

**STATE OF NEW YORK**

**OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE CONTRACT NUMBER TBD**

**Less than Truckload Shipping Services**

THIS AGREEMENT (hereinafter "Agreement" or "Contract") is made by and between the New York State Office of Temporary and Disability Assistance (hereinafter "OTDA"), and (Insert Contractor's Name Here) (hereinafter "Contractor").

**W I T N E S S E T H**

**WHEREAS**, OTDA requires Less than Truckload Shipping services; and

**WHEREAS**, to meet this requirement OTDA, issued an advertisements in the New York State Contract Reporter, for the purposes of entering into an Agreement for shipping services in accordance with the terms and conditions of this Agreement; and

**WHEREAS**, the Contractor reviewed and analyzed OTDA's needs as contained in said advertisement, and submitted a Bid; and

**WHEREAS**, the Contractor is engaged in the business of providing the services necessary to fulfill the needs pursuant to the terms of this AGREEMENT; and

**WHEREAS**, OTDA, in reliance upon the expertise of the Contractor, selected the Contractor as the successful respondent to the required services and equipment, and desires to engage the Contractor to fulfill OTDA's needs under the terms and conditions hereinafter set forth; and

**WHEREAS**, the Contractor is ready, willing and able to provide such services.

**NOW, THEREFORE**, in consideration of the terms set forth and the mutual covenants and obligations of the parties, the parties do hereby agree as follows:

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## **ARTICLE 1**

### **AGREEMENT DURATION AND AMENDMENT**

Unless modified as provided herein, this Contract shall commence on July 16, 2016 and continue for a period of three (3) years, upon approval by the Office of the State Comptroller, subject to the termination provisions of Article 20.

OTDA, in its sole discretion may extend the Contract term for up to two (2) additional one (1) year terms upon providing notice to Contractor prior to the expiration date of this Agreement or the expiration date of the first of the extension Agreements.

OTDA shall have the right to re-negotiate the terms and conditions of the Agreement in the event applicable New York State (State) or Federal statutes, policy, rules, regulations and/or guidelines are altered from those existing at the time of this Agreement, in order to be in continuous compliance therewith. It shall be understood that, in the event OTDA and the Contractor are unable to mutually agree to a set of terms and conditions through re-negotiation, the terms and conditions required to continue the Agreement in compliance with revised State or Federal statutes, policy, rules, regulations and/or guidelines shall be decided by the Commissioner of OTDA or his/her duly authorized representative(s) or designee(s), in accordance with Article 20 herein.

This Agreement is subject to amendment only upon mutual consent of the parties, reduced to writing and approved by the Comptroller of the State of New York.

## **ARTICLE 2**

### **EXECUTORY PROVISION**

The New York State Finance Law, Section 112, requires that any contract made by a State department, which exceeds fifty thousand dollars, be first approved by the Comptroller of the State of New York before becoming effective. The parties recognize that the Agreement is wholly executory until and unless approved by the Comptroller of the State of New York.

This Agreement and the appendices attached hereto constitute the entire agreement between the parties with respect to the subject matter; all other prior agreements, representations, statements, negotiations and undertakings are superseded hereby. Any provision of the Agreement that imposes or contemplates continuing obligations on a party will survive the expiration or termination of the Agreement. It is understood that unless the context clearly indicates otherwise, all references herein to this Agreement shall be deemed to include the Appendices attached hereto, subject to Article 3 of this Agreement.

## **ARTICLE 3**

### **DOCUMENT INCORPORATION AND ORDER OF PRECEDENCE**

This Agreement resulting from the Contract Reporter Advertisement Published March 7, 2016 for Less than Truckload Shipping services consists of:

The body of the Agreement; and the appendices attached to or incorporated by reference in this Agreement body.

In the event of any inconsistency in or conflict among the document elements of this Agreement identified in this Section, such inconsistency or conflict shall be resolved in the following order of precedence:

1. Appendix A-Standard Clauses for New York State Contracts.
2. Agreement - (this document) including any amendments and appendices, except Appendix D.
3. The Contract Reporter Advertisement –Less than Truckload Shipping published March 7, including Questions and Answers, Clarifications thereto; and
4. Appendix D, Pricing Schedule, including any clarification correspondence.

#### **ARTICLE 4 COMPENSATION**

OTDA shall compensate the Contractor pursuant to this Agreement in accordance with the Pricing Schedule as set forth in Appendix D (Pricing Schedule).

The prices set forth in this Agreement shall be adjusted following the third and fourth year in accordance with the provisions of this clause. There shall be no price adjustment during the first three (3) years of the contract.

The Contractor may be granted an increase or subject to a decrease in compensation after the third year of the Agreement, dependent upon fluctuations in the latest published copy of the Consumer Price Index for All Urban Consumers (CPI-U), as published by the U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. 20212. It is the Contractor's responsibility to request the price increases from the OTDA Contract Manager. The CPI-U is available through the Bureau of Labor Statistics web site at <http://stats.bls.gov/cpi/>.

For items listed in Appendix D, a price adjustment will be established as follows:

On each contract anniversary date following the first full 36 months of operations, pricing for those services as indicated in Appendix D shall be subject to adjustment based on fluctuations in the CPI Detailed Report Data for the month preceding expiration of the contract for over the previous 12-month period. Such adjustments will be limited to no more than 3% per contract year. The CPI will be the Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, by expenditure category and commodity and service group (1982-84=100%) as published by the Bureau of Labor Statistics, unadjusted indexes, commodity and service group-transportation services.

