance coverage to cover associated damages and other costs.
- c. Notwithstanding the above, neither the Contractor nor OTDA shall be liable for any consequential, indirect or special damages of any kind which may result directly or indirectly from such performance, including, without limitation, damages resulting from loss of use or loss of profit by OTDA, the Contractor, or by others.
- d. In no event shall the Contractor be liable to or obligated to indemnify OTDA for losses imposed on, incurred by or asserted against OTDA or the State to the extent such losses are caused by the Contractor's action or inaction in reliance upon any instruction by OTDA, or its officers or Contractors, except to the extent that a court of competent jurisdiction has fully and finally adjudicated that any such losses arise from or relate to the willful misconduct or negligent act or failure to act of the Contractor, its officers, employees, subcontractors, partners or agents in relation to Contractor's compliance with any such instruction by OTDA.
- e. Contractor shall have no obligation or duty to indemnify, defend, or hold harmless OTDA or any of

their officers, employees, or agents under this §49, if and only to the extent that such losses, if any, are caused by the negligence, gross negligence, willful misconduct, fraud, or bad faith of, or violation of applicable law by, OTDA, or any officer, employee, or agent thereof while acting within the course and scope of their employment

## **50. DISPUTE RESOLUTION PROCEDURES**

**Policy** - It is the policy of OTDA to provide an opportunity to resolve disputes related to contract administration. Interested parties are encouraged, but not required, to seek resolution of disputes through consultation with OTDA staff through the Informal Dispute Resolution Process described herein, prior to filing a Formal Dispute. All Informal and Formal Disputes will be accorded full, impartial and timely consideration.

### **Dispute Resolution Procedures**

#### **a. Informal Dispute Resolution Process**

- i. In the event there is a dispute, OTDA and Contractor agree to exercise best efforts to resolve the dispute as soon as possible. The Contractor and OTDA shall, without delay, continue to perform their respective obligations under the Contract.
- ii. In the event OTDA is dissatisfied with the Contractor's Product(s) provided under the Contract, then OTDA shall notify the Contractor of such in writing pursuant to the terms of the Contract. In the event the Contractor has any disputes with OTDA, the Contractor shall notify OTDA in writing. If either party notifies the other of a dispute, then the other party shall make good faith efforts to solve the problem or settle the dispute amicably, including meeting with the party's representatives to attempt to diligently reach a satisfactory result through negotiation.
- iii. If negotiation between the Contractor and OTDA fails to resolve any such dispute to the satisfaction of the parties within 14 business days of such notice, or as otherwise agreed to by the Contractor and OTDA, the matter shall be submitted to OTDA's Director of the Bureau of Contract Management (the Director). The Director shall attempt in good faith to resolve the dispute within the next 14 business days or as otherwise agreed to by the parties. The Director shall then send a written notification to the Contractor, memorializing the good faith effort. This attempt must be held before either party may seek any other method of dispute resolution, including judicial or governmental resolutions. Notwithstanding the foregoing, this section shall not be construed to prevent either party from seeking and obtaining temporary equitable remedies, including injunctive relief.

#### **b. Formal Dispute Process**

- i. Submission of Formal Disputes - A Formal Dispute must be filed by mail and email to the person specified in the Solicitation or Agreement to receive receipt of notifications. The notification must include a detailed statement of the legal and/or factual grounds for the Formal Dispute, relevant documents, a statement as to the form of relief requested, and any other pertinent information relating to the dispute.
- ii. A Formal Dispute must be filed within 20 business days after the Contractor and OTDA failed to reach resolution through the Informal Dispute Resolution Process.

#### **c. Agency Response to Dispute**

- i. The Director will consider all information relevant to the Formal Dispute and may require the Contractor to meet or participate in a conference call with OTDA to discuss the Formal Dispute when, in the Director's sole judgment, circumstances so warrant.
- ii. The Director shall send a formal dispute determination to the Contractor

#### **d. Appeals**

Should the Contractor be dissatisfied with the Director's Formal Dispute determination, a written appeal may be filed with the Division of Legal Affairs, by regular mail, using the following mailing information:

General Counsel  
Division of Legal Affairs, Floor 16  
Office of Temporary and Disability Assistance 40 North Pearl Street  
Albany, NY 12243

Written notice of appeal of a determination must be received at the above address no more than 10 business days after the date the Formal Decision by the Director is received by the Contractor.

