**Exhibit J - Preliminary Base Contract and License**

**THIS AGREEMENT** is made this XX day of XXX by and between the New York State Department of Taxation and Finance, located at Building 9, W.A. Harriman State Office Campus, Albany, New York 12227 (hereinafter, the “Department,” or “DTF”), the New York State Office of Information Technology Services, located at Empire State Plaza, Swan Street Building, Core 4, 1st Floor, Albany, NY 12223 (hereinafter, “OITS”) and *[Contactor Name]*, with principal place of business located at *[Contractor Address}* (hereinafter, the “Contractor”). The Department and OITS are jointly referred to herein as “the State,” and the Department, OITS and Contractor are collectively referred to herein as “the Parties.”

**WHEREAS,** the State issued “Request for Proposals (RFP) 15-08 Real Property Tax System” on [Date], seeking proposals for an Enterprise Level, Multi-tenancy capable, and Web-based Real Property Tax System (“RPSv5” or “the System”); and

**WHEREAS,** the Contractor timely submitted a responsive proposal to provide the System specified in RFP 15-08, and the State has determined the Contractor is responsible*;* and

**WHEREAS,** pursuant to **Section XI** of the RFP, the Contractor was determined to have provided the best value proposal and has been deemed capable of providing the System; and

**WHEREAS**, the Contractor is prepared to undertake performance of developing, implementing, supporting and maintaining the System according to the terms of this Agreement and recognizes that delivery of a fully functional RPSv5 System to the State is a fundamental requisite of such undertaking.

**NOW, THEREFORE,** in consideration of the mutual covenants and conditions herein set forth, the Parties agree as follows:

**Article I. Definitions**

Whenever used in this Agreement, the following terms shall have the meaning ascribed to them below. The terms defined herein include the plural as well as the singular.

**Acceptance or Accepted** – **See RFP 15-08**.

**Agreement** - this Contract CXXXXXXX, and all documents identified in **Article II., Entirety of Agreement and Order of Precedence**

**Attorney General or AG** - the New York State Attorney General, or designee.

**Authorized User(s)** - **See RFP 15-08**.

**Base Contract and License -** that portion of the Agreement preceding the signatures of the Parties.

**Business Continuity Plan - See RFP 15-08**.

**Business Day** - the days between and including Monday to Friday, excluding any holiday officially observed by New York State.

**Certification of Final Acceptance - See RFP 15-08**.

**Change Control Procedure** - the process set forth in RFP 15-08 Exhibit A.

**Commissioner -** the Commissioner of the New York State Department of Taxation and Finance and/or the Chief Information Officer of the New York State Office of Information Technology Services.

**COTS - See RFP 15-08**.

**Custom COTS -** customizations and enhancements to COTS that the State requires as part of the Agreement.

**Deliverable - See RFP 15-08**.

**Developer (or “ISV”) - See RFP 15-08**.

**Direct Damages -** the damages incurred by the claiming party to this Agreement directly resulting from the breach of this Agreement by another party to this Agreement and specifically excludes: (a) loss of interest, profit or revenue; failure to achieve cost savings and (b) any incidental, consequential, punitive, multiple, or indirect damages of any kind or nature. Direct Damages include by way of example but without limitation, (i) the costs incurred by the State to obtain software or services that are the same or substantially similar to (but not broader in scope than) the Product or Services being replaced, that is, the charges to be paid to another service provider(s) to the extent such costs are commercially reasonable and exceed the Fixed Charges hereunder for such Product or Services; (ii) the costs to correct any defects, non-conformities, or errors in the Product or Services rendered that result in a failure of the Deliverables to meet Requirements or Specifications set forth in the RFP or Agreement, after Contractor has failed or refused to correct such defects, non-conformities, or errors; (iii) the costs incurred to transition the Product or Services to another provider(s) of services; and (iv) any payments, fines, penalties, or interest imposed by a governmental body or regulatory agency for failure to comply with requirements or deadlines.

**Dispute Resolution -** a procedure set forth in **Article XXI. Remedies, D.** for resolving disputes arising under this Agreement.

**Disaster Recovery - See RFP 15-08**.

**Documentation - See RFP 15-08**.

**Effective Date** - the date upon which this Agreement becomes effective; this Agreement is not effective until approved by both the NYS Attorney General and the NYS OSC.

**Enterprise Level - See RFP 15-08**.

**Final Acceptance - See RFP 15-08**.

**Finalized Project Timeline - See RFP 15-08**.

**Functional Requirements/Specifications -** the Requirements and Specifications as to which the Product(s) and System shall conform, as set forth herein and in RFP 15-08.

**General Public - See RFP 15-08**.

**Good Working Order -** the uninterrupted, trouble–free operation of the Product(s) and System, and all components thereof, in conformity with all applicable warranties, representations, Specifications and other Requirements.

**Letter of Deliverable Acceptance** - **See RFP 15-08**.

**Letter of Deliverable Rejection - See RFP 15-08**.

**License** - **See RFP 15-08**.

**Licensees -** the State of New York, through signatories DTF and OITS.

**License Effective Date** - the License(s) shall be effective upon the approval of this Agreement by the NYS Attorney General and NYS OSC.

**Licensor - See RFP 15-08**.

**Maintenance - See RFP 15-08**.

**Material Breach -** failure to perform an obligation that the Contractor is bound to perform under this Agreement which significantly impacts the State with regard to RPSv5 and Real Property Tax Administration or is so fundamental to the Agreement that the Contractor’s failure to perform defeats its purpose. See **Article XXII**. for examples of Material Breach**.**

**Notice of Deficiency** (or **NOD) -** a written notice issued by the State in its sole discretion which sets forth a Deficiency or Material Breach.

**Object Code - See RFP 15-08**.

**OITS** - the New York State Office of Information Technology Services.

**OSC** - the New York State Office of the State Comptroller.

**Post-Production Error(s)** - **See RFP 15-08**.

**Product(s) - See RFP 15-08**.

**Project Management Plan** - required as part of Deliverable 1 in RFP 15-08. A plan which includes: a project charter and a proposed project timeline (to be finalized in consultation with the State, i.e., Finalized Project Timeline). The project timeline must, at a minimum, contain a list of components, their purpose, any applicable dependencies, and associated timeframes.

**Proposal** -the bid submitted by Contractor in response to RFP 15-08.

**Proprietary** - protected by secrecy, patent, copyright or trademark against commercial competition.

**Real Property Taxing Jurisdictions - See RFP 15-08**.

**Release - See RFP 15-08**.

**Requirements - See RFP 15-08**.

**RFP 15-08 -** the Real Property Tax System Request for Proposals issued by the State on [DATE], including all appendices and exhibits contained therein, and any written clarifications or amendments thereto made by the State, including any questions and answers and any attachments and files.

**Regulations -** rules or directives promulgated by the State or another governmental unit thereof in accordance with the State Administrative Procedure Act which have the force of law.

**Reverse Engineering -** with respect to software, the process of recreating, extracting, decompiling, or otherwise determining the source code of a software program from the object code or machine code form.

**Services - See RFP 15-08**.

**Source** **Code** - **See RFP-15-08.**

**Specifications - See RFP 15-08**.

**Subcontractor - See RFP-15-08.**

**System - See RFP-15-08.**

**System Integrator -** the Contractor, to the extent responsible for integrating hardware, software, and the State’s network into an integrated working System.

**Third-Party Product(s) - See RFP-15-08.**

**Transition Plan -** aplan developed byContractor and approved by the State that contains reasonable procedures to transition work being performed by Contractor to ensure the System continues operating without interruption.

**Virus** - any computer code, whether or not written, conceived or developed by Contractor or Third-Party Developer, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product(s) or System, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by a Product manufacturer.

**Warranty Period - See RFP 15-08**.

**Article II. Entirety of Agreement and Order of Precedence**

The entire Agreement shall consist of the documents listed below. Conflicts between these documents shall be resolved in the following order of precedence:

Appendix A of the RFP, “Standard Clauses for New York State Contracts,” dated January 2014;

Attachment 12 – DTF—202, Agreement to Adhere to the Secrecy Provisions of the Tax Law and the Internal Revenue Code, dated December 2014;

Attachment 13 – Acknowledgement of Confidentiality of IRS Tax Return Information and Internal Revenue Code Selected Confidentiality Provisions Pertaining to Contractors;

Base Contract and License;

Any Amendments and Clarifications to RFP 15-08, including Questions and Answers;

RFP 15-08 (including all attachments to the RFP), but excluding Appendix A, Attachment 12, Attachment 13, all Amendments and Clarifications, and all Questions and Answers;

Contractor’s Proposal Clarifications; and

Contractor’s Proposal, excluding Clarifications.

**Article III. Scope of Agreement--Delivery of a Fully Integrated Working Real Property Tax System**

**Scope**--This Agreement sets forth the terms and conditions under which Contractor will design, develop, integrate, deliver, install, maintain, and support the Product(s) and the Deliverables for the State’s new RPSv5 System.

**Delivery of a Fully Integrated Working System**--The Parties acknowledge and agree that Contractor is fully responsible, pursuant to the terms and conditions hereof, for providing the Deliverables in full conformity with the terms and conditions of this Agreement, and that said Deliverables shall function in conformity with the Functional Requirements, performance and other Requirements stipulated herein and in the RFP upon delivery and continuing throughout the Warranty Period. The Contractor agrees to deliver a complete, integrated working System and to fix any problems that arise within the System in accordance with the Deliverable(s) acceptance criteria and warranty provisions of the Agreement.

**Article IV. Contractor Responsibilities**

The Contractor hereby agrees to provide all Deliverables as required by the RFP 15-08 and the Contractor’s bid proposal in response to RFP 15-08, to implement an Enterprise Level, Multi-tenancy capable, and Web-based Real Property Tax System (“RPSv5,” or “the System”), which will replace and provide enhanced functionality over the State’s current Real Property System (RPSv4). In addition to the Contractor’s responsibilities set forth elsewhere in the Agreement, the Contractor shall:

* Provide all the Deliverables and the System in accordance with the RFP and the Finalized Project Timeline agreed to by the State;
* Provide all required Maintenance;
* Provide any modifications or additional services, including all additional Maintenance or enhancements, as may be implemented through the Change Control Procedure;
* Comply with the Secrecy requirements set forth in **Article XVII**. Herein;
* Maintain accurate records;
* Accept State oversight, and keep the State informed of any problems encountered in providing the System (Products, Third-Party Product(s), Documentation and/or Services);
* Ensure Subcontractor compliance with all responsibilities under this Agreement, as applicable;
* Meet MWBE goals as outlined in **Article XXV. Continuing Administrative Requirements, 6.** of this Agreement;
* Pay, at its sole expense, all applicable permits, licenses, tariffs, tolls and fees and give all notices and comply with all federal, state, and local, laws, ordinances, rules and regulations of any governmental entity in conjunction with the performance of obligations under the Agreement.
* Not disclose confidential data of the State to any other individual or entity except as expressly required by law;
* Keep the State’s data, while in the control of the Contractor, confidential, and take all reasonable and prudent steps to ensure the data is fully protected and secured;
* Work in good faith with the State and any other party to accommodate any changes in requirements or to assist in the development of any enhancement;
* Make good faith efforts to follow any recommendations made by the State regarding the performance of the Agreement;
* Notify the State in writing, specifying the reason(s), why a deviation from any Requirement is believed necessary, and obtain written approval for a deviation; and
* Ensure that Contractor team members observe State work rules while working on State premises.

**Article V. State Responsibilities**

The State has engaged the Contractor to develop a new, updated, version of the State’s existing Real Property System with enhanced capabilities. In addition to responsibilities set forth elsewhere in this Agreement, the State will:

* Oversee all aspects of the development and implementation of the System provided by Contractor and make recommendations regarding Contractor’s performance of the Agreement;
* Designate the State Leadership Team, Project Director and State Project Managers following the date of commencement of this Agreement;
* Provide the Contractor with direction, assistance, procedures, and contact persons necessary for the Contractor to perform in accordance with its responsibilities;
* Utilize, where necessary, informal dispute resolution to facilitate the timely resolution of disputes that arise;
* Provide the Contractor with access, as necessary, to State end users and System staff who will provide the business information needed by the Contractor;
* Be responsible for the performance of the State’s employees and agents;
* Advise the Contractor in writing of the security rules, procedures, regulations, and work rules that the State may from time to time establish for State employees and Contractors with respect to the State’s premises, property, records, and data in the State’s care and custody;
* Advise Contractor that its employees, agents, and team members shall observe State security rules, procedures, regulations, and work rules; and
* Provide appropriate meeting rooms, office space, office supplies, furniture, telephone, machine time and other facilities for the Contractor and its employees, agents, and team members while working on State premises. Those facilities shall be provided as determined by the State Project Manager.

**Article VI. Term of Agreement and License**

The initial term of the Agreement will commence upon approval of the New York State Attorney General (AG) and the Office of the State Comptroller (OSC) and run for one (1) five (5) year term. Upon mutual agreement of the Parties, the term of the Agreement may be extended, subject to the approval of the AG and OSC, for up to two (2) additional five (5) year terms, for Maintenance.

As further described herein at **Article XIV. Software/Products/License Grants—Terms of Use**, the License for the Contractor’s software is perpetual and irrevocable, with its term commencing upon approval of this Agreement by both the New York State Attorney General and the Office of the State Comptroller, and extending past the expiration date of this Agreement.

The term of the Licenses for any Third-Party Product(s) licensed to the State will be as set forth in the agreements governing such Third-Party Product(s).

**Article VII. Fees and Payment**

1. **Fees and Payments**

All fees and payments will be in accordance with the mandatory provisions of **RFP 15-08, Section VIII., Financial Requirements**, which are incorporated herein by reference.

1. **Electronic Payment**

Payment for invoices submitted by the Contractor shall be made electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner’s sole discretion, due to extenuating circumstances. Such electronic payment shall be made in accordance with ordinary State procedures and practices. The 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 [helpdesk@sfs.ny.gov](mailto:helpdesk@sfs.ny.gov) ; or by telephone at 855-233-8363. 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 procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

1. **Properly Submitted Invoices**

Payment will be made only upon submission of proper invoices by the Contractor, and in accordance with Article 11-A of New York State Finance Law.