#### **ARTICLE 5 PAYMENT AND INVOICES**

Monthly invoicing will be submitted in arrears by the Contractor. Contractor must bill OTDA on standard New York State vouchers satisfactory to OTDA and the Comptroller of the State of New York. Timeliness of payment and any interest to be paid to the Contractor for late payment shall be governed by the laws of the State. To ensure the timely processing and

payment of contract vouchers, they must be submitted to the Business Service Center (BSC).

Please submit your vouchers via one of the following methods:

1. Preferred Method: Email a .pdf copy of your signed voucher to the BSC at:

[AccountsPayable@ogs.ny.gov](mailto:AccountsPayable@ogs.ny.gov) with a subject field as follows:

Subject: Unit ID: TDA01 Contract #C(TBD)

(Note: do not send a paper copy in addition to your emailed voucher.)

2. Alternate Method: Mail vouchers to BSC at the following U.S. postal address:

NYS Office of Temporary and Disability Assistance  
Unit ID: TDA01  
c/o OGS BSC Accounts Payable  
Building 5, 5<sup>th</sup> Floor  
Albany, NY 12226-1900

Include all Required Information on Vouchers – your voucher should include:

Contractor's SFS Vendor Number;

Invoice number and date;

Unit ID# TDA01;

Name of the NYS Agency to which you provided the services: NYS OTDA;

Contract Number (TBD);

PRO Reference Number;

Consignee Information; and

Detailed Specifications (ie. Unit price, weight and number of pallets)

The period of service for which the claim is made or reference to deliverable completed.

If prompt payment discounts are applicable, the terms of the discounts must be included on all invoices as well as the amounts due if OTDA meets the terms, and the date for which the prompt payment discount(s) expires.

The period of service for which the claim is made or reference to deliverable completed.

**NOTE:** Services are to be invoiced on a monthly basis, to include all shipping services of the previous month for all deliveries made throughout New York State.

Vouchers that do not comply with the above guidelines will be returned to the Vendor for corrections.

NOTE: do NOT include contractually required supporting documentation with the voucher submitted to the Business Service Center, please see note below for submission instructions.

Important Note about Submission of Contractually Required Supporting Documentation for Payment: In order for OTDA to provide the Business Services Center with approval to process a voucher for payment, you need to send your OTDA Program Manager a copy of the voucher sent to the Business Services Center and all contractually required supporting documentation, such as reports, receipts, timecards and other schedules. Receipt of any required supporting documentation is required to allow timely payment of vouchers. Lack of submission of any contractually required supporting documentation will "stop the clock" in determining the allowed thirty (30) day period for voucher payment.

The Contractor will submit a copy of the invoices and the supporting documents required by OTDA to the following address, unless directed otherwise:

NYS Office of Temporary and Disability Assistance  
Attn: Holly Clifton  
Bureau of Management Services  
93 Broadway  
Menands, New York 12204

The State shall not be liable for the payment of any taxes under this Agreement however designated, levied or imposed. No person, firm, or corporation is exempt from paying the State truck mileage and unemployment insurances taxes and other Federal, State, and local taxes to which the Contractor is subject.

The State represents that the Contractor is not liable for the payment of any transfer taxes including, but not limited to, sales taxes upon goods or services purchased for or provided for the State. For purposes of tax free transactions under the Internal Revenue Code, the New York State Registration Number is 14740026K.

Contractor shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller's website at [www.osc.state.ny.us/epay/index.htm](http://www.osc.state.ny.us/epay/index.htm), by email at [epunit@osc.state.ny.us](mailto:epunit@osc.state.ny.us) or by telephone at 518-474-4032. Contractor acknowledges that it will not receive payment on any invoices submitted under this Contract 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 herein. The Contractor acknowledges that payment 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 payment shall be made in accordance with ordinary State procedures and practices as established by the State Comptroller.

The Contractor shall also comply with the State Comptroller's requirement to file a Substitute Form W-9. The form and the instructions for completing the W-9 can be found at the OSC's website: <http://www.osc.state.ny.us.epay> .

## **ARTICLE 6**

### **NOTICES**

All notices permitted or required hereunder shall be in writing and shall be transmitted either:

via certified or registered United States mail, return receipt requested;  
by facsimile transmission;  
by personal delivery;  
by expedited delivery service; or  
by e-mail.

Such notices to OTDA shall be addressed as follows, unless directed otherwise:

State of New York Office of Temporary and Disability Assistance  
NYS Office of Temporary and Disability Assistance  
Attn: Harry C. Phillips Jr.  
Assistant Manager, Bureau of Management Services  
93 Broadway  
Menands, New York 12204  
Telephone Number: (518) 408-5573  
Facsimile Number: (518) 402-0084  
E-Mail Address: [Harry.Phillips@otda.ny.gov](mailto:Harry.Phillips@otda.ny.gov)

Such notices to Contractor shall be addressed as follows, unless directed otherwise:

Contractor Name  
Attn:  
Address:  
City, State, Zip  
Telephone Number  
Facsimile Number  
E-Mail Address

Should either party change their contact information, they must send notification within fifteen (15) business days of such change.

Unless otherwise noted, all communications with the Contractor shall be to the person designated above.

Unless specified otherwise in this Agreement, notices shall be effective when received.

## **ARTICLE 7**

### **SERVICES**

OTDA hereby retains the Contractor to perform the services, and the Contractor hereby agrees to perform the services, which shall include all deliverables, work and/or work products, as described in the Contract Reporter Advertisement for Less than Truckload Shipping.

Nothing contained herein shall prohibit OTDA from contracting at any time with a third party or from performing any of the work itself or through other State entities, for any services that otherwise may be requested or required of the Contractor pursuant to this Agreement, and the

Contractor shall not assert an exclusive right to perform such services.