The General Counsel shall review and make a final determination on all appeals or may designate a person or persons to act on his/her behalf. The final determination on the appeal shall be issued within 20 business days of receipt of the appeal.

An appeal of the decision of the Director shall not include new facts and information unless requested in writing by the General Counsel. The decision of the General Counsel shall be a final and conclusive agency determination.

## **51. PROCEDURE FOR PROTESTS/APPEALS OF BID SPECIFICATIONS**

- a. Formal Written Protests** Final agency decisions or recommendations for award generally may be reconsidered only in the context of a formal written protest as described below. Any Offeror or prospective Offeror who believes that there are errors or omissions in the procurement process or who otherwise has been aggrieved in the drafting or issuance of this Solicitation, may present a formal complaint to OTDA and request administrative relief concerning such action ("formal protest"). A formal protest must be submitted in writing to OTDA, by ground mail, except where alternate arrangements have been made, to the:

Director, Bureau of Contract Management  
40 North Pearl Street, 12th Floor, Section D,  
Albany, NY 12243.

A formal protest must include a statement of all legal and/or factual grounds for disagreement with an OTDA specification or purchasing decision including a contract award; a description of all remedies or relief requested; and copies of any and all applicable supporting documentation.

- b. Deadline for Submission of Formal Protests for Errors or Omissions in the Procurement Process** OTDA must receive formal protests concerning errors, omissions or prejudice, including patently obvious errors in the Solicitation or Specifications, at least 10 calendar days before the Bid Submission Date.
- c. Deadline for Submission of Formal Protests of Contract Award** OTDA must receive a formal protest concerning a contract award within 10 business days of the issuance of notice of contract award or receipt of a non-select letter by an Offeror to:

Director, Bureau of Contract Management  
40 North Pearl Street, 12th Floor, Section D,  
Albany, NY 12243

- d. Review and Final Determination of Protests** Protests will be resolved through written correspondence. However, the protester may request a meeting to discuss a formal protest or OTDA may initiate a meeting on its own accord, at which time the participants may present their concerns. Either the protester or OTDA may decline such a meeting. The Director of BCM may designate an OTDA employee ("designee") to determine and undertake the initial resolution or settlement of any protest. The Director of BCM or his/her designee will conduct a review of the records involved in the protest, including, but not limited to: (a) the evaluation team's reports and recommendations; (b) the materials presented by the protesting party and/or (c), any materials required of or submitted by other Offerors. If necessary, the Director of BCM or the designee shall consult with OTDA's Counsel's Office; and prepare a protest decision. A copy of the protest decision, stating the reason(s) upon which it is based and informing the protester of the right to appeal an unfavorable decision to the OSC shall be sent to the protester or its agent within 45 calendar days of receipt of the protest, except that upon notice to the protester such period may be extended. The protest decision will be recorded and included in the procurement record, or otherwise forwarded to the OSC upon issuance.



- e. **Appeals** Upon receipt of OTDA's protest decision, a protester has 10 business days to file an appeal of the determination with the OSC, Bureau of Contracts. The appeal must be filed with:

Director of the Bureau of Contracts at [bidprotests@osc.state.ny.us](mailto:bidprotests@osc.state.ny.us) or Bureau of Contracts  
New York State Office of the State Comptroller 110 State Street, 11th Floor  
Albany, NY 12236

The protester's appeal must contain an affirmation in writing that a copy of the appeal has been served on OTDA, the successful bidder (except where the contracting agency upholds the protest and the successful bidder is the appealing party), and any other party that participated in the protest. In its appeal, the interested party shall set forth the basis on which it challenges OTDA's determination. The OSC Bureau of Contracts will conduct a formal review and issue its determination of the appeal in accordance with its established policy and procedures.