Required Information on properly submitted invoices--

* Contractor's SFS Vendor Number;
* Invoice or account number;
* Name of NYS Agency to which goods or services related to the invoice were provided;
* A valid NYS Purchase Order (PO) Number and/or Contract number associated with the invoice; and
* Line item details that match the corresponding PO line item.

Submission--

Preferred Method: Email invoices to the OGS-BSC at: [accountspayable@ogs.ny.gov](mailto:accountspayable@ogs.ny.gov) including the invoice number and the name of the agency being billed in the subject field. (Note: Do not send a paper copy, in addition to the electronic invoice.)

Alternate method: Mail invoices to OGS-BSC at the Following U.S. postal address:

New York State Department of Taxation and Finance

c/o NYS OGS Business Services Center

1220 Washington Ave., Building 5, 5th Floor

Albany, NY 12226-1900

**Article VIII. Timely Performance**

1. Contractor shall complete all of the Services and provide Deliverables in accordance with the deadlines set forth in the Finalized Project Timeline, negotiated as part of the Project Management Plan (RFP Deliverable 1). Contractor acknowledges that due to the nature of the State’s need to commence use of the System by the dates specified in the Finalized Project Timeline, **TIME IS OF THE ESSENCE IN THE PERFORMANCE OF THIS AGREEMENT**, and that timely performance in accordance with the Finalized Project Timeline is a material requirement of Contractor’s performance under this Agreement.
2. **CONTRACTOR IS OBLIGATED TO UNDERTAKE ALL COMMERCIALLY REASONABLE EFFORTS** to prevent delays in its performance beyond critical dates set forth in the Finalized Project Timeline. If Contractor is delayed in its performance and/or completion of a Deliverable solely due to circumstances outside of the control of the Contractor or a subcontractor, including any delays caused by the State, Contractor may in writing (supported by a detailed explanation of its plan to prevent delay of the other critical dates) request an extension of time beyond the corresponding completion times set forth in the Finalized Project Timeline. The State, in its sole discretion, will decide whether the Contractor’s request is reasonable under the circumstances presented in the documented request, and may grant such extension. State personnel will use all reasonable efforts to cooperate with and assist Contractor as may be reasonably required to meet the Finalized Project Timeline agreed to by the Parties for implementation.
3. Delays on the part of the State or a third party other than a subcontractor to Contractor, may result in the State’s affording the Contractor an extension of time to perform (as set forth in paragraph 2 above) but Contractor is not entitled to any other remedy, including money damages.

**Article IX. Deliverables-Transmittal, Testing, Acceptance, and Rejection**

* 1. **General Provisions Regarding Deliverables**

Non-negotiable, mandatory requirements concerning Transmittal, Testing, Acceptance, Rejection and payment for Deliverables are set forth throughout the RFP, particularly at RFP **Section III.** (Post Award Deliverables), **Section VII. D**. (Acceptance of Deliverables) and **Section VIII.** (Financial Requirements). These requirements are incorporated herein by reference. In addition, the following terms will apply:

1. Acceptance of a Deliverable does not relieve the Contractor from responsibility for design or other defects, non-conformities or errors of any sort in the requirements, designs, drawings, or plans, to the extent caused by the Contractor.
2. Contractor shall not charge the State for the remediation of any defects, non-conformities or errors within a Deliverable, and Contractor is not entitled to an extension of the Finalized Project Timeline for time spent correcting such defects, non-conformities or errors in a Deliverable.
3. Contractor shall not proceed with any activity under the Agreement that is conditioned upon the State’s Acceptance of a Deliverable in the absence of such Acceptance, except as may be expressly authorized by the State in writing. Such authorization to proceed does not constitute Acceptance of the Deliverable and does not obligate the State to pay for such Deliverable.
4. **Transmittal of all Deliverables for State Evaluation**

Transmittal of Deliverables will be in accordance with the provisions set forth in **RFP 15-08, Section III. Post Award Deliverables** (following the chart describing the Deliverables), which are incorporated herein by reference.

1. **Testing, Acceptance and Rejection of Deliverables**

Testing, Acceptance and Rejection of Deliverables will be in accordance with the provisions set forth in RFP 15-08, particularly at **Section III. Post Award Deliverables**, and **Section VII D. Acceptance of Deliverables**, which are incorporated herein by reference.In addition,the following will apply:

* **Requirements Review and Fit Gap Analysis (Deliverable 2)**

Upon completion of its review of, and after payment for, Deliverable 2 the State shall have the right to use and reproduce Deliverable 2 for State purposes consistent with the program prescribed in RFP 15-08, or similar purpose.  The State shall not retain the right to publish, sell, gift or in any way alienate such Deliverable.

**Article X. Ownership/Title to Deliverables**

Contractor acknowledges that it has been contracted by the State to provide the Deliverables detailed in RFP 15-08. The State shall have ownership and license rights as follows:

1. **COTS / Third-Party Product(s)**
2. **COTS, Owned and Delivered by Bidder**--Title and ownership to COTS delivered by Contractor under the Agreement that is normally commercially distributed on a license basis by the Contractor, whether or not embedded in, delivered or operating in conjunction with hardware or Custom COTS, shall remain with Contractor, as applicable.

Any product which is owned and purchased through Contractor shall be licensed to the State in accordance with the Contractor’s standard license agreement, provided, however, that such standard license, must, at a minimum grant the State a license which is: irrevocable, non-exclusive, royalty-free, perpetual, concurrent and unlimited (as to number of users), allowing the State to access, deploy, use, execute, reproduce, display, perform and/or merge the Contractor’s software (collectively referred to herein as “use of’ or ‘to use’ the Contractor’s Product(s)”) and which includes all license rights necessary to fully effectuate the business purposes of the State and the Real Property Taxing Jurisdictions, as described in the RFP and Agreement, and all rights necessary for the State to carry out its part of the System implementation and other provisions of the Agreement.

The State and all Real Property Taxing Jurisdictions authorized under license to use the Contractor’s Products as part of their use of the System shall reproduce all copyright notices and any other legend of ownership on any copies authorized under this clause.

1. **Contractor’s Obligation with Regard to ISV (Third Party) Product:** Where Contractor furnishes Third-Party Product(s) as part of a Deliverable, and sufficient rights, including perpetual license rights, necessary to effect the purposes of this section are not otherwise provided in the standard license agreement governing such product, Contractor shall obtain from the ISV/ third-party proprietary owner/developer the rights set forth herein to the benefit of the State at Contractor’s sole cost and expense. In the event that Contractor is unable to secure a perpetual license in the Third-Party Product, Contractor shall secure license terms sufficient to meet their deliverable requirements and warranty obligations as set forth herein.
2. **Hardware** - Title and ownership of hardware, if any, shall pass to the State upon Acceptance.
3. **Title and Legal Interest in Agreement Deliverables**

Unless otherwise specified in the Agreement, all materials developed pursuant to the terms of the Agreement without limitation, including materials developed as a result of contractually required documentation, or Change Orders, and all other Agreement Deliverables of whatever description, developed or prepared for the State by the Contractor under the Agreement, whether or not the Agreement is completed, is the property of the State and all title and interest therein shall vest in the State, with the exclusion of works that are derivative of the Contractor’s existing intellectual property. Software coding or modifications and custom program code developed or prepared for the State by the Contractor under the Agreement, whether or not the Agreement is completed, is confidential information and the property of the Contractor and all title and interest therein shall vest in the Contractor. The State shall have a license to use such Contractor-owned materials on the same terms and for the same duration as applicable to the licenses described in this Agreement.

Notwithstanding the foregoing, the Contractor or third parties shall retain all right, title and interest in any of their respective pre-existing software products. The State acknowledges that the Contractor or its licensors shall retain all ownership and intellectual property rights to the proprietary code offered to the State under a licensing agreement. Any property or material furnished or provided by the State to the Contractor hereunder is and will remain the property of the State.

1. **Title and Legal Interest in Deliverable, COTS and Third-Party/ISV in the Event of a Material Breach**

For all COTS and any completed or partially completed Deliverable product which is licensed to the State by Contractor and which is owned by Contractor, in the event Contractor materially breaches this Agreement, or any portion thereof, the State shall receive a non-exclusive, perpetual license to use, execute, reproduce, display, perform, adapt, modify, de-construct, distribute or manipulate for the purposes of completing the Deliverable in a manner chosen by the State.

For all ISV or third party products licensed to the State through the Contractor but which the Contractor does not own, in the event Contractor materially breaches this Agreement, or any portion thereof, Contractor agrees to assign any and all ISV or third party licenses to the State for the State’s continued use in completing the Deliverable to the extent such assignment is permitted by the applicable ISV or third party license agreement. Contractor shall use best efforts to ensure that such assignments are completed timely. In the event Contractor cannot assign such licenses to the State in a timely manner, Contractor shall be liable for the full cost of acquisition borne by the State for the acquisition of such licenses

**Article XI.** **Proof of License**

The Contractor must provide to the State either: (i) the Product developer’s certified license confirmation certificates in the name of the State; or (ii) a written confirmation from the proprietary owner accepting Product invoice as proof of license. Contractor shall submit a sample certificate, or alternatively such written confirmation from the proprietary developer. Such certificates must be in a form acceptable to the State.

**Article XII. Product Version**

Product and/or purchase orders issued in connection with this Agreement shall be deemed to reference manufacturer’s most recently released model or version of the Product at time of order, unless an earlier model or version is specifically requested in writing by the State and Contractor is willing to provide such version.

**Article XIII. Changes to Product or Service Offerings**

1. **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 support provided by Contractor (“withdrawn support”) is no longer going to be offered, Contractor shall be required to: (i) notify the State, if then under contract for Maintenance, in writing of the intended discontinuance; and (ii) continue to offer Product or withdrawn support upon the Agreement terms previously offered for the greater of: a) the best terms offered by Contractor to any other customer, or b) not less than twelve (12) months from the date of notice and (iii) at the State’s option, provided that the State is under contract for maintenance on the date of notice, either: provide the State with a Product replacement or migration path with at least equivalent functionality at no additional charge to enable the State to continue use and maintenance of the Product.

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, to the State within five (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 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 State approval, to an alternate Subcontractor.

1. **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 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 the State in writing of the intended change; (ii) continue to provide Product or withdrawn support upon the same terms and conditions as previously offered on the then-current Agreement for the greater of: a) the best terms offered by Contractor to any other customer, for b) not less than twelve (12) months from the date of notice; and (iii) shall submit the proposed re-bundling change to the State for approval prior to its becoming effective for the remainder of the Agreement term. The provisions of this section do not apply if the Contractor is not the Product manufacturer.

**Article XIV. Software/Products/License Grants—Terms of Use**

* + 1. **Contractor’s Products—License Grant**
  1. License Grant/ Effective Date--Upon the Effective Date and subject to the terms of this Agreement, Contractor grants the State and State accepts a License to the Contractor’s Product(s) conforming in all respects to the mandatory requirements of section **VI.A.6 of RFP 15-08, Licensing/ Source Code Escrow**.  For avoidance of doubt, this means that upon the Effective Date, the Contractor grants and the State accepts a License to the Contractor’s Product(s) providing the State with a License to the Contractor’s software which is:  irrevocable, non-exclusive, royalty-free, perpetual, concurrent and unlimited (as to number of users), allowing the State to access, deploy, use, execute, reproduce, display, perform and/or merge the Contractor’s software (collectively referred to herein as “use of’ or ‘to use’ the Contractor’s Product(s)”) and which includes all license rights necessary to fully effectuate the business purposes of the State and the Real Property Taxing Jurisdictions, as described in the RFP and Agreement, and all rights necessary for the State to carry out its part of the System implementation and other provisions of the Agreement. All Contractor’s Product(s) customized for inclusion and embodiment in Deliverables to be provided to the State after the Effective Date, will be licensed to the State under the same above-listed terms immediately upon such inclusion/embodiment (“Date of Inclusion”).
  2. Modifications and Reproductions- The Contractor further grants: (1) the State the right to use and distribute modifications or customizations of the Contractor’s Product(s) to and for use by any Authorized User(s), provided that any modifications, however extensive, shall not diminish Contractor’s proprietary title or interest; (2) the State a License to make, reproduce (including downloading electronic copies of the Contractor’s Product(s)) and distribute to Authorized Users, either electronically or otherwise, copies of Product Documentation as necessary to enjoy full use of the Product(s) and System, or as necessary to effectuate the business purposes for which the State is procuring the Contractor’s Product(s); and (3) the State the right, under commercially reasonable arrangements, to modify or to allow a third party under Contract with the State to modify the Contractor’s Product(s) as may be needed by the State.
  3. Use By State, Real Property Taxing Jurisdictions and Third Parties (on their behalf) - Any third party with whom the State or any Real Property Taxing Jurisdiction has or enters a relationship whereby the third party performs some or all of the State’s or Real Property Taxing Jurisdiction’s real property tax functions on their behalf, shall have the right to use the System and Product(s), to perform all such activities serviced by the System and Product(s), for the time period that the third party is engaged in performing such activities on behalf of the State and/or Real Property Taxing Jurisdiction. Except as provided herein, the State agrees not to sell, lease, license, or in any manner encumber, pledge, convey or transfer the Contractor’s Product(s) or any interest therein.
  4. Documentation -The Contractor shall deliver, at Contractor’s expense: (i) one (1) hard copy and one (1) master electronic copy of the Documentation in Word or Adobe for all Product(s) provided to the State by or through the Contractor; and (ii) hard copy instructions for access by downloading from the Internet of such Documentation.  The Contractor must provide the Documentation described in RFP 15-08 at **Section III. Post Award Deliverables (I) Deliverable 9 – Documentation.**
  5. Confidentiality -The State agrees that Contractor’s Product(s) are trade secret, confidential and proprietary.  The State will keep the Product(s) confidential and will not disclose or otherwise distribute or reproduce Product(s) to anyone other than as authorized under the terms of the Agreement.  The State will not remove or destroy any proprietary markings of Contractor. Upon the request of any New York State official the State may, without Contractor’s consent, make a copy of the Contractor’s Product(s) and copy any printed materials provided for such Product(s) for examination and inspection purposes only. All copies of the Product(s) or documentation shall include all copyright, trademark, restricted rights and other proprietary notices as originally provided therein.
  6. Permitted License Transfers-As the State’s business operations may be altered, expanded or diminished, license(s) granted hereunder may be transferred or combined for use at an alternative or consolidated site not originally specified in the license(s), including transfers between Agencies (“permitted license transfers”).  The State does not have to obtain the approval of the Contractor for permitted license transfers, but must give thirty (30) days prior written notice to Contractor of such move(s).  There shall be no additional license or other transfer fees due Contractor.
  7. Archival Back-Up and Disaster Recovery - The State may disclose, provide or otherwise make available the Contractor’s Product(s) to: the State’s employees, agents, contractors, as necessary, Contractor’s employees, and any third-party service providers of the State’s choosing for the purposes of backup, operations continuity, and/or disaster recovery, without prior written consent of the Contractor.  The State may use and copy the Product(s) and related Documentation in connection with: (i) reproducing a reasonable number of copies of the Product(s) and Documentation for archival backup and disaster recovery procedures in the event of destruction or corruption of the Product(s) and Documentation or disasters or emergencies which require the State to restore backup(s) or to initiate disaster recovery procedures for its platform or operating systems; (ii) reproducing a reasonable number of copies of the Product(s) and related Documentation for cold site storage.  “Cold Site” storage shall be defined as a restorable back-up copy of the Product(s) and System not to be installed until and after the declaration by the State of a disaster; (iii) reproducing a back-up copy of the Product(s) and System to run for a reasonable period of time in conjunction with a documented consolidation or transfer otherwise allowed herein.  For purposes of this paragraph, “Disaster Recovery” shall be defined as the installation and storage of Product(s) and System in ready-to-execute, back-up computer systems prior to disaster or breakdown which is not used for active production or development.

