



**STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE  
Office of Budget & Management Analysis  
Bureau of Fiscal Services  
Building 9, Room 234  
W.A. Harriman Campus  
Albany, NY 12227**

Patricia Mitchell, Chief Financial Officer  
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**Request for Information (RFI)  
Cigarette Excise Tax and Prepaid Sales Tax Program**

July 6, 2009

The New York State Department of Taxation and Finance (the "Department") is requesting information from qualified vendors interested in supplying the Department with a Cigarette Excise Tax and Prepaid Sales Tax Program.

This is a Request for Information (RFI) only. This RFI is issued solely for information and planning purposes – it does not constitute a Request for Proposal (RFP) or a promise to issue an RFP in the future. Respondees are advised that the State will not pay for any information or administrative costs incurred in response to this RFI; all costs associated with responding to this RFI will be solely at the interested party's expense. Not responding to this RFI does not preclude participation in any future RFP, if issued.

**History of Need for Procurement**

Article 20 of the New York State Tax Law empowers the Commissioner of Taxation and Finance to levy and collect taxes on the possession for sale and/or use of cigarettes in New York State. Section 472 of such law further authorizes the Commissioner to license cigarette stamping Agents to purchase and affix cigarette excise tax stamps. Agents authorized to purchase on credit must pay for such tax stamps within thirty (30) days after the date of purchase when collateralized with a surety bond or alternative security. This section also authorizes the Tax Commissioner to prescribe a schedule of stamping Agent commissions. Section 1103 of Article 28 of the New York State Tax Law mandates that Prepaid Sales Tax be imposed on cigarettes possessed for sale or use within New York State. The Prepaid Sales Tax must be paid the same time and in the same manner as the Cigarette Excise Tax imposed by Article 20 of such law.

Hence, a cigarette Agent is required to prepay the sales tax at the time that the Agent is required to purchase Cigarette Tax stamps. By affixing such stamps, the Agent evidences payment of both Cigarette Excise Tax and the Prepaid Sales Tax. In Article 1, Section 70.2 of the Cigarette Tax Regulations (20 N.Y.C.R.R. §70.2) defines a stamp or cigarette stamp as, "any adhesive stamp, metered stamp, heat transfer stamp or other form of evidence of payment of the Cigarette Tax as prescribed by the Commissioner of Taxation and Finance."

The City of New York is authorized to impose its own Cigarette Excise Tax upon cigarettes possessed for sale or use within the City as set forth in Chapter 13 of Title 11 of the Administrative Code of the City of New York. The State and City of New York have agreed to jointly select a commercial bank or document processor to act as their agent for the sale and distribution of Cigarette Tax indicia. All facets of the administration of the distribution system are subject to the approval of the State and City. The various records and files to be maintained are specified by the State and/or City and are contained within this document. Unless otherwise noted, separate record keeping, account maintenance, and reporting are required to distinguish State and City activities.

## **Program Overview**

The current Cigarette Excise Tax and Prepaid Sales Tax Program (the Program) is performed by a Commercial Bank. Approximately 80-90 authorized Agents purchase a stamp product which is the accepted indicia used to show proof of taxes paid on cigarettes. The stamps are currently manufactured under a separate contract with Meyercord, located in Carol Stream, Illinois and are transported to a secured site in the Capital District, New York. The stamps are transferred via secure transport to the incumbent Contractor's processing site where they must be stored to prevent theft, loss, destruction or unauthorized access.

Orders are placed, via the telephone, by authorized representatives of the Agents on a daily basis. Stamp orders are filled from the Contractor's working inventory, securely packaged, and prepared for pick-up by the United States Postal Service (USPS). Fees to USPS are considered a pass through cost and are paid directly to USPS by the Department.

The Contractor is responsible for verifying the accuracy and authenticity of the order based on the agent profile information, maintaining an inventory tracking system for issued stamps and stamps in inventory, processing payments from the Agents, initiating a credit to the Department's tax receipt account for prepaid Sales Tax and maintaining information to meet the Department's reporting requirements.

The Contractor is also required to maintain 6 secure emergency sites (4 Upstate and 2 Downstate) throughout New York State to service Agents who do not receive their delivery of stamps due to a "lost in transit occurrence" or other emergency. Agents are allowed one (1) emergency per year. All emergency inventories must be replenished at the emergency site no later than 24 hours after use.

## **Program Objective**

The objectives of this Program are:

- 1 to process orders and supply authorized cigarette Agents with Cigarette Excise Tax and Prepaid Sales Tax indicia in a timely, efficient and cost effective manner;
- 2 to receive and deposit remittances in a timely and efficient manner; and
- 3 to provide timely and accurate detail and management information to support payment of commissions, monitor and track agent payments, and monitor and control indicia inventory activity.

## **Information Requested**

### **1 Program**

In an effort to increase competition, the Department would like to open this process up to document processors. Please provide an overview of how you envision the operation of this program and identify any areas of concern and/or recommended improvements.

### **2 Performance Standards and Liquidated Damages**

Attachment 1 contains the current Performance Standards and Liquidated Damages for this program. Please identify any unnecessary restrictions these standards present and recommend alternatives. The recommendation must clearly outline why you believe the standards may be overly restrictive and how the recommended alternative will be beneficial.

### **3 Proposal Conditions, Invariable and Negotiable Contract Conditions**

Attachment 2 contains the Proposal Conditions, Invariable and Negotiable Contract Conditions that were in the recent Request for Proposal for the Cigarette Excise Tax and Prepaid Sales Tax Program and will be included in any future RFP's. Please identify any areas of concern and provide recommended alternative language.

#### 4 Pricing

The current pricing structure for this program allows for a one-time development fee and a fully loaded transaction fee for each roll of stamps sold. These fees must be guaranteed for the first three years of the Contract and are adjustable thereafter on an annual basis using the Consumer Price Index for All Urban Consumers (CPI-U), table 10. The number of rolls sold over the last four years is:

2005	20,857
2006	20,869
2007	20,740
2008	17,715

As the pre-paid Sales tax increases, it is expected that the number of rolls sold will decrease. Please identify any issues or concerns with this pricing structure and/or recommend suggestions for alternative pricing structures.

#### 5 Additional Comments/Information

Please provide any additional comments/information or alternative language that you feel would be beneficial to the Department in securing a vendor to provide the services outlined in this RFI.

Please note: Additional information regarding the Cigarette Tax Program can be found in the previous Request for Proposal (RFP) 08-32 which is posted on the Department's website at: [http://www.tax.state.ny.us/procurement/current\\_bid\\_opportunities.htm](http://www.tax.state.ny.us/procurement/current_bid_opportunities.htm)

#### **RFI Questions**

All questions concerning this RFI should be submitted to the following designated contacts (e-mail preferred):

Catherine Golden	Assistant Director of Procurement
Karen Brino	Contract Administrator
Tricia Huff	Contract Management Specialist I

e-mail – [bfs\\_contracts@tax.state.ny.us](mailto:bfs_contracts@tax.state.ny.us) phone – (518) 457-0954 or fax (518) 435-8413

#### **RFI Response**

Please respond to the areas of concern listed above by August 3, 2009. Be sure to provide the name, location, contact person, phone number and e-mail address for your company.

Your response related to this RFI may be e-mailed (preferred), faxed or mailed to:

e-mail address: [bfs\\_contracts@tax.state.ny.us](mailto:bfs_contracts@tax.state.ny.us)

FAX number: (518) 435-8413

Mail Address:

New York State Department of Taxation and Finance  
Office of Budget and Management Analysis  
ATTN: Catherine Golden, Assistant Director  
Building 9, Room 234  
W.A. Harriman State Office Building Campus  
Albany, NY 12227  
(518) 457-0954

A response does not bind or obligate the responder or the Department to any agreement of provision or procurement of products referenced.

# Attachment 1

## I PERFORMANCE STANDARDS and LIQUIDATED DAMAGES

### A Cigarette Excise Tax and Prepaid Sales Tax Program

Timeliness, accuracy and completeness performance standards establish the acceptable level of service for all aspects of the Contractor's processing operations. Each critical requirement in the Program has a corresponding timeliness and/or accuracy and completeness standard. The matrix in Section I.E. identifies Performance Standards and the associated Liquidated Damages and Reimbursements.

The general performance standards include:

**TIMELINESS:** All processes, services, activities and deliverables, etc., must be 99.5% timely in accordance with the stated and/or agreed upon requirements, schedules, time frames, etc.

**ACCURACY AND COMPLETENESS:** All processes, services, activities and deliverables, etc., must be 99.5% complete and accurate according to the stated and/or agreed upon requirements.

In all cases, the Contractor is accountable for compliance with standards. All individual detail standards stated in the Program support the general standards.

### B Future Program Changes

The performance standards reflect current statutes, rules, regulations, policy and procedures. Future changes that alter the Program may require that the performance standards be adjusted accordingly.

The Department also reserves the right to add performance standards and liquidated damages as appropriate after the Program has been finalized to ensure that the Contractor is accountable for all aspects of the Program. If additional performance standards and liquidated damages are required, the Contractor may propose additional fees to support the resources required to meet the performance standards consistent with the Change Control Procedure.