- f. **Reservation of Rights and Responsibilities of OTDA** OTDA reserves the right to waive or extend the time requirements for protest submissions, decisions, and appeals herein prescribed when, in its sole judgment, circumstances so warrant to serve the best interests of the State and OTDA. If OTDA determines that there are compelling circumstances, including the need to proceed immediately with the Contract award in the best interest of the State, then these protest procedures may be suspended, and such decision shall be documented in the procurement record. OTDA will consider all information relevant to the protest, and may, at its discretion, suspend, modify, or cancel the protested procurement action including solicitation of bids or withdraw the recommendation of Contract award prior to issuance of a formal protest decision.
- g. **Procurement Activity Prior to Final Protest Determination** Receipt of a formal bid protest shall not stay action on a procurement unless otherwise determined by OTDA. If a formal protest or appeal is received by OTDA on a recommended award prior to the underlying Contract being forwarded to the OSC, notice of receipt of the protest and appeal must be included in the procurement record forwarded to the OSC. If a final protest decision or final decision on appeal has been reached prior to transmittal to the OSC, a copy of the final decision must be included in the procurement record and forwarded with the recommendation for award. If a final protest decision is made after the transmittal of a bid package to the OSC, but prior to the OSC approval under State Finance Law § 112, a copy of the final OTDA decision shall be forwarded to the OSC when issued, along with a letter either: a) confirming the original OTDA recommendation for award and supporting the request for final § 112 approval, b) modifying the proposed award recommendation in part and supporting a request for final § 112 approval as modified; or c) withdrawing the original award recommendation.
- h. **Record Retention of Bid Protests** All records related to formal Offeror protests and appeals shall be retained for at least one (1) year following resolution of the protest. All other records concerning the procurement shall be retained according to the statutory requirements for records retention.

## 52. NO PRESUMPTION AGAINST DRAFTER

Each of the parties hereto has jointly participated in the negotiation and drafting of this Agreement. In the event an ambiguity or a question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by each of the parties hereto and no presumptions or burdens of proof shall arise favoring any party by virtue of the authorship of any provisions of this Agreement.

## 53. NO CONFLICT

The Contractor warrants and affirms that the terms of the Agreement do not violate any agreements to which it is a party and that its other contractual obligations will not adversely influence its capabilities to perform under this Agreement.

## 54. AVAILABILITY OF OTDA RESOURCES

No aspect of Contractor's performance under the Agreement will be contingent upon OTDA or State personnel or the availability of OTDA or State resources with the exception of (a) all actions required of the Contractor specifically identified in this Agreement as requiring OTDA approval, policy decisions, or policy approvals; (b)

exceptions specifically stated in the Agreement; or (c) the normal cooperation which can be expected in such a contractual relationship or duties, tasks and obligations subsequently agreed to by the parties.

**To the extent the scope of the Solicitation or Contract includes the sale, development, maintenance, or use of Information Technology Products such as software, computer components, systems, or networks for the processing, distribution, or storage of data, the following clauses shall govern, as applicable.**

## **55. SOFTWARE LICENSE GRANT**

Where Product is acquired on a licensed basis, and unless otherwise provided or modified in the Solicitation or Contract, the following shall constitute the license grant:

- a. License Scope.** OTDA, its agents, and subcontractors is granted a non-exclusive, perpetual license to use, copy, execute, reproduce, display, perform, and merge the Product within its business enterprise. OTDA, its agents and subcontractors shall have the right to use modifications or customizations of the Product.

OTDA and Contractor may agree to alternative licensing rights (e.g., subscription, term, etc.) for specific Products, provided such agreement is reached prior to Contract approval.

- b. License Term** The license term shall commence upon the date as indicated in the Contract.
- c. Product Documentation** Contractor shall provide Product Documentation electronically to OTDA at no charge. If Product Documentation is made available to customers in hard copy, Contractor shall provide at no charge one hard copy.

Contractor hereby grants to OTDA a non-exclusive, fully paid-up, royalty-free perpetual license in the Product Documentation to make, reproduce, and distribute, either electronically or otherwise, copies of the Product Documentation as necessary to enjoy full use of the Product in accordance with the Contract.

- d. Product Technical Support & Maintenance** OTDA shall have the option of electing the Product technical support and maintenance ("maintenance") set forth in the Contract (if any) by giving written notice to Contractor any time during the Contract term. Contractor shall fully disclose all terms and conditions of maintenance available to OTDA, including the extent to which updates, upgrades, revisions, and new releases are included in maintenance.