1. **Source Code -** The Contractor will comply with the mandatory Source Code provisions of Section **VI.A.6 of RFP 15-08, Licensing/Source Code Escrow**. The Contractor must keep the Source Code updated as necessary to reflect all changes, including any corrections and modifications required to keep the System fully functional.  Such updating shall be certified to the State in writing. The following terms shall apply to Source Code, whether escrowed or deposited with the State, as applicable.
   1. If the Contractor offers a Source Code escrow agreement, acceptable to the State, then the Contractor represents that: (i) Contractor has entered into a Source Code Escrow Agreement (“Escrow Agreement”) with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Escrow Agent”); (ii) All Source Code and related documentation for the Contractor’s Product(s) is under escrow deposit pursuant to said Escrow Agreement; and (iii) Contractor shall maintain the Escrow Agreement until either the State no longer uses the Contractor’s Product(s) or Contractor provides the Source Code to the State.
   2. Contractor shall add the State as a beneficiary under the Escrow Agreement and ensure that the State be entitled to obtain the Contractor’s Product(s) Source Code upon the occurrence of an “Event of Default,” as described in subparagraph f. below.  Costs associated with escrowing the Contractor’s Product(s) Source Code shall be fully borne by the Contractor.  Contractor shall provide the State thirty (30) days prior written notice of a change of Contractor’s Escrow Agent.
   3. Source Code related to the Contractor’s Product(s), as well as any corrections or modifications to such Source Code, must be updated for each new Release, patch service pack or upgrade of the Contractor’s Product(s) and placed in escrow or deposited with the State, as applicable. Such Source Code shall be in a form suitable for reproduction and use by computer equipment, and shall consist of a full source language statement of the program or programs comprising the Contractor’s Product(s).
   4. Contractor agrees that: (i) all updates to the Contractor’s Product(s) will be escrowed, or deposited with the State, as applicable, within sixty (60) days of the date of issue; (ii) the Escrow Agent will verify deposit of the Contractor’s Product(s) and all updates thereof and so notify the State; and (iii) the State is permitted, at its own cost and expense, to require periodic testing of all Source Code held in escrow or deposited with the State.
   5. Contractor shall certify in writing that it has deposited, and thereafter will maintain, a current copy of all Source Code related to the Contractor’s Product(s), including all current commentary and supporting documentation, with the Escrow Agent or the State, as applicable, and agrees to comply with the obligations set forth herein.  Contractor shall re-certify in writing annually that the Source Code escrow remains in effect with the Escrow Agent in compliance with the terms of this section.
   6. An Event of Default shall be deemed to have occurred if Contractor, its assignees or successor:
      * 1. ceases to market or make available Maintenance for the Contractor’s Product(s) pursuant to the terms of this Agreement during a period in which the State is entitled to such services and Contractor has not cured such failure within thirty (30) days of its receipt of written notice from the State demanding that Contractor make available or perform such services;
        2. files, or is the subject of the filing of, a petition by or against Contractor for relief under the United States Bankruptcy Code, makes a general assignment for the benefit of creditors, appoints or has appointed a general receiver or trustee in bankruptcy for Contractor’s business or property, provided that any such events will not apply if within thirty  (30) days thereafter Contractor or its receiver or trustee provides assurances, reasonably satisfactory to the State, of Contractor’s continuing ability and willingness to fulfill all material obligations under this Agreement;
        3. ceases business operations generally; and/or
        4. materially breaches this Agreement.
   7. If an Event of Default occurs, the State shall have the right to so certify to the Escrow Agent and to direct the Escrow Agent to provide the State with a copy of the Source Code, documentation, and commentary for the State’s installed Release of the Contractor’s Product(s).  If the State is holding the Source Code itself, and an Event of Default occurs, the State shall have the right to access and use the Source Code.
   8. In the event that the Source Code is made available to the State as a result of an Event of Default, then Contractor grants the State an irrevocable, non-exclusive, non-transferable, royalty-free, perpetual, concurrent, and unlimited (as to number users) license to use the Source Code as necessary for the State to enjoy full use of the Contractor’s Product(s) for all of the purposes described in the RFP, including but not limited to, using it to satisfy the support obligations under this Agreement by modifying, maintaining and correcting errors in the Contractor’s Product(s).
   9. Notwithstanding anything contained in this Agreement, upon the occurrence of an Event of Default, Contractor shall only be obligated to provide the State with Source Code to Contractor’s Product(s) for which Contractor or one of its affiliated companies has full right, title and interest.
2. **Contractor’s Work Materials**

The State agrees that the Contractor will retain all right, title, and interest in and to all of the Contractor’s Materials.  “Contractor’s Materials” means all discoveries, concepts, ideas, whether or not registerable under patent, copyright, or similar statutes, including, without limitation,  patents, copyrights, trademarks, trade secrets, processes, methods, formulae, techniques, tools, solutions, programs, data and Documentation, and related modifications, improvements and know-how, that the Contractor, alone, or jointly with others, its agents or employees, conceives, makes, develops, or acquires at any time before, during or after the term of this Agreement without breach of the Contractor’s duty of confidentiality to the State. If the Contractor’s Materials are included with or embodied in any work product (“Work Product”), the State will have an irrevocable, non-exclusive, royalty-free, perpetual, concurrent and unlimited (as to number of users) License to access, deploy, use, execute, reproduce, display, perform, merge and distribute to Authorized Users and prepare for its uses (as described within the RFP) “derivative works” as defined in the Copyright Act, 17 U.S.C. § 101, based upon the Contractor’s Materials in each case solely in conjunction with the Work Product delivered hereunder.  Any interest in the Services and Work Products granted hereunder by the Contractor to the State shall be effective immediately upon the Effective Date or, if later developed, the Date of Inclusion.  Contractor shall own all rights, title and interest in and to Contractor’s Product(s) (including copyright, trade secrets, patent, trademark, and other proprietary rights) including all customizations, enhancements, modifications, or other changes thereto.  Any copies of the Contractor’s Product(s), in whole or in part, which are made hereunder remain the property of the Contractor.

1. **Third-Party Product(s)**
2. The State may, in its discretion, request that the Contractor procure application specific licenses on behalf of the State, or purchase itself some or all of the Third-Party Product(s) necessary  to the System pursuant to independent contracts between the State and a third party; provided that: (i) the State will timely provide such Third-Party Product(s) to the Contractor; and (ii) the State, at its own expense, shall procure maintenance, support, and/or software assurance applicable to such independently acquired Third-Party Product(s).
3. Risk of loss to Third-Party Product(s) passes from Contractor to the State upon Final Acceptance of the System. Contractor shall ensure that Third-Party Product(s) meet all applicable Specifications and other Requirements of the Agreement.  If such Products do not meet the Specifications and Requirements, Contractor is responsible for securing satisfactory performance at its own expense.  Upon transfer of title or other interest, Contractor shall provide the State with all associated Documentation, including warranty information.
4. Third-Party Product(s) are licensed under the terms of the applicable third party license agreement; provided, however, that nothing contained in the Third-Party license agreement shall be deemed to limit or alter the Contractor’s obligations hereunder.
5. The Price contained in the Contractor’s Financial Response Form (Attachment 19 to the RFP) is deemed inclusive of the costs for the provision, support and maintenance of any Third-Party Product(s) that form a part of the System. Contractor shall ensure that the Third-Party Product(s) are up to date during (i) the entire term of this Agreement, including the Warranty Period during the provision of any Maintenance, pursuant to this Agreement and (ii) during any follow on agreement to provide continuing Maintenance.

**Article XV. Representations and Warranties of the Contractor**

The following Warranties are in addition to the Warranties required by **Section VII. F of RFP 15-08, Product/System Warranty:**

1. **System Warranty**

Contractor warrants that, for the duration of the Warranty Period, all components of the System supplied by or through Contractor will be in Good Working Order and will operate in accordance with their intended use and meet or exceed the specifications set forth in the Product documentation and all Specifications and other Requirements set forth in the Agreement. If the manufacturer’s warranty for any COTS software, custom software, third party software, hardware, installed components, modifications, additions, and parts thereof is in excess of the periods stated herein, then that period of time shall be in effect.

As required by the RFP, the Warranty Period will commence upon the State’s Final Acceptance of the System and will expire two (2) years thereafter, subject to any Extended Warranty periods that may be applicable. Contractor shall provide and bear the costs of all labor and materials required to meet its obligations under this warranty.

During the Warranty Period, Third-Party Product(s) acquired or furnished by the State are deemed to be components supplied by the Contractor for purposes of Contractor’s System Warranty obligations under this section; provided that the State must maintain current maintenance and support agreements applicable to such Third-Party Product(s) for the duration of the term of the Agreement and the Warranty Periods.

1. **Product Performance Warranty**

Contractor warrants and represents that the Product(s) acquired by the State under this Agreement conform to the manufacturer’s specifications, performance standards and Documentation, and that the Documentation fully describes the proper procedure for using the Product(s). Contractor further warrants and represents that the Product(s) conform to the requirements of RFP 15-08, and will work together in a commercially reasonable manner to provide the State with a fully functional System as such System is described in RFP 15-08.

Contractor warrants that the Product(s) will perform as specified herein, and will perform as represented by Contractor with respect to updates, enhancements or additional software which may be acquired by the State at any time during the term of the Agreement, the Warranty Period and for so long as the State continues with a Maintenance agreement with Contractor or Contractor’s successors or assigns.

During the Warranty Period and at any time during which the State maintains an agreement for Maintenance including any time during which the Contractor is providing Maintenance, Contractor shall design, code, check out, document and deliver any amendments or alterations (“Amendments”) to the COTS necessary to maintain the System in Good Working Order, and shall correct or avoid any defect in the Product(s), whether present at the time of delivery or later discovered.

In case of dissolution of Contractor’s third-party supplier, Contractor shall replace such third-party supplier with an equivalent supplier at no additional cost to the State and without extension to the Project Schedule.

During the term of the Agreement and throughout the Warranty Period, as well as during any time in which the Contractor is providing Maintenance, Contractor shall provide any Amendment supplied by Contractor, and shall ensure that the System remains in Good Working Order, including, if necessary, the purchase of patches, updates, upgrades or additional support from third-party software providers, and the correction of defects.

1. **Title and Ownership Warranty**

As to any Product(s) the State acquires from or through the Contractor under this Agreement, Contractor warrants and represents that it has (i) full ownership, clear title free of all liens, (ii) has obtained all necessary rights to use any proprietary software and related documentation required by Contractor to perform the Services set forth in this Agreement, and/or (iii) the right to transfer or deliver specified license rights to any Product(s) acquired by the State under this Agreement. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor shall fully indemnify the State and hold the State harmless from any damages and liabilities (including reasonable attorneys’ fees and costs) arising from a breach of Contractor’s warranties as set forth herein.

1. **Third-Party Product(s)**

If the Contractor is the licensee or sub-licensee of Third-Party Product(s) that it or the State will use in connection with the Services performed under the Agreement, then the Contractor warrants that: (a) Such license or sub-license has not expired; (b) Such license or sub-license allows the State to use, execute, copy, display and distribute such software and documentation, for at least as long as the Contractor performs the Services under the Agreement.

1. **Workmanship Warranty**

The Contractor warrants and represents that all Services provided by the Contractor and its subcontractors under the Agreement will be performed in a professional and workmanlike manner, in accordance with the highest applicable industry standards. Contractor warrants each of the Contractor’s employees and agents assigned to perform Services under this Agreement have the proper skills, training and background (core competencies) so as to be able to perform the Services in a competent and professional manner. For purposes of the Agreement, “highest applicable industry standards” shall be defined as the degree of care, skill, efficiency, and diligence that a prudent person possessing technical expertise in the subject area and acting in a like capacity would exercise in similar circumstances. The State will notify Contractor of any Services warranty deficiencies within ninety (90) calendar days from performance of the Services that gave rise to the warranty claim.

1. **Virus** **Warranty**

The Contractor represents and warrants that any Product(s) acquired under the Agreement by the State does not contain any known viruses and that Services relating to the integration, development, and implementation of the Product(s) for the System by means of the Contractor’s configuration, modification, and/or enhancement of such Product(s) shall be performed in a manner so as not to result in introducing a virus or other malware to the System. The Contractor will utilize industry reasonable virus detection and vulnerability scanning software on its equipment to ensure that any configuration, modification, and/or enhancement it creates and provides to the State shall not contain any virus or vulnerability. If it is discovered that Product(s) used in performing the Services contains a virus, worm or device, then Contractor shall take appropriate measures at its sole expense, to remove such virus, worm or device and assist the State, if necessary, with the restoration of data and/or software that has been damaged as a result of such virus, worm or device.