### C Evaluating Contractor Compliance with Performance Standards

The Department's Performance Audit Program for Contractor services provides a means to evaluate compliance with performance standards. Accordingly, the Performance Audit Program would ensure:

- Timely and accurate processing of orders, payments, reports, and electronic files, consistent with the performance standards;
- Appropriate controls are implemented and maintained for complete, accurate, and timely processing of cigarette tax indicia remittances, purchases and all related procedures consistent with performance standards;
- Automated processing and deposit systems are implemented and maintained consistent with performance standards;
- Security measures are implemented and maintained consistent with performance standards;
- Disaster recovery capability is maintained consistent with performance standards;
- Complete and accurate documentation is maintained consistent with the performance standards; and
- Liquidated damages may be assessed for failure to achieve performance standards.

# Attachment 1

The Contractor's performance will be evaluated through a variety of generally accepted audit methodologies, including but not limited to:

- Review of system reports for timeliness, accuracy, security access;
- On-site review for compliance with policy, procedures, standards;
- Review of order and payment transactions (sampling, as well as evaluation of the entire universe of cigarette tax indicia transactions);
- Review of documentation;
- Data file comparisons for data accuracy; and
- Review of related back office transactions handled by the Department's staff responsible for Cigarette Excise Tax and Prepaid Sales Tax operations.

Timeliness may be evaluated on a continuous basis through the use of operation and management reports. The Contractor will be informed in advance of reviews and audits related to the Processing Environment and General Controls. Prior to each review, the Department will inform the Contractor of the intended scope and methodology. The Contractor will have the option of proposing an alternative methodology if appropriate; however, the final methodology must be approved by the Department. Unannounced visits may be utilized, as appropriate.

## **D Liquidated Damages and Reimbursements**

Failure to comply with the performance standards identified through Performance Audit and/or Contractor "errors" identified by Department personnel may result in the imposition of liquidated damages or reimbursements. Additionally, civil and/or criminal penalties exist for violation of secrecy and confidentiality statutes.

The matrix in Section I.E. identifies the liquidated damages and reimbursements that may be imposed and is organized into the following components.

### **1 Processing Environment**

- Reimbursement to the Department of any losses including cost incurred to maintain the existing Program with the current Contractor if the initial implementation is late;
- Reimbursement to the Department of any losses including cost incurred if system maintenance and/or enhancement is late and/or inaccurate based upon the agreed upon schedule;
- Reimbursement to the Department of any losses including lost interest if a late implementation of the initial system, maintenance, and/or enhancement prevents the timely and/or accurate deposit and processing of payments; and
- Flat fee for each occurrence the system documentation is inaccurate and/or late based upon the agreed schedule.

### **2 General Controls**

- Flat fee for each occurrence of violation per day; and
- General Controls include Security, Disaster Recovery, Procedures, Change Control, Internal Controls and Data Retention and Reports.

# Attachment 1

## **3 Performance Audit Monitoring Requirements**

- Flat fee for each occurrence of violation per day.

## **4 Timeliness of Payment/Ordering Processing**

- Flat fee for each occurrence of violation per day;
- Reimbursement of lost interest to the Department associated with untimely deposit;
- Reimbursement to the Agent(s) for losses, including costs, incurred as a result of the Contractor's failure to meet the performance standards (e.g., interest, penalties, fees, etc.); and
- Reimbursement to the Department for any losses, including cost, incurred as a result of Contractor failure to meet the performance standards.

## **5 Accuracy and Completeness of Payment/Order Processing**

- Reimbursement of lost interest to the Department associated with untimely deposit;
- Reimbursement to the Agent(s) for losses, including costs, incurred as a result of the Contractor's failure to meet the performance standards (e.g., interest, penalties, fees, etc.);
- Reimbursement to the Department for any losses, including cost, incurred as a result of Contractor failure to meet the performance standards; and
- Reimbursement to the Department for any losses, including cost, incurred for any incomplete and/or inaccurate records on the Cigarette Tax Indicia systems, files and/or reports.

The following matrix has been developed based on the Program requirements as defined in the Cigarette Excise Tax and Prepaid Sales Tax Program. Failure to comply with **any** requirement or standard in the Program is subject to assessment of liquidated damages and/or reimbursement at the Department's discretion.

# Attachment 1

## E Performance Standards and Associated Liquidated Damages and Reimbursements Matrix

<b>1 PROCESSING ENVIRONMENT 99.5% TIMELY, COMPLETE AND ACCURATE</b>			
	<b>PERFORMANCE STANDARD</b>	<b>LIQUIDATED DAMAGES</b>	<b>REIMBURSEMENTS</b>
<b>1.1</b>	<p><b>System and Program Development and Implementation Activity</b></p> <p>All system and Program development activities, deliverables, etc., for complete Program must be operational and be delivered to the Department according to the agreed upon schedules.</p>		Reimbursement to the Department for any expenses including losses incurred for failure to meet the agreed upon implementation schedule. If appropriate, the losses will include the cost to maintain the existing Program with the existing Contractor until full implementation by successful Contractor.
<b>1.2</b>	<p><b>System Enhancement/Maintenance</b></p> <p>The Contractor must accurately and timely test data, implement production fixes, perform system modifications and notify the Department of the results as identified in the RFP and/or as agreed upon in subsequent negotiations.</p>		Reimbursement to the Department for any expenses including losses incurred for failure to perform system enhancement /maintenance as prescribed.
<b>1.3</b>	<p><b>Program Documentation</b></p> <p>All documentation related to the Cigarette Excise Tax and Prepaid Sales Tax processing systems must be complete, accurate, and available for Department review and approval according to the agreed upon schedule.</p>	Flat fee of \$250 for failure to complete the documentation based upon the cure period. Also a flat fee of \$250 for each occurrence the agreed upon deliverable date is missed and/or late; or for each occurrence the deliverable is incomplete or inaccurate after the agreed upon cure period. Corrective action and a timetable will be specified by the Department for each violation.	

# Attachment 1

<b>2 GENERAL CONTROLS</b> <b>99.5% TIMELY, COMPLETE AND ACCURATE</b>			
	<b>PERFORMANCE STANDARD</b>	<b>LIQUIDATED DAMAGES</b>	<b>REIMBURSEMENTS</b>
<b>2.1</b>	<p><b>Logical Security System</b></p> <p>The Contractor must implement and maintain the agreed upon logical system security measures to prevent unauthorized access to Cigarette Excise Tax and Prepaid Sales Tax indicia data including, but not limited to:</p> <ul style="list-style-type: none"> <li>- all supporting department data (inventory, agent profiles, etc.);</li> <li>- cigarette tax indicia system data; and</li> <li>- depository information.</li> </ul>	<p>Liquidated damages of \$2,000 for each violation of unauthorized access; corrective time frames will be specified by the Department for each violation.</p>	
<b>2.2</b>	<p><b>Security/Confidentiality for Personnel</b></p> <p>The Contractor must implement and maintain the agreed upon comprehensive security and confidentiality provisions in accordance with the requirements of this RFP.</p> <p>Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 889-aa; State Technology Law Section 208). Contractor shall be liable for the costs associated with such breach if caused by Contractor's negligent or willful acts or omissions, or the negligent or willful acts or omissions of Contractor's Agents, officers, employees or subcontractors.</p> <p>The Contractor must</p>	<p>Liquidated damages of \$2,000 for each violation of the security measures as it relates to the Program. Corrective time frames will be specified by the Department for each violation.</p>	

# Attachment 1

<b>2 GENERAL CONTROLS</b> <b>99.5% TIMELY, COMPLETE AND ACCURATE</b>			
	<p>agree to support Department efforts to criminally prosecute employees who have violated the requirements with respect to the Program.</p>		
<b>2.3</b>	<p><b>Physical Security</b></p> <p>The Contractor must maintain the agreed upon physical security measures for all sites and services associated with the Program including, but not limited to:</p> <ul style="list-style-type: none"> <li>- Cigarette Tax indicia, current and prior series inventories;</li> <li>- All proposed locations, including: <ul style="list-style-type: none"> <li>-- Emergency site locations;</li> <li>-- Primary Cigarette Tax indicia processing site;</li> </ul> </li> <li>- Storage site(s), if applicable; and</li> <li>- Transportation of Cigarette Tax indicia.</li> </ul>	<p>Liquidated damages of \$2,000 for each violation of the security measures as it relates to the Program. Corrective time frames will be specified by the Department for each violation.</p>	
<b>2.4</b>	<p><b>Internal Controls</b></p> <p>The Contractor must maintain and implement the agreed upon internal control measures.</p>		<p>Reimbursement to the Department for any expenses including losses incurred as a result of failure to maintain/ implement internal control procedures.</p>

# Attachment 1

<b>2 GENERAL CONTROLS</b> <b>99.5% TIMELY, COMPLETE AND ACCURATE</b>			
<b>2.5</b>	<p><b>Change Management Process and Procedures</b></p> <p>The Contractor must utilize the mutually agreed upon Change Control Procedure to identify, request, analyze, prioritize and track any changes to the Program.</p> <p>The Contractor must provide the Department thirty (30) days prior notification of proposed changes to other Contractor systems (e.g., ACH) that impact the Program.</p>	Liquidated damages of \$500 for each violation.	
<b>2.6</b>	<p><b>Disaster Recovery and Fail Safe Operations</b></p> <p>The Contractor must notify the designated Department staff within the agreed upon time frames of all disasters and/or business disruptions that impact the Program.</p> <p>The Contractor must maintain, test and update as necessary (at least once annually) disaster recovery/fail safe operations procedures throughout the duration of the Agreement. In addition, the Contractor must provide the Department with an annual briefing to discuss disaster recovery/fail safe operations procedures, test results; updates, etc.</p> <p>The Contractor must recover within the agreed upon time frames from all disasters and/business disruptions to ensure that all Cigarette Tax indicia orders are processed and monies are deposited timely.</p>	Liquidated damages of \$500 for each failure to maintain the agreed upon Disaster Recovery Plan and Fail Safe Operations that impacts the Program.	Reimbursement to the Department of all direct costs incurred but not limited to interest expense, processing costs, etc., for failure to maintain the Plan and/or implement the Plan.