## **ARTICLE 8**

### **STANDARD CONTRACT PROVISIONS**

Standard Clauses for All New York State Contracts, attached hereto as Appendix A, is hereby fully incorporated into this Agreement.

The parties agree that this Agreement shall be construed and interpreted in accordance with the Laws of the State of New York. The Contractor shall be required to bring any legal proceeding against OTDA arising from this Agreement in to New York State courts.

Should any provision of this Agreement be declared or found to be illegal, unenforceable, and ineffective or void, then each party shall be relieved of any obligation arising from such provision; the balance of this Agreement, if capable of performance, shall remain in full force and effect.

No term or provision of the Agreement shall be deemed waived and no breach consented to, unless such waiver or consent shall be in writing and signed by the party claimed to have waived or consented. Any consent by a party to, or waiver of, a breach under the Agreement shall not constitute or consent to, a waiver of, or excuse for any other, different or subsequent breach.

It shall be understood that the Contractor is an independent contractor, and the Contractor, its agents, officers and employees, in the performance of this Agreement, shall act in an independent capacity and not as officers or employees of OTDA.

## **ARTICLE 9**

### **ASSURANCES**

The Contractor warrants that it has carefully reviewed the needs of OTDA, as described in the Contract Reporter Advertisement, on the OTDA website, its attachments and as otherwise communicated in writing by OTDA to the Contractor that it has familiarized itself with OTDA's specifications, and it warrants that it can provide such services as represented in its Bid and the other documents incorporated into this Agreement.

The Contractor agrees that it will perform its obligations hereunder in accordance with all applicable laws, rules and regulations now or hereafter in effect.

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

By entering into this Agreement, Contractor certifies that it is not on the "Entities Determined To Be Non-Responsive Bidders/Offerors Pursuant to The New York State Iran Divestment Act of 2012" list ("Prohibited Entities List") posted on the OGS website at: <http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf> and further certifies that it will not

utilize on such Agreement any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Agreement, it must provide the same certification at the time the Agreement is renewed or extended. Contractor also agrees that any proposed assignee of the Agreement will be required to certify that it is not on the Prohibited Entities List before OTDA may approve a request for assignment of Agreement.

During the Term of the Agreement, should OTDA receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, OTDA will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Iran Divestment Act within ninety (90) calendar days after the determination of such violation, then OTDA shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, seeking compliance, recovering damages, or declaring the Contractor in default. OTDA reserves the right to reject any request for renewal, extension, or assignment for an entity that appears on the Prohibited Entities List prior to the renewal, extension, or assignment of the Contract, and to pursue a responsibility review with Contractor should it appear on the Prohibited Entities List hereafter.

## **ARTICLE 10**

### **CONTRACTOR REQUIREMENTS**

The Contractor shall provide to OTDA, upon request, services and commodities at the awarded bid rate, or less.

The Contractor accepts sole and complete responsibility for the timely accomplishment of all activities required under this Agreement and to provide the services and commodities as specified in accordance with this Agreement and the Contractor's Bid.

The OTDA Contract Manager and those individuals designated by him/her in writing shall have the prerogative to make announced or unannounced on-site visits to the Contractor's facilities.

The Contractor agrees to strict adherence to the Mandatory Requirements as outlined in the Contract Reporter Advertisement –Less than Truckload Shipping.

Upon expiration of this Agreement, the Contractor agrees to cooperate in assisting OTDA with transition of the services provided through this contract to any new contractor selected for subsequent contract periods.

## **ARTICLE 11**

### **NON-ASSIGNABILITY**

Full responsibility for the delivery of services must be provided by the Contractor under this Agreement. Should the Contractor seek external financing, OTDA reserves the right to approve the assignment of the Agreement for financing purposes. There will be no subcontracting for the less than truckload shipping services under this Agreement.

Nothing contained in this Agreement, expressed or implied, is intended to confer upon any person, corporation or other entity, other than the parties hereto and their successors in

interest and assigns, any rights or remedies under or by reason of this Agreement.

## **ARTICLE 12**

### **RECYCLED OR RECOVERED MATERIALS**

In accordance with the laws of the State of New York, Contractors are encouraged to use recycled or recovered materials in the manufacture of products and packaging to the maximum extent practicable without jeopardizing the performance or intended end use of the product or packaging unless such use is precluded due to health, welfare, safety requirements or in the Bid Specifications.

## **ARTICLE 13**

### **PUBLIC OFFICERS LAW**

The Contractor agrees not to engage in any conduct that the Contractor knows would violate or would assist an employee of OTDA in violating Sections 73 and 74 of the Public Officers Law.

The Contractor further recognizes that an administrative or judicial finding that a Contractor has violated any of the statutes specified in the Contractor/Subcontractor Background Questionnaire completed prior to the award of this contract may entitle OTDA to terminate the Contract, at its discretion, within thirty (30) calendar days after the Contractor notifies OTDA of such finding or OTDA notifies the Contractor that it has become aware of such finding. The Contractor shall notify OTDA immediately in writing upon becoming aware of such finding.

Any termination of the Contract by OTDA under this Article shall be deemed to be a termination of the Contract for cause. The remedies set forth in this section shall be in addition to any other remedy available to OTDA under the Contract or under any other provisions of law.

## **ARTICLE 14**

### **LIABILITY AND INDEMNIFICATION FOR DAMAGES**

In performance of its duties, the Contractor shall fully indemnify and save harmless OTDA without limitations from suits, actions, damages and costs of every name and description relating to personal injury, damage to real or personal tangible or intangible property, or any other claim for direct damages arising as a result of acts or omissions of the Contractor, its officers, employees, partners or agents in performing this Contract.

The Contractor shall be jointly and severally responsible for the actions of its agents, employees, partners, including losses arising from, but not limited to:

Providing defective or inadequate specifications; and

Defective or inadequate performance.