1. **No Disabling Code Warranty**

Contractor warrants that Product(s) will not contain disabling code planted by Contractor and/or a Subcontractor of Contractor that will activate upon a predetermined date or that can be remotely activated by Contractor and/or a Subcontractor of Contractor without the Department’s prior written consent.

1. **Latent Defects Warranty**

The Contractor warrants and represents that upon notification by the State of a latent defect in design, material or workmanship, or a latent nonconformity of the Services, material, or equipment to the Requirements, which would have constituted a basis for rejection if discovered prior to Acceptance, it will repair or replace or otherwise correct the defect to the level of performance specified in the Agreement.

1. **Training and Certification Warranty**

The Contractor warrants and represents that all staff assigned to the State’s work in performing this Agreement will be kept current in training including secure coding training, and any applicable certification. Any fees or charges incurred by the Contractor to obtain and maintain such training and certification shall be the responsibility of the Contractor and will not be billed to the State.

1. **Survival of Warranties**

Except as otherwise expressly stated, all warranties contained in this Agreement shall survive the termination and/or expiration of this Agreement. The Contractor will maintain all original manufacturers’ warranties, organized by installation location, and will present the organized warranty package to the State upon expiration and/or termination of Agreement.

1. **Warranty of Non-Infringement**

Contractor warrants and represents that all Product(s), and any enhancements thereto: (i) do not violate any copyright, patent, trademark or trade secrets law; (ii) do not constitute defamation or invasion of the right of privacy or publicity; and (iii) are not an infringement of any kind, of any rights or any third party.

To the extent the Product(s) incorporate any non-original material, Contractor represents and warrants that it has obtained all necessary permissions and clearances, in writing, for the use of such non-original material under the Agreement, copies of which must be provided to the State upon execution of the Agreement.

To the extent Contractor is procuring Third-Party Product(s) for the State’s benefit, Contractor represents and warrants that it has obtained all necessary permissions and clearances, in writing, to provide such Third-Party Product(s), copies of which shall be provided to the State prior to or upon execution of the Agreement.

1. **No Limitation of Rights**

The rights and remedies of the State provided in this Article are in addition to and do not limit any rights afforded to the State by any other Article or section of the Agreement. The warranties specified in this section shall be in addition to the warranties made by Contractor elsewhere in this Agreement.

**Article XVI. Disaster Recovery Plan**

The Contractor must have in place its comprehensive Business Continuity Plan, as necessary and in the manner agreed upon, which provides alternative arrangements for all Services in the event of a short-term business interruption and/or long term loss of performance capability.

Contractor shall as soon as possible but no later than twenty-four (24) hours after the occurrence of an event requiring activation of its Disaster Recovery Plan, inform the State that its Disaster Recovery Plan has been activated. At that time, Contractor shall provide the State with a description of the nature and extent of the disaster, an assessment of the impact on all Services provided pursuant to the Agreement, and a description of the specific recovery actions with their associated timeframes which have been or will be taken as part of its Disaster Recovery Plan. Contractor will provide appropriate periodic updates of the recovery process as required by the State.

The RPSv5 System will be hosted at NYS’s Data Center. NYS has its own Disaster Recovery process, policies and procedures. The RPSv5 System will be incorporated into the State’s Disaster Recovery plan, therefore the Contractor must provide the State with all related Disaster Recovery Documentation which will be necessary for the State’s use to incorporate the RPSv5 System into its Disaster Recovery process.

**Article XVII: Tax Secrecy, Confidentiality and Information Security Breach Notification**

1. **Tax Secrecy-Required Forms**

The Contractor will require each employee and/or subcontractor assigned to this Agreement to sign form **DTF-202 Agreement to Adhere to the Secrecy Provisions of the Tax Law and the Internal Revenue Code** as set forth in **Attachment 12** of the RFP; and form **Acknowledgment of Confidentiality of IRS Tax Return Information and Internal Revenue Code Selected Confidentiality Provisions Pertaining to Contractors** as set forth in **Attachment 13** of the RFP. The form **Acknowledgment of Confidentiality of IRS Tax Return Information and Internal Revenue Code Selected Confidentiality Provisions Pertaining to Contractors** must be signed annually. Both forms will be retained by the Contractor and a copy provided to the Department. The Contractor shall complete the Department’s Annual Security Awareness Training on the Department’s website at <http://www.tax.ny.gov/about/procure>.

1. **New York State Tax Secrecy Provisions**

The various secrecy provisions of the Tax Law (e.g., Tax Law § 697 (e) and 1825) prohibit independent Contractors from disclosing tax information in any manner and provide for misdemeanor prosecution for violations. The secrecy provisions of the Internal Revenue Code (26 USC § 6103) provide for felony prosecution for unauthorized disclosure of Federal tax information in the possession of the Department.

All other information about the Department's operations not covered by the preceding provisions of law must be kept confidential as if it were so covered. Contractor representatives must comply with the administrative procedures enforcing these rules.

The Contractor, all staff members and subcontractors shall agree to view, access and use only that confidential information relevant and necessary to provide the System and Services to the State under the Agreement; and to subscribe to the provisions of § 73 and 74 the Public Officers Law.

1. **Federal Secrecy Provisions**

**I. PERFORMANCE**

In performance of this Agreement, the Contractor agrees to comply with and assume responsibility for compliance by his or her employees with the following requirements:

1. All work will be done under the supervision of the Contractor or the Contractor's employees.
2. Any return or return information made available in any format shall be used only for the purpose of carrying out the provisions of this Contract. Information contained in such material will be treated as confidential and will not be divulged or made known in any manner to any person except as may be necessary in the performance of this Contract. Disclosure to anyone other than an officer or employee of the Contractor will be prohibited.
3. All returns and return information will be accounted for upon receipt and properly stored before, during, and after processing. In addition, all related output will be given the same level of protection as required for the source material.
4. The Contractor certifies that the data processed during the performance of this Agreement will be completely purged from all data storage components of his or her computer facility, and no output will be retained by the Contractor at the time the work is completed. If immediate purging of all data storage components is not possible, the Contractor certifies that any IRS data remaining in any storage component will be safeguarded to prevent unauthorized disclosures.
5. Any spoilage or any intermediate hard copy printout that may result during the processing of IRS data will be given to the agency or his or her designee. When this is not possible, the Contractor will be responsible for the destruction of the spoilage or any intermediate hard copy printouts, and will provide the agency or his or her designee with a statement containing the date of destruction, description of material destroyed, and the method used.
6. All computer systems receiving, processing, storing or transmitting Federal Tax Information (FTI) must meet the requirements defined in IRS Publication 1075. To meet functional and assurance requirements, the security features of the environment must provide for the managerial, operational, and technical controls. All security features must be available and activated to protect against unauthorized use of and access to Federal Tax Information.
7. No work involving Federal Tax Information furnished under this Agreement will be subcontracted without prior written approval of the IRS.
8. The Contractor will maintain a list of employees authorized access. Such list will be provided to the agency and, upon request, to the IRS reviewing office.
9. The agency will have the right to void the Agreement if the Contractor fails to provide the safeguards described above.

**II. CRIMINAL/CIVIL SANCTIONS**

1. Each officer or employee of any person to whom returns or return information is or may be disclosed will be notified in writing by such person that returns or return information disclosed to such officer or employee can be used only for a purpose and to the extent authorized herein, and that further disclosure of any such returns or return information for a purpose or to an extent unauthorized herein constitutes a felony punishable upon conviction by a fine of as much as $5,000 or imprisonment for as long as 5 years, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized further disclosure of returns or return information may also result in an award of civil damages against the officer or employee in an amount not less than $1,000 with respect to each instance of unauthorized disclosure. These penalties are prescribed by IRCs 7213 and 7431 and set forth at 26 CFR 301.6103(n)-1.
2. Each officer or employee of any person to whom returns or return information is or may be disclosed shall be notified in writing by such person that any return or return information made available in any format shall be used only for the purpose of carrying out the provisions of this Agreement. Information contained in such material shall be treated as confidential and shall not be divulged or made known in any manner to any person except as may be necessary in the performance of the Agreement. Inspection by or disclosure to anyone without an official need-to-know constitutes a criminal misdemeanor punishable upon conviction by a fine of as much as $1,000 or imprisonment for as long as 1 year, or both, together with the costs of prosecution. Such person shall also notify each such officer and employee that any such unauthorized inspection or disclosure of returns or return information may also result in an award of civil damages against the officer or employee [United States for Federal employees] in an amount equal to the sum of the greater of $1,000 for each act of unauthorized inspection or disclosure with respect to which such defendant is found liable or the sum of the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure plus in the case of a willful inspection or disclosure which is the result of gross negligence, punitive damages, plus the costs of the action. These penalties are prescribed by IRC 7213A and 7431.
3. Additionally, it is incumbent upon the Contractor to inform its officers and employees of the penalties for improper disclosure imposed by the Privacy Act of 1974, 5 U.S.C. 552a. Specifically, 5 U.S.C. 552a(i)(1), which is made applicable to contractors by 5 U.S.C. 552a(m)(1), provides that any officer or employee of a contractor, who by virtue of his/her employment or official position, has possession of or access to agency records which contain individually identifiable information, the disclosure of which is prohibited by the Privacy Act or regulations established thereunder, and who knowing that disclosure of the specific material is prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.
4. Granting a contractor access to FTI must be preceded by certifying that each individual understands the agency’s security policy and procedures for safeguarding IRS information. Contractors must maintain their authorization to access FTI through annual recertification. The initial certification and recertification must be documented and placed in the agency's files for review. As part of the certification and at least annually afterwards, contractors must be advised of the provisions of IRCs 7431, 7213, and 7213A (see Exhibit 4, *Sanctions for Unauthorized Disclosure*, and Exhibit 5, *Civil Damages for Unauthorized Disclosure of IRS Publication 1075*). The training provided before the initial certification and annually thereafter must also cover the incident response policy and procedure for reporting unauthorized disclosures and data breaches. (See Section 10 of IRS Publication 1075). For both the initial certification and the annual certification, the contractor must sign, either with ink or electronic signature, a confidentiality statement certifying their understanding of the security requirements.
   * 1. **INSPECTION**

The IRS and the Agency shall have the right to send its officers and employees into the offices and plants of the Contractor for inspection of the facilities and operations provided for the performance of any work under this Agreement. On the basis of such inspection, specific measures may be required in cases where the contractor is found to be noncompliant with contract safeguards.

1. **Breach of Confidentiality Provisions**

The Contractor, through its employees and agents, may have access to tax secret and other confidential and/or proprietary information and materials of the State and tax secret and other confidential and/or proprietary information and materials of third parties rightfully in the State’s possession (“confidential information”). Contractor shall maintain all such information in confidence for the sole and exclusive benefit of the State, and shall not use same for any purpose whatsoever other than rendering services to the State. Contractor shall execute, and shall cause its employees and agents having access to such confidential information to execute, confidentiality agreements in such form as the State may reasonably request.

The Contractor shall be fully liable for breach of the confidentiality provisions of this Agreement in an amount not to exceed the amount allowed by applicable Federal or New York State law (including any damages construed as incidental, consequential or indirect damages). Liability limitations set forth in this Agreement shall not apply to breaches involving Contractor’s confidentiality obligations.

1. **Information Security Breach and Notification Act**

Contractor agrees to be responsible for the Department’s obligation to comply with the provisions of Section 208 of the State Technology Law,, commonly known as the Information Security Breach and Notification Act (the “ISBNA” or “Act”), and any future amendments thereto, to the extent an information security breach occurs as a result of the acts or omissions of the Contractor, including being responsible to pay all costs associated with and/or incurred because of the breach.. Contractor shall comply with all obligations imposed by the Act on the Department with respect to any breach of “private information” (as defined in the Act) used, received, handled, processed, uploaded, stored, or maintained by Contractor on behalf of the Department under this Agreement (“Department Information”). In the event of a “breach of the security of the system” (as defined by the Act), Contractor shall immediately notify the Department upon Contractor’s discovery or receipt of notification of such breach. Such notice to the Department shall be made by contacting the Information Security Office by email to: [ISO.Mail@tax.ny.gov](mailto:ISO.Mail@tax.ny.gov). Contractor shall immediately commence an investigation, in cooperation with the Department, to determine the scope of the breach and to restore the security of the system. To the extent the Department determines that further notifications are required to be sent out pursuant to the Act, Contractor shall be responsible for providing such notifications to all required recipients including, in accordance with New York State policy NYS-PO3-002, non-New York State residents whose private information is reasonably believed to have been exposed as a result of the breach. All costs associated with providing breach notifications shall be borne by the Contractor. It is expressly agreed that Contractor shall be obligated to receive authorization from the Department prior to making additional notifications hereunder to any individuals, the State Office of Information Technology Services, the State Consumer Protection Board, the Attorney General’s Office or any consumer reporting agencies of a breach of the security of the system, or concerning making any determination to delay notifications due to law enforcement investigations. Contractor agrees that the Department shall have final approval over the form, content, mode of transmission, and timing of any notice to be provided concerning a breach of the security of the Department Information. Nothing contained herein shall be interpreted as reducing or altering Contractor’s own obligations under section 899-aa of the General Business Law if such breach also involves other private information unrelated to this Agreement.

**Article XVIII. Ownership and Return of the State’s Data**

The State retains sole ownership and intellectual property rights in and to all information, data, databases, data compilations, reports, charts, graphs, diagrams, or other information provided or made accessible by the State to the Contractor, or created by the Contractor pursuant to the Agreement. The Contractor shall not copy or use such records except to carry out contracted work under the terms herein, and shall not transfer nor display such records to any other party not involved in the performance of this Agreement. The Contractor does not have the right to retain such data.

The Contractor must, during the term of the Agreement (including any extensions and/or transition or disengagement), provide the State with access to any such data maintained by the Contractor. The Contractor must, in accordance with applicable law and the instructions of the State, exercise due care for the protection of such data, and maintain appropriate data integrity safeguards against the deletion or alteration of the data.