Unless otherwise provided by written agreement between the Contractor and OTDA, maintenance offered shall include, at a minimum, (i) the provision of Error Corrections, updates, enhancements, revisions, Patches, and upgrades to OTDA, and (ii) help desk assistance at no additional cost, either by toll-free telephone or on-line functionality. Contractor shall maintain the Product so as to provide OTDA with the ability to utilize the Product in accordance with the Product Documentation without significant functional downtime to its ongoing business operations during the maintenance term.

OTDA shall not be required to purchase maintenance for use of Product, and may discontinue maintenance at the end of any current maintenance term upon notice to Contractor. In the event that OTDA does not initially acquire or discontinues maintenance of licensed Product, it may, at any time thereafter, reinstate maintenance for Product without any additional penalties or other charges. Contractor shall submit written notification to OTDA of the upcoming maintenance end date no later than 60 calendar days prior to such maintenance end date.

- e. Permitted License Transfers**, Licenses granted hereunder may be transferred or combined for use pursuant to governmental restructuring or reorganization ("permitted license transfers"). There shall be no additional license or other transfer fees due Contractor, provided that the consolidated enterprise is equal to the prior enterprise capacity
- f. Restricted Use By Third Parties** Third parties retained by OTDA shall have the right to use the Product to maintain OTDA's business operations, including data processing, for the time period that they are engaged in such activities provided such third party has executed, or agrees to execute, the Product

manufacturer's standard nondisclosure or restricted use agreement, which executed agreement shall be accepted by the Contractor ("Non-Disclosure Agreement"); and such third party maintains a logical or physical partition within its computer system so as to restrict use and access to the program to that portion solely dedicated to beneficial use for OTDA. In no event shall OTDA assume any liability for third party's compliance with the terms of the Non-Disclosure Agreement, nor shall the Non-Disclosure Agreement create or impose any liabilities on the State or OTDA.

- g. Archival Back-Up and Disaster Recovery** OTDA may use and copy the Product and related Documentation in connection with: (i) reproducing a reasonable number of copies of the Product for archival backup and disaster recovery procedures; (ii) reproducing a reasonable number of copies of the Product and related Documentation for cold site storage; (iii) reproducing a back-up copy of the Product to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed herein. The phrase "cold site storage" means a restorable back-up copy of the Product not to be installed until the need for disaster recovery arises. The phrase "disaster recovery" means the installation and storage of Product in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development. Contractor shall fully disclose all archival back-up and disaster recovery options available to OTDA (e.g., cold, warm, and hot back-up), including all terms and conditions, additional charges, or use authorizations associated with such options.
- h. Confidentiality Restrictions** If any portion of the Product or Product Documentation contains confidential, proprietary, or trade secret information, the Contractor shall identify such information in writing to OTDA. The terms of OTDA's use and disclosure of such information shall be governed by a written agreement between the Contractor and OTDA.

## **56. PRODUCT ACCEPTANCE**

Unless otherwise provided for in the Contract, Contractor shall issue a written Notice of Completion to OTDA when a Product meets the specifications in the Contract. Subsequently, OTDA shall issue either a Notice of Acceptance or a Notice of Deficiency which sets forth defects associated with the Product. In the event a Notice of Deficiency is issued, then Contractor shall have 15 calendar days to correct such defects, and redeliver the Product to OTDA for approval. This process shall continue until OTDA has approved the Product.

Unless otherwise provided for in the Contract, OTDA shall have the option to run testing on the Product prior to acceptance, such tests and data to be specified by OTDA. The testing may, as appropriate, take the form of a documented installation test, capable of observation by OTDA, which shall be made part of the Contractor's standard documentation and shall be covered by the Product warranty. The test data shall remain accessible to OTDA after completion of the test.

Unless otherwise provided by mutual agreement or if OTDA elects to provide a deficiency statement specifying how the Product fails to meet the specifications, Contractor shall have 30 calendar days to correct the deficiency, and OTDA shall have an additional 60 calendar days to evaluate the Product as provided herein.