OTDA may, in addition to other remedies available to it by law, recover by the deduction of such costs from monthly billing payments for up to sixty (60) calendar days, except in cases where risk of bankruptcy exists and then by attachment of the letter of credit, if any, as may be

necessary to satisfy any claim for damages, penalties, costs and the like asserted by or against them; provided, however, that the Contractor shall not indemnify to the extent that any claim, loss or damage arising hereunder is caused solely by the negligent act or failure to act of OTDA.

OTDA shall provide Contractor: (i) prompt written notice of any claims for which indemnification may be sought hereunder; (ii) the opportunity, subject to the approval of the Department of Law, to take over, settle or defend any action or suit relating to such claim at Contractor's sole expense; and (iii) assistance in the defense of any such action or suit at the request and expense of the Contractor.

**ARTICLE 15**  
**FORCE MAJEURE**

Neither the Contractor, OTDA, nor the State shall be liable for any delay or failure in performance beyond its control resulting from acts of war, hostility or sabotage, act of God, electrical, internet, or telecommunications outage that is not caused by the obligated party, or other force majeure event. The parties shall use reasonable efforts to eliminate or minimize the effect of such force majeure events upon performance of their respective duties under this Agreement. If such event continues for more than ninety (90) days, either party may terminate all or any agreed upon portion of the Services immediately upon written notice. This Article does not excuse either party's obligation to take reasonable steps to follow its normal disaster recovery procedures, or OTDA's obligation to pay for Services provided by the Contractor which have been approved by OSC.

**ARTICLE 16**  
**RECORD RETENTION**

The Contractor, during the course of this Agreement and for a period of six (6) years following its termination or final payment hereunder, whichever occurs later, agrees to maintain and make available for audit by duly authorized representatives of OTDA, the individual states, and the United States Government all records or documentation arising hereunder or relating hereto.

Additionally, all records involving matters in litigation or audit must be kept for a period of not less than three (3) years following the termination of the litigation or audit provided. Electronic copies of any documents related to this Agreement may be substituted for the originals with the prior written approval of OTDA, provided that the copy procedures are accepted by OTDA as reliable and are supported by an adequate retrieval system.

The Contractor shall be responsible for assuring that the provisions of this Article shall apply to any subcontract related to performance under this Agreement.

**ARTICLE 17**  
**ACCESS TO AND AUDIT OF AGREEMENT RECORDS**

The Contractor agrees to preserve all Agreement-related records in accordance with the

provisions of Paragraph 10 of Appendix A of this Agreement for the Term of this Agreement.

All records and information obtained by OTDA pursuant to the provisions of this Agreement, whether by audit or otherwise, shall be usable by OTDA in any manner, in its sole discretion, as it deems appropriate and the Contractor shall have no right of confidentiality or proprietary interest in such records or information. Notwithstanding the preceding sentence and in addition to the provisions set forth in Appendix A herein, OTDA agrees, in those instances in which it has discretion, not to disclose outside those government agencies involved in the performance of this Agreement and then only to the personnel who are involved in the performance of the particular data contained within this Agreement.

The Contractor hereby agrees that all documents furnished by the Contractor shall be subject to public disclosure by OTDA in the normal course of business in accordance with the requirements of the Public Officers Law, Article 6, except for proprietary information the disclosure of which would cause substantial injury to the competitive position of Contractor enterprise. Information relating to Contractor 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 the Contractor. Contractor may otherwise preserve proprietary rights as to confidential or business process information in accordance with procedures established under applicable State laws, provided that (i) Contractor informed OTDA prior to or with submission of its bid, in writing, that such records are being furnished, are proprietary and are not to be disclosed; and (ii) said records shall be sufficiently identified; and (iii) Contractor stated the reasons with specificity why the information should be exempted from disclosure; and (iv) designation of said records as exempt from disclosure is reasonable and accepted by OTDA.

The Contractor shall promptly notify OTDA of any request for access to any records maintained pursuant to this Agreement. Access by Federal or State bank regulatory agents, or the Contractor's regular outside auditors to the Contractor's financial records, pursuant to regularly scheduled or routine audits or inspection of the Contractor, shall not require notification to OTDA provided that rights of confidentiality or proprietary interests are preserved.

## **ARTICLE 18**

### **CONFIDENTIALITY OF INFORMATION**

The Contractor, its officers, agents and employees, shall treat all information, with particular emphasis on information relating to public benefit recipients and providers, which is obtained through its performance under the Agreement, as confidential information to the extent required by the laws of the State of New York and of the United States and any regulations promulgated hereunder.

Individually identifiable information relating to any Supplemental Nutrition Assistance Program (SNAP), SSI/State Supplement Program (SSP), Temporary Assistance Program applicant/recipient, or provider and/or recipient of Fair Hearings Determination shall be held confidential and shall not be disclosed by the Contractor, its officers, agents and employees, without the prior written approval of the Commissioner or her/his designee.

All Contractor staff performing under this Contract must sign a Non-Disclosure Agreement (NDA), provided by OTDA, to demonstrate their understanding of the confidential nature of the information obtained in the performance of their duties, and their promise not to disclose this information unless directed by the OTDA Contract Manager. The Contractor agrees that all NDAs must be submitted to the OTDA Contract Manager prior to staff commencing work on the contract.

The uses of information obtained by the Contractor in the performance of its duties under this Agreement shall be limited to purposes directly connected with such duties.

The Contractor shall promptly advise OTDA of all requests made to the Contractor for information described in this herein.

The Contractor shall be responsible for assuring that any agreement between the Contractor and any of its officers, agents and employees contains a provision, which strictly conforms to the provisions of this subsection.