Contractor will destroy or return all data and records to the State upon completion of the work hereunder. Promptly after the termination or expiration of the Agreement, the Contractor shall, at no cost to the State, perform the following actions with respect to such data: (i) transmit the data to the State or its designee(s) in a format that is easily usable by the State or its designee(s) and does not contain any proprietary software or other materials of Contractor or third parties; (ii) destroy the data and any copies, extracts, descriptions, and summaries thereof contained in the Contractor’s records or systems; and (iii) provide the State with a written certification of such destruction executed, under penalty of perjury, by an Officer of the Contractor.

**Article XIX. Security**

The Contractor must ensure that all Deliverables and the System comply with New York State Information Technology Services Secure System Development Lifecycle (SSDLC) Standard, the New York State Secure System Development Life Cycle Roadmap, and the Enterprise Secure Coding Standard. In addition, the following specific requirements must be met.

1. **Security Review and Report**
   1. Independent Review

Contractor shall have the System reviewed and approved for security flaws by an independent organization that specializes in application security, at Contractor’s expense, prior to production deployment. The independent organization must provide a copy of the report to the State. Contractor shall obtain the State’s approval of the independent organization prior to the review.

* 1. Review Coverage

Security review shall cover all aspects of the System delivered, including third-party modules, units, integration points, components, and libraries.

* 1. Scope of Review

At a minimum, the review shall cover all software vulnerabilities. The review shall include a combination of requirements validation, vulnerability scanning, penetration testing, and static analysis of the source code, with the results to be provided to the State upon request.

* 1. Issues Discovered

Overall System security ratings with aggregate number of flaws found will be reported to both the State and the Contractor. Detailed reports of specific vulnerability instances within the System will only be provided to the Contractor.

1. **Security Issue Management**
2. Identification

Contractor shall track all security issues uncovered during the security review and the entire development life cycle, whether a requirements, design, implementation, testing, deployment, or operational issue. The risk associated with each security issue will be evaluated and documented.

1. Remediation

Security issues that are identified before Acceptance of the System shall be fixed by the Contractor. Security issues discovered after Acceptance of the System shall be handled in accordance with the applicable change management and Maintenance terms.

1. **Security Approval and Maintenance**
2. Approval

The System shall not be Finally Accepted by the State, until the security review is completed and its results approved by the State and all security issues have been resolved or remediated to the satisfaction of the State. Security issues discovered post Acceptance shall be handled in accordance with the applicable change management and Maintenance terms.

1. Investigation and Resolution of Security Issues post Acceptance

Post Acceptance, if security issues are discovered or reasonably suspected, Contractor shall assist State in performing an investigation to determine the nature of the issue(s).

The issue shall be considered "novel" if it is not covered by the security requirements and is outside the scope of requirements validation, vulnerability scanning, penetration testing and static analysis of the source code.

If novel, Contractor and State agree to scope the effort required to resolve the novel security issue(s), and to negotiate in good faith to achieve an agreement to perform the required work to address them. If not novel, Contractor shall use all industry reasonable efforts consistent with sound software development practices, taking into account the severity of the risk, to resolve all security issues not considered novel as quickly as possible.

1. **Assurance**
2. No Malicious Code

Contractor represents and warrants that the Solution shall be free from all forms of malicious or harmful code including, but not limited to, computer viruses, worms, time bombs back doors and Trojan horses.

1. Certification

Upon final delivery of the System the Contractor shall demonstrate and certify to the State in writing that the Contractor complied with its secure coding policy, submitted with its proposal, in the performance of its obligations under the Agreement. The Contractor shall also certify that all security activities have been performed, and all identified security issues have been documented and resolved. Any exceptions to the certification status shall be fully documented with the delivery.

1. **Training and Background Investigation**
2. Security Training

Contractor will be responsible for verifying that all members of the developer team have been trained in secure coding techniques.

1. Trustworthy Developers

Contractor agrees to perform appropriate background investigation of all development team members.

**Article XX. Reserved Rights**

In addition to its other rights under this Agreement, the State reserves the following rights:

1. To require the removal of any Contractor staff assigned to this project for work related cause upon written notification to the Contractor. Such notification shall set forth the reasons for the request for removal. In such event, Contractor shall promptly provide a substitution.
2. To request a copy of Federal Form I-9, Employment Eligibility Verification, for each individual assigned to work under this Agreement, if the Contractor is so legally obligated to obtain and retain such Form I-9. The social security number of the employee, if listed on Form I-9, shall be redacted from the form.
3. In the State’s sole discretion, to allow extra time for the delivery of a Deliverable, without waiver of, or prejudice to, any of its rights.
4. To terminate the Agreement should the Contractor not cooperate with a State investigation. This includes, but is not limited to, not providing immediate and unfettered access to personnel and records relating to the Agreement.
5. To terminate the Agreement if the Contractor does not resolve a conflict of interest to the State’s satisfaction.
6. To perform its own independent application security review in addition to the Contractor obtained review.

**Article XXI. Remedies**

1. **Cover/Substitute Services**

Should Contractor’s performance of the Agreement fail to meet any Requirement or Specification and such failure, remaining uncured, materially interferes with the State’s ability to utilize the Product(s) and/or System for the purposes contemplated by the RFP such that the State declares a Material Breach and terminates the Services of Contractor, the State shall be entitled to immediately obtain cover, e.g., substitute Services and/or Product(s) at Contractor’s expense from a third party and/or to perform services in-house to cure such failure(s). After substitution, and completion of the System, the State shall certify the expenses incurred.   If the expenses incurred exceed the total sum payable under this Agreement had it been fully performed and satisfactorily completed by the Contractor, such excess expenses shall be promptly paid by the Contractor to the State upon demand by the State.  Liability limitations, if any, set forth in this Agreement shall not apply to the State’s ability to recover under this provision.

1. **Remedial Action**

If the State informs Contractor of a Deficiency, the following shall occur at no additional cost to the State:

* 1. If requested by the Department, representatives from both Parties shall meet promptly to determine in good faith the appropriate actions to be taken and resources to be committed by Contractor to correct the Deficiency.
  2. Contractor shall, in good faith, follow specific conditions provided by the State to correct the Deficiency.
  3. Contractor shall commit the resources necessary to correct such Deficiency expeditiously.
  4. Contractor shall provide to the State complete and accurate written status reports and action plans concerning the Deficiency as often as required by the State.

If Contractor fails to cooperate with the State or to remedy a Deficiency to the State’s satisfaction then the State may invoke any and all remedies provided in this Agreement, including declaring a Material Breach and terminating the Agreement.

1. **Notice of Deficiency**

In the event of Contractor’s Material Breach or failure to meet any Deliverable, Finalized Project Timeline deadline, Requirement or Specification, the State may issue a written Notice of Deficiency which may or may not provide the Contractor with a Cure Period.

If any identified Deficiency or Material Breach is not resolved to the satisfaction of the State during an applicable Cure Period, the State may decide, in its sole discretion, to provide the Contractor with additional time to cure the Deficiency or Material Breach, or to terminate the Agreement.

1. **Dispute Resolution**

In the event of a dispute arising from this Agreement, the State and its Authorized User(s) shall continue to be able to use the Product(s) under the terms and conditions herein while the dispute is resolved. The Contractor and the State agree that it is important to resolve any disputes regarding the performance of Services, or otherwise arising under the Agreement, expeditiously.

The first step of Dispute Resolution will be through conference between the State and the Contractor. The party initiating the process shall notify the other party in writing and set forth the issues for resolution and provide all necessary documentation. The Parties shall review each other’s position and attempt to reach a resolution. Unresolved disputes will be resolved by the Commissioner, or his/her designee, whose decision is final and binding. During this period all work required hereunder shall continue to be performed. If the Contractor pursues any legal remedy outside this process, the Contractor will continue to perform work in accordance with the Agreement and the direction of the State until such proceedings may be concluded and Contractor will continue to be paid, less an amount determined by the State to be attributable to the disputed work. Disputes that go to litigation must be pursued in a court of competent jurisdiction within the State of New York. New York law (without regard to conflicts of law provisions) will govern the dispute. Nothing in this paragraph shall diminish the State’s right to terminate the Agreement.

**IN ACCORDANCE WITH THE MANDATORY REQUIREMENTS OF RFP 15-08, CONTRACTOR EXPRESSLY AGREES THAT THE REMEDIES FOR ALL DAMAGES FOR BREACH OF THE AGREEMENT AND/OR LICENSE TERMS SHALL BE EXCLUSIVELY AT LAW, EXCEPT THAT BIDDER SHALL HAVE THE RIGHT TO SEEK INJUNCTIVE RELIEF ONLY FOR THE PURPOSES OF PREVENTING OR SEEKING TO PREVENT THE STATE FROM PUBLISHING ANY CONTRACTOR OWNED INTELLECTUAL PROPERTY**

**Article XXII. Termination/ Stop Work Order**

1. **Termination for Cause (Material Breach)**

The State, in its sole discretion, may terminate the Agreement in the event of a Material Breach. Such termination shall not give rise to any cause of action against the State for damages, loss of profits, expenses, or other remuneration of any kind. The Contractor shall be fully liable for the State’s damages resulting from such Material Breach, and shall be responsible for all additional costs the State incurs should the State terminate the Agreement. Without limiting the foregoing, this includes costs incurred by the State in engaging a new contractor or completing the Deliverables “in-house.” If termination occurs during the Maintenance period(s), the Contractor will reimburse the State for the prorated unused portion of Maintenance.

**Examples of Material Breach include, but are not limited to, the following:**

1. Failure of Contractor to achieve Acceptance on any Deliverable or to meet date(s) as set forth in the Finalized Project Timeline.
2. Significant and/or repeated failure of Contractor to comply with its obligations under the Agreement.
3. Failure of Contractor to maintain financial stability as set forth under the Agreement such that the State can reasonably expect Contractor to not satisfactorily perform their respective obligations through the term of this Agreement and which, are of a material nature and directly and negatively impact the Product(s), System or Services. Contractor may be provided with an opportunity to demonstrate that it has restored its financial stability, and/or has obtained sufficient resources to continue to perform through the term of this Agreement.
4. Breach of a material term or condition of any subcontract by Contractor or the Subcontractor, if such breach materially impairs Contractor's performance under this Agreement with the reasonable likelihood that a Material Breach will occur.
5. Failure of Contractor to maintain the confidentiality of information and/or security of data owned by the State, taxpayer data or tax administration policies and procedures as set forth in the Agreement. However, isolated acts of individual employees do not constitute a Material Breach, unless Contractor has failed to adequately inform such individuals of the State’s confidentiality and security requirements as set forth in the Agreement.
6. Failure of Contractor to implement Disaster Recovery or Business Continuity services, within a reasonable period of time, in the event of a disaster or material business interruption affecting the subject matter of the Agreement.
7. Failure of Contractor to correct an infringement of an Intellectual Property right, when such failure materially impairs Contractor's ability to perform in accordance with the terms of this Agreement.
8. Significant and/or repeated failure of Contractor to continue to provide all required Services during an extension or transition period following expiration, or termination of this Agreement.
9. Failure of Contractor to cooperate fully with the State and/or its agents and/or OSC, to the extent required under this Agreement.
10. Failure of Contractor to remain a responsible Contractor consistent with applicable New York State Law, regulations and/or Executive policy.
11. A finding that the certification filed by the Contractor in accordance with Section 5-a of the Tax Law was intentionally false or intentionally incomplete.
12. A finding that the certification filed by the Contractor in accordance with Procurement Lobbying Law was intentionally false or intentionally incomplete.
13. A finding that the information filed by the Contractor in accordance with the requirements for Vendor Responsibility is incomplete, untrue or inaccurate or that the Contractor has failed to comply with the Vendor Responsibility provisions of the Agreement.
14. Contractor’s breach of any warranty or representation under the Agreement, which remains uncured.

**Note**-If it is subsequently determined for any reason that the Contractor was not in Material Breach or that the Contractor’s failure to perform or make progress in performance was due to causes beyond the control and without the fault or negligence of the Contractor, the State shall have the option, at its sole discretion, to either deem the Termination for Cause to have been issued as a Termination for Convenience, or to allow the Contractor to resume performance under the Agreement.

1. **Refund Upon Termination**

Upon termination of the Agreement for Cause, the State will notify the Contractor that it intends to:

* + - 1. accept the System as incomplete at a reduced price reflecting the reduced value to the State, which price will be negotiated between the Parties, or
      2. reject the System in whole or in part and terminate all or part of the Services under the Agreement for Cause. To the extent the System is rejected pursuant to this subsection, the State is not obligated to pay for the rejected System or any component Deliverables, and the Contractor shall refund to the State all prior payments associated with such rejected Deliverables and COTS payments.

1. **Termination for Convenience**

The State may terminate this Agreement in whole or in part without reason at any time for convenience upon 30 days’ written notice to the Contractor, without penalty or other early termination charges due. This provision should not be understood as waiving the State’s right to terminate the Agreement for Cause or to require the Contractor to stop work immediately for unsatisfactory performance, but is supplementary to those provisions.

1. **Notice of Termination; Cooperation**

In the event of termination of the Agreement by the State, the State will issue a written Notice of Termination, addressed to the person and in a manner provided for in the Notices section of the Agreement. The Parties agree to cooperate in a manner to effect an orderly termination of the Agreement.

1. **Transition Plan**

Within thirty (30) calendar days of receipt of a Notice of Termination, or at the end of the Agreement term, the Contractor shall provide the State with a written plan for orderly transition. The plan shall outline tasks necessary to accomplish a smooth transition of the System and associated work to the State or, if necessary, to a successor contractor. The Transition Plan shall include all other information mutually agreed upon by the Parties. If the State instructs the Contractor to purge any data in Contractor’s possession, such purge shall be performed at no additional cost to the State, and an Officer of the Contractor will certify subsequent to the data purge, under penalty of perjury, that all data has been purged in accordance with the requirements of this Agreement.

**F.** **Stop Work Order**

The State may, in its sole discretion, at any time issue a written order to Contractor, requiring Contractor to stop performing all, or any part, of the work required under the Agreement (a “Stop Work Order”) for a period of up to ninety (90) days from the date specified in the Stop Work Order, and for any further period to which the Parties may agree (Stop Work Period).