# Attachment 1

<b>2 GENERAL CONTROLS</b> <b>99.5% TIMELY, COMPLETE AND ACCURATE</b>			
<b>2.7</b>	<b>Files and Reports</b>  The Contractor must provide the Department with accurate and timely reports (e.g., Operations Reports, Accounting Management Reports, Cash Management Reports, etc.) , and maintain and retrieve data in accordance with the agreed upon frequency and format.		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard. Corrective action and a timetable will be specified by the Department for each violation.

<b>3 PERFORMANCE AUDIT MONITORING REQUIREMENTS</b> <b>99.5 % TIMELY, COMPLETE AND ACCURATE</b>			
	<b>PERFORMANCE STANDARD</b>	<b>LIQUIDATED DAMAGES</b>	<b>REIMBURSEMENTS</b>
<b>3.1</b>	<b>Performance Audit Monitoring</b>  The Contractor must cooperate fully with the Department, or its designee, in all Performance Audits and Reviews.	Liquidated damages of \$500 per day, with a limit of \$5,000 per audit, for each failure to meet the requirement.	
<b>3.2</b>	<b>OSC Audits and Reviews</b>  The Contractor must cooperate fully with Office of the State Comptroller (OSC), or its designee, for all aspects of audits, reviews, etc.	Liquidated damages of \$500 per day, with a limit of \$5,000 per audit, for each failure to meet the requirement.	

<b>4 TIMELINESS OF PAYMENT/ORDER PROCESSING</b> <b>99.5% TIMELY</b>			
	<b>PERFORMANCE STANDARD</b>	<b>LIQUIDATED DAMAGES</b>	<b>REIMBURSEMENTS</b>
<b>4.1</b>	<b>Payment Processing</b>  The Contractor must ensure same day deposit for all payment types received prior to the established cut off time.		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.
<b>4.2</b>	<b>Aging Accounts Receivable</b>  The Contractor must initiate payment processes for credit orders in accordance with the requirements set forth in this		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.

# Attachment 1

<b>4 TIMELINESS OF PAYMENT/ORDER PROCESSING</b> <b>99.5% TIMELY</b>			
	RFP.		
<b>4.3</b>	<p><b>Prepaid Sales Tax</b></p> <p>The Contractor must create, process, and reconcile the Prepaid Sales Tax information and returns (including ST-810) according to the agreed upon schedule.</p>	<p>Liquidated damages of \$100 per day for each day the agreed upon schedule is late.</p>	
<b>4.4</b>	<p><b>Agent Orders</b></p> <p>The Contractor must process all Cigarette Tax indicia orders for next day delivery. Orders received on Friday prior to the stated cut-off must be processed for delivery on Saturday, providing Saturday is not a legal holiday. Orders received after the stated cut-off must be fully processed for delivery as though the order had been received the next business day prior to the stated cut-off.</p>		<p>Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.</p>
<b>4.5</b>	<p><b>Emergency Orders</b></p> <p>The Contractor must process all emergency orders, up to the inventory of stock maintained at an emergency site, according to the agreed upon schedule.</p>		<p>Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.</p>
<b>4.6</b>	<p><b>Delivery of Indicia</b></p> <p>The Contractor must ensure delivery/pickup to the USPS in time for next day delivery for orders received prior to the stated cutoff time.</p> <p>The Contractor shall cooperate with the Department and the USPS regarding lost and missing orders.</p>		<p>Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.</p>
<b>4.7</b>	<p><b>Insufficient Fund Notification</b></p> <p>Upon notification of insufficient funds, the Contractor must:</p> <ul style="list-style-type: none"> <li>-- Notify the Department of insufficient funds for an</li> </ul>		<p>Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.</p>

# Attachment 1

<b>4 TIMELINESS OF PAYMENT/ORDER PROCESSING</b> <b>99.5% TIMELY</b>			
	<p>Agent within one business hour, within the business day of 8:00 a.m. - 4:30 p.m., of the Contractor being informed.</p> <p>-- At the Department's direction, immediately lock Agent accounts to prevent additional Cigarette Tax indicia purchases.</p> <p>-- Suspend all sales of indicia to a defaulted Agent pending the State's and/or City's receipt of confirmed replacement payment(s) due in good funds and the State/City's reauthorization of authority to purchase on credit.</p>		
<b>4.8</b>	<p><b>Lost and/or Stolen Indicia</b></p> <p>a) When a loss occurs (i.e., indicia stolen, lost) under the control of the Contractor, the Contractor must reimburse the Department for the face value of the indicia within ten (10) business days and allow for research of missing indicia.</p> <p>b) When a loss occurs out of the control of the Contractor (specifically, indicia lost or stolen in transit), the Contractor must reimburse the Department the replacement value within 14 business days.</p> <p>c) Notify the Department of any loss within one (1) hour of the Contractor being made aware of the loss.</p>	<p>Liquidated Damages of \$100 for each time the notification to the Department is late.</p>	<p>a) Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard; and if not timely, reimbursement for lost interest for each day beyond the specified time frame for failure to meet the standard.</p> <p>b) Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard; and if not timely, reimbursement for lost interest for each day beyond the specified time frame for failure to meet the standard.</p>

## Attachment 1

<b>5 ACCURACY AND COMPLETENESS OF PAYMENT/ORDER PROCESSING 99.5% COMPLETE AND ACCURATE</b>			
	<b>PERFORMANCE STANDARD</b>	<b>LIQUIDATED DAMAGES</b>	<b>REIMBURSEMENTS</b>
<b>5.1</b>	<p><b>All Payment Types</b></p> <p>All payment transactions must be processed accurate and complete in accordance with all stated RFP requirements.</p>		Reimburse Agent for any principal, lost interest, interest income, and bank fees as a result of failure to meet the standard.
<b>5.2</b>	<p><b>Agent Orders</b></p> <p>The Contractor must process all indicia orders (regular orders and emergency orders).</p>		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.
<b>5.3</b>	<p><b>Agent Credit Lines</b></p> <p>The Contractor must not process orders from Agents when the order results in Agent(s) exceeding the Department set credit limits.</p>		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.
<b>5.4</b>	<p><b>Delivery of Indicia</b></p> <p>The Contractor must ensure delivery of all indicia orders.</p>		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.
<b>5.5</b>	<p><b>Insufficient Fund Notification</b></p> <p>The Contractor must notify the Department of all Agent insufficient fund notifications.</p>	Liquidated damages of \$500 for each failure to meet the standard.	
<b>5.6</b>	<p><b>Locked Accounts</b></p> <p>The Contractor upon Department direction must lock any specified Cigarette Tax Agent account(s).</p>		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.
<b>5.7</b>	<p><b>Supply of Cigarette Tax Indicia Inventory</b></p> <p>The Contractor must maintain access to one month's supply of inventory to fill and complete orders.</p>		Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.

## Attachment 1

<b>5 ACCURACY AND COMPLETENESS OF PAYMENT/ORDER PROCESSING</b>			
<b>99.5% COMPLETE AND ACCURATE</b>			
	<p>The Contractor must maintain one case (NYS 20 - 25 rolls per case) of State-only indicia in each upstate emergency site and one case (Joint 20 - 25 rolls per case) each of State-only and Joint indicia in each downstate emergency site.</p> <p>Accurately and completely maintain all physical inventories and associated records and implement all inventory tracking procedures.</p>		
<b>5.8</b>	<p><b>Prepaid Sales Tax</b></p> <p>The Contractor must accurately and completely process Prepaid Sales Tax information according to the Department's procedures.</p>		<p>Reimbursement to the Department for any expenses including losses incurred as a result of failure to meet the standard.</p>

## Attachment 2

### II PROPOSAL CONDITIONS, INVARIABLE and NEGOTIABLE CONTRACT CONDITIONS

This Section outlines conditions concerning the Request for Proposal, the Bidder's response and proposal conditions, invariable and negotiable contract conditions related to any awarded Contract. This Section is arranged as follows:

**Part A: Proposal Conditions** outlines conditions directly related to the submission of bids in response to this RFP.

**Part B: Invariable Conditions** outlines invariable conditions related to the submission of bids as well as any resultant Contract. **Invariable Contract Conditions** will be included in any Contract awarded as a result of this RFP without change. The Bidder *must agree* to the invariable conditions without change. Bidders are not permitted to propose extraneous terms with respect to these provisions. If extraneous terms are proposed, the bid will be disqualified as non-responsive.

**Part C: Negotiable Conditions** are Negotiable Contract conditions to be addressed in the Contract awarded as a result of this RFP. Bidders are allowed to propose extraneous terms for each of these provisions.

#### A Proposal Conditions

These conditions are directly related to the submission of bids in response to this RFP.

##### 1 Issuing Agency

This RFP is issued by the New York State Department of Taxation and Finance ("the Department" or "DTF"), which is responsible for all criteria stated herein and for evaluation of all proposals submitted.

##### 2 Solicitation

This RFP is a solicitation to bid, not an offer of a Contract.

##### 3 Liability

The State of New York is not liable for any costs incurred by a Bidder in the preparation and production of any proposal, or for any work performed prior to the execution of a formal Contract.

##### 4 Proposal Ownership

All proposals and accompanying documentation becomes the property of the State of New York and will not be returned. The Department reserves the right to use any portions of the Bidder's proposal not specifically noted as proprietary.