The Contractor will use the same care and discretion to avoid disclosure, publication or dissemination of Confidential Information as it uses with its own similar information that it does not wish to disclose, publish or disseminate.

Except for personal information relating to public benefit recipients and providers which shall be kept confidential pursuant to requirements of New York State and Federal laws, and information relating to the business and finances of the State or the Contractor, confidential information disclosed by one party to the other continues to be subject to this Contract for six (6) years following termination of this Contract. No obligation of confidentiality applies to:

Information the Contractor already possesses without an obligation of confidentiality,

Information the Contractor develops independently from publicly available data,

Information the Contractor receives without obligation of confidentiality from a third party, or

Information that is, or becomes, publicly available without breach of this Contract.

In the event either party receives a subpoena or other validly issued administrative or judicial process requesting Confidential Information of the other party, it shall, to the extent permitted by law, provide prompt notice to the other of such receipt. The party receiving the request shall thereafter be entitled to comply with such subpoena or other process to that extent permitted or required by law.

## **ARTICLE 19**

### **NYS INFORMATION SECURITY BREACH AND NOTIFICATION ACT**

Contractor shall comply with the provisions of the New York State Information Breach and Notification Act. Contractor shall be liable for the costs associated with such breach if caused by the Contractor's negligence or willful acts or omissions, or the negligence or willful acts or omissions of the Contractor's agents, officers, employees and/or subcontractors. The Contractor must comply with the "Information and Security Breach and Notification Act" (also

known as Chapter 4212 of the Laws of 2005 - the "Internet Security Privacy Act" – Article 2 of the New York State Technology Law). In the event the Contractor has reason to believe that there has been unauthorized access to and/or use of OTDA's data or data system, the Contractor must provide immediate written notification to OTDA. The Contractor must cooperate with activities necessary for OTDA to determine the need for notification and/or to provide the notification(s) required. Within twenty-four (24) hours of the notification by Contractor, the Contractor must report to OTDA the steps taken or proposed to be taken in response to the instance of unauthorized access. The Contractor must also notify OTDA of the steps taken to prevent similar instances in the future as soon as is practicable after the unauthorized access is discovered.

## **ARTICLE 20**

### **TERMINATION OF THE AGREEMENT**

This Agreement shall be subject to the following termination provisions:

All or any part of this Agreement may be terminated by mutual written agreement of the contracting parties.

All or any part of this Agreement may be terminated immediately by OTDA in the event of the failure of the Contractor to perform within the time requirements set forth in this Agreement, termination effective upon Contractors receipt of written notice of OTDA.

All or any part of this Agreement may be terminated by OTDA for cause upon the failure of the Contractor to comply with the terms and conditions of this Agreement, including the attachments hereto. In the event that the Contractor is in breach of its obligations under this Agreement other than for a) willful violation or b) a violation that presents a danger to the health, safety, or welfare of the employees, agents, or citizens of the State, OTDA shall give the Contractor written notice specifying Contractor's failure and ten (10) calendar day period to submit a corrective action plan. The corrective action plan shall define the scope and timeline of the cure. If OTDA reasonably determines, in its sole discretion, that the failure to comply is a) a willful violation, b) presents a danger to the health, safety, or welfare of the employees, agents, or citizens of the State, or c) is not remedied by the Contractor's corrective action plan within then (10) calendar days, in OTDA's sole discretion, OTDA may terminate the Agreement immediately upon notice to the Contractor. The Contractor agrees to incur no new obligations or to claim any expenses made after receipt of notification of termination. Termination for cause shall create a liability upon the Contractor for legal damages.

This Agreement may be terminated if OTDA deems that termination would be in the best interest of OTDA, provided that OTDA gives written notice to the Contractor not less than sixty (60) calendar days prior to the date upon which termination shall become effective, such notice to be made via registered or certified mail, return receipt requested or hand-delivered with receipt made. The date of such notice shall be deemed to be the date of postmark in the case of mail or the date of the Contractor's receipt for notice in the case of hand delivery. In the case of termination under this subsection, OTDA agrees to pay the Contractor for reasonable and appropriate expenses incurred in good faith.

Should OTDA determine that Federal and/or State funds are unavailable, OTDA may terminate this Agreement immediately upon notice to the Contractor. If the initial notice is oral notification, OTDA shall follow this up with written notice within ten (10) days of oral notification. OTDA will be obligated to pay the Contractor only for the expenditures made and obligations incurred by the Contractor until such time as notice of termination is received either orally or in writing by the Contractor from OTDA.

In the event of termination for any reason, the Contractor shall not incur new obligations for the terminated portion, the Contractor shall cancel as many outstanding obligations as possible, the Contractor shall take all reasonable measures to mitigate any damages for which OTDA may be liable, and OTDA will not be obligated to pay the Contractor for any lost and/or anticipated profits.

If this Agreement is terminated for any reason, OTDA shall have the right to award a new contract to a third party. In the event of termination for cause, OTDA shall have the right to seek recovery of damages, and for all additional costs incurred in reassigning the contract, subject to the limitations set forth in Article 14 (Limitation of Liability) of this Agreement.

It is understood that OTDA reserves the right to suspend or reduce the Contractor services during the Term of this Agreement. It should also be understood that OTDA reserves the right to enter into multiple agreements with other contractors for the same products and services provided herein. OTDA does not guarantee any minimum volume of work. Such action(s) by OTDA shall not be considered a breach of this Agreement or otherwise give rise to damages on the part of the Contractor, provided, however, that the Contractor is given written notification of such action. OTDA reserves the sole discretion for the volume of work provided to the Contractor pursuant to this Agreement, and makes no commitment to any specific minimum volume of work.