Upon receipt of a Stop Work Order, Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs during the Stop Work Period allocable to the work covered by the Stop Work Order. Within the Stop Work Period, the State shall either:

* 1. by written order cancel the Stop Work Order and instruct the Contractor to resume work at the end of the Stop Work Period or on such other date specified therein; or
  2. terminate the work covered by the Stop Work Order in accordance with the termination provisions of this Agreement.

If the State takes action under paragraph (i), Contractor shall resume work as ordered by the State, and the State shall grant Contractor an extension of time for the completion of the work required by the Agreement, which shall be at least as long as the period of time during which work was stopped, but may at the State’s discretion be longer if Contractor can demonstrate that the Stop Work Order resulted in the need for an increase in time to complete any work required by the Agreement.

**Article XXIII.**  **Indemnification Provisions and Limitation of Liability**

1. **Indemnification**

Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully defend, indemnify and hold harmless the State and its officers, commissioners, employees, representatives, and agents from all suits, actions, damages and costs 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 Agreement, without limitation; provided, however, that the Contractor shall not indemnify to the extent any claim, loss or damage arising hereunder is solely due to the negligent act, failure to act, gross negligence or willful misconduct of the State.

The State 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 the State, (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. The Contractor agrees to cooperate fully with the Attorney General in the defense of such action. 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 any action or proceeding at law or in equity is commenced against the State arising out of a claim for death, personal injury or damage to real or personal tangible property caused by an 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 or Services performed under this Agreement, and 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 the Agreement, Contractor shall immediately notify the State 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 Agreement and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event attempt to secure a continuance to permit the State to appear and defend its interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State 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.

**B. Indemnification Relating to Infringement**

The Contractor will defend, indemnify and hold the State and its officers, commissioners, employees, representatives, and agents harmless from and against any and all damages, expenses (including reasonable attorneys’ fees), claims, judgments, liabilities and costs in any action for infringement of a patent, copyright, trademark, trade secret or other proprietary right provided: (i) such claim arises solely out of the Products or Services as supplied by the Contractor, and not out of any modification to the Products made by the State or by someone other than the Contractor at the direction of the State without Contractor’s approval, and (ii) the State gives Contractor prompt written notice of any such action, claim, suit, or threat of suit alleging infringement.

The State shall give Contractor the opportunity to take over, settle or defend such action, claim or suit at Contractor’s sole expense, and the State will provide assistance in the defense of any such action, claim or suit at the expense of Contractor.

Such indemnity shall only be applicable in the event of claims, judgments, liabilities and/or costs that may be finally assessed against the State in any action for infringement of a patent, or of any copyright, trademark, trade secret or other third party proprietary right except to the extent such claims, judgments, liabilities and/or costs arise solely from the State’s negligent act, failure to act, gross negligence or willful misconduct.

Where a dispute or claim arises relative to a real or anticipated infringement, the State may require the Contractor, at its sole expense, to submit such information and documentation, including formal patent attorney opinions, as the State shall require. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense when it determines there is an issue involving a significant public interest.

If any claim is brought against the State for the unauthorized use of such Product, information, service or thing, the Contractor will indemnify the State for any expense due to such claim and will cooperate with the State and the Attorney General in the defense of that claim.

If use of any Contractor provided Product(s), Deliverable or part(s) thereof, shall be enjoined for any reason, or if the Contractor believes that such Product(s), Deliverable or part(s) thereof 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 the State the right to continue using such Product(s), Deliverable or part(s) thereof, as applicable; (ii) to modify the Service, Product(s) or Deliverable so that usage becomes non-infringing, and is of at least equal quality and performance; (iii) to replace said Product(s) or Deliverable(s) or part(s) thereof, as applicable, with a non-infringing Product(s) or Deliverable(s) of at least equal quality and performance; or (iv) if none of the foregoing is commercially reasonable, then the State agrees to return the Product(s) or Deliverable(s) (or part thereof) and Contractor shall provide monetary compensation to the State for its inability to continue to use the affected Product(s) or Deliverable(s) (or part thereof).

In the event that any action or proceeding at law or in equity is commenced against the State arising out of a claim that the State’s use of the Product(s) under the Agreement infringes any patent, copyright, trademark, trade secret or proprietary right, and 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 the Agreement, Contractor shall immediately notify the State 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 Agreement and to what extent it is not so obligated to defend and indemnify. Contractor shall in such event protect the interests of the State and seek to secure a continuance to permit the State to appear and defend its interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State may have. This constitutes the State’s sole and exclusive remedy for patent infringement, or for infringement of any other third party proprietary right.

**C. Limitation of Liability**

Except as otherwise provided in this Agreement, and as set forth in the Indemnification and Indemnification Relating to Infringement paragraphs above, the limit of liability shall be as follows:

1. Contractor’s liability for any claim, loss or liability arising out of, or connected with Contractor’s Products or performance of this Agreement, 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 the amount of two times the total value of this Agreement, as set forth in the Contractor’s Financial Response Form, Attachment 19; provided, however, that such dollar limitation shall not apply to damages resulting from Contractor's (i) willful, malicious, intentional misconduct, (ii) intentional tortious conduct, or (iii) gross negligence.

2. In the event of termination and/or cancellation of the Agreement, the State will not be liable for damages, loss of profits, expenses, specific performance or remuneration for future performance of any kind.

3. Neither the Contractor nor the State shall be liable for any consequential, indirect or special damages of any kind which may result directly or indirectly in connection with the performance of this Agreement, including, without limitation, damages resulting from loss of use or loss of profit by the State, the Contractor, or others.

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.

**D. Force Majeure**

Neither the State nor the Contractor shall be responsible to the other for a delay resulting from its failure to perform if neither the fault nor negligence of the State or the Contractor, it officers, employees or agents contributed to such delay and the delay is due directly to acts of God, wars, acts of public enemies, strikes, fire or floods, or other similar causes beyond the control of either party, or for any of the foregoing which affects subcontractors or suppliers and no alternate source of supply is available to the Contractor. In such event, the aggrieved party shall notify the other party, by certified or registered mail, of the delay or potential delay and the cause(s) thereof either (a) within ten calendar days after the cause which creates or will create the delay first arose if the aggrieved party could reasonably foresee that a delay could occur by reason thereof, or (b) if the delay is not reasonably foreseeable, within five calendar days after the date the aggrieved party first had reason to believe that a delay could result. The foregoing shall constitute the aggrieved party’s sole remedy or excuse with respect to such delay. In the event performance is suspended or delayed in whole or in part, by reason of any of the aforesaid causes or occurrences and proper notification is given to the other party, any performance so suspended or delayed shall be performed by the Contractor at no increased cost, promptly after such disabilities have ceased to exist unless it is determined in the sole discretion of the State that the delay will significantly impair the value of the Agreement to the State. In the event of such determination, the State may immediately terminate the Agreement with written notice.

**Article XXIV. Insurance**

The Contractor shall be required to procure, at its sole cost and expense, insurance as set forth below.

The Contractor shall be required to provide proof of compliance with the requirements of this section, as follows:

* Proof of Workers’ Compensation and Disability Benefits Insurance shall be provided at the time of bid submission;
* Proof of all other insurance shall be provided within twenty (20) business days of tentative award, or at request of the State, but in all events prior to commencement of Services under the Agreement;
* After award, the Contractor shall be required to provide proof of all insurance within three (3) days of request or as otherwise required in this section.

During the term of the Agreement, the Contractor shall maintain in force, at its sole cost and expense policies of insurance as set forth below. All insurance shall be written by companies licensed or authorized by the New York State Department of Financial Services (NYSDFS) to issue insurance in the State of New York and that have an A.M. Best Company rating of “A-,” Class “VII” or better. If, during the term of a policy, the carrier’s A.M. Best rating falls below “A-,” Class “VII,” the insurance must be replaced, on or before the renewal date of the policy, with an insurer licensed or authorized by the NYSDFS to issue insurance in the State of New York and rated at least “A-” Class “VII” in the most recently published Best’s Insurance Report.

The Contractor shall deliver to the State evidence of the insurance required by this section in a form acceptable to the State. Policies must be written in accordance with the requirements of the paragraphs below, as applicable. Acceptance and/or approval by the State does not, and shall not be construed to, relieve the Contractor of any obligations, responsibilities or liabilities under this Agreement.

The Contractor shall not take any action, or omit to take any action that would suspend or invalidate any of the insurance coverages during the term of this Agreement.

**General Conditions**

1. ***Conditions Applicable to Insurance.*** All policies of insurance required by this section shall comply with the following:
2. ***Coverage Types and Policy Limits.*** The types of coverage and policy limits required from the Contractor are specified below in Paragraph B-*Insurance Coverage/Limits.*
3. ***Policy Forms.*** Except as otherwise specifically provided herein, or agreed to in writing by the State, all policies of insurance required by this section shall be written on an occurrence basis.
4. ***Certificate of Insurance/Notices.*** The Contractor shall provide the State with a Certificate or Certificates of Insurance, in a form satisfactory to the State (i.e., an ACORD certificate), within twenty (20) business days of tentative award, or at the request of the State, but in all events prior to commencement of Services under the Agreement, and thereafter, within thirty (30) days after renewal or within three (3) business days of a request from the State therefor. Certificates shall reference the Agreement number and shall name the New York State Department of Taxation and Finance, Procurement Services, Building 9, W.A. Harriman State Office Campus, 12227, and the New York State Office of Information Technology Services, Empire State Plaza, Swan Street, Core 4, Floor 2, Contracts and Procurement, Albany, NY 12223 as the certificate holders.

Policies shall be written so as to include the requirements for notice of cancellation contained in the New York State Insurance Law. The Contractor shall provide the State with a copy of any written notice of cancellation or non-renewal received from an insurer along with proof of replacement coverage that complies with the requirements of this section within ten (10) business days of Contractor’s receipt.

Certificates of Insurance shall:

* Disclose any deductible, self-insured retention, aggregate limit or exclusion to the policy that materially changes the coverage required by this Agreement.
* Refer to this Agreement by the contract number assigned to it;
* Be signed by an authorized representative of the referenced insurance carriers; and
* Contain the following language in the Description of Operations/Locations/Vehicles section: The People of the State of New York, the New York State Department of Taxation and Finance, the New York State Office of Information Technology Services, and any entity authorized by the Agreement, law or regulation to use any Deliverable under this Agreement and their officers, agents, and employees are included as an additional insured on endorsement CG 20 10 11 85 (or endorsements that provide equivalent coverage), General liability coverage is provided on Commercial General Liability Coverage Form CG 00 01 01 (or a form that provides equivalent coverage).  Insurance is primary and non-contributory to other insurance available to the People of the State of New York, the New York State Department of Taxation and Finance, the New York State Office of Information Technology Services, and any entity authorized by the Agreement, law or regulation to use any Deliverable under this Agreement and their officers, agents, and employees.  A waiver of subrogation is granted in favor of The People of the State of New York, the New York State Department of Taxation and Finance, the New York State Office of Information Technology Services, and any entity authorized by the Agreement, law or regulation to use any Deliverable under this Agreement and their officers, agents, and employees.

Only original documents (an ACORD Certificate and any endorsements and other attachments) or electronic versions of the same that can be directly traced back to the insurer, agent or broker via e-mail distribution or similar means will be accepted.

The State has not requested the Contractor to submit copies of their entire insurance policies.  Generally, the State only requests specific documentation regarding proof of insurance coverage, such as an ACORD form and endorsements.   The Contractor is requested to refrain from submitting entire insurance policies, unless specifically requested by the State.  If an entire insurance policy is submitted but not requested, the State shall not be obligated to review and shall not be chargeable with knowledge of its contents.  In addition, submission of an entire insurance policy not requested by the State does not constitute proof of compliance with the insurance requirements and does not discharge Contractor from submitting the requested insurance documentation.

1. ***Primary Coverage.*** All insurance policies shall provide that the required coverage shall be primary and non-contributory to other insurance available to the People of the State of New York, the New York State Department of Taxation and Finance, the New York State Office of Information Technology Services, and any entity authorized by the Agreement, law or regulation to use any Deliverable under this Agreement and their officers, agents, and employees.  Any other insurance maintained by the People of the State of New York, the New York State Department of Taxation and Finance, the New York State Office of Information Technology Services, and any entity authorized by this Agreement, law or regulation to use any Deliverables under from this Agreement and their officers, agents, and employees shall be in excess of and shall not contribute with the Contractor’s insurance.
2. ***Breach for Lack of Proof of Coverage.*** The term of the Agreement shall not commence if the coverage provisions and limits of the policies provided by the Contractor do not meet the provisions of this section or proof of compliance is not provided to the State. In addition, the failure to comply with this section at any time during the term of any Agreement shall be considered a breach of the terms of the Agreement and shall allow the State to avail itself of all remedies available under the Agreement or at law or in equity.
3. ***Self-Insured Retention/Deductibles.*** Certificates of Insurance must indicate the applicable deductibles/self-insured retentions for each listed policy. Deductibles or self-insured retentions above $100,000.00 are subject to approval from the State. Such approval shall not be unreasonably withheld, conditioned or delayed. The Contractor shall be solely responsible for all claim expenses and loss payments with the deductibles or self-insured retentions.
4. ***Subcontractors.*** Prior to the commencement of any work by a subcontractor, the Contractor shall require such subcontractor to procure policies of insurance as required by this section and maintain the same in force during the term of any work performed by that subcontractor.
5. ***Waiver of Subrogation.*** For the Commercial General Liability Insurance and Comprehensive Business Automobile Liability Insurance required below, the Contractor shall cause to be included in each of its policies a waiver of the insurer’s right to recovery or subrogation against the People of the State of New York, the New York State Department of Taxation and Finance, the New York State Office of Information Technology Services, and any entity authorized by the Agreement, law or regulation to use any Deliverable under this Agreement and their officers, agents, and employees. A Waiver of Subrogation Endorsement evidencing such coverage shall be provided to the State within three (3) days of request.
6. ***Additional Insured.*** For the Commercial General Liability Insurance and Comprehensive Business Automobile Liability Insurance required below, the Contractor shall cause to be included of each of its policies ISO form CG 20 10 11 85 (or a form or forms that provide equivalent coverage) naming as additional insureds: The People of the State of New York, the New York State Department of Taxation and Finance, the New York State Office of Information Technology Services, and any entity authorized by the Agreement, law or regulation to use any Deliverables under this Agreement and their officers, agents, and employees.  An Additional Insured Endorsement evidencing such coverage shall be provided to the State within twenty (20) business days of tentative award and within three (3) days of request.
7. ***Insurance Coverage/Limits:*** The Contractor shall, at its own expense, obtain and maintain in full force and effect during the term of the Agreement, the following insurance with limits not less than those described below, or as required by law, whichever is greater (limits may be provided through a combination of primary and umbrella/excess policies):
8. ***Commercial General Liability Insurance*** covering the liability of the Contractor for bodily injury, property damage and personal/advertising injury arising from all work and operations under the Agreement. The limits under such policy shall not be less than the following:

* Each Occurrence Limit-$1,000,000.00
* General Aggregate Limit-$2,000,000.00
* Products/Completed Operations Limit-$2,000,000.00
* Personal Advertising Injury Limit-$1,000,000.00
* Damage to Rented Premises Limit-$50,000.00
* Medical Expenses Limit-$5,000.00

Coverage shall include, but not be limited to, the following:

* Premises liability;
* Independent contractors;
* Blanket contractual liability, including tort liability of another assumed in a contract;
* Defense and/or indemnification obligations, including obligations assumed under this Agreement;
* Products/completed operations for a term of no less than three (3) years, commencing upon acceptance of the work.
* Cross liability for additional insureds; and
* Explosion, collapse and underground hazards.