If the Product does not meet the specifications at the end of the testing period, as determined by OTDA, then OTDA, upon prior written notice to Contractor, may reject the Product and return all defective Product to Contractor, and Contractor shall refund any monies paid by OTDA to Contractor therefor. Costs and liabilities associated with a failure of the Product to perform in accordance with the functionality tests or product specifications during the acceptance period shall be borne fully by Contractor to the extent that said costs or liabilities shall not have been caused by negligent or willful acts or omissions of OTDA's agents or employees. When Product is not accepted, it must be removed by the Contractor from the premises of OTDA within 10 calendar days of notification of non-acceptance by OTDA. Rejected items not removed by the Contractor within the 10 calendar day period shall be regarded as abandoned by the Contractor and OTDA shall have the right to dispose of Product as its own property. The Contractor shall promptly reimburse OTDA for any costs incurred in storage or effecting removal or disposition after the 10-calendar day period.

## **57. NO HARDSTOP OR PASSIVE LICENSE MONITORING**

Unless otherwise expressly agreed to by the Licensee, the Product and all upgrades shall not contain any computer code that would disable the Product or upgrades or impair in any way its operation based on the

elapsing of a period of time, exceeding an authorized number of copies, advancement to a particular date or other numeral, or other similar self-destruct mechanisms (sometimes referred to as “time bombs,” “time locks,” or “drop dead” devices) or that would permit Contractor to access the Product to cause such disablement or impairment (sometimes referred to as a “trap door” device). Any Contractor access to the Product agreed to by OTDA as provided above shall be in accordance with OTDA’s security or other requirements. Contractor agrees that in the event of a breach of this provision that OTDA shall not have an adequate remedy at law, including monetary damages, and that OTDA shall consequently be entitled to seek a temporary restraining order, injunction, or other form of equitable relief against the continuance of such breach, in addition to any and all remedies to which OTDA shall be entitled.

## **58. OWNERSHIP/TITLE TO PROJECT DELIVERABLES**

This clause shall apply where Contractor is commissioned by OTDA to furnish project deliverables as detailed in the Contract.

### **a. Definitions**

- i. For purposes of this clause, “Products” means deliverables furnished under this Contract by or through Contractor, including existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), whether printed in hard copy or maintained on electronic media c) Third-Party Software, d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components, and e) any properties embodied therein, whether in tangible or intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, Source Code, object code).
- ii. For purposes of this clause, “Existing Products” means Products that exist prior to the commencement of work under the Contract. Contractor bears the burden of proving that a particular Product was in existence prior to the commencement of the project.
- iii. For purposes of this clause, “Custom Products” means Products, preliminary, final, or otherwise, that are created or developed by Contractor, its Subcontractors, partners, employees, or agents for OTDA under the Contract.

**b. Title to Project Deliverables** Unless otherwise specified in writing in the Contract, OTDA shall have ownership and license rights as follows:

#### **i. Existing Products:**

- 1) **Hardware** - Title and ownership of existing hardware Products shall pass to OTDA upon acceptance.
- 2) **Software** - Title and ownership to existing Software Products delivered by Contractor under the Contract that is normally commercially distributed on a license basis by the Contractor or other Third-Party Software vendor (“Existing Licensed Product”), whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with Contractor or the Third-Party Software vendor. Effective upon acceptance, such Product shall be licensed to OTDA in accordance with the Contractor or Third-Party Software vendor’s standard license agreement; provided, however, that such standard license, must, at a minimum: (a) grant OTDA, its agents, and contractors a non-exclusive, perpetual license to use, execute, reproduce, display, perform, adapt (unless Contractor advises OTDA as part of Contractor’s proposal that adaptation will violate existing agreements or statutes and Contractor demonstrates such to OTDA’s satisfaction) and distribute Existing Licensed Product to OTDA up to the license capacity stated in the Contract with all license rights necessary to fully effect the general business purposes stated in the Solicitation; and (b) recognize OTDA as the licensee. Where these rights are not otherwise covered by the Third-Party Software vendor’s standard license agreement, the Contractor shall be responsible for obtaining these rights at its sole cost and expense. OTDA shall reproduce all copyright notices and any other legend of ownership on any copies authorized under this clause.