The State reserves the right to immediately terminate the award resulting from this procurement in the event it is found that the certification filed by the Contractor in accordance with New York State Finance Law §139-k was intentionally false or intentionally incomplete. Upon such finding, the State may exercise its termination right by providing written notification to the award recipient.

## **ARTICLE 21**

### **PATENT/COPYRIGHT INDEMNIFICATION**

The Contractor will indemnify, defend and hold OTDA harmless from and against any and all damages, expenses (including reasonable attorney fees), claims, judgments, liabilities and costs which may be assessed against OTDA in any action for infringement of a United States Letter Patent with respect to the products furnished, or of any copyright, trademark, trade secret or other third party proprietary right, provided that OTDA shall give the Contractor:

Prompt written notice of any action, claim or threat of infringement suit, or other suit;

The opportunity, subject to approval of the Department of Law, to take over, settle or defend such action, claim or suit at the Contractor's sole expense; and

Assistance in the defense of any such action is at the expense of the Contractor.

If the use of any item(s) or part(s) thereof shall be enjoined for any reason or if the Contractor believes that it may be enjoined, the Contractor shall have the right, at its own expense and sole discretion to take action in the following order of precedence:

to procure for OTDA the right to continue using such item(s) or part(s) thereof, as applicable;

to modify the component so that it becomes non-infringing equipment of at least equal quality and performance; or

to replace said item(s) or part(s) thereof, as applicable, with non-infringing components of at least equal quality and performance.

The foregoing provisions shall not apply to any infringement occasioned by modification by OTDA of any tangible or intangible product(s) without the Contractor's approval or the use of any Equipment with any adjunct device added by OTDA without the consent of the Contractor.

In the event that an action by law or in equity is commenced against OTDA arising out of a claim that OTDA's use of a product under this Agreement infringes any patent, copyright or proprietary right and the Contractor is of the opinion that the allegations in such action in whole or in part are not covered by the indemnification and defense provisions set forth in this Agreement, the Contractor shall immediately notify OTDA and the Office of the Attorney General in writing and shall specify to what extent the Contractor believes it is obligated to defend and indemnify under the terms and conditions of this Agreement. The Contractor shall in such event protect the interests of OTDA and secure a continuance to permit OTDA to appear and defend its interests in cooperation with the Contractor as is appropriate, including any jurisdictional defenses OTDA may have.

## **ARTICLE 22**

### **LOBBYING CERTIFICATION**

Section 1352 of Title 31 of the U.S. Code requires that funds appropriated to a federal agency be subject to a requirement that any Federal Contractor or grantee (such as OTDA) must be required to certify that no Federal funds will be used to lobby or influence a Federal officer or a Member of Congress. The certification that OTDA has been required to sign for the U.S. Health and Human Services Administration for Children and Family Services provides 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-recipients shall certify and disclose accordingly. The certification also requires the completion of Federal lobbying reports and the imposition of a civil penalty of \$10,000 to \$100,000 for failing to make a required report. As a sub-recipient, the Contractor understands and agrees to the Federal requirements for certification and disclosure.

## **ARTICLE 23**

### **CONFLICT OF INTEREST**

If during the Term of this Agreement and any extension thereof the Contractor becomes aware of an actual or potential relationship, which may be considered a conflict of interest, the Contractor shall notify OTDA in writing immediately. Should the Contractor engage any current or former New York State employee as its own employee or as an independent Contractor because of such employee's knowledge of New York State finances, operation or knowledge of OTDA's programs, or any current or former State employee who in the course of his State employment had frequent contact with management level Contractor employees, the Contractor shall notify OTDA, in writing, immediately; should OTDA thereafter determine that such employment is inconsistent with State or Federal Law, OTDA shall advise the Contractor, in writing, specifying its basis for so determining, and may require that the contractual or employment relationship be terminated.

## **ARTICLE 24**

### **LIMITATION OF LIABILITIES**

The Contractor shall be liable for breach of any express warranties, obligations and indemnifications set forth herein and, except where expressly provided otherwise, the total liability of the Contractor and its subsidiaries for such claim(s), regardless of the nature and basis for the claim, shall not exceed two (2) times the "Current Contract Amount" as indicated by the State Comptroller's Open Book New York

<http://www1.osc.state.ny.us/transparency/contracts/contractsearch.cfm> .

Notwithstanding the above, neither party shall be liable for any consequential, indirect, or special damages of any kind that may result directly or indirectly from such performance, including, without limitation, damages resulting from loss of use or loss of profit by OSC, the Contractor, or by others.

The warranties set forth herein are in lieu of all other warranties expressed or implied including but not limited to, the implied warranties of merchantability and fitness for a particular purpose.

Where express loss liabilities set forth herein provide for a higher loss limitation liability than as set forth in this paragraph, or where such express provisions impose the Contractor liability "without limitation," such express warranties, obligations and indemnifications shall supersede the loss limitation cap contained in this Article. For any suit, action, claim, damages or costs arising under or connected to the title, patent and copyright actions by third parties, the Contractor shall be fully liable for damages without limitation should the same arise in performance of this contract. Notwithstanding the foregoing, Contractor remains liable, without monetary limitation, for direct damages for personal injury, death or damage to real property or tangible personal property or intellectual property attributable to the negligence or other tort of Contractor, its officers, employees or agents.

**ARTICLE 25**  
**PRODUCT DELIVERY**

Delivery must be made as ordered and in accordance with the terms of this Agreement.

**ARTICLE 26**

**Non-Discrimination, Equal Employment Opportunity (EEO) and Minority and Women-Owned Business Enterprise (M/WBE)**

All work conducted under this contract must be in compliance with the specifications set forth in the applicable Request for Proposal and OTDA's policies and procedures set forth in Appendix A, Standard Clauses for NYS Contracts and as may be amended from time to time.