If at any time during the term of the Agreement, the Contractor performs work at more than one location, the policy shall contain an endorsement to the effect that the aggregate limit in the policy shall apply separately to each location where work is performed by the Contractor.

1. ***Comprehensive Business Automobile Liability Insurance*** covering liability arising out of any automobile used in connection with performance under this Agreement, including owned, leased, hired and non-owned automobiles bearing or, under the circumstances under which they are being used, required by the Motor Vehicles Laws of the State of New York to bear, license plates. Such policy shall have a combined single limit for Bodily Injury and Property Damage of at least $2,000,000.00 each accident. The limits may be provided through a combination of primary and umbrella liability policies. If performance under this Agreement shall require the removal of hazardous waste from the work site or other transporting of hazardous materials, pollution liability coverage for covered autos shall be provided by Form CA 9 48 03 06 or Form CA 00 12 03 06 and the Motor Carrier Act Endorsement (MCS90) shall be attached to the policy.

In the event that the Contractor does not own, lease or hire any automobiles used in connection with performance under this Agreement, the Contractor does not need to obtain Comprehensive Business Automobile Liability Insurance, butmust attest to the fact that the Contractor does not own, lease or hire any automobiles used in connection with performance under this Agreement on a form provided by the State. If, however, during the term of this Agreement, the Contractor acquires, leases or hires any automobiles that will be used in connection with performance under this Agreement, the Contractor must obtain Comprehensive Business Automobile Liability Insurance that meets all of the requirements of this section and provide proof of such coverage to the State within ten (10) days following the date the coverage is bound.

***3. Technology Errors and Omissions Insurance*** covering professionals employed or retained by the Contractor to work on this Agreement. The Contractor shall procure and maintain during, and for a period of three (3) years after completion of the Agreement, Technology Errors and Omissions Insurance in the amount of $2,000,000 for claims for damages arising from computer related services including the following: consulting, data processing, programming, system integration, software development, customization, installation, distribution or maintenance, systems analysis or design, training, staffing or other support services, any electronic equipment, computer hardware or software developed, manufactured, distributed, licensed, marketed or sold. The Technology Errors and Omissions Insurance may be issued on a claims-made policy form, in which case the Contractor shall purchase at its sole cost and expense, extended Discovery Clause coverage of up to three (3) years after work is completed if coverage is cancelled or not renewed.

**Article XXV. Continuing Administrative Requirements**

1. **Financial Stability**

The Contractor must continue to evidence financial stability as a material condition of this Contract. Financial stability may be evaluated annually based upon criteria similar to that used in the bidding process to include the reports required for Contractor’s particular organizational structure as set forth in RFP 15-08 and as otherwise required by the State. In addition to annual financial statements, interim financial statements based on the period ending six-months from the fiscal year end must be submitted for review by the State within 45 days of the end of the six month financial period.

Contractor shall immediately notify the State of a significant expansion of the Contractor or a change in ownership. Any significant change in ownership or significant expansion will require a re-evaluation of the Contract in its entirety by the State.

1. **Vendor Responsibility**

**General Responsibility—**

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

**Suspension of Work—**

The Commissioner or his or her designee, at his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the Commissioner or his or her designee issues a written notice authorizing resumption of performance under the Contract.

**Termination—**

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

1. **Sales and Compensating Use Tax**

Contractor certifies to the State that pursuant to Section 5-a of the New York State Tax Law, it filed the required Certification regarding its registration status to collect sales tax in New York State. The filing of the certification with the State applies to the Contractor, its affiliates and subcontractors as well. Moreover, the Contractor acknowledges its responsibility and that of its affiliates and subcontractors, during the term of the Contract, to amend the original Certification if after four successive quarters, the Contractor and/or its affiliates and/or its subcontractors reaches the threshold amount requiring the filing of the certification.

Contractor acknowledges if the Contractor falsifies or fails to file any required Certification under Section 5-a of the Tax Law, this can result in a Material Breach of the Contract and shall be subject to termination if the State determines it is in the best interest of the State to do so.

1. **Procurement Lobbying**

Contractor acknowledges that it read and understands its obligations pursuant to State Finance Law §§139-j and 139-k, regarding restrictions on communications between a Governmental Entity and an Offerer/Bidder during the procurement process.

If this Agreement is renewed or amended, Contractor shall again be subject to the Procurement Lobbying restrictions set forth in State Finance Law §§139-j and 139-k and shall submit such updated Procurement Lobbying forms as are required by the State.

1. **Contractor Consultant Law**

In 2006 the Civil Service and State Finance Law were amended to require information about Contractor employees for Contractors working on State agency service and consulting contracts be provided to the State , the Office of the State Comptroller (OSC), the Division of the Budget (DOB) and the Department of Civil Service (CS). To meet these requirements, the Contractor will assist in the completion of **Form A – State Consultant Services - Contractor’s Planned Employment, *Exhibit G.***

In addition, for each year a consulting services contract is in effect, contracting agencies must require contractors to report annually regarding the above described employment information including work performed by subcontractors.  The Contractor must properly complete a copy of **Form B, State Consultant Services – Contractor’s Annual Employment Report, attached to RFP as Exhibit H**, and provide it to the contracting agency, i.e., the New York State Department of Taxation and Finance; the Office of the State Comptroller (OSC) and the Department of Civil Service (CS).  Form B captures historical information, detailing actual employment information for the most recently concluded State fiscal year (April 1 – March 31).  Form B will be due no later than May 15 of each year.

Form B shall be provided to OSC and CS as set forth in the Guide to Financial Operations; the Guide may be found on-line at:

<http://www.osc.state.ny.us/agencies/guide/MyWebHelp/Content/XI/18/C.htm>

Form B shall be provided to the State as follows:

By mail: New York State Department of Taxation and Finance

Office of Budget and Management Analysis

Procurement Services Unit

    W. A. Harriman State Office Building Campus

               Albany, NY 12227

By email:      [bfs.contracts@tax.ny.gov](mailto:bfs.contracts@tax.ny.gov)

Fax:                (518) 435-8413

For purposes of this section, the following terms have the specified meanings:

* “employment category” means the specific occupation(s), as listed in the O\*NET occupational classification system, which best describes the employees providing services under this contract; and

(Note:  The O\*NET database is available through the US Department of Labor’s Employment and Training Administration, at <http://online.onetcenter.org> to find a list of occupations.)

* “consulting services contract” includes any contract entered into by a State agency for analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health and mental health services; accounting, auditing, paralegal, legal, or similar services.

1. **Participation By Minority Group Members and Women With Respect To State Contracts:**

**Requirements and Procedures**

1. **General Provisions**
2. The DTF and OITS are required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 (“MWBE Regulations”) for all State contracts as defined therein, with a value (1) in excess of $25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of $100,000 for real property renovations and construction.
3. The Contractor to the subject Contract (the “Contractor” and the “Contract,” respectively) agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to the State (the “[AGENCY]”), to fully comply and cooperate with the State in the implementation of New York State Executive Law Article 15-A. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for certified minority and women-owned business enterprises (“MWBEs”). The Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR § 142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) or other applicable federal, state or local laws..
4. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of Contract, leading to the withholding of funds or such other actions, liquidated damages pursuant to paragraph “g” hereof or enforcement proceedings as allowed by the Contract.
5. **Contract Goals**
6. For purposes of this procurement, the State hereby establishes an overall goal of 30% for MWBE participation, 12% for New York State certified minority-owned business enterprises (“MBE”) participation and 18% for New York State certified women-owned business enterprises (“WBE”) participation (collectively, “MWBE Contract Goals”) based on the current availability of qualified MBEs and WBEs.
7. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the MWBE Contract Goals established in paragraph “b-i” hereof, the Contractor should reference the directory of New York State Certified MBWEs found at the following internet address: <https://ny.newnycontracts.com>.

Additionally, the Contractor is encouraged to contact the Division of Minority and Woman Business Development ((518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

1. Where MWBE Contract Goals have been established herein, pursuant to 5 NYCRR § 142.8, the Contractor must document “good faith efforts” to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of the Contract. In accordance with Section 316-a of Article 15-A and 5 NYCRR § 142.13, the Contractor acknowledges that if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such a finding constitutes a breach of contract and the Contractor shall be liable to the State for liquidated or other appropriate damages, as set forth herein.
2. **Equal Employment Opportunity (EEO)**
3. The Contractor agrees to be bound by the provisions of Article 15-A and the MWBE Regulations promulgated thereunder by the Division of Minority and Women's Business Development of the New York State Department of Economic Development (the “Division”). If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.
4. The Contractor shall comply with the following provisions of Article 15-A:
5. Each contractor and subcontractor performing work on the Contract shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
6. The Contractor shall submit an EEO policy statement to the State within seventy two (72) hours after the date of the notice by the State to award the Contract to the Contractor.
7. If the Contractor or Subcontractor does not have an existing EEO policy statement, the State may provide the Contractor or Subcontractor a model statement (see **Exhibit K– Minority and Women-Owned Business Enterprises Equal Employment Opportunity Policy Statement**).
8. The Contractor’s EEO policy statement shall include the following language:
9. The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
10. The Contractor shall state in all solicitations or advertisements for employees that, in the performance of the contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.
11. The Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein.
12. The Contractor will include the provisions of Subdivisions (a) through (c) of this Subsection 4 and Paragraph “v” of this Section c, which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each Subcontractor as to work in connection with the Contract.
13. **Attachment 5 - Staffing Plan**

To ensure compliance with this Section, the Contractor shall submit a staffing plan to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories. The Contractor shall complete the Staffing plan form and submit it as part of their bid or proposal or within a reasonable time, but no later than the time of award of the contract.

1. Exhibit L- Workforce Employment Utilization Report (“Workforce Report”)
2. The Contractor shall submit a Workforce Report, and shall require each of its Subcontractors to submit a Workforce Report, in such format as shall be required by the State on a quarterly basis during the term of the contract.
3. Separate forms shall be completed by Contractor and any Subcontractor.
4. In limited instances, the Contractor may not be able to separate out the workforce utilized in the performance of the Contract from the Contractor's and/or Subcontractor's total workforce. When a separation can be made, the Contractor shall submit the Workforce Report and indicate that the information provided related to the actual workforce utilized on the Contract. When the workforce to be utilized on the contract cannot be separated out from the Contractor's and/or Subcontractor's total workforce, the Contractor shall submit the Workforce Report and indicate that the information provided is the Contractor's total workforce during the subject time frame, not limited to work specifically under the contract.
5. The Contractor shall comply with the provisions of the Human Rights Law, all other State and Federal statutory and constitutional non-discrimination provisions. The Contractor and Subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.
6. **MWBE Utilization Plan**
7. The Contractor represents and warrants that Contractor has submitted an MWBE Utilization Plan, by submitting evidence thereof through the New York State Contract System (“NYSCS”), which can be viewed at https://ny.newnycontracts.com, provided, however, that the Contractor may arrange to provide such evidence via a non-electronic method to the State either prior to, or at the time of, the execution of the contract.
8. The Contractor agrees to use such MWBE Utilization Plan for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in Section “b-i” of this section.
9. The Contractor further agrees that a failure to submit and/or use such MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, the State shall be entitled to any remedy provided herein, including but not limited to, a finding of the Contractor non-responsiveness.
10. **Waivers**
11. For Waiver Requests, the Contractor should use the NYSCS and submit **Exhibit M, M/WBE 104, Request for Waiver Form**, provided, however, that Bidder may arrange to provide such evidence via a non-electronic method to the State.
12. If the Contractor, after making good faith efforts, is unable to comply with MWBE goals, the Contractor may submit a Request for Waiver documenting good faith efforts by the Contractor to meet such goals. If the documentation included with the waiver request is complete, the State shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.
13. If the State, upon review of the MWBE Utilization Plan and updated Quarterly MWBE Contractor Compliance Reports determines that the Contractor is failing or refusing to comply with the MWBE Contract Goals and no waiver has been issued in regards to such non-compliance, the State may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.
14. **Quarterly MWBE Contractor Compliance Report**

The Contractor is required to submit a Quarterly MWBE Contractor Compliance Report through the NYSCS, provided, however, that Bidder may arrange to provide such evidence via a non-electronic method to the State by the 10th day following each end of quarter over the term of the Contract documenting the progress made towards achievement of the MWBE goals of the Contract. See **Exhibit N** of **RFP 15-08** for an example of the information required.

1. **MWBE Liquidated Damages - MWBE Participation**
2. Where the State determines that the Contractor is not in compliance with the requirements of the Contract and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, the Contractor shall be obligated to pay to the State liquidated damages.
3. Such liquidated damages shall be calculated as an amount equaling the difference between:
4. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and
5. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.
6. In the event a determination has been made which requires the payment of liquidated damages and such identified sums have not been withheld by the State, the Contractor shall pay such liquidated damages to the State within sixty (60) days after they are assessed by the State unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the Division of Minority and Woman Business Development pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if Director renders a decision in favor of the State.