- ii. **Custom Products:** Effective upon creation of Custom Products, Contractor hereby conveys, assigns and transfers to OTDA the sole and exclusive rights, title and interest in Custom Products, whether preliminary, final or otherwise, including all trademark and copyrights. Contractor hereby agrees to take all necessary and appropriate steps to ensure that the Custom Products are protected against unauthorized copying, reproduction and marketing by or through Contractor, its agents, employees, or Subcontractors. Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed in the course of Contractor's business. OTDA may, by providing written notice thereof to the Contractor, elect in the alternative to take a non-exclusive perpetual license to Custom Products in lieu of OTDA taking exclusive ownership and title to such Products. In such case, OTDA shall be granted a non-exclusive perpetual license to use, execute, reproduce, display, perform, adapt and distribute Custom Product as necessary to fully effect the general business purposes of OTDA.
- c. **Contractor's Obligation with Regard to Third-Party Software** Where Contractor furnishes existing licensed Products as a project deliverable, and sufficient rights necessary to effect the purposes of this section are not otherwise provided in the Contractor or the Third-Party Software vendor's standard license agreement, Contractor shall be responsible for obtaining from the Third-Party Software proprietary owner/developer the rights set forth herein to the benefit of OTDA at Contractor's sole cost and expense.

## 59. CHANGES TO PRODUCT OR SERVICE OFFERINGS

- a. **Product or Service Discontinuance** Where Contractor is the Product manufacturer/developer, and Contractor publicly announces to all U.S. customers ("date of notice") that a Product is being withdrawn from the U.S. market or that maintenance service or technical support provided by Contractor ("withdrawn support") is no longer going to be offered, Contractor shall be required to: (i) notify OTDA in writing of the intended discontinuance; and (ii) continue to offer Product or withdrawn support upon the Contract terms previously offered for the greater of: (a) the best terms offered by Contractor to any other similarly situated, supported customer, or (b) not less than 12 months from the date of notice; and (iii) at OTDA's option, and in order to enable OTDA to continue the use and maintain the Product, provide OTDA with a Product replacement or migration path with at least equivalent functionality at no additional charge, provided that OTDA is under contract for maintenance on the date of notice and Contractor is offering such replacement or migration path to all of its similarly situated, supported customers without additional charge.

In the event that the Contractor is not the Product manufacturer, Contractor shall be required to: (i) provide the notice required under the paragraph above within 5 business days of Contractor receiving notice from the Product manufacturer, and (ii) include in such notice the period of time from the date of notice that the Product manufacturer will continue to provide Product or withdraw support.

The provisions of this subdivision (a) shall not apply or eliminate Contractor's obligations where withdrawn support is being provided by an independent Subcontractor. In the event that such Subcontractor ceases to provide service, Contractor shall be responsible for subcontracting such service, subject to OTDA approval, to an alternate Subcontractor.

- b. **Product or Service Re-Bundling** In the event that Contractor is the Product manufacturer and publicly announces to all U.S. customers ("date of notice") that a Product or maintenance or technical support offering is being re-bundled in a different manner from the structure or licensing model of the prior U.S. commercial offering, Contractor shall be required to: (i) notify OTDA in writing of the intended change; (ii) continue to provide Product or withdrawn support upon the same terms and conditions as previously offered for the greater of: (a) the best terms offered by Contractor to any other similarly situated, supported customer, or (b) not less than 12 months from the date of notice; and (iii) shall submit the proposed rebundling change to OTDA for approval prior to its becoming effective for the remainder of the Contract term. The provisions of this section do not apply if the Contractor is not the Product manufacturer.

## 60. FEDERAL PROCUREMENT CLAUSES

In the event the Contract is Federally funded, then the following provisions shall apply:

**a. Equal Employment Opportunity**

The Contractor understands and agrees to comply, when applicable, with the equal opportunity clause provided under 41 CFR 60- 1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor." (2 CFR 200, Subpart F, Appendix II).

**b. Clean Air and Federal Water Pollution Control Act**

As applicable, Contractor understands and agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251- 1387). Contractor shall report violations to OTDA to then be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA). (2 CFR 200, Subpart F, Appendix II).

**c. Anti-Lobbying Act**

As a sub-client of OTDA, the Contractor understands and agrees to comply with the Federal requirements for certification and disclosure of Section 1352, Title 31 of the U.S. Code and implemented at 2 CFR 200, Subpart F, Appendix II. By signing this Agreement, the Contractor certifies that it will not use federally appropriated funds for lobbying the Executive or Legislative branches of the Federal government in connection with a specific contract, grant, or loan funds.