##### 5 Timely Submission

Bidders are solely responsible for timely delivery of their proposal to the location set forth by the stated bid due date/time and are solely responsible for delays in receipt including, but not limited to those due to third-party carriers.

## Attachment 2

### **6 Non-Collusive Bidding Certification (Reference State Finance Law Section 139-d and Appendix A, Clause 7)**

In accordance with Section 139-d of the State Finance Law and Appendix A, Standard Clauses for New York State Contracts, by submission of this bid, each bidder, and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of his knowledge and belief:

- a. The prices in this bid have been arrived at independently without collusion, consultation, communication or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other Bidder or with any competitor;
- b. Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the Bidder and will not knowingly be disclosed by the Bidder prior to opening, directly or indirectly, to any other Bidder or to any competitor; and
- c. No attempt has been made or will be made by the Bidder to induce any other person, partnership or corporation to submit or not submit a bid for the purpose of restricting competition.

### **7 MacBride Fair Employment Principles**

In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

### **8 Proposal Effective Period**

The Bidder's proposal must be firm and binding for a period of at least 180 days following the bid proposal due date.

### **9 Bidder Proposal Clarification**

The Department reserves the right to require a Bidder to provide clarification and validation of its proposal, to the satisfaction of the Department, through any means the Department deems necessary. Failure of a Bidder to cooperate with the Department's effort to clarify a proposal may result in the proposal receiving a reduced evaluation score or being labeled as non-responsive and given no further consideration.

Additionally, the Department reserves the right to use information submitted by the Bidder in response to the Department's request for clarifying information in the course of evaluation and selection under this RFP.

### **10 Bid Opening**

Bids will not be opened publicly. The Department reserves the right at any time to postpone or cancel a scheduled bid opening.

### **11 Bid Evaluation and Selection**

See **Section X: Proposal Evaluation**, regarding bid selection and evaluation methodology. To the extent permitted by law, Bidder proposals shall not be disclosed, except for purposes of evaluation and approval, prior to approval of any resulting Contract by the Office of the State Comptroller. Submitted proposals may be reviewed and

## Attachment 2

evaluated by any personnel or agents of the Department, other than one associated with a competing Bidder.

### **12 Disqualification for Past Performance and Findings of Non-Responsibility**

The Bidder may be disqualified from receiving awards if the Bidder; or the commercial bank acting as a subcontractor, if applicable; or anyone in the Bidder's employment, has previously failed to perform satisfactorily in connection with public Bidding or Contracts or is deemed non-responsible.

### **13 Bidder Notification of Intent to Award**

The successful Bidder will be advised of selection by the Department through the issuance of a "Notification of Intent to Award Letter." Bidders whose bids have not been selected by the Department in response to this RFP shall be notified of such non-selection.

### **14 Contract Approval**

Any Contract resulting from this RFP will not be effective until approved by the Office of the Attorney General and the Office of the State Comptroller.

### **15 Disclosure of Contract Award Information**

Public announcements or news releases shall not be made prior to Contract award. Requests concerning bid information or the evaluation of a bid submitted will be considered under the Freedom of Information Law (FOIL) only after Contract negotiations are complete and the Contract is approved by the State Attorney General's Office and the Office of the State Comptroller.

### **16 Debriefing Sessions**

Bidders will be notified in writing and may request the opportunity for a debriefing session. Such sessions will be limited to discussions of evaluation results as they apply to the Bidder receiving the debriefing.

### **17 Bid Protest Policy**

The Department's procedures for handling protests of bid awards are set forth in **Exhibit A: Bid Protest Policy**.

### **18 Reserved Rights**

The Department reserves the right to exercise any of the following:

- a. Change any of the scheduled dates stated herein.
- b. Amend RFP specifications after their release to correct errors or oversights, or to supply additional information as it becomes available and so notify all Bidders.
- c. Withdraw the RFP, at its sole discretion.
- d. Not award a Contract as a result of this RFP.
- e. Re-bid this RFP, at its sole discretion.
- f. Eliminate a mandatory requirement when all Bidders cannot meet such requirement.

## Attachment 2

- g. Evaluate, accept and/or reject any and all proposals, in whole or in part, and to waive technicalities, irregularities, and omissions if, in the Department's judgment, the best interests of the State will be served. In the event compliant bids are not received, the Department reserves the right to consider late or non-conforming bids as offers.
- h. Require the Bidder to demonstrate, to the satisfaction of the Department, any information presented as a part of their proposal.
- i. Use proposal information obtained through site visits, management interviews and the Department's investigation of a Bidder's qualifications, experience, ability or financial standing, and any material or information submitted by the Bidder in response to the Department's request for clarifying information in the course of evaluation and selection under this RFP.
- j. Determine a tie breaking mechanism for award of the Contract to serve the best interests of the State.
- k. Negotiate with the successful Bidder(s) within the scope of the RFP to serve the best interests of the State.
- l. Conduct Contract negotiations with the next highest-ranked responsible Bidder should the Department be unsuccessful in negotiating an agreement with the selected Bidder(s) within 45 days from Notification of Award or upon failure of the selected Bidder to successfully complete the Development Phase upon approval of the initial Contract, at the sole discretion of DTF.

### **B Invariable Conditions**

The Bidder must agree to the invariable conditions in this Section without change. Bidders are not permitted to propose extraneous terms with respect to these provisions. If extraneous terms are proposed, the bid will be disqualified as non-responsive. **Invariable Conditions** will be included in any Contract awarded as a result of this RFP without change.

#### **1 Appendix A – Standard Clauses for New York State Contracts**

Appendix A – Standard Clauses for New York State Contracts will be incorporated, in its entirety, into any Contract resulting from this RFP.

#### **2 Contract Order Of Precedence/Rules of Construction**

- a. The Contract will consist of the following documents and the following order of precedence shall control in the event of a conflict:
  - i. Appendix A;
  - ii. DTF-202 Agreement to Adhere to the Secrecy Provisions of the Tax Law and Internal Revenue Code;
  - iii. Written amendments to the Contract;
  - iv. The main body of the Agreement, including Appendices and Exhibits (other than Appendix A, DTF-202 Agreement to Adhere to the Secrecy Provisions of the Tax Law and Internal Revenue Code, the RFP, Contractor's Bid Proposal, questions and answers and Contractor Service Agreements);
  - v. The RFP (excluding Appendix A and DTF-202 Agreement to Adhere to the Secrecy Provisions of the Tax Law and Internal Revenue Code) including any amendments, clarifications and the questions and answers;

## Attachment 2

- vi. The Contractor's Bid Proposal; and
  - vii. The Contractor's Service Agreements.
- b. In the event of a conflict between or among the documents referenced in a clause above, the latest in time document shall govern.

### **3 Outstanding Tax Liabilities**

All outstanding tax liabilities, if any, due to the State of New York from the Contractor, or Contractor's partners, officers, agents or 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.

### **4 Equal Employment/Business Participation Opportunities for Minority Group Members and New York State Certified Minority/Women-Owned Businesses**

In accordance with Article 15-A of the New York State Executive Law (Participation by Minority Group Members and Women with Respect to State Contracts) and in conformance with the Regulations promulgated by the Minority and Women's Business Development Division of the New York State Department of Economic Development set forth at 5 NYCRR Parts 140-144, the Contractor agrees to be bound by the following to promote equality of economic opportunities for minority group members and women, and the facilitation of minority and women-owned business enterprise participation on all covered DTF Contracts.

#### **a. Equal Employment Opportunity Requirements**

By submission of a bid or proposal in response to this solicitation, the Offerer agrees with all of the terms and conditions of Appendix A, including Clause 12 - Equal Employment Opportunities for Minorities and Women. The Contractor is required to ensure that the provisions of Appendix A, Clause 12 – Equal Employment Opportunities for Minorities and Women, are included in every subcontract in such a manner that the requirements of these provisions will be binding upon each Subcontractor as to work in connection with the State Contract.

#### **b. Participation Opportunities for New York State Certified Minorities and Women-Owned Businesses**

Authorized Users are encouraged to make every good faith effort to promote and assist the participation of New York State Certified Minority and Women-owned Business Enterprises (M/WBE) as Subcontractors and suppliers on this Contract for the provision of services and materials. To locate New York State Certified M/WBE, the directory of Certified Businesses can be viewed at:

[http://www.empire.state.ny.us/Small\\_and\\_Growing\\_Businesses/mwbe.asp](http://www.empire.state.ny.us/Small_and_Growing_Businesses/mwbe.asp).

### **5 Financial Stability**

Contractors are required to evidence financial stability as a material condition of any Contract awarded as a result of this RFP. Financial stability may be evaluated annually based upon criteria similar to that used in the bidding process to include the reports required for the Contractor's particular organizational structure as set forth in the RFP and as otherwise required by the Department.

## Attachment 2

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 Department within 45 days of the end of the six month financial period.

The Contractor is required to immediately notify the Department of a significant expansion of the Contractor or any change in ownership or organizational structure. Any significant change in ownership or significant expansion of organizational structure may require a re-evaluation of the Contract, in its entirety, by the Department.

### **6 Independent Contractor**

It is understood and agreed that the legal status of the Contractor, its agents, officers and employees under this Contract is that of an independent Contractor and, in no manner shall they be deemed employees of the Department, and therefore are not entitled to any of the benefits associated with such employment. The Contractor agrees, during the term of the Contract awarded under this RFP, 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 for its employees, including worker's compensation, disability and unemployment insurance, and to provide the Department with certification of such insurance upon request. The Contractor remains responsible for all applicable federal, state and local taxes, and all FICA contributions.