**Article XXVI: General Terms and Conditions**

* + - 1. **Americans with Disabilities Act**

The Contractor's operations sites must be in compliance with applicable building codes and the Americans with Disabilities Act.

* + - 1. **Appendix A**

The Contractor has read and agrees to Appendix A (Standard Clauses for New York State Contracts), which is incorporated as part of the Agreement without revision.

* + - 1. **Assignment of Rights and Duties**

The Contractor may not assign the Agreement except in accordance with Section 138 of the State Finance Law and Appendix A. The State may assign this Agreement to any New York State Agency provided that the assignee agrees in writing to be bound by the terms and conditions of this Agreement. The State agrees to provide the Contractor 30 day prior written notice of any such assignment.

* + - 1. **Authorized Representatives**

The following individuals are authorized representatives of the Parties and by signing documents do bind their respective party:

On behalf of the Department:

- Commissioner

- Executive Deputy Commissioner

- Chief Financial Officer

- Director, Procurement Services

On behalf of OITS

Chief Information Officer

Deputy Chief Information Officer

Chief Administrative Officer

* Director of Finance

On behalf of the Contractor:

\_\_\_[To be provided]\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

* + - 1. **Conflict of Interest**

The Contractor will be responsible for establishing procedures to identify potential conflicts of interest. If during the term of this Agreement, and any extensions thereof, the Contractor becomes aware of an actual or potential relationship which may be considered a conflict of interest, the Contractor shall immediately notify the State in writing and disclose the nature of the potential conflict of interest in the manner prescribed by the State. The State will have sole discretion in evaluating the nature of the identified conflict of interest and will make the final decision regarding its resolution.

* + - 1. **Continuity of the Agreement**

The terms and conditions of this Agreement shall remain in full force and effect for the term of this Agreement and the Contractor agrees to provide all Services for such term, regardless of any reorganizations, consolidations or mergers to which the Contractor is, or may become, a party.

Notwithstanding the foregoing, **Appendix A, Article XVII (Tax Secrecy, Confidentiality, and Information Security Breach Notification**) and **Article XXIII (Indemnification Provisions and Limitation of Liability)** shall survive the term of this Agreement. Any insurance requirements set forth herein shall survive six months beyond the termination of this Agreement, or longer, as otherwise prescribed in **Article XXIV (Insurance)** of this Agreement.

* + - 1. **Contractor and Subcontractors**
      2. **Contractor**

The Contractor is acting as the prime Contractor under this Agreement and shall be:

* 1. Responsible for, and liable to, the State for performing in accordance with this Agreement. Contractor shall not in any way be relieved of any financial, programmatic or service responsibility under the Agreement by its agreement with any Subcontractor or by the State’s approval of such an agreement with a Subcontractor.
  2. Responsible for supervising the work of its Subcontractors performing any Services under the Agreement consistent with industry standards applicable to such work.
  3. As fully responsible for the acts and omissions of its Subcontractors and employees as it is for acts and omissions of its own employees and agents.
  4. Responsible for payment of all Subcontractors and suppliers engaged by or through the Contractor in performance of this Agreement.

**2. Subcontractors**

The State reserves the right to reject any proposed Subcontractor, assignee or supplier for bona fide business reasons, which may include, but are not limited to: that the proposed Subcontractor is on the Department of Labor’s list of companies with which New York State cannot do business; or the State determines that the Subcontractor is not qualified; or unsatisfactory contract performance or service has been previously provided by such Subcontractor.

Contractor may subcontract to Subcontractors selected by Contractor for Services performed in connection with this Agreement, subject to the Department’s prior written approval. A Subcontractor shall be defined as any firm or person who is not a full time employee of the Contractor, engaged or assigned to perform work under the Agreement. All agreements between the Contractor and its Subcontractors shall be by bona fide written contract.

Contractor shall include in all subcontracts for the Services performed in connection with this Contract binding provisions consistent with those found in the Agreement, including, but not limited to:

* 1. That the work performed by the Subcontractor must be in accordance with the terms of the Agreement including, but not limited to, Appendix A;
  2. That Subcontractor shall comply with the provisions of section 5-a of the Tax Law and all Secrecy provisions;
  3. That nothing contained in such subcontract shall impair the rights of the State;
  4. That nothing contained herein shall create any contractual relation between any Subcontractor and the Department;
  5. That Subcontractor shall maintain all records with respect to work performed under the Subcontractor in the same manner as required of the Contractor; and
  6. That the State shall have the same authority to audit the records of all Subcontractors as it does those of the Contractor.
     + 1. **Cooperation with Department, State and/or Federal Investigations**

The Contractor must agree to cooperate fully with any investigation conducted by the State or its designee acting on its behalf, including but not limited to, the Inspector General’s Office, the Office of Internal Affairs, the New York State Police or any local, state or federal law enforcement agency. If the State determines it necessary to investigate relative to a possible or actual (1) crime, or (2) breach of confidentiality or security, in either case related to the Services provided under this Agreement, Contractor and its Subcontractors shall cooperate fully with the State’s efforts to investigate and identify the responsible individuals. Upon written notification from the State, Contractor and its Subcontractors shall make their employees and all relevant records, including personnel records and employee photographs, available to investigators. The Contractor must allow the State to interview Contractor’s employees and/or agents on matters related to the Agreement during normal business hours.  Contractor representatives may be disallowed from being present when the State determines (at its sole discretion) that such presence would present a potential conflict or impede an investigation or review.  The Contractor shall provide immediate and unfettered access to the State to all records deemed necessary by the State for the conduct of an investigation. In the case of criminal investigations, an out of state Contractor or out of state Subcontractor performing any of the Services, must accept a subpoena served upon one of its New York State branches/offices or the Secretary of State designated for this purpose.

* + - 1. **Cooperation with Third Parties**

The Contractor shall cooperate with all persons engaged in performing services for the State, whether or not related to this Agreement including, without limitation, State officers and employees and third-party vendors engaged by the State.

* + - 1. **Dual Employment Provision**

Contractor shall implement and administer a "dual employment policy" under the Code of Ethics in Government Act. Contractor will not knowingly or recklessly employ a State employee in the provision of the Services under this Agreement. Further, if Contractor discovers that an employee is also an employee of the State, Contractor shall immediately notify the Department and take appropriate action to remove such employee from the provision of Services under this Agreement. Contractor agrees that all of Contractor’s personnel, whether permanent or temporary, involved in providing Services pursuant to this Agreement, shall be required to sign a document at the time of employment attesting that they are not employed by the State.

* + - 1. **Ethics Provisions**

The Contractor shall comply with all applicable requirements of Public Officers Law Sections 73 and 74, the Procurement Lobbying Reform Act of 2005, and other State statutes, rules and regulations establishing ethical standards for the conduct of business with New York State. Failure to comply with those provisions may result in termination of the Agreement and/or other civil or criminal proceedings as required by law.

* + - 1. **Evidence/Litigation Support**

During the term of this Agreement (including extensions and transition periods, if applicable) and for a reasonable time thereafter, Contractor shall cooperate with any request by the State to provide an affidavit or equivalent document (and supporting testimony to the extent reasonably necessary) to establish the accuracy, trustworthiness, authenticity or admissibility, in any administrative or judicial proceeding involving the State, of any systems and procedures utilized by Contractor, and any records generated by Contractor in connection with the Services provided under this Agreement, subject to any right of Contractor to make a claim to the presiding officer in any administrative or judicial proceeding that such records are confidential and/or privileged. The provisions of this section shall survive the termination or expiration of the Agreement.

* + - 1. **Extension of Use**

The terms and conditions of this Agreement may be extended to any other New York State agency, political subdivision, governmental jurisdiction or other authorized entity, through the use of a formally executed agreement between the Contractor and the state agency, political subdivision, governmental jurisdiction, or other authorized entity, subject to review and approval of the Office of the New York State Attorney General and the Office of the New York State Comptroller, if applicable. New York State reserves the right to negotiate pricing discounts based on any increased volume generated by such extensions.

* + - 1. **Funding**

In accordance with Section 41 of the State Finance Law, the State shall have no liability under this Agreement to the Contractor or to anyone else beyond funds appropriated and available for this Agreement. Accordingly, this Agreement will be performed only as long as the New York State legislature appropriates funds and the Governor allocates such funds to the State. Failure of New York State to enact a timely Budget may result in the State being unable to reimburse the Contractor for Services provided in the new fiscal year. All work approved and accepted by the State will subsequently be reimbursed when the Budget has been signed into law.

* + - 1. **Governing Law and Venue**

This Agreement shall be governed by and construed in accordance with the laws of the State of New York without giving effect to its principles of conflict of laws. Venue must be laid in a court of competent jurisdiction in New York.

* + - 1. **Independent Contractor**

It is understood and agreed that the legal status of the Contractor, its agents, officers and employees under this Agreement is that of an independent Contractor and in no manner shall they be deemed employees of the State, and therefore are not entitled to any of the benefits associated with such employment. The Contactor agrees, during the term of the Agreement to maintain at Contractor's expense those benefits to which its employees would otherwise be entitled by law, including health benefits, and all necessary insurance, including worker's compensation, disability and unemployment insurance, and to provide the State with certification of such insurance upon request. The Contractor remains responsible for all applicable federal, state and local taxes, and all FICA contributions.

* + - 1. **Mergers, Acquisitions or Consolidation**

In the event of any merger, acquisition, or consolidation involving the Contractor which affects this Agreement, the Contractor agrees to transfer all responsibilities for the performance of this Agreement to the successor entity with the approval of the State, which approval will not be unreasonably withheld.

* + - 1. **Notices**

All notices provided hereunder shall be in writing and transmitted either:

* 1. via certified or registered United States mail, return receipt requested;
  2. by facsimile transmission;
  3. by personal delivery;
  4. by expedited delivery service; or
  5. by e-mail.

Unless otherwise provided herein, such notices shall be addressed to the individuals designated below or to others as the Parties may from time to time designate:

**Notices to the State from the Contractor:**

Ms. Catherine Golden

Director, Procurement Services

New York State Department of Taxation and Finance

Office of Budget and Management Analysis

W.A. Harriman Campus

Albany, NY 12227

Email: bfs.contracts@tax.ny.gov

Ms. Kim Szady

Director, Office of Finance

New York State Office of Information technology Services

Swan Street, Core 4, Floor 2

Albany, NY 12223

e-mail: kim.szady@its.ny.gov

**Notices to the Contractor from the State:**

\_\_\_[To be provided]\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

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

* + - 1. **Payment Records**

The Contractor must maintain adequate records as prescribed by the State to substantiate all claims for payment and must make those records available in New York State for examination and copying.

* + - 1. **Pending Litigation**

Contractor shall notify the State of any pending litigation, regulatory action or commencement of legal or regulatory actions which may have a material adverse impact on the ability of Contractor to perform Services under this Agreement. Such notification shall be in writing, and directed to the Director of Procurement.

* + - 1. **Publicity**

Neither the Contractor nor any of its officers, directors, employees, affiliates, agents or subcontractors shall, at any time, during or after termination of this Agreement, make any statement to the press or issue any material for publication through any media of communication bearing on the Services performed or data collected under this Agreement without the prior written approval of the State. If pursuant to this section, the Contractor publishes a work related to any aspect of performance under this Agreement, or the results and accomplishments attained in such performance, the State shall have, in addition to any rights and remedies it may have under this Agreement, a perpetual, royalty-free, non-exclusive and irrevocable license to reproduce, publish or otherwise use and to authorize others to use the publication.

Neither party grants the other the right to use any of its trademarks, trade names, logos, seals, or other designations, whether in any promotion, publication, or otherwise, without the other party's prior written consent.

* + - 1. **Required Approvals**

This Agreement and any amendments will not be effective until approved by the Department, the Office of the New York State Attorney General, and the Office of the New York State Comptroller.

* + - 1. **Severability**

If any term or provision of this Agreement shall be found to be illegal or unenforceable, then, notwithstanding such provision, the remainder of this Agreement shall remain in full force and effect, and such term or provision shall be deemed null and void. In addition, if any provision of the Agreement, for any reason, is declared to be unenforceable, the Parties shall make a reasonable effort to substitute an enforceable provision that, to the maximum extent possible in accordance with applicable law, preserves the original intentions and economic positions of the Parties.

* + - 1. **Tax Liabilities**

All outstanding tax liabilities due to the State of New York from the Contractor, or Contractor's partners, agents and subcontractors engaged in providing services under this Agreement, other than tax liabilities being contested by any such party, must be satisfied prior to the execution of this Agreement, or a payment schedule arranged for their speedy satisfaction.

* + - 1. **Unauthorized Use of Information**

Contractor, its officers, employees, Subcontractors, or agents shall not use information, confidential or otherwise, obtained in the course of providing the Services to the State, to obtain benefits, financial or otherwise, for themselves or anyone else. Neither can Contractor or its officers, employees, Subcontractors, or agents use or disclose such information to cause embarrassment or injury to others.

**Z. Waiver of Breach**

No Waiver of breach or failure to exercise any option, right, or privilege under the terms of this Agreement or any order on any occasion or occasions shall be construed to be a waiver of the same or any other option, right, or privilege on any other occasion. All waivers must be in writing and a waiver of one provision does not constitute a waiver of any other provision. The failure to act or a delay in acting shall not constitute a waiver of any right or remedy.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Agreement as of the dates setforth below.

***[Contractor Name]* New York State**

**Department of Taxation and Finance**

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Signature Signature

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Date Date

CORPORATION

STATE OF \_\_\_\_\_\_\_

COUNTY OF \_\_\_\_\_\_\_\_\_\_\_

On this \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, before me personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, to me known, who being duly sworn, did depose and state that he/she resides in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_; that he/she is the\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ of the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, the Corporation described in and which executed the foregoing instrument; that he/she knows the seal of said Corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by the order of the Board of Directors of said Corporation, and that he/she signed his/her name thereto by like order.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,

NOTARY PUBLIC

**Remainder of page left intentionally blank**

**New York State**

**Office of Information Technology Services**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print Name

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Date

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**Attorney General** **Office of the State Comptroller**