The Contractor understands and agrees that the language of this certification shall be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans and cooperative agreements) and that all sub-clients shall certify and disclose accordingly. The Contractor shall comply with any requirements to provide OTDA with Federal lobbying reports to comply with this Anti-Lobbying Act. The Contractor may be liable for any civil penalty imposed upon OTDA for failing to make a required report.

**d. Americans with Disabilities Act**

28 CFR Part 35, Title II, Subtitle A prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public and State and local governments, except public transportation services.

The Contractor shall ensure that the Services provided comply with the Americans for Disabilities Act (ADA), the Rehabilitation Act of 1973, as amended, State law, and implementing regulations.

**e. Drug-Free Workplace Statement**

The Contractor shall comply with 41 U.S. Code § 8103, Drug-free workplace requirements in the provision of the Services. By signing this Agreement, the Contractor certifies that it will provide drug-free workplaces for its employees.

**f. Royalty Free Rights to Use Software or Documentation Developed**

All documentation produced as part of the Agreement will become the exclusive property of OTDA. OTDA reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish or otherwise use such documentation and to authorize others to do so.

Contractor shall comply with 2 CFR 200.315 regarding OTDA's rights to the intangible property acquire under this Agreement.

**g. Debarment and Suspension**

The Contractor certifies that the Contractor and its principals are not listed on the government wide exclusions in the System for Award Management (SAM). The Contractor by signing this Agreement further certifies that the Contractor and its principals are not suspended or debarred, as specified by the OMB

guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension". The Contractor also certifies by signing this Agreement that the Contractor and its principals are not ineligible under statutory or regulatory authority other than Executive Order 12549 pursuant to 2 CFR 200, Subpart F, Appendix II and 7 CFR Part 3017. Contractor shall complete and return in pursuit of such certification any appropriate form required by OTDA (see Federal Executive Order 12549 and 7 CFR Part 3017).

**h. Title VI of the Civil Rights Act of 1964**

The sub-grantee, Contractor, Subcontractor, successor, transferee, and assignee shall comply with Title VI of the Civil Rights Act of 1964, which prohibit recipients of federal financial assistance from excluding from a program or activity, denying benefits of, or otherwise discriminating against a person on the basis of race, color, or national origin (42 USC § 2000d et seq.) as implemented by the Department of the Treasury's Title VI regulations, 31 CFR Part 22, which are herein incorporated by reference and made a part of this Contract (or Agreement). Title VI also includes protection to persons with "Limited English Proficiency" in any program or activity receiving federal financial assistance, 42 USC § 2000d et seq., as implemented by the Department of the Treasury's Title VI regulations, 31 CFR Part 22, and herein incorporated by reference and made a part of this Contract or Agreement.

The Contractor shall include the above provision in each Subcontractor agreement within thirty (30) days of execution of this Contract.

**i. Other federal requirements**

The Contractor agrees to comply with any applicable federal requirements such as, among others not listed above, the Copeland "Anti-Kickback Act" (18 USC 874), and Section 306 of the Federal Clean Water Act and to provide to OTDA any reasonably requested documents supporting such compliance, including if necessary creating such supporting documentation upon at least 30 days prior written notice to Contractor.

The Contractor shall include in all sub-awards documents at all tiers (including Subcontracts, sub-grants, and contracts under grants, loans and cooperative agreements) the language of this Section 27 Federal Procurement Clauses and shall ensure that all sub-clients shall certify and disclose as required by any federal requirements.

**61. Service Violation**

If part of the Services to OTDA under the Contract would cause the Contractor to violate any applicable federal or New York State (i) statute, (ii) rule, (iii) regulation, (iv) order, (v) directive, or (vi) enforcement action, then the Contractor may modify the provision of any such impacted Service(s) to any affected account(s) to comply therewith. The Contractor shall notify in writing OTDA immediately of such violation and, if any, of the proposed modification(s) to the impacted Service(s). Contractor shall also immediately provide OTDA its plan to mitigate the violation while continuing to provide the Services. Contractor will work diligently to limit the scope of any such modification and it shall not modify any provision of Service(s) not impacted by any such violation.