By submission of its bid/proposal, the successful Contractor agrees that it will not discriminate against any employee or applicant for employment to the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, and as more fully set forth in paragraph five of Appendix A. By submission of its bid/proposal, the successful Contractor further agrees that it will comply with applicable Federal, State and Local requirements concerning Equal Employment Opportunity and opportunities for Minority and Women Business Enterprises, including but not limited to the Statute and its implementing regulations as promulgated by the New York State Division of Minority and Women's Business Development (DMWBD) and set forth at 5 NYCRR Parts 140-144), and as more fully set forth in paragraph twelve of Appendix A . The successful Contractor further agrees that it will comply with OTDA's Appendix Z, attached and incorporated by reference herein, for the specific EEO/MWBE requirements and associated forms required for this procurement.

**ARTICLE 27**

**MINORITY AND WOMAN-OWNED BUSINESS ENTERPRISE (M/WBE)**

**REPORTING REQUIREMENTS**

The Contractor shall comply with the following OTDA New York State MWBE Contract System reporting requirements as set forth below:

- A. OTDA has developed compliance requirements to ensure that (i) all contractors as defined under Executive Law § 310 (3) (to include those who submit bids/proposals in an effort to be selected for contract award as well as those successful Bidders/proposers with whom OTDA enters into State Contracts, as defined in Executive Law § 310 (13) [hereinafter "Contractors"], as well as proposed or actual "Subcontractors", as defined in Executive Law § 310 (14) shall comply with requirements to ensure Equal Employment Opportunities for Minority Group Members and Women, and, (ii) there are meaningful participation opportunities for certified minority or women-owned business enterprises (M/WBEs) in the OTDA procurement process. Contractors participating in and/or selected for procurement opportunities with

- B. OTDA shall fulfill their obligations to comply with applicable Federal, State and Local requirements concerning Equal Employment Opportunity and opportunities for Minority and Women Business Enterprises, including but not limited to the Statute and its implementing regulations as promulgated by the New York State Division of Minority and Women's Business Development (DMWBD) and set forth at 5 NYCRR Parts 140-145). Please refer to Appendix Z, attached and incorporated by reference herein, for the specific EEO/MWBE requirements. To streamline the MWBE compliance tracking, vendors may now report payments and track goals using an electronic monitoring and compliance system. The New York State Contract System will allow vendors to electronically update their contact information, provide subcontractor payment data for contract audits and provide revenue and payment data for concession audits. The system will also allow Subcontractors to enter the system to verify receipt of Contractor payments. Data is to be submitted without change to goals specified in Appendix Z of the Agreement, unless otherwise authorized by OTDA. The electronic monitoring and reporting system can be viewed at <https://ny.newnycontracts.com/?TN=ny>. The Vendor Guide and Vendor Training Manual are available on the OTDA's internet site at <http://otda.ny.gov/contracts/mwbe/forms.asp>.
- C. Vendors who cannot access the electronic monitoring and compliance tracking system may also opt to submit hardcopy forms to the designated OTDA Contract Program Manager. Please refer to Appendix Z, for the specific EEO/MWBE requirements and associated forms required by this procurement. These forms are to be submitted without change to goals specified in the Appendix Z of this Agreement, unless otherwise authorized by OTDA. Copies of the required OTDA Forms are identified in this Appendix and available on OTDA's Internet site at <http://otda.ny.gov/contracts/mwbe/forms.asp>.

## **ARTICLE 28**

### **DISPUTES**

This disputes provision shall apply to any dispute of the parties relating to performance under the Agreement except liquidated damages. Any dispute concerning any question of fact or law arising under the Agreement, which is not disposed of, by mutual agreement of the parties shall be initially decided by the adjudicator designee (hereinafter "Designee") of the Director the Bureau of Contract Management (hereinafter "Director"). The Director shall also designate the person who will present OTDA's position in the dispute (hereinafter "Advocate"). Within thirty (30) calendar days of such designations, the Advocate will state and brief the Designee on OTDA's position on the dispute. The Contractor will then have thirty (30) calendar days to make its submission; the submission may include any material the Contractor deems relevant to the dispute. All documents may be sent either by surface mail, by carrier, or electronically.

The Advocate will have a right to submit a response to the Contractor's submission. The response must be limited to the material rebutting evidence and arguments raised by the Contractor in its most recent submission and must be submitted within fifteen (15) calendar days of receipt of the Contractor's submission. If the Advocate submits a response, the Contractor will have thirty (30) calendar days to prepare and submit a response to the Advocate's rebuttal submission; this response shall consists wholly of material which responds

to evidence or arguments raised in the Advocate's rebuttal. Any actual submission by the Advocate shall generate a right of rebuttal by the Contractor.

The Advocate and the Contractor will be informed in writing by the Designee when the submission process is deemed complete. The Designee shall have the right to take administrative notice of relevant matters of law and fact as he believes appropriate, in accordance with general principles of Administrative Law.

The Designee will prepare and forward the recommended written decision to the Director. The Director shall: (a) evaluate the Designee's findings and recommendations, (b) review the materials presented by the Contractor and the Advocate, (c) if necessary, consult with agency Counsel, and (d) prepare a response to the dispute either ratifying, modifying, or reversing the recommended decision. The Director's decision will be rendered within forty-five (45) calendar days of the date when the submission process is deemed complete.