### **7 Prime Contractor/Subcontracting**

Contractor may subcontract for services performed in connection with this Contract. 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 Contract.

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 on the List of Debarred Offerers maintained by the Office of General Services under State Finance Law §139-j(10)(b); or
- the Department determines that the company is not qualified, has unsatisfactory contract performance, or service has been previously provided.

In the performance of work under the Contract, Contractor remains primarily liable for the successful completion of all work in accordance with the Contract, and jointly and severally liable for the timely performance of all work or goods/materials furnished pursuant to this contract by third parties acting for or through Contractor. The Contractor shall be so liable even where subcontracting, independent Contractors, consortiums or partnering for a portion of the work is expressly authorized under the Contract.

Contractor shall remain primarily liable to the Department for the acts and omissions in the performance of services under the Contract of the subcontractors and/or persons either directly or indirectly employed by it or by the subcontractors, as it is for the acts and omissions in the performance of services under the Contract or persons directly employed by the Contractor. Contractor shall not in any way be relieved of any financial, programmatic or service responsibility under the Contract by its agreement with any subcontractor or by the Department's approval of such an agreement with a subcontractor.

The work performed by the subcontractor must be in accordance with the terms of the Contract including, but not limited to the following:

- Appendix A;

## Attachment 2

- That subcontractor shall comply with the provisions of Section 5-a of the Tax Law and all Secrecy provisions;
- That nothing contained in any agreement with the subcontractor shall impair the rights of the Department;
- That nothing contained herein shall create any contractual relation between any subcontractor and the Department;
- That subcontractor shall maintain all records with respect to work performed;
- That the DTF shall have the same authority to audit the records of all subcontractors as it does those of the Contractor; and
- Financial stability.

The Department reserves the right to request a list of subcontractors to ensure compliance.

### **8 Cooperation with Third Parties**

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

### **9 Termination of the Contract**

- a. The Department may terminate the Contract, or any portion thereof, immediately for failure to: meet implementation or certification dates; remain financially stable or responsible; adhere to the secrecy provisions; or for a violation of procurement lobbying act requirements. Otherwise, the Department may terminate the contract for material breach including, but not limited to, repeated performance problems, security breach, failure to comply with revised Tax Law Section 5-a, or the Contractor is otherwise deemed non-responsible upon 90 days written notice.
- b. The Department may terminate the Contract, or any portion thereof, for convenience upon reasonable notice, without penalty or other early termination charges due, if determined to be in the best interests of the State.
- c. The parties may agree to mutually terminate the Contract, or any portion thereof, on terms satisfactory to both parties.
- d. The Department reserves the right to terminate the Agreement immediately if the Contractor's financial stability is reasonably determined by the Department to be in question.

### **10 Payments**

All payments will be made in accordance with Article 11-A of the New York State Finance Law. Additional information related to payment can be found in Section VI of this RFP.

The Contractor must maintain adequate records, as prescribed by the Department, to substantiate all claims for payment and, upon request, must make those records available to the Department for examination.

### **11 Public Announcements**

Public announcements or news releases relating to this RFP or the resulting agreement shall not be made by any Bidder or its agent without the prior approval of the Department.

## Attachment 2

Such approval shall not be considered until an executed Contract is approved by the Office of the Attorney General and the Office of the State Comptroller.

### 12 Amendments

Amendments to the Contract awarded as a result of this RFP will not be effective until approved by the Office of the Attorney General and the Office of the State Comptroller, where necessary.

### 13 Contract Execution

The Bidder must be willing and capable of entering into a contract within 45 calendar days after Notification of Intent to Award is issued.

### 14 Contract Term

The Contract shall become effective following approval by the New York State Attorney General and the Office of the New York State Comptroller and shall continue for a five (5) year term Agreement, thereafter. The Agreement may be extended upon mutual agreement of the parties, for one (1) two-year term.

The Agreement will also include an extension of up to twelve (12) months at the end of the initial term of the Agreement or the extension period, as applicable, to provide for an orderly transition of services to a subsequent service provider, at the sole discretion of the Department.

### 15 Ownership of Data/Data Security

- a. All data under the Contract shall be and remain the property of the Department, and the Contractor must, during the term of the Contract (including any extensions and/or transition periods), provide the Department with access to any such data maintained by Contractor.
  - i. The Contractor must, in accordance with applicable law and the instructions of the Department, maintain such data for the time period required by applicable law, exercise due care for the protection of data, and maintain appropriate data integrity safeguards against the deletion or alteration of such data.
  - ii. Promptly after the termination or expiration of the Contract, the Contractor shall provide all such data still within its possession or that of its subcontractors to the Department, or sanitize such data, consistent with applicable law and instructions from the Department.
- b. Upon the Department's reasonable request, Contractor shall correct, to the extent practicable, at Contractor's sole expense, reports, data and/or image output that fail to achieve the Performance Standards.

### 16 Payment for Services

All proposed fees are guaranteed for the first three (3) years of the base term described in this RFP.

- a. Sections 105 and 106 of the State Finance Law require financial institutions holding deposits of State monies to pledge collateral with the Office of the New York State Comptroller to the extent deemed appropriate by the Comptroller.
- b. A financial institution providing depository bank services must be insured by the FDIC through the term of the Agreement, including any extensions and/or transition periods.

## Attachment 2

- c. The method of compensation shall be by means of direct payment and/or compensating balances or a combination of the two, at the State's discretion. The State reserves the right to change the compensation method. The State agrees not to change the method of compensation at a frequency greater than once annually, except in extraordinary situations, as determined by the State. The State shall provide the Contractor with at least ninety (90) days advance notice of change of compensation method.
- d. If the State elects to pay by direct payment, the State may choose to either offset the fee payment with Earnings Credits or request direct reimbursement from the Contractor (as described in Section VI of this RFP).

Payment may be by means of direct payment or compensating balances (if the Contractor is a bank).

- Compensating balances will be established and maintained by OSC.
- Payment for services (including development fees) via direct fee shall be billed by Contractor to the Department and will be paid in accordance with the voucher and audit procedures established by the State Finance Law and OSC.
- Proposed fees shall be guaranteed for the first three years of the base term. Thereafter, any fee increase shall not exceed the annual change in the CPI-U *for all Urban Customers* for the prior one-year period.

The Contractor shall provide the Department with an invoice or voucher within 30 calendar days after the end of the month in which services are rendered, in appropriate detail to permit the Department to identify all fees and charges imposed by the Contractor pursuant to the Agreement. In addition, the Contractor shall provide the Department with an invoice or voucher within 30 days of the end of the New York State fiscal year for all required payments for change control enhancements for development and operation fee payments approved by the Department in such fiscal year in accordance with the Change Procedure. The Contractor must include the appropriate record detail as prescribed by the Department to substantiate such claim for payment.

### **17 Implementation Plan**

A mutually agreed upon Implementation Plan as described in Exhibit B, CDRL of this RFP will be included as part of the Agreement.

### **18 Implementation**

The testing and acceptance criteria and performance measurements included in the Implementation Plan will be reasonably determined by the Department.

A mutually agreed upon Implementation Plan setting forth timetables for implementing the services will be included as part of the Contract.

- a. The Department shall, in its sole and reasonable judgment, determine the number of implementation deliverables that it desires to test, the performance measures for an implementation deliverable, or the final implementation deliverable, the length of user acceptance testing and the means of testing such deliverables. Contractor may make recommendations to the Department regarding the performance measures, length of user acceptance testing, and the means of testing an implementation deliverable and/or the final implementation deliverable, but the Department shall have final responsibility for determining such criteria.

## Attachment 2

- b. User acceptance testing shall begin as set forth in the implementation plan or when Contractor informs the Department, in writing, that an implementation deliverable, or the final implementation deliverable, complies with the relevant performance measures, and is ready for user acceptance testing by the Department. The Department shall have a defined number of days, as set forth in the implementation plan, from receipt of such notice to test such deliverable for compliance with the performance measures. The Department shall provide Contractor, within 15 business days after the expiration of the test period, with a notice of defects, a notice of acceptance or a notice of certification (applicable to the final implementation deliverable), as applicable. Upon receipt of a notice of defects, Contractor shall diligently proceed to correct all defects and thereafter notify the Department that such deliverable is again ready for user acceptance testing. This process shall continue until the Department delivers to Contractor a notice of acceptance for the implementation deliverable, or a notice of Certification for the final implementation deliverable, as applicable.

### 19 Program Management

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

#### a. Personnel Changes by Contractor

- i. The Contractor shall notify the Department of any and all planned personnel changes (including but not limited to terminations, reassignments and organizational restructuring) of managers responsible for the provision of services. Such notification must be received by the Department at least fourteen (14) days prior to the effective date of the change when feasible, or else as soon as possible after the change.
- ii. If the personnel change for a manager(s) is in the control of the Contractor, and the Department believes the result of such change will cause degradation of the services performed by Contractor, then the Department may pursue the dispute resolution process (as described in subsection C.1. below) regarding such change.
- iii. Staff Management

The Department shall have the right to request the removal of any Contractor manager or staff person assigned to the provision of services under the Agreement, for work-related cause, provided that such cause is not one which is prohibited by law as a basis for terminating an employee.

#### b. Program Enhancements

- i. The Department may request that the Contractor provide enhancement services (through the Change Control process) which are beyond the scope of services identified in the RFP. However, the Department is under no obligation to ask the Contractor to provide enhancement services and reserves the right to develop and implement such program enhancements internally at the Department or to obtain such enhancement services from a third party. The Contractor agrees to work in good faith with the Department and any other involved party to develop such enhancements.
- ii. The Contractor will not be paid for such enhancement services performed internally at the Department or through a third party.

1 Contractor must maintain lockboxes on behalf of the Department with the US Postal Service, in a configuration defined by the Department. Lockboxes shall be owned by the Department through the Contract term and upon Contract termination or expiration.

## Attachment 2

- 2 Contractor must maintain one or more processing sites in order to perform services under the Contract. The Department shall have the right to disapprove any change in processing site(s) if the Department reasonably determines that the change would adversely affect provision of the services under the Contract.
- 3 Contractor must provide those management and staff resources necessary to perform the services under the contract.
  - a. The Department shall have the right to require removal of any Contractor manager assigned to the provision of services under the Contract, for work-related cause, provided that such cause is not one which is prohibited by law as a basis for terminating an employee.
  - b. The Department may request the removal of any Contractor staff person assigned to perform services under the Contract, for reasonable work-related cause.
- 4 Contractor shall acquire, operate and maintain the equipment necessary to support performance of services under the Contract, through the Contract term (including any extensions and/or transition periods).

### **20 Change Control Procedure**

- a. All changes to the services and fees set forth in the RFP must be initiated through the Change Control Procedure as set forth in Exhibit 6 of this RFP.
- b. All changes to the Contract, whether programmatic changes or fee changes, must be made through the defined Change Control Procedure.
- c. Contractor may be required to proceed with enhancements prior to completion of the fee change procedure. In such a case, the fee change will be retroactive to a date mutually agreed to by the parties.

### **21 Warranties**

- a. Computer virus warranty

The Contractor represents and warrants that Licensed Software contains no known viruses. Contractor is not responsible for viruses introduced at Licensee's site.

- b. No disabling code warranty

Contractor warrants that all Contractor Software Deliverables shall not contain disabling code planted by Contractor that will activate upon a predetermined date or that can be remotely activated by Contractor without the State's prior written consent. Contractor shall make an inquiry (including applicable license agreement, if necessary) with respect to whether any Licensed Third-Party Software Deliverable furnished to DTF by or through Contractor contains any disabling code, and shall notify DTF accordingly.

- c. Qualified staff

Contractor warrants that each of Contractor's employees and agents assigned to perform services under the Contract has the proper skill, training and background so as to be able to perform the services in a competent and professional manner.

### **22 Disaster Recovery/Fail Safe Operations**

## Attachment 2

- a. The Contractor shall develop and deliver to the Department for its review and approval, on or before a date as reasonably determined by the Department, and at no additional cost, a Disaster Recovery Plan for the Program services provided under the Agreement. The Department's approval of the Disaster Recovery Plan shall not be unreasonably withheld.
- b. The Contractor agrees to provide the Department with reasonable access to that portion of its Disaster Recovery Plan relevant to the services provided under the Agreement. The Contractor shall provide the Department with any reports or findings of any regulatory agency dealing with the Contractor's disaster recovery capabilities, unless it is prohibited from making such disclosure by law or by any such agency. The Contractor shall also make available any reports of its independent auditors relating to such plans. The Contractor shall provide the Department with reasonable access to any results of any tests of the Contractor's disaster recovery facilities conducted by the Contractor or any third party. The Contractor shall provide an annual briefing to the Department related to its disaster recovery strategy.
- c. Contractor shall no later than twenty-four hours after the occurrence of an event requiring activation of the disaster recovery plan, inform the Department that the plan has been activated. At that time, Contractor shall provide the Department with a description of the nature and extent of the disaster, an assessment of the impact on all services provided pursuant to the Contract and a description of the specific recovery actions with their associated timeframes which have been or will be taken as part of the plan. Contractor will provide appropriate periodic updates of the recovery process as required by the Department.
- d. Contractor agrees to provide the Department with any updates to the disaster recovery plan with respect to the services provided under the Contract, and/or any plans to implement recommendations resulting from routine testing of the disaster recovery plan. Contractor must maintain, test (at least once annually on a date as reasonably determined by the Department), and update the plan as necessary throughout the duration of the Contract (including any extensions and/or transition periods). In addition, Contractor must inform the Department on an annual basis as to the status of disaster recovery operations.

### 23 Transition Period

A transition period will be required to wind down Contractor activities and ease the move to a subsequent Contractor. During this period, services will continue. Performance standards and liquidated damages/reimbursements will be applicable.

### 24 Indemnification

The Contractor shall be fully liable for the actions of its agents, employees, partners or Subcontractors and shall fully indemnify and save harmless the State from suits, actions, damages and costs of every name and description relating to personal injury and damage to real or personal tangible property caused by an intentional act or negligence of Contractor, its agents, employees, partners or Subcontractors, without limitation; provided, however, that the Contractor shall not indemnify for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the State.

### 25 Intellectual Property Rights Indemnity

- a. The Contractor shall fully indemnify, defend and save harmless the Department, its officers, employees, and agents, from and against any and all losses, liabilities, judgments, damages, awards and costs (including legal fees and expenses), arising out of or related to any claim of, or action for, infringement of a patent, or of any copyright, trademark, trade secret or other third party intellectual property rights in each case to the extent caused by intellectual property provided by or through the Contractor

## Attachment 2

and used to perform the services, without limitation. The foregoing provisions of this paragraph shall not apply to the Department's misuse or modification of such intellectual property, the Department's failure to use corrections or enhancements made available by the Contractor, or the Department's use of the intellectual property in combination with any product or information not provided by the Contractor, where such misuse, modification or combination gives rise to the infringement. The State shall give the Contractor:

- i. Prompt written notice of any action, claim or threat of infringement suit, or other suit;
  - ii. The opportunity to take over, settle or defend such action, claim, or suit at the Contractor's sole expense; and
  - iii. Assistance in the defense of any such action at the expense of the Contractor.
- b. In the event that an action at law or in equity is commenced against the Department arising out of the performance of the Agreement by the Contractor, its officers, partners, employees, subcontractors, or agents and if the Contractor is of the opinion that the allegations in such action, in whole or in part, are not covered by the indemnification and defense provisions set forth herein, the Contractor, after receiving notice of such action, shall immediately notify the Department, in writing, specifying to what extent the Contractor believes it is obligated to defend and indemnify under the terms and conditions of the Agreement.
- c. If usage shall be enjoined for any reason or if Contractor believes that it may be enjoined, Contractor shall have the right, at its own expense and sole discretion to take action in the following order of precedence: (i) to procure for the Department the right to continue Usage (ii) to modify the service or Product so that Usage becomes non-infringing, and is of at least equal quality and performance; or (iii) to replace said service or Product or part(s) thereof, as applicable, with non-infringing service or Product of at least equal quality and performance. If the above remedies are not available, the parties shall terminate the Contract, in whole or in part as necessary and applicable, provided the Authorized User is given a refund for any amounts paid for the period during which Usage was not feasible.

### **26 Litigation Support**

Contractor shall make available appropriate personnel during the term of the contract (including any extensions and/or transition periods) to provide affidavits and/or testify in any administrative or judicial proceeding as to the accuracy and trustworthiness of the systems and procedures utilized to provide services under the Contract.

### **27 Contractor Cooperation**

Contractor and its employees, partners, agents and subcontractors shall cooperate with Department personnel and any other Contractors engaged by the Department to provide services under the Program.

### **28 Dual Employment Provisions**

- a. Contractor shall implement and administer a "dual employment policy." Contractor shall agree that all of its personnel, whether permanent or temporary, involved in providing services pursuant to the Contract, shall be required to sign a document at the time of employment attesting that they are not employed by the Department or engaged in the activities set forth below.
  - i. Outside employment or business activity, unless otherwise permitted by the Department, must not relate to tax issues, preparation of tax returns, coupons or

## Attachment 2

the determination of tax liabilities. Preparation of tax returns, coupons and other forms as required by Federal, State, or local taxing authorities, whether compensated or uncompensated, for a person or a business other than for one's self, one's spouse, child or spouse's child, grandchild, and one's own or spouse's brother, sister, parent or grandparent shall be prohibited;

- ii. Maintaining accounting and/or bookkeeping records for any for profit firm, individual, association or corporation, whether compensated or uncompensated shall be prohibited, provided, however, that maintaining accounting and/or bookkeeping records for the purpose of preparing a tax return or coupon for himself or herself, his or her spouse, child or spouse's child, grandchild, and one's own or spouse's brother, sister, parent or grandparent shall be permitted; and
  - iii. Having direct financial interest in an organization which is involved with the preparation for clients of tax returns or other related documents required by the State or any other taxing authority shall be prohibited.
- b. Contractor employees may not use information, confidential or otherwise, obtained in the course of providing services to the Department under the Contract, to obtain benefits, financial or otherwise, for themselves or anyone else. Neither can employees use or disclose such information to cause embarrassment or injury to others.

### **29 Continuity of 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, Secrecy, Indemnification and Limitation of Liability shall survive the termination or expiration of this Contract.

### **30 Performance Standards and Liquidated Damages/Reimbursements**

#### a. Performance Standards

Categories of Performance Standards shall be those set forth in Section V of this RFP. The Performance Standards establish minimum levels at which the services are to be performed by the Contractor. Performance audits will be conducted by the Department to determine the Contractor's level of compliance with the Performance Standards. The Contractor's performance will be evaluated by applying a variety of generally accepted audit methodologies. Liquidated damages and/or reimbursements may be imposed by the Department for the Contractor's failure to perform in accordance with a Performance Standard.

#### b. Liquidated Damages/Reimbursements

The service levels associated with the Performance Standards and the amount of Liquidated Damages and Reimbursements are set forth in this RFP and shall be included in the Agreement. Procedures to impose Liquidated Damages and Reimbursements shall be addressed in the Agreement. In the event that the Contractor fails to meet any Performance Standard, and as a result thereof the Department's normal business operations are materially interrupted, then, the Department shall be entitled to immediately obtain substitute services from a third party or perform the services in-house on an interim basis until that failure has been cured. The Contractor shall not be paid for the services affected by the failure to meet the Performance Standard if substitute services must be performed by a third party or the Department and shall be liable for any additional costs to the State for substitute services. If Liquidated Damages are assessed for any failure to meet the Performance Standards, the Contractor shall make payment prior to initiating any challenge through the dispute resolution process.

## Attachment 2

- i. Contract will include performance standards to measure Contractor performance and liquidated damages/reimbursements for failure of Contractor to meet the standards as set forth in section V of the RFP.
- ii. Amount of liquidated damages/reimbursements that may be imposed shall be without limitation.
- iii. Liquidated damages/reimbursements may be imposed with or without conduct of a formal Department performance audit.
- iv. Liquidated damages/reimbursements shall be paid by Contractor before resorting to dispute resolution process.
- v. Contractor shall continue to perform services, including disputed services, until completion of dispute resolution process.

### **31 Proposal Transmittal Letter**

A transmittal letter must be signed by an official authorized to bind the Bidder to proposal provisions.

### **32 Designation of Prime Contact and Authorized Contract Negotiators**

During the bid evaluation and Contract negotiation, the Department requires direct access to Bidder personnel who have full authority to make commitments on behalf of the Bidder. The Bidder must identify and certify a prime contact authorized to respond on behalf of the Bidder. The prime contact is responsible for responding to any evaluation clarification and for disseminating information to appropriate Bidder personnel. Bidders must also identify individual(s) who will serve as authorized Contract negotiators and any restrictions under which their primary negotiators will operate. Any change in designation must be submitted in writing to the Department and include a revised form.

### **33 Proposal Security/Freedom of Information Law**

During the evaluation process, each Bidder's proposal will be held in strict confidence by the Department staff and will not be disclosed except to the Office of the Attorney General and the Office of the State Comptroller as may be necessary to obtain the approvals of those agencies for the final Contract.

Public inspection of the bids is regulated by the Freedom of Information Law (Article 6 of the New York State Public Officers Law). The bids are presumptively available for public inspection. The Freedom of Information Law provides for exemption from disclosure for trade secrets or information the disclosure of which would cause injury to the competitive position of commercial enterprises. The Freedom of Information Law (Article 6 of the New York State Public Officers Law) provides that agencies may deny access to records or portions thereof that... "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise..." (Public Officers Law Section 87.2(d)). This exception would be effective both during and after the evaluation process.

Where a Freedom of Information request is made for trade secret or other information which, if disclosed, may cause substantial injury to the competitive position of the Bidder, the Bidder must explain with particularity why the designated portion of the bid meets the statutory criteria for exemption from disclosure.

The provisions of the Freedom of Information Law will also govern the confidentiality of any and all products or services supplied by the successful Bidder.

## Attachment 2

The ethical standards of the Public Officers' Code of Ethics (Section 74 of the Public Officers Law) provide that no officer or employee of a State agency shall disclose confidential information that he acquires during the course of his official duties except as otherwise required by law.

These standards control the confidentiality of a Bidder's proposal unless the Department grants a petition for records access in accordance with the Freedom of Information Law.

### **34 Vendor Responsibility**

Article XI Section 163(4)(d) of the State Finance Law states that "service Contracts shall be awarded on the basis of best value to a responsive and responsible offerer." Upon identification of the Bidder with the highest evaluation score, the Department will evaluate the Bidder and the Commercial bank subcontractor, if applicable, to ensure responsibility. In the event a Bidder is found to be non-responsible, the Bidder may be disqualified from award.

During the Contract term, Contractors must agree to evidence vendor responsibility substantially similar to, or superior to, its status as of the execution of the Contract awarded as a result of this RFP. The Contractor must further also agree to notify the Department promptly of any material change in vendor responsibility or if a change in ownership occurs. A review of vendor responsibility shall be undertaken prior to any Contract renewal/extension and the Department reserves the right to undertake such a review annually upon the anniversary date of any awarded Contract.

### **35 Contractor Certification - Tax Law 5-A Amended April 26, 2006**

Section 5-a of the Tax Law, as amended, effective April 26, 2006, requires certain Contractors awarded state Contracts for commodities, services and technology valued at more than \$100,000 to certify, to the Department of Taxation and Finance (DTF), that they are registered to collect New York State and local sales and compensating use taxes. The law applies to Contracts where the total amount of such Contractors' sales delivered into New York State are in excess of \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made, and with respect to any affiliates and Subcontractors whose sales delivered into New York State exceeded \$300,000 for the four quarterly periods immediately preceding the quarterly period in which the certification is made.

This law also imposes upon certain Contractors the obligation to certify whether or not the Contractor, its affiliates, and its subcontractors are required to register to collect state sales and compensating use taxes and Contractors must certify to DTF that each affiliate and subcontractor exceeding the \$300,000 sales threshold referenced above is registered with DTF to collect New York State and local sales and compensating use taxes. The law prohibits the State Comptroller, or other approving agency, from approving a Contract awarded to a Contractor meeting the registration requirements but who has not registered in accordance with the law.

### **36 Secrecy Provisions**

All information regarding the Cigarette Tax imposed by Article 20 of the New York State Tax Law, the Prepaid Sales Tax on Cigarettes imposed pursuant to Section 1103 of the New York State Tax Law, and the Cigarette Tax imposed by Chapter 13 of Title 11 of the Administrative Code of the City of New York, obtained by the Contractor in the course of carrying out its responsibilities under any contract awarded pursuant to this RFP, shall be confidential, and shall not be disclosed or redisclosed except as provided by law.

All information regarding the Department of Taxation and Finance's operations, including, without limitation, automated tax system information, shall likewise be treated as confidential. For these purposes, "automated tax system information" includes, but is not limited to, functional, technical and detailed systems design; systems architecture; automated analysis

## Attachment 2

techniques; systems analysis and development methodology; audit selection methodologies; and information regarding proprietary products such as software packages.

The Contractor acknowledges and agrees that only those persons with a need to know confidential information (as defined in this Section) for purposes of performing their job responsibilities under any contract awarded as a result of this RFP shall be afforded access thereto.

The Department shall have the right to send its officers and employees into the facilities of the Contractor in order to inspect such facilities and Contractor operations to determine whether the confidentiality of the information described in this Section is being adequately safeguarded. Remedial actions prescribed by the Department in the event that confidentiality is not being satisfactorily safeguarded shall be immediately implemented by the Contractor. If the Contractor fails to take such measures immediately, the failure shall be a material breach of the Contract, and the Department may resort to any of the remedies available to it under the Contract.

The Department 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 Agreement safeguards.

If the Contractor fails to perform its obligations as set forth in the New York State Department of Taxation and Finance Secrecy Provisions and Federal Secrecy provisions, the Contract may be cancelled immediately upon written notice. At its sole discretion, the Department may elect not to allow a cure period for such failure.

The Contractor and all staff members shall agree not to divulge or use, for their own benefit or the benefit of others, confidential tax administration information; and to subscribe to § 73 and 74 of the Public Officers Law.

### **37 Procurement Lobbying Act**

Pursuant to State Finance Law §§139-j and 139-k, this solicitation includes and imposes certain restrictions on communications between DTF and an Offerer/Bidder during the procurement process. An Offerer/Bidder is restricted from making contacts from the earliest notice of intent to solicit offers/bids through final award and approval of the Procurement Contract by DTF and, if applicable, the Office of the State Comptroller ("restricted period") to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in State Finance Law §139-j (3) (a). Designated staff, as of the date hereof, are identified in the Preface section of the Request for Proposal. DTF employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the Offerer/Bidder pursuant to these two statutes. Certain findings of non-responsibility can result in rejection for Contract award and in the event of two findings within a four-year period, the Offerer/Bidder is debarred from obtaining governmental Procurement Contracts. Information related to the Procurement Lobbying Law and DTF guidelines can be found on the Department's Procurement website at: <http://www.nystax.gov/procurement>.

Contacting individuals other than the designated contacts listed in the Preface Section of this document during the restricted period may result in the disqualification of the Bidder's proposal - please refer to the Procurement Lobbying Law and the Department guidelines posted on the Department's procurement website at: <http://www.nystax.gov/procurement>.

#### **a. Offerer Disclosure of Prior Non-Responsibility Determinations**

New York State Finance Law §139-k(2) obligates a Governmental Entity to obtain specific information regarding prior non-responsibility determinations with respect to State Finance Law §139-j. This information must be collected in addition to the information that is

## Attachment 2

separately obtained pursuant to State Finance Law §163(9). In accordance with State Finance Law §139-k, an Offerer must be asked to disclose whether there has been a finding of non-responsibility made within the previous four (4) years by any Governmental Entity due to: (1) a violation of State Finance Law §139-j or (2) the intentional provision of false or incomplete information to a Governmental Entity. The terms "Offerer" and "Governmental Entity" are defined in State Finance Law § 139-k(1). State Finance Law §139-j sets forth detailed requirements about the restrictions on Contacts during the procurement process. A violation of State Finance Law §139-j includes, but is not limited to, an impermissible Contact during the restricted period (for example, contacting a person or entity other than the designated contact person, when such contact does not fall within one of the exemptions).

As part of its responsibility determination, State Finance Law §139-k(3) mandates consideration of whether an Offerer fails to timely disclose accurate or complete information regarding the above non-responsibility determination. In accordance with law, no Procurement Contract shall be awarded to any Offerer that fails to timely disclose accurate or complete information under this Section, unless a finding is made that the award of the Procurement Contract to the Offerer is necessary to protect public property or public health safety, and that the Offerer is the only source capable of supplying the required Article of Procurement within the necessary timeframe. See State Finance Law §§139-j (10) (b) and 139-k(3).

A Governmental Entity must include a disclosure request regarding prior non-responsibility determinations in accordance with State Finance Law §139-k in its solicitation of proposals or bid documents or specifications or Contract documents, as applicable, for Procurement Contracts. The attached form is to be completed and submitted by the individual or entity seeking to enter into a Procurement Contract. It shall be submitted to the Governmental Entity conducting the Governmental Procurement.

### b. Offerer's Certification of Compliance with State Finance Law 139-k(5)

New York State Finance Law 139-k(5) requires that every Procurement Contract award subject to the provisions of State Finance Law 139-k or 139-j shall contain a certification by the Offerer that all information provided to the procuring Government Entity with respect to State Finance Law 139-k is complete, true and accurate.

The Department reserves the right to terminate any Contract awarded as a result of this RFP in the event it is found that the certification filed by the Offerer/Bidder in accordance with New York State Finance Law 139-k was intentionally false or intentionally incomplete.

## 38 Ethics Compliance

All Bidders/Contractors and their employees must comply with Public Officers Law §73 and §74, Chapter 1 of the Laws of 2005, the Procurement Lobbying Reform Act of 2005, and other State statutes, rules, regulations and executive orders establishing ethical standards for the conduct of business with New York State. In signing the bid, the Bidder certifies full compliance with those provisions for any present or future dealings, transactions, sales, Contracts, services, offers, relationships, etc., involving New York State and/or its employees. Failure to comply with those provisions may result in disqualification from the bidding process, termination of Contracts, and/or other civil or criminal proceedings as required by law.

The Contractor shall complete and sign Attachment G, Public Officer's Law, Section 73.4, which addresses business or professional activities by state officers and employees and party officers. This Form shall be made part of this Contract.

## C Negotiable Conditions

**Negotiable Conditions** are Contract provisions to be addressed in the Contract awarded as a result of this RFP.

## Attachment 2

Extraneous terms for each of the following conditions may be submitted as outlined in Section VIII.E.3, Negotiable Conditions Response Requirements.

### 1 Dispute Resolution

The first step of dispute resolution will be through conference between the Department 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. Unresolved disputes will be considered by the Commissioner of Taxation and Finance, or his designee, whose decision is final and binding on the Department. During this period all work required hereunder shall be performed. If the Contractor pursues any legal or equitable remedy outside the Department, the Contractor will continue to perform work in accordance with the direction of the Department until such proceedings may be concluded and will continue to be paid, less an amount attributable to the disputed work. Disputes that go to litigation must be pursued in a court of competent jurisdiction of the State of New York. New York law will govern the dispute and venue must be laid in Albany County, New York.

### 2 Information Security Breach and Notification Act

The Contractor expressly agrees to comply with the provisions of Chapter 442 of the Laws of 2005, as amended by Chapter 491 of the Laws of 2005, commonly known as the Information Security Breach and Notification Act (the "ISBNA" or "Act"), and any future amendments thereto. Contractor shall comply with all obligations imposed by the notice provisions of the ISBNA with respect to any computerized "private information" (as defined in the Act) received, handled, processed, uploaded, or maintained by Contractor on behalf of DTF under this Contract (hereinafter, the "DTF Information"). In the event of a "breach of the security of the system" (as defined by the Act), Contractor shall immediately notify DTF upon discovery or notification of such breach. Such notice to DTF shall be made in one of the following ways: by contacting the Contractor's DTF liaison for the Contract; by e-mail to Dave\_Beals@tax.state.ny.us; or by telephone to Dave Beals at (518) 292-7827. Contractor shall immediately commence an investigation, in cooperation with DTF, to determine the scope of the breach and to restore the security of the system. To the extent DTF 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, non-New York State residents whose private information is reasonably believed to have been exposed as a result of the breach, and all costs associated with providing such notices shall be borne by the Contractor. It is expressly agreed that the Contractor shall be obligated to receive authorization from DTF **prior** to making any notifications to any individuals, the State Office of Cyber Security and Critical Infrastructure Coordination, 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 DTF 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 DTF Information. Nothing contained herein shall be interpreted as reducing or altering Contractor's obligations under Section 899-aa of the General Business Law.

### 3 Force Majeure

Neither party will be liable for losses, defaults, or damages under this Agreement which result from delays in performing, or inability to perform, all or any of the obligations or responsibilities imposed upon it pursuant to the terms and conditions of this Agreement, due to or because of acts of God, the public enemy, acts of government, earthquakes, floods, civil strife, fire, or any other cause beyond the reasonable control of the party that was so delayed or so unable to perform provided that such party was not negligent and shall have made reasonable efforts to avoid and overcome such cause. Such party will

## Attachment 2

resume full performance of such obligations and responsibilities promptly upon removal of any such cause.

### **4 Licensed Software (third party and pre-existing contractor SW) and Custom Software**

- a. Department license to Licensed SW and accompanying documentation shall last through Contract term, including any extensions and/or transition periods.
- b. Contractor shall be responsible for SW maintenance through Contract term, including any extensions and/or transition periods.

- i. Licensed Software

If the Contractor is the licensee or sub-licensee of third-party licensed software that the Department will use in connection with the Services performed under the Agreement, then the Contractor warrants that:

- 1 such license or sub-license has not expired; and
- 2 such license or sub-license allows the Department 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.

The Contractor grants the Department (including an agent, Contractor or outsourcer of the Department), without compensation, a perpetual, non-exclusive license to use, execute, copy, display and distribute for the Department's tax administration purposes, object code to pre-existing software created by the Contractor which is deemed necessary for the performance of the services of the Agreement.

- ii. Custom Software

Upon final payment therefore, the Department shall own and possess all rights, title and interest in and to custom software created by the Contractor specifically for the Department under the Agreement, including, without limitation, all ownership and intellectual property rights.

- 1 A source code escrow shall be established for Licensed SW, if the vendor offers source code escrow to other customers.
- 2 With respect to Contractor's a) pre-existing software and documentation which is necessary for the performance of services under the Contract, b) software and documentation developed by contractor during the term of the Contract, and c) third party software and documentation furnished by Contractor to perform services under the Contract, Contractor warrants and represents full ownership, clear title free of all liens, and/or that Contractor has obtained all necessary rights to use such products for the purposes set forth in the Contract. The Department may require Contractor to furnish appropriate written documentation establishing the above rights and interests as a condition of payment. The Department's request or failure to request such documentation shall not relieve Contractor of liability under this warranty.

## Attachment 2

### **5 Most Favorable Terms**

The Contractor agrees that all fees, terms, warranties and benefits provided and offered by the Contractor are substantially similar to the best equivalent terms being offered by the Contractor to any present governmental agency for services of similar size, scope and complexity. If during the term of the Agreement, the Contractor enters into an arrangement with any other similar government customer, including New York State Department of Taxation and Finance, providing greater benefits or more favorable terms for services of similar size, scope and complexity as the services provided the Department pursuant to the Agreement, then the Agreement shall thereupon be deemed amended to provide the same to the Department.

### **6 Ownership of Data/Data Security**

In the event that any data is lost or destroyed because of any act or omission of Contractor or any noncompliance with the obligations of Contractor under the contract, then Contractor shall, at its own expense, use its best efforts to reconstruct such data as soon as feasible. In such event, Contractor shall reimburse the Department for any costs incurred by the Department in correcting, recreating, restoring or reprocessing such data or in providing assistance therewith.

### **7 Investigation Support**

- a. In the event of a suspected crime, or a breach of confidentiality or security, the Contractor and its subcontractors shall cooperate fully with the Department to the extent permitted by law to investigate and identify the responsible individuals. Consistent with applicable law, the Contractor and its subcontractors shall make their employees and all relevant records, whether historical or current, including personnel records, employee photographs and original documents, available to the Department investigators upon request.
- b. Investigators may interview Contractor employees without the presence of other Contractor employees, during normal business hours, either before or after any Contractor or subcontractor internal investigation, in support of an investigation being conducted by the Department, at the Department's discretion, to the extent permitted by law.

### **8 Liability Provisions**

#### Limitation on Liability

Except where the Agreement provides that the Contractor's liability is without limitation, limits on Contractor liability shall be addressed in the contract.

- a. Liquidated Damages/Reimbursements do not represent an exclusive remedy and the Contractor shall be liable for actual direct damages of the Department in an amount not to exceed the greater of three times (3X) the annual amount payable by the Department under the Contract in the year giving rise to the liability, or the data recovery and/or development costs and any excess operating costs to cover moving the services in-house or to a subsequent contractor. The Liquidated Damages/Reimbursements shall be in addition to the amount of direct damages subject to this liability limit.

## Attachment 2

- b. Damages resulting from Contractor's (i) willful, malicious, intentional misconduct, (ii) intentional tortious conduct, or (iii) gross negligence, shall be without limitation.