A copy of the Director's decision stating the reason(s) upon which it is based and informing the Contractor of the right to appeal an unfavorable decision to the General Counsel of OTDA, will be issued to both parties. The dispute decision shall be deemed a final and conclusive agency decision unless a written notice of appeal is received no more than fifteen (15) calendar days after the date the decision is received by the Contractor. Such notice of appeal must be filed with the General Counsel of OTDA.

The General Counsel of OTDA or her designee(s) shall hear and make a final decision on all appeals. A formal dispute appeal may not introduce new facts unless responding to facts or issues unknown to the Contractor prior to the final dispute decision. The General Counsel's decision will be rendered within thirty (30) calendar days of the date that the notice of appeal is received by the General Counsel.

If the Contractor is unwilling to accept the decision rendered through this procedure or if a decision is not made within ninety (90) calendar days after the record is deemed final, it may then pursue its normal legal remedies de novo, but it is specifically agreed that any and all reports rendered through this procedure shall be admissible as evidence in any court action taken with respect to the matter. Pending conclusion of any dispute or disagreement by whatever procedure, the construction placed upon the Agreement by the State shall govern operation thereunder and the Contractor and OTDA shall continue to perform under the Contract.

The Director and General Counsel shall have the power to change any or all of their designees or otherwise alter the rules of proceeding upon written notice to the Contractor.

The Contractor shall be required to bring all legal proceedings relating to this Agreement against OTDA or the State of New York in the Supreme Court of the State of New York in the County of Albany or the New York State Court of Claims.

**ARTICLE 29**  
**ANTI-KICKBACK**

The Contractor understands that it must comply with federal Executive Order 11246, the Copeland "Anti-Kickback Act" (18 USC 874), Section 306 of the Federal Clean Air Act, Section 306 of the Federal Clean Water Act, and that it must certify that neither it nor its principals are debarred or suspended from Federal financial assistance programs and activities and to complete and return in pursuit of such certification any appropriate form required by OTDA (see Federal Executive Order 12549 and 7 CFR Part 3017).

**ARTICLE 30**  
**DRUG-FREE WORKPLACE**

The Contractor agrees to comply with the provisions of Section 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.), and further agrees to have its representative execute the certification provided to the Contractor.

**ARTICLE 31**  
**OTHER AGENCY USE**

Upon request by any other New York State Agency, the Contractor shall enter into an agreement with such agency for the purchase of the goods and services that are the subject of this Agreement. Such new agreement shall provide that the cost of such goods and services to the agency entering into such agreement shall be the same as charged to OTDA under this Agreement except that the Contractor shall be permitted to negotiate an increase in price to the extent it can show an increase in the cost of providing goods and services which can be attributed to the fact that the agency requires the Contractor to be obligated to standard contractual provisions that are more onerous than those contained in Standard New York State Appendix A . In the event that a volume discount is applicable to the increase in services due to other agency use, both OTDA and the other agency shall share in the cost savings.

Upon request by a local social services district, NYC HRA or its designated purchasing agent, the Contractor shall enter into an agreement with such district or agent for the purchase of the goods and services that are the subject of this Agreement. Such new agreement shall provide that the cost of such goods and services to the district/agent entering into such agreement shall be the same as charged to OTDA under this Agreement except that the Contractor shall be permitted to negotiate an increase in price to the extent it can show an increase in the cost of providing goods and services which can be attributed to the fact that the municipality constituting the local social services district requires the Contractor to be obligated to standard contractual provisions are more onerous than those contained in Standard New York State Appendix A. In the event that a volume discount is applicable to the increase in services due to other agency use, both OTDA and the other agency shall share in the cost savings.

**ARTICLE 32**  
**ENTIRE AGREEMENT**

This Agreement, the appendices, exhibits and attachments herein constitute the entire Agreement between the parties hereto and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid. The Agreement shall not be changed, modified, or altered in any manner except by an instrument in writing executed by the parties, and approved by the by the Comptroller of the State of New York (if applicable).

In addition to the acceptance of this Agreement, the OTDA and Contractor signatures on the Contract Signature Page certify that the originals of this signature page will be attached to all other exact copies of this Agreement.

INTENTIONALLY LEFT BLANK

# Contract Signature Page

Agency Code: 27000 Contract Number: \_\_\_\_\_

## Agency Certification

In addition to acceptance of this contract, I also certify that original copies of this signature page will be attached to all other exact copies of this contract.

\_\_\_\_\_  
Agency Signature Dated

\_\_\_\_\_  
Contractor Signature Dated

Contractor Signatory Name (Printed): \_\_\_\_\_

Contractor Signatory Title: \_\_\_\_\_

### Corporate, Partnership Or Individual Acknowledgement

STATE OF NEW YORK

)  
) SS.:  
)

COUNTY OF

[Check One]

If an individual): On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me personally came \_\_\_\_\_, to me known and known to me to be the person described in and who executed the foregoing instrument and (s)he acknowledged to me that (s)he executed the same.

If a corporation): On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me personally came \_\_\_\_\_, to me known who being duly sworn, did depose and say that (s)he resides in \_\_\_\_\_; that (s)he is the \_\_\_\_\_ of the \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that (s)he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and that (s)he signed her/his name thereto by like order.

If a partnership): On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me personally came \_\_\_\_\_, to me known and known to me to be the person who executed the above instrument, who, being duly sworn by me, did for herself/himself depose and say that (s)he is a member of the firm of \_\_\_\_\_, and that (s)he executed the foregoing instrument in the firm name of \_\_\_\_\_, and that (s)he had authority to sign same, and (s)he did duly acknowledge to me that (s)he executed the same as the act and deed of said firm of \_\_\_\_\_, for the uses and purposes mentioned therein.

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

Approved as to Form:  
Eric T. Schneiderman  
Attorney General

Approved:  
Thomas P. DiNapoli  
State Comptroller

By